[2019] IEHC 698

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 52 J.R.]

BETWEEN

I.H. (AFGHANISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of October, 2019

1. The applicant was born in Afghanistan in 1980. In 2001 he married his first wife, Ms. H. He claimed to have suffered persecution in Afghanistan from 2006 to 2007. He says he left Afghanistan on 20th September, 2007 and travelled through Pakistan, Turkey, Greece, Italy and France, arriving in the State on 28th February, 2008. He applied for asylum here on 3rd March, 2008. That application was rejected by the Refugee Applications Commissioner.

2. His lawyers state in submissions that judicial review was sought against that negative decision, although (contrary to the Practice Direction HC81) they have not produced any record number; and nor does that alleged proceeding appear on the High Court computer system, so it is not clear exactly what happened. Nonetheless, I am told that a second negative recommendation was ultimately produced which the applicant then appealed to the Refugee Appeals Tribunal. The tribunal rejected that appeal on 25th July, 2011. That was then the subject of further judicial review proceedings [2011 No. 916 J.R.].

3. In August, 2012, the applicant's first wife, Ms. H., died. In 2013 the applicant married a second "wife", Ms. S. Without obviously making any finding in this regard, one has to note that many of the features prevalent in the marriages-of-convenience industry are present here. The instant falling in love immediately upon meeting the "wife", the instant marriage which took place in August, 2013, after a relationship that began earlier in the same year, and the instant application for EU Treaty rights after the marriage. In this case, he applied for a temporary permission to remain in the State, which was given on 29th October, 2013, two months after the marriage, and then almost equally instantly he broke up with the "wife", who had left Ireland by early 2014. It is also to be noted that at the time of the marriage, the only basis for the applicant's presence in the State was that of being a failed asylum claimant who was judicially reviewing the refusal of asylum, so he was obviously a good catch at that point in time.

4. In any event, the applicant's fortunes were to improve considerably when Stewart J. granted an order of certiorari in the second judicial review on 12th January, 2016 (*see I.H. (Afghanistan) v. Refugee Appeals Tribunal* [2016] IEHC 14 [2016] 1 JIC 1203 (Unreported, High Court, 12th January, 2016)). His situation then came to something of a crunch in mid-2016. On 16th March, 2016, the first husband of the woman who was to become the applicant's third wife died. On 21st July, 2016, following remittal of the asylum claim to the tribunal, the applicant was declared to be a refugee. Very shortly

thereafter in October, 2013 the applicant then "married" the third wife, Ms. N., in Pakistan. That illustrates another feature of the typical marriage of convenience situation, again without having to make any specific finding in this regard. Characteristic of such cases is that as soon as an applicant's legal status is established, the "real wife" emerges from the shadows. Of course given the timing I have referred to, the applicant had not divorced the second "wife" by that stage. The State in the present case have not positively asserted that the second marriage was invalid because it was one of convenience, and nor has the applicant, who in any event could not rely on his own wrong, so I must proceed on the basis that it was a valid marriage.

5. The third wife is an Afghan citizen and apparently had been an acquaintance of the applicant since childhood. They both travelled to Pakistan to get married, the applicant coming from Ireland and she from Afghanistan. As noted above, she was previously married and had a daughter, born in 2014, with her first husband. I am informed that under Pakistani law, being that of the place of celebration, it was permissible for the applicant to marry a third wife without at that stage having been divorced from the second wife.

6. On 15th December, 2016, the applicant submitted an application for family reunification in respect of eight people - his third "wife", her daughter, his two sons from the first marriage, his two brothers and two nephews. It appears to be common case between the parties that the application fell to be considered under s. 18 of the Refugee Act 1996. On 31st December, 2016, the International Protection Act 2015 came into force and so if the application were to be granted the permission would be granted under s. 56 of that Act having regard to s. 70(15) of the Act.

7. The applicant and the second "wife" were divorced on 6th November, 2017. On 19th June, 2018, the International Protection Office issued a negative proposal under the s. 18(2) of the Refugee Act 1996. That gave rise to further correspondence between the parties and ultimately to a further decision on 26th October, 2018 whereby the respondent refused the family reunification application in respect of the third wife, her daughter and the nephews. The situation regarding the nephews is that that refusal has since been revoked and their situation is now being reconsidered by the Minister, so therefore does not form part of anything I have to decide.

