THE HIGH COURT

[2021] IEHC 766

[2020 No. 182 JR]

BETWEEN:

JAIMEE MIDDELKAMP

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY (No. 2)

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 30th November 2021.

SUMMARY

The Minister wishes to appeal the court's principal judgment in these proceedings to the Court of Appeal. Pursuant to s.5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, the Minister can only do so if the 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* [Court of Appeal]". To this end, the Minister has contended that a particular point of law of exceptional public importance presents. The court does not see that point of law to present. So no certificate can issue.

I

Introduction

1. This judgment follows on the decision of the court last July in *Middelkamp v. Minister for Justice and Equality* [2021] IEHC 521 in which, for the reasons set out in its judgment, the court granted an order of *certiorari* in respect of the Minister's decision of 2nd January 2020 to refuse an application made by Ms Middelkamp under s.4(7) of the Immigration Act 2004 for a variation of the permission (visa) pursuant to which she presently resides lawfully in Ireland.

2. The Minister wants to appeal the court's decision to the Court of Appeal. Pursuant to s.5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, the Minister can only do so if the 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* [Court of Appeal]".

3. In its judgment, the court identified various criticisms that could be levelled at the Minister's bland and uninformative decision concerning Ms Middelkamp's application for a variation of her visa (permission) under s.4(7) of the Immigration Act 2004. Those criticisms included but were not limited to the following. (1) The decision was so broad as to be meaningless. (2) The Minister, at the hearing of the application, had sought impermissibly to add to her initial reasoning. (3) Although the impugned decision refers to "*all rights arising*" it gives no indication as to what rights were considered and how they were weighted. (4) Notwithstanding that Ms Middelkamp's near-200 page application put Article 8 ECHR rights in issue, the Minister made no express mention of same in her decision (notwithstanding the clear spousal separation issue presenting and presented).

II

The Point of Law Contended For

4. The Minister contends that one point of law of exceptional public importance arises from the court's judgment which the Minister has posited in the form of the following question:

> "*Following the judgment of the Supreme Court in* Luximon *and* Balchand v. Minister for Justice, Equality and Law Reform*, is the Minister obliged to consider rights alleged to arise under Article 8(1) ECHR, as given fuller effect by the European Convention on Human Rights Act 2003, in applications made under s.4(7) of the Immigration Act 2004 by or on behalf of* ***short-term entrants*** *to the State where such rights must be considered by the Minister where the Minister is considering whether or not to make a deportation order in respect of the person concerned in the deportation process under s.3 of the Immigration Act 1999?*"
>
> [Emphasis added].

5. The parties are agreed that the principles applicable to an application for a certificate were identified by MacMenamin J. in *Glancré Teo*. *v. An Bord Pleanála* [2006] IEHC 250. The court was also referred to certain other case-law that offers insights on how to approach applications such as the within (*MAU v. Minister for Justice, Equality and Law Reform (No 3)* [2011] IEHC 59, *Balz and Ors. v. An Bord Pleanála* [2018] IEHC 535, *SA v. Minister for Justice (No 2)* [2016] IEHC 646, *YY v. Minister for Justice and Equality (No 2)* [2017] IEHC 185, and *Akram v. Minister for Justice* [2019] IEHC 33). All those judgments are helpful, and the court has had regard to them. In truth, however, a court is unlikely to go wrong in law by having regard solely to the succinct statement of principles in *Glancré*.

III

Difficulties with Question/Issue Posited

6. There are two difficulties with the question/issue posited by the Minister as the basis for an appeal.

Difficulty #1

7. The first difficulty with the question posited by the Minister is that it requires the court to accept that a person admitted to Ireland for 2 years in the first instance is, to use the language of the question, a "*short-term*" entrant to Ireland. It offends against meaning to suggest that a 2-year period can properly be described as "*short-term*" and so the question posed disregards

the facts of (and hence cannot arise from the principal judgment in) this case. It is clear from case-law (not least the decision of the Court of Appeal in *Chen v. Minister for Justice and Equality* [2021] IECA 99) that the judgment of the Supreme Court in *Luximon and Balchand* does not apply to short-term visitors to Ireland. Again, the problem for the Minister in terms of the within application is that Ms Middelkamp is not (and cannot rationally be described as) such a person: she is more than a mere short-term entrant and the posited point of law consequently does not extend to her.

