[2020] IEHC 66

THE HIGH COURT

[2018 No. 418 JR]

BETWEEN

MUHAMMAD NADEEM

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL (NO. 4)

RESPONDENTS

JUDGMENT of Mr. Justice Max Barrett delivered on 18th February 2020.

1. Pursuant to s.5 of the Illegal Immigrants (Trafficking) Act 2000, as amended, the respondents seek leave to appeal the decision of the court on 9 December last. It is not disputed that this application falls to be determined in line with the principles identified in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, as supplemented by *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646. The additional factors identified in *S.A.* are satisfied; however, the court accepts that the criteria identified in *Glancré* are not satisfied. It is, of course, possible, in this wealth of binding guidance, to lose sight of the fact that a relatively straightforward standard is established by statute, *viz*. the court must be satisfied "*that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken"* to the Court of Appeal. Having regard to the case-law aforesaid and the said statutory requirement, the court is not satisfied for the reasons set out hereafter to grant the certificate/leave sought. The court reiterates, *mutatis mutandis*, its observations in *Connolly v. An Bord Pleanála* [2016] IEHC 624, at para. 14; however, neither side has objected to this Court deciding the within application.

2. One point of law of exceptional public importance is contended to arise, *viz*:

> *"Whether the Applicant who obtained a temporary Stamp 4 based on his recognition as a Permitted Family Member under Regulation 5(3) of the European Communities (Free Movement of Persons) Regulations 2015 and who subsequently was refused a Residence Card due to the provision of false and misleading information regarding his alleged status of being in a 'durable relationship duly attested' with the Union citizen is entitled to the benefit of the removal provisions in the 2015 Regulations and cannot be the subject of a proposal to deport under Section 3 of the Immigration Act 1999."*

3. The judgment in *Glancré* indicates the following principles to be relevant in deciding the within application.

   i. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of *exceptional importance* being a clear and significant additional requirement.

      Court Response: There is no evidence of any nature before the court to suggest that contended-for point is a point of law of exceptional public importance. The

respondents have pointed to there being circa. 145 residency permit applications *per annum*. However, no indication whatsoever has been given as to how many of those applications would feature facts akin to the within (unusual) case where, despite the ultimate refusal, the applicant was nonetheless found to be a permitted family member.

ii. The jurisdiction to certify such a case must be exercised sparingly.

Court Response: Noted.

iii. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.

Court Response: Again, the court has no information as to the possible number of future such cases. It is also worth bearing in mind that there is no assertion by the Minister that there was any false or misleading information provided in terms of what counsel for the applicant referred to at the hearing of the within application as the *"first leg*" of the Minister's decision, *viz*. that the applicant was a permitted family member.

iv. Where leave is refused in an application for judicial review *i.e.* in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court.

Court Response: n/a.

v. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.

Court Response: It is accepted by the applicant that the contended-for point of law does so arise.

vi. The requirements regarding "*exceptional public importance"* and *"desirable in the public interest*" are cumulative requirements which although they may overlap, to some extent require separate consideration by the court.

Court Response: In light of the findings of the European Court of Justice in *Chenchooliah (Case C-94/18)* [ECLI:EU:C:2019:693], the requisite exceptional public importance does not present, at least any more (it may have presented before the European Court of Justice's judgment in *Chenchooliah*) and the court does not see how, given the said findings, the requisite desirability in the public interest could be contended to arise.

vii. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word "*exceptional*".

Court Response: No information has been forthcoming from the Minister as to how many cases would feature facts akin to the within (unusual) case where, again, despite the ultimate refusal, the applicant was nonetheless found to be a permitted family member.

viii. Normal statutory rules of construction apply which mean, inter alia, that "*exceptional*" must be given its normal meaning.

Court Response: Noted.

ix. "*Uncertainty*" cannot be "*imputed*" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.

Court Response: What the respondent is seeking to do is precisely what is cautioned against in *Glancré, viz*. to impute uncertainty despite the findings in *Chenchooliah* and the application of same in the court's judgment of last December. Again, no indication whatsoever has been given as to how many applications would feature facts akin to the within (unusual) case where, despite the ultimate refusal, the applicant was nonetheless found to be a permitted family member.

x. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases.

Court Response: Again, no indication whatsoever has been given as to how many applications would feature facts akin to the within (unusual) case where, despite the ultimate refusal, the applicant was nonetheless found to be a permitted family member.

4. The court does not accept that it is the court of final appeal in the within proceedings, as the potential for two forms of appeal to the Supreme Court would appear to continue to present, even in the face of the refusal of the certificate/leave now sought, viz. an application to be considered for a so-called 'leapfrog' appeal against the decision of last December and, arguably, an appeal to the Supreme Court against the within decision to refuse the certificate/leave now sought. It need hardly be stated, but it perhaps worth mentioning nonetheless, that it is clear from the determination of the Supreme Court in *Fitzpatrick & Anor. v. An Bord Pleanála* [2018] IESCDET 61, at para. 8, that the Supreme Court, as one would respectfully expect, is keenly aware of the implications of, and its obligations pursuant to, the *CILFIT (Case C-283/81)* [ECLI:EU:C:1982:335] line of case-law of the European Court of Justice when application to bring an appeal is made. In any

event, if this Court were the court of final appeal in the within proceedings (and it is not) it is clear from the court's judgment last December that it proceeded on the basis that it considers European Union law on the point arising to be *acte claire*. As this Court is not the court of final appeal in the within proceedings it would but note that it does not consider, and at no point in these proceedings considered, it necessary to make a reference to the European Court of Justice to enable the court to give judgment.

5. The certificate/leave sought are respectfully refused. Nor will the court make any reference to the European Court of Justice.

6. Finally, the court notes that there was some initial suggestion that the within application was being brought 'on consent'; however, if the court might use a colloquialism, in 'the heel of the hunt' the application turned out to be contested. It goes without saying that counsel for the respondents was, of course, entirely honest in his initial suggestion/understanding that the application was thought to be 'on consent' and the court does not mean (nor should it be construed) to suggest otherwise. The court merely mentions this aspect of matters to note that, even if the application had been brought 'on consent', although the court would have given due weight to the fact (which turned out not to be the case) that both sides considered the court's decision to involve *"a point of law of exceptional public importance and that it* [was]*…desirable in the public interest that an appeal should be taken",* the decision as to whether this was in truth the situation presenting would nonetheless have fallen to the court, even in that instance, to decide by reference to the decisions in *Glancré, etc.*