Procedural history

8. The statement of grounds was filed on 25th January, 2019, the primary relief sought being an order of *certiorari* quashing the decision of 26th October, 2018. An ancillary order was sought directing that the s. 18 application be reconsidered, as was declaratory relief, but all of that is dependent on the applicant succeeding on the primary relief. I granted leave on 4th February, 2019. On 8th February, 2019, the applicant applied under the Irish Refugee Protection Programme Humanitarian Admission Programme, commonly referred to as the IHAP scheme, which allows for family reunification on a non-statutory basis in relation to family members who do not qualify for statutory family reunification. That application was made in respect of the third wife and her daughter without prejudice to the proceedings, according to the applicants. The application remains outstanding.

9. The applicant's substantive notice of motion was returnable for 25th February, 2019 and a statement of opposition was ultimately delivered dated 5th July, 2019. On 10th July, 2019 the applicant's solicitor wrote to the respondent stating that the applicant's third wife was expecting a baby, the due date apparently being in December, 2019. I have now received helpful written and oral submissions from Ms. Rosario Boyle S.C. (with Mr. Anthony Hanrahan B.L.) for the applicant and from Ms. Denise Brett S.C., with Ms. Emily Farrell B.L., who also addressed the court, for the respondents. On 19th July, 2019 at the conclusion of the hearing I gave an *ex tempore* ruling to the effect that I was dismissing the application and I am now taking the opportunity to set out reasons in more detail by way of a reserved judgment.

Ground A

10. Ground A contends that "*The Respondent erred in law and acted unreasonably and irrationally in finding that granting of the Applicant's application for family reunification in respect of his wife … was precluded by public policy, in circumstances where there was no rational basis on public policy grounds, and a fortiori no substantially incontestable basis, for withholding recognition of the marriage between the Applicant and his one wife …, which is* de facto *monogamous.*"

11. It follows from the Supreme Court decision in *H.A.H. v. S.A.A*. [2017] IESC 40 [2017] 1 I.R. 372 that a marriage should not be denied recognition merely because it is potentially polygamous in the sense that the law of the country of celebration allows for the unactualised possibility of a second wife. If a potentially polygamous marriage becomes actually polygamous, that does not mean that the first wife ceases to be a wife, but it involves non-recognition of the second or subsequent "wife". An actually polygamous marriage involving a second or subsequent spouse is contrary to public policy. Thus the decision at issue here isn't the exercise of ministerial discretion; it is simply an application of the law. The Minister was correct to refuse family reunification on the basis that the third "wife" is not a wife because the applicant was married to another person at the time of celebration of that "marriage". To recognise such a "marriage" would be contrary to public policy.

12. For good measure that approach is consistent with European standards, albeit ones not part of Irish law: see in particular art. 4.4 of the Family Reunification Directive 2003/86.

Ground B

13. Ground B contends that *"the respondent acted in contravention of Article 41 of the Constitution in refusing the applicant's application for family reunification in respect of his wife…on grounds of public policy*". This ground is misconceived. If the marriage is not to be recognised in Irish law, then Article 41 does not confer any rights in that regard.

Ground C

14. Ground C contends that *"the respondent erred in fact and in law in finding that the marriage between the applicant and his wife…remains polygamous in nature"*. The Minister's decision did not involve an error in law or fact. A divorce from the first spouse does not render a second marriage non-polygamous if it was actually polygamous on the

date it was contracted. An actually polygamous marriage is invalid *ab initio*: see *per* Costello J. in *B. v. R*. [1996] 3 I.R. 549.

Ground D

15. Ground D contends that "*The Respondent erred in law in making his decision on the basis that, in order for a refugee's spouse to qualify as a* "spouse*" for the purposes of section 18(3)(b)(i) of the Refugee Act 1996, their marriage must be recognisable under Irish law, even where the marriage is valid under the law of the state in which it took place. In failing to appreciate that a marriage may be recognisable for refugee family reunification purposes while not necessarily recognisable for all other legal purposes, the Respondent has rendered his decision invalid".*

16. It is clear from the wording of s. 18(3)(b)(i) that one of the conditions for recognition of the spouse for the purposes of the family reunification application is *"that the marriage is subsisting on the date of the refugee's application pursuant to subsection (1)*." Thus the word *"spouse*" in s. 18 of the 1996 Act means a spouse in a subsisting valid marriage. If the marriage is contrary to public policy, then the "wife" is not a spouse for the purposes of the section: see also per Fennelly J. in *Hassan v. Minister for Justice and Equality* [2013] IESC 8 (Unreported, Supreme Court, 20th February, 2013). It might be open to the Oireachtas to make provision in a particular context for a non-recognised partner or party to a non-legally recognised marriage be treated on a similar basis to a spouse for specified purposes, but that is a matter for the Oireachtas if there is some rational basis to do so. It is not a matter for the Minister to make up as he goes along.