Difficulty #2

8. There is a second difficulty with the question posited by the Minister. Ms Middelkamp is a law-abiding woman. She lawfully obtained a visa to come from Canada to Ireland. She wishes to have her visa varied in accordance with law so that she can remain lawfully here with her husband while he completes his dentistry degree in UCC. (He is now, the court understands, in his final year of studies). She made the application for variation in the course of her existing visa in an obvious bid to ensure that she could continue to remain here lawfully and at no point be here unlawfully. And there is no evidence to suggest that Ms Middelkamp, if she is refused the variation sought, will 'overstay' in Ireland beyond the time allowed by her visa, *i.e.* there is no reason at this time to believe that she will place herself in a position in which a deportation process would require to be commenced against her. Her bringing these judicial review proceedings shows just how eager she is to conform with the law.

9. Leaving aside Difficulty #1 for a moment, the question posited by the Minister doubly departs from the facts of this case in asking, essentially:

> 'Can the Minister defer addressing the Art.8 ECHR issues raised by Ms Middelkamp in her application for a variation of her visa (permission) to a fancied moment in time when a deportation process, which there is no evidence to suggest will come about (indeed the evidence points in the opposite direction) is commenced against Ms Middelkamp?'

10. The court would be surprised if there is anyone outside the Minister's 'camp' who doubts what the answer to this question is. But even if the question as formulated by the Minister involved the greatest "*point of law of exceptional public importance*" ever to have arisen, it is

possessed of a fatal flaw. That flaw is as follows. The question, as formulated by the Minister (and quoted at para.4 above), rests on a foundation of fact – the confident expectation of the commencement of a deportation process – which simply does not present in this case. There is no evidence before the court to suggest that this confident expectation will ever be realised in fact. Indeed, the evidence in this case points most firmly to the likelihood that it will *never* be realised in fact. The Minister – like Ms Middelkamp, and indeed the court – is 'stuck' with the evidence that is before the court. It is a basic premise that one gets to appeal the case that is before the court, not some other case which, were the evidence different, might yield the point of law as formulated by the Minister and quoted previously above.

IV

The Resources Point

11. As to the resources point (and it was a resources point) made at the hearing of this application, the court (i) respectfully reiterates the observation made in its initial judgment, para.17, that while "[t]*he court has no desire to create extra work for doubtless busy officials…any notion that the court should determine, interpret and/or apply the law of Ireland by reference to the workload of the Department of Justice need only be stated to see just how inappropriate it is*", but (ii) accepts that in terms of gauging "*exceptional public importance*" for the purposes of s.5(3)(a) alleged practical consequences of a decision, provided they are duly sworn to (as here) and not simply the subject of submissions by counsel, can be of relevance in the court's assessment of matters. However, even alleged practical consequences cannot transform into a "*point of law of exceptional public importance*" a point that, as here, doubly departs from the facts of the case presenting.

V

Conclusion

12. It follows from the foregoing that the court cannot properly certify that, to borrow from s.5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, its decision involves the posited "*point of law of exceptional public importance*". Hence the within application must fail.

TO THE APPLICANT:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?

Dear Ms Middelkamp

I am always concerned that because applicants in visa application cases are foreign nationals, they should, if possible, be placed by me in a position where they can understand the overall direction of a judgment that has a sometimes great impact on them. I therefore briefly 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 what I have decided. The Minister requires no such assistance. So this section of my judgment is addressed to you, though copied to all. Your lawyers will explain my judgment more fully to you.

*The Minister wishes to appeal my previous judgment in these proceedings to the Court of Appeal. By law, the Minister can only do so if I certify that my decision, amongst other matters involves "*a point of law of exceptional public importance*". I do not see such a point of law to present. I cannot, therefore, certify it to present. As a result, there can be no appeal to the Court of Appeal.*

Yours sincerely

Max Barrett (Judge)