THE HIGH COURT

[2021] IEHC 399

[2019 No. 650 JR;

2020 No. 119 JR]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED) AND IN THE MATTER OF THE INTERNATIONAL PROTECTION ACT 2015

BETWEEN

(1) A

APPLICANT

– AND –

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL (2)

RESPONDENTS

(2) B

APPLICANT

– AND –

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL (2)

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 10th June 2021.

SUMMARY

This is an application made pursuant to s.5 of the Illegal Immigrants Trafficking Act 2000 for leave to appeal the court's judgment in the above-entitled proceedings, which were the subject of a single judgment ([2021] IEHC 25). Leave is respectfully refused for the reasons set out hereafter. This summary is part of the court's judgment.

A. Mr A's Application

1. This is an application for leave to appeal the court's decision in Mr A's proceedings, which, along with Ms B's proceedings, were the subject of a single judgment bearing the citation '[2021] IEHC 25'. The application is made under s.5 of the Illegal Immigrants Trafficking Act 2000.

2. Section 5(1) of the Act of 2000, as amended, provides that "*the validity of*" an array of immigration-related matters shall not be questioned ("*A person shall not question the validity of…*") otherwise than by way of an application for judicial review under O.84 RSC.

3. It is clear from s.5(6) of the Act of 2000, as amended, that the general expectation of the Oireachtas is that, when it comes to the type of application that comes within s.5, 'the buck stops' in the High Court, *i.e.* save in very limited instances, the High Court's decision on matters will be final (see also *Vadim Raiu v. Refugee Appeals Tribunal and Anor*. (Unreported, High Court, 26th February 2002)). That said, we live, thankfully, in a liberal democracy whose animating spirit is that (all else being equal) each one of us should generally be allowed to do whatever we each want to do. Thus while the courts must duly apply s.5(6), they must not go further, seeking to close out potential appeals that, consistent with the said animating spirit – and bringing to bear a generous interpretation of what constitutes a "*point of law of exceptional public importance*" – ought rightly to be the subject of an appeal. In a liberal democracy a court should surely err on the side of

allowing the greatest freedom, in the present context on the side of allowing an appeal to proceed. Section 5(6) does not require a court to go any further than it expressly requires; indeed given that it seeks to set a boundary to personal freedom it ought rightly to be narrowly construed.

4. Section 5(6) of the Act of 2000 provides as follows:

> *"(a) The determination of the High Court of an application for leave to apply for judicial review to which this section applies, or of an application for such judicial review, shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies 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 Supreme Court.*
>
> *(b) This subsection shall not apply to a determination of the High Court insofar as it involves a question as to the validity of any law having regard to the provisions of the Constitution".*

5. Since the approval of the 32nd Amendment of the Constitution, the reference to the 'Supreme Court' now falls to be read as a reference to the 'Court of Appeal'.

6. Some elements of/factors relevant to the adjudication of the within leave application are identified in *M.A.U. v. Minister for Justice, Equality and Law Reform (No 3)* [2011] IEHC 59, with the judgment *in Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 bringing clarity to what is meant by "*exceptional public importance*", and *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 mentioning a few extra criteria that can be brought to bear in appropriate cases. The relevant portions of the three cases have been recited in many other judgments concerning s.5(6) applications. The court proposes simply to apply them, rather than repeat them yet again. However, the court would reiterate the point that it made in *Nadeem v. Minister for Justice and Equality and Ors. (No. 4)* [2020] IEHC 66, para.1, *viz*. that:

> ***"It is…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."***

7. The factors/principles identified in *M.A.U., Glancré*, and *S.A*. are signposts to truth erected by judges who have gone down the route of s.5(6) before and are intended as an aid to judges who follow after. They are binding on the court but they do not fall to be applied like statutory criteria in which all must be fully satisfied before a person can obtain the leave that s.5(6) makes necessary. A High Court judge looks to those cases/factors/principles, s/he is bound by them, but s/he arrives at her/his decision in the round by reference to all the facts and issues in play.