Ground E

17. Ground E contends that "*The Respondent has acted in breach of the Applicant's right to respect and protection for his family under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. In circumstances where the Applicant is a refugee in the State, the refusal of family reunification in respect of his wife and step-daughter amounts to what is likely to be a lengthy or potentially even permanent sundering of his family. The Respondent has thus acted in breach of Article 41 of the Constitution and section 3(1) of the European Convention on Human Rights Act 2003, rendering the decision invalid. The Respondent has not pointed to any legitimate aim which would require the exclusion from the State of the Applicant's wife and step-daughter".*

18. Article 41 does not arise for the reasons set out above. Article 8 of the ECHR, as applied by the 2003 Act, was not breached because the non-recognition of a second marriage in a polygamous situation is within the margin of appreciation open to contracting states and was recognised as not contrary to the Convention by the European Commission of Human Rights in *R.B. v. United Kingdom*. (Application No. 19628/92, 29th June, 1992). Article 12 of the ECHR was referred to in submissions but not pleaded, so the applicant cannot succeed under that heading. Likewise, equality under Article 40.1 of the Constitution and art. 14 of the ECHR were not pleaded, so the applicant cannot succeed under those headings either.

Ground F

19. Ground F contends that *"the respondent erred in fact and in finding that [the third wife's daughter] is not the applicant's step daughter and/or independent and/or ward by reason of the perceived invalidity of the applicant's marriage to [the daughter's] mother…the respondent's refusal of the family reunification application in respect of [the daughter] is therefore invalid".*

20. The ground is somewhat confused when compared to the actual application made. Section 18(3) of the 1996 Act allows for family reunification in respect of a child, whereas sub-s. (4) applies to reunification in respect of a step-child or a ward. The application actually made was under sub-s. (3). The third wife's daughter was listed in the applicant's questionnaire under the heading of the applicant's children, not his step-children, wards or "*other dependent family members".* The Minister dealt with the application that was made and was therefore not in error, but even if the applicant had applied under sub-s. (4), which he didn't, it would not have been an error to consider the child of the third wife as not being a stepchild or a ward if the marriage is not being recognised.

Ground G

21. Ground G relates to the nephews and it is accepted that this is now moot.

IHAP Scheme

22. The respondents submit at para. 57 of the written submissions that refusal under s. 18 *"does not have the effect of barring entry into the State*" and it is to be assumed that the IHAP applications on behalf of the third "wife" and her daughter will be dealt with lawfully. That is a valid objection and one relevant to both the claim of breach of rights, which claims fail on their own merits anyway, and also to discretion if that had arisen. Even if the applicant's complaints had any substance, his rights are not violated if there was an alternative route to achieving that objective. If protection of the applicant's rights requires a favourable family reunification decision, that will presumably happen *via* the outcome of the IHAP application, which has yet to occur. Thus if I wasn't dismissing it anyway, I would have held that the application failed on the grounds of there being an alternative remedy.

23. In the context of prematurity or alternative remedies, my attention has been drawn to the judgment of Barrett J. in *A. v. Minister for Justice and Equality* [2019] IEHC 547 (Unreported, High Court, 17th July, 2019). A full treatment of that case would take us somewhat beyond the scope of the issue at hand, but the following points can be made briefly. Insofar as the learned judge there took the view that the alternative remedy argument was a "*red herring*", no reference was made in that part of the judgment to the opposite conclusion having been reached in an identical legal context only a couple of months before in *R.C. (Afghanistan) v. Minister for Justice and Equality* [2019] IEHC 65 [2019] 2 JIC 0109 (Unreported, High Court, 1st February, 2019), at paras. 7 to 14. Nor is the caselaw detailed there analysed. Nor indeed is there even passing reference in the aspect of the *A*. decision dealing with constitutionality to the fact that in *R.C,* I had come, some months before, to precisely the opposite conclusion on the same legal question.

That certainly cannot be put down to any default on the part of counsel in the A. case, as they certainly drew the court's attention to that decision. The proverb *"quod gratis asseritur, gratis negatur*" is now perhaps better known as [Christopher] Hitchens's Razor, to the effect that "that which is asserted without evidence can be dismissed without evidence". The jurisprudential equivalent might be to say that that which is asserted without discussion (of relevant materials) can be dismissed without discussion *(as per incuriam).*

24. That part of the judgment in *A*. which refers to the ECHR *does* contain a passing reference to *R.C*., to the effect that *"the court is mindful when it comes to the ECHR dimension of proceedings that in* R.C. *…the court there declined to follow the decision of the Court of Human Rights in* Hode [and Abdi v. the United Kingdom *(Application No. 22341/09, European Court of Human Rights, 6th February, 2013)]"*. The learned judge then went on to say that *"the court is also mindful in this regard of the binding appellate court precedent in* D.P.P. v. O'Brien *[2010] IECCA 103, 14 - 15 (a decision of the Court of Criminal Appeal that is not referenced in* R.C.)." This passage embodies a number of misconceptions.

25. Firstly, this seems to assume that *stare decisis* and the common law concept of "following" precedent applies in the same sense to Strasbourg, which is to misunderstand that civilian context (see *per* O'Donnell J. *in D.E. v. Minister for Justice and Equality* [2018] IESC 16 (Unreported, Supreme Court, 8th March, 2018) at para. 3).

26. Anyway, it was not a question of not following *Hode*. In *R.C*. I pointed out certain factual differences and at para. 23 said "Hode *however was decided on certain factors which do not apply here"*. That is distinguishing, which unfortunately is not the same thing as *"declin[ing] to follow*" (the phrase used in *A*. at para. 10).

27. Furthermore, the learned judge seems to have proceeded on the basis that the comment in *O'Brien* that the court should "*generally"* follow ECHR jurisprudence was "*binding"* because it came from an "*appellate court"* (*A*. at para. 10, repeated at para. 11). But that is a misunderstanding. Only the *ratio* of a decision by an appellate court is *"binding*"; and this fairly general discursive comment by Macken J., the relevant part of which is a fragment amounting to half a sentence, the first half of which was totally orthodox (being a paraphrase of the 2003 Act), could not by any stretch be regarded as the *ratio*. Something is not binding or even, one has to very respectfully say, necessarily correct, still less in an absolute or unqualified sense, just because an appellate court says it. To assume that to be so is to posit indifference to the distinction between *obiter* and *ratio.*

28. The statutory obligation is *"to take due account of the principles laid down*" in Strasbourg caselaw (2003 Act, s. 4), not to *follow* the caselaw as such, either "*generally*" or otherwise. Certainly the concept of following Strasbourg has been repudiated in the UK. This was a point that was dealt with in detail – in R.C. itself at para. 21. There I noted that under the 2003 Act, the court has regard to the general principles of the Convention, not an avant-garde application in an individual case. I noted that Fennelly J. in *J.McD. v.*

P.L. [2010] 2 I.R. 199 at 315 - 316 had followed the approach of *"keep[ing] pace with the Strasbourg jurisprudence" per* Lord Bingham in *R. (Ullah) v. Special Adjudicator* [2004] UKHL 26 [2004] 2 A.C. 323. I could have added that his comments were quoted by Laffoy J. in *Byrne v. An Taoiseach* [2010] IEHC 353 [2011] 1 I.R. 190, by MacMenamin J. in *J.Mc.B. v. L.E.* [2010] IEHC 123 [2010] 4 I.R. 433 and by White J. in *Simpson v. Governor of Mountjoy Prison* [2017] IEHC 561 (Unreported, High Court, 13th September, 2017), in each case without later jurisprudential developments either having materialised or having been opened to the court. But the law has moved on, very significantly, since *Ullah*. The UK Supreme Court has decided that *"This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law (see e.g.* R v Horncastle *[2009] UKSC 14; [2010] 2 WLR 47). Of course, we should usually follow a clear and constant line of decisions by the EurCtHR*: R (Ullah) v Special *Adjudicator [2004] UKHL 26; [2004] 2 AC 323. But we are not actually bound to do so": Manchester City Council v. Pinnock* [2010] UKSC 45, *per* Lord Neuberger at para. 48. Laws L.J. has commented that the previous suggestion by Lord Bingham in *Ullah* that the court should *"keep pace with the Strasbourg jurisprudence*" is incorrect insofar as it *"has been taken to indicate that the Strasbourg cases should generally, even if not rigidly, be treated as authoritative: as having the effect of legal precedent, or something very close to it. With deference to the House of Lords, and with great respect for Lord Bingham, I have in common with others come to think that this approach represents an important wrong turning in our law"*; before concluding that "*The Strasbourg case law is not part of the law of England; the Human Rights Convention is"* (Hamlyn Lecture III, The Common Law and Europe, 27th November, 2013, paras. 25, 37). I would very respectfully associate myself with such a view and would say the same about the concept of generally following Strasbourg decisions here.