8. In the case that was decided last January, the court observed as follows at paras. 4-5:

> *"4. Three key questions were contended by Mr A to arise in the within proceedings:*
>
> ***[1] Did the IPAT err in law insofar as it failed [if it failed] to apply the actual test prescribed by reg.4(5) of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017? [2] Did the IPAT err by failing correctly to apply reg.4(5)?***
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> *The court's answer to each of Questions [1] and [2] is 'no', for the reason that the IPAT never applied reg.4(5). It refused to proceed with the application for an extension of time on the basis that at the time of the application the IPO's s.39 recommendation had been superseded by a s.47 decision by the Minister, making it pointless to proceed (as any appeal against the recommendation would then be moot/futile).*
>
> **[3] Is reg.4(5) invalid?**
>
> *The court's answer to Question [3] is that this question does not arise for determination as reg.4(5) was not relied upon by the IPAT."*

9. As the court understands the present application, no criticism is made of the court's answers to the three key questions, as identified by Mr A. Immediately that places Mr A in the odd position that although he does not, it seems, seek to impugn the actual answers given to the questions that he considered to present in his application, he nonetheless wishes to appeal the court's judgment. Where a point of appeal, good for the purposes of s.5(6), is claimed by Mr A to lie, is in the court's treatment of a preliminary issue concerning s.2(2) of the International Protection Act 2015. To understand the point it is necessary to quote s.2(2) and certain observations that the court made. Section 2(2) provides as follows:

> *"(2) A person shall cease to be an applicant on the date on which—(a) subject to subsection (3), the Minister refuses—(i) under subsection (2) or (3) of section 47 to give the person a refugee declaration, or (ii) under section 47(5) both to give a refugee declaration and to give a subsidiary protection declaration to the person, (b) subject to subsection (3), he or she is first given, under section 54(1) , a permission to reside in the State, or (c) he or she is transferred from the State in accordance with the Dublin Regulation."*

10. In its judgment, the court observed, *inter alia*, as follows, at para.2:

> *"[A] preliminary issue arises. That issue is this: an application under reg.4(5) falls to be made by an 'applicant'. But, by virtue of s.2(2) of the Act of 2015, one effect of the Minister's s.47 decision was that, by 26/8/2019, Mr A had ceased to be an 'applicant' and so was no longer eligible to make application under reg.4(5). That is a complete answer to any complaint that Mr A makes regarding his reg.4(5) application: he was ineligible to make that application and has no grounds for*

complaint. The court respectfully does not see how it can correctly be contended, by reference to Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Arts. 2 and 46, that the operation of the foregoing domestic provisions has the result that Mr A was denied a right to an effective remedy before a court/tribunal, or that the time limits or other rules considered in the within application are less than reasonable or render impossible or excessively difficult the exercise of a right to an effective remedy before a court/tribunal."

11. In the Appendix to its judgment, the court explained its reasoning in this regard still further, in the following terms:

"32. The contention has been made by counsel for Mr A, in effect, that the Act of 2015 departs to some extent from what European law requires. Reference was made in this regard to Directive 2005/85/EC but as that Directive ceased to have validity on 20/7/2015, it seems to the court to be more appropriate to look to the not dissimilar requirements in Arts. 2 and 46 of the replacement directive, viz. Directive 2013/32/EU (though it would have reached the same conclusion by reference to the relevant provisions of the earlier directive).

33. Article 2 of the Directive of 2013 states, inter alia, *as follows:*

- "'applicant' means a third-country national...who has made an application for international protection in respect of which a final decision has not yet been taken", *and*
- "'final decision' means a decision on whether the third-country national...be granted refugee or subsidiary protection status by virtue of Directive 2011/95/EU and which is no longer subject to a remedy within the framework of Chapter V of this Directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome".

34. Chapter V consists of a single article, Article 46, which provides*, inter alia, *as follows:

'1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following: (a) a decision taken on their application for international protection....

4. Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. The time limits shall not render such exercise impossible or excessively difficult.'

35. The court respectfully does not see how it can correctly be contended that Mr A was denied a right to an effective remedy before a court or tribunal, or that the time limits or other rules considered in the within application are less than reasonable or

render impossible or excessively difficult the exercise of a right to an effective remedy before a court or tribunal."

12. Arising from the foregoing, Mr A has posited the following "*point of law of exceptional public importance*" to arise from the court's decision and contends "*that it is desirable in the public interest that an appeal should be taken to the*" Court of Appeal concerning same:

> *"Whether the Applicant is entitled to a Declaration that section 2(2) of the International Protection Act 2015 [is] in breach of EU law and/or a breach of the right to an effective remedy insofar as it operates to abrogate the jurisdiction to extend time to bring an appeal to [the] IPAT where the Minister has made a Decision under s.47 refusing international protection following the first-instance IPO decision".*

13. It seems to the court, with all respect, and to use a metaphor, that this question puts the s.2(2) 'cart' before the s.47 'horse', because it is s.47 (which has not been impugned by Mr A) that is the driving provision. Thus, a decision must be made by the Minister pursuant to s.47 after a recommendation has been made. All section 2(2) does is makes clear that once the Minister so proceeds a person is no longer an "*applicant"* within the meaning of the Act; it is essentially an ancillary provision. Having regard to *M.A.U.,* and more particularly *Glancré*, para. 7 (see further below), the court is satisfied that the point of law raised cannot properly be described as one of "*exceptional public importance*". Not being a point of law of "*exceptional public importance*" the within application just cannot succeed. Turning in more detail to the principles in *Glancré*, para. 7:

> **"1. 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."**
>
> For the reasons already stated, the court does not see that the point raised is one of "*exceptional public importance*".
>
> **"2. The jurisdiction to certify such a case must be exercised sparingly."**
>
> *Noted.*
>
> **"3. 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."**
>
> *There is no uncertainty presenting. The court accepts that leave could be granted to a person who happens to be the first person to identify a point presenting,* i.e*. the benefit of leave under s.5(6) is not necessarily and in all or any instances restricted to those who are second or even later in raising a point. However, here there is just no uncertainty presenting: the point contended for by Mr A is, with respect, misconceived.*

"4. 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".

Noted but not relevant here: leave was granted.

"5. 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."

The court struggles even to say that the point of law arises out of the decision of the court because there is just no issue presenting of the type contended for.

"6. 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".

Noted, though it must be rare enough that a point of law of exceptional public importance that had not previously been the subject of a decision by the Court of Appeal and/or the Supreme Court would not also be one in respect of which it was desirable in the public interest that an appeal should be taken to the Court of Appeal. Here, however, the point raised is not one of "exceptional public importance*", so it 'falls at the first' and the present application just cannot succeed.*

"7. 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'."

Noted.

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

The Oxford English Dictionary *gives a slightly tautologous definition of* "exceptional*", defining it as "[o]*f the nature of or forming an exception*", moving on to define it as* "out of the ordinary course, unusual, special*". It seems to the court that for the reasons identified at point 1 above, the putative point of law is not one of* "exceptional" *public importance; in truth, it is not a point of any importance, for it is, with every respect, a misconceived point.*

"9. '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."

See the court's observations concerning point 3.

"10. 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."

No such benefit presents.

34. Strictly speaking the principles in S.A. do not require to be considered: the putative point of law of exceptional public importance is not a point of law of exceptional public importance and hence no leave can issue under s.5(6)(a). So solely for the sake of completeness the court notes that, (i) this is a timely application, (ii) the question of law is, with every respect, and for the reasons previously stated, misconceived; (iii) the court does not know what cases are before the Court of Appeal and none of relevance have been identified to it; and (iv) the question is suitably precise – though the court's understanding is that when matters do get to the Court of Appeal, an appellant is not constrained solely to arguing the point of law of exceptional public importance, so it may be that the precision of the question is not especially significant and it can in any event be finessed by the High Court (albeit that this may be to no end, if an appellant is not constrained to arguing the said point on appeal).

35. There was discussion at the hearing as to whether the court could make an Art.267 reference to the European Court of Justice to assist the court in reaching a conclusion in a s.5(6) application, with arguments being made both ways. The court's attention has been drawn in this regard to the judgment of Keane J. in *McNamara v. An Bord Pleanála* [1998] 3 I.R. 453 (albeit, the court notes, that it is the European Court of Justice that has the ultimate say on what cases may be referred to it). The court does not see that it needs to consider this aspect of matters in any detail as the court does not in any event consider that a reference is necessary to enable it to decide the present application, even if such a reference is possible.

36. For the reasons aforesaid, the court respectfully declines to grant the leave sought.

B. Ms B's Case

37. For the same reasons, *mutatis mutandis*, as are considered in the case of Mr A, the court respectfully declines to grant the leave sought by Ms B.

TO THE APPLICANTS:

WHAT DOES THIS JUDGMENT MEAN FOR YOU?

Dear Applicants,

I am always concerned that because applicants in asylum and immigration cases are foreign nationals for whom English may not be their first language, they should, if possible, be placed by me in a position where they can understand a judgment that has a sometimes great impact on their lives. So I summarise my judgment below.

This summary, though a part of my judgment, is not a substitute for the detailed text above. It seeks merely to help you understand some key elements of what my judgment says. The other parties require no such assistance. So this section of my judgment is addressed to you, the applicants, though copied to all of the parties.

You have both asked for 'leave' (in effect, permission) to bring an appeal to the Court of Appeal against my judgment of last January. Under applicable law, for that leave to be granted I must certify, that my previous 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. I respectfully do not see any point of law of exceptional public importance to arise out of my previous judgment. For that reason, I am respectfully declining to grant the leave that each of you has sought.

Yours sincerely

Max Barrett (Judge)