29. Fennelly J.'s *obiter* comment in *Mc.D. v. P.L.* at para. 99 (grounded on the now significantly qualified if not superseded *Ullah* approach) that "*The European Court has the primary task of interpreting the Convention. The national courts do not become Convention courts"* could itself legitimately be subject to some possibly significant qualification. One can at a minimum say with confidence that Strasbourg itself does not see things that way. An article, "Interpretative mechanisms of ECHR case-law: the concept of European consensus" produced by the European Programme for Human Rights Education for Legal Professionals, acting under Committee of Ministers Recommendation (2004) 4, the 2010 Interlaken Declaration, the 2012 Brighton Declaration and the 2015 Brussels declaration, and published by the Council of Europe and available on its own website, states at para. 1 that "*national courts have an important role in the interpretation of the Convention" – interpretation*, not just implementation.

30. Similarly Fennelly J.'s *obiter* comment at para. 104 that "*It is vital to point out that the European Court of Human Rights has the prime responsibility of interpreting the Convention. Its decisions are binding on the contracting states. It is important that the Convention be interpreted consistently. The courts of the individual states should not*

adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence" could also legitimately be qualified having regard to a number of factors. Firstly there is the civilian nature of Strasbourg methodology emphasised subsequently in *D.E.*, as well as to the post-*Ullah* developments. In particular, the word "*binding*" in that passage is correct, and therefore must have been intended, only in the limited and narrow technical sense that the state party in a particular case is required to give effect to the judgment in that case only. That is clearly set out in art. 46.1 of the ECHR, although even that limited obligation is not part of Irish law under the 2003 Act – see the definition of "*Convention provisions*" in s. 1(1), as amended by s. 53 of the Irish Human Rights and Equality Commission Act 2014, which covers only arts. 2 to 14 and specified protocols. Strasbourg judgments are not "*binding*" in the common law *stare decisis* sense of the term, as explained in the emphatic comments by Laws L.J. in the piece referred to above. It is notable that no particular authority beyond *Ullah* is relied on for the broad range of points made by Fennelly J., and in fairness to him, his main concern was to scotch over-adventurous developments of Strasbourg caselaw by national courts that go significantly and implausibly beyond anything already recognised. That is a concern which I would very respectfully venture to suggest continues to be relevant, for the simple reason that such adventurous pro-applicant decisions cannot be challenged in Strasbourg due to the absence of any right of appeal by the State. In a one-way ratchet system of that kind, there can be no "*dialogue"* of the type envisaged by Lord Neuberger. Eccentric interpretations of the Convention by national courts would simply stand unless overturned on appeal at national level, if appeal there be. Fennelly J. was not addressing the totally different context we are talking about here, which is the possibility that a national court might legitimately and respectfully question or challenge over-adventurous interpretations of the ECHR by the Strasbourg court itself, at the very least by taking the view that those interpretations should not be applied beyond the particular facts of the cases concerned, and at least outside the context of clearly articulated general principles emerging from a clear and consistent line of authority rather than from a handful of cases or a single one. Such an approach should not be viewed as ruled out by Fennelly J.'s comments in *Mc.D.*, still less by Macken J.'s in *O'Brien*, even if those comments were binding, which they aren't, and even if they didn't otherwise require some qualification in the light of subsequent developments, which I respectfully suggest they do. To view things otherwise would be to crudely kill off the possibility of dialogue where it *can* take place, in order to prevent incorrect interpretations in cases where it can't. Surely a more subtle and beneficial legal approach is possible.

31. The concept of constructive dialogue between national courts and Strasbourg stressed by Lord Neuberger is vital because there are virtually no other checks and balances on the Strasbourg court. That court encounters no legislature to overturn its decisions, no referendum to allow the People of Europe express a view, no counterbalancing organs to rein it in, other than the unlikely theoretical possibility of the Committee of Ministers ignoring its judgments and the virtually impossible and certainly unprecedented situation of a unanimous amendment of the Convention to reverse a court decision. Contracting parties have no redress within the Convention system against the court's interpretations, however outlandish some may be and whatever the consequences on the ground. That

can only lead to mission creep as interpretations of the Convention become more and more expansive in the absence of any counterbalancing dynamic. The only way out, and one which almost certainly will start to materialise if the Strasbourg court continues to improvidently expand the tentacles of the ECHR, particularly into core areas of sovereignty such as immigration, is denunciation of the Convention, with or perhaps even without re-ratification with new reservations. To reply that Strasbourg generally considers the state of European consensus on the ground rings just a tiny bit hollow in the context of *Hode,* because as I noted in *R.C.,* a significant number of EU member states would have their legislation upended if the *Hode* approach were to be applied generally. Ireland as it happens came to be next in the firing line, thus making *R.C*. an appropriate context to discuss whether to rein things in. The highly deferential nodding-dog approach to Strasbourg taken in *A*., if applied throughout the member states of the Council of Europe, would mean that such an opportunity would never arise.

32. A constructive and respectful dialogue between national courts and Strasbourg is pretty much the only thing potentially holding back such developments, and an attitude of deferential submission by national courts to the Strasbourg court's interpretations would, to use Lord Neuberger's phrase, destroy that dialogue. It was precisely such a spirit of respectful dialogue that motivated my suggestions in *R.C*. to the effect that *Hode* might in effect best be viewed as being outlying, and certainly capable of being distinguished and confined to its own facts, if not of being regarded as over-adventurous and improvident. Without taking away from any of the other complaints, my most significant concern in relation to *Hode* was its dismissal of reliance by the contracting state concerned on EU standards as a basis for the legal distinction involved, an approach that sits very uneasily with the comment of Judge O'Leary in her concurring opinion in *J.K. v. Sweden* (Application no. 59166/12, European Court of Human Rights, 23rd August, 2016) at para. 5 that *"it is incumbent on this Court, when examining complaints with a heavy EU law component, to understand fully the legal framework with which it is confronted and on which the impugned decisions of the domestic authorities are based."*

33. At para. 25, the learned judge states that "*the court is satisfied"* to depart from *R.C*. on the basis of *Re Worldport Ireland Ltd. (in liquidation)* [2005] IEHC 189 (Unreported, Clarke J., 16th June, 2005) or *Kadri v. The Governor of Wheatfield Prison* [2012] IESC 27 [2012] 2 I.L.R.M. 392. However, that assertion ends there, and we are not expressly enlightened either in detail or at all as to the rigorous chain of reasoning on which the learned judge's satisfaction in that regard logically depends. Insofar as inference is possible, the inference one draws is that the strong reason envisaged by *Worldport* is that the learned judge believes that Strasbourg interpretations, even in an individual outlying case, *must* be followed by national courts. The most significant of the many problems with that approach is that it fails to distinguish between general principles laid down in a clear and consistent line of Strasbourg authority on the one hand, which certainly should generally be followed, and statements in individual and possibly outlying cases on the other, of which that cannot be said either at all or with any confidence. More generally, the relationship between national courts and Strasbourg should not be one of subordination, inferiority and deference, or of the one-way flow of authority in a rigidly

hierarchical system. Rather it needs to be one of dynamic and respectful dialogue between active partners in the great shared project of European values.

34. Insofar as *Worldport* is concerned, sure, as the learned judge was at pains to highlight, I didn't mention the Court of Criminal Appeal's comment in *O'Brien*, but (as he unfortunately omitted to add) I *did* cite a Supreme Court comment to the same effect (in *J.McD. v. P.L.*) and explained why that did not represent the up-to-date thinking on the matter. That explanation is not engaged with, even inferentially, in the decision in *A*. On any sensible reading I don't think that could be put down to the absence of a clear and express articulation of the point in *R.C.*, even after making all due allowance for the fact that I would say that. Disagreement is inevitable from time to time and is not a problem in itself. In one sense it can be welcome and can play an educational role, as it highlights active fault-lines in legal thinking which the system normally takes pains to obscure, pains that can come to a deadening plateau in the flattening monotone of civilian consensus judgments. But one rather feels it would have been preferable if Barrett J. had simply said "forget about *Worldport*, I just don't agree", rather than offer up such a logical vacuum as being a "*strong reason*" envisaged by *Worldport* for coming to the opposite view.

35. Dr. Paul J. Silvia commented in *Write it Up* (Washington D.C., 2014) at p. 9 that "*Science is a grand conversation that anyone with a good idea can enter".* Law likewise is such a grand conversation; and while mathematics is the primary language of science, that of law is legal reasoning. Thus understood, legal reasoning allows communication across vast distances of time and space and between radically different points of view. While there is no automatic obligation on different judges to agree, an awareness of, and an ability and willingness to engage in, the rigorous methodology of legal reasoning allows for the possibility of a constructive conversation.

Order

36. The application is dismissed.