# THE HIGH COURT

# JUDICIAL REVIEW

[2022] IEHC 675

**[Record No. 2020/776JR]**

**BETWEEN**

**M**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Ms Justice Miriam O'Regan delivered on 3 November 2022.**

**Issues**

**1.** The within named applicant's application for *certiorari* of a deportation order made against him on 16 September 2020 was refused in a judgment of this Court on 1 July 2022.

**2.** As a result of the foregoing two matters remain outstanding namely: -

(a) The applicant is seeking his cost or in the alternative no order as to cost. The respondent is seeking her costs in full;

(b) The applicant seeks leave to appeal to the Court of Appeal the judgment of this Court of 22 July 2022 pursuant to the provisions of s.5(6)(a) of the

Illegal Immigrants (Trafficking) Act 2000 as amended. Certification may be granted if the decision (22 July 2022) involves a point of law of exceptional public importance and an appeal is desirable in the public interest.

The respondent resists such application.

**3.** Given that the applicant argues that the granting of leave to appeal to the Court of Appeal has a bearing on the issue of costs it is appropriate to deal with the leave application in advance of the costs application.

**Application for leave to appeal to the Court of Appeal**

**4.** The parties are in agreement that in accordance with the judgment of Cooke J in *IR v. MJELR* [2009] IEHC 510 and the preceding judgment of MacMenamin J in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 the principles applicable to the granting or withholding of leave to appeal to the Court of Appeal are: -

(1) It is not sufficient for an applicant for a certificate to show that a point of law emerges in or from a case but an applicant must show that the point is one of exceptional public importance;

(2) The jurisdiction to grant a certificate must be exercised sparingly;

(3) The area of law involved must be uncertain such that it is in the common good that the uncertainty be resolved for the benefit of future cases;

(4) The uncertainty as to the point of law must be genuine and not merely a difficulty at predicting the outcome of the proposed appeal or in appraising the strength of the appellant’s arguments;

(5) The point of law must arise out of the court's decision and not merely out of some discussion at the hearing;

(6) The requirement of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements.

**5.** The applicant suggests that the following questions arise from the judgment: -

(1) In an examination of file pursuant to the power under s.3(6) of the Immigration Act 1999 to determine whether to make a deportation order in relation to a person, is it lawful when having regard to the employment prospects of the person under s.3(6)(f) of the 1999 Act, for the respondent Minister to recite that the person, "does not have the permission of the Minister to reside or work in the State at this time and there is no obligation on the Minister to grant [them] permission to remain in the State in order to facilitate [their] employment/self-employment in this State? If so, in what circumstances may same be lawful, and was the inclusion of the statement lawful on the facts of the present case.

(2) If there was error, does it operate to vitiate the deportation order?

(3) Where, as in the present case, a judge of the High Court is required to choose between two seemingly conflicting precedents which appear to apply the same principles, should the court apply the case which was decided latest in time in preference to an earlier case which was decided by the court who otherwise made prior decisions on the same issue?

(4) In a challenge by way of judicial review to a deportation order, may relief be refused on discretionary grounds owing to a prior finding of a marriage of convenience made against the applicant and the fact that he

unsuccessfully requested the Minister to consider refoulement in his case, and returned to their country of origin thereafter? If so, in what circumstances?

**Questions 1 and 2**

**6.** The applicant argues that the matter of *Talukder v. MJE* [2021] IEHC 835 was not distinguished by the respondent in submissions from the facts in the present case. Indeed the subsequent judgment of this Court did not distinguish the facts either notwithstanding that it is argued that the applicant has a stronger case than the applicant in *Talukder*. The applicant argues this on the grounds that the applicant has a stronger employment history, was a self-employed business owner and employed others therefore there was an element of the common good with his business.

Such point seems to me to arise from submissions rather than from within the judgment.

**7.** In *Talukder* the Court applied and followed the prior decision of Burns J in *MAH v. Minister for Justice* [2021] IEHC 302 and distinguished the judgment of Burns J in *ANA v. Minister for Justice* [2021] IEHC 589. The applicant argues that: -

(a) the within decision did not distinguish *ANA* or *MAH* and the uncertainty arising from such conflicting judgments;

(b) the factual circumstances of both *Huang* and *Talukder* were similar but with different outcomes;

Therefore it is necessary for the Court of Appeal to resolve the uncertainty created by the different outcomes in *Huang* and *Talukder*.

Finally, it is suggested that within judgment and the judgment of Humphreys J in *Lin v. The Minister for Justice No. 2* [2017] IEHC 745 were not consistent and adds to the need for resolutions by the Court of Appeal.

**8.** The respondent counters that: -

(a) in accordance with the judgment of Baker J in *Ogalas Limited v. An Bord Pleanála* [2015] IEHC 205 the degree of legal uncertainty required must be more than one referable to the individual facts in a particular case.

(b) the findings in the principal judgment were based on the facts of the case therefore a point of law of exceptional public importance does not arise.

(c) the fact that at the hearing of the application the applicant argued that the cases of *Huang, BMAM* and *Odum* (none of which supported the applicant's case) turned on their own facts rather than amounting to a legal approach irreconcilable with the applicant's case.

This is a point arising from submissions rather than the judgment.

(d) the applicant is seeking an advisory opinion or other assistance with the management of future claims while suggesting that the certificate should be granted so as to clarify what consideration of employment prospects would be considered material in the future. This position is incompatible with the principles recognised above (see *Conway v An Bord Pleanála* [2020] IEHC4).

The latter mentioned two points raised by the respondent apply in particular to the second question and the second part of the first question raised by the applicant.

(e) the judgment interpreted the word "prospects" contained in s.3(6)(f) of the 1999 Act. This was the first time the word was interpreted in the context of the instant statutory provisions. Accordingly, it did not conflict with any other case law.

(f) the instant judgment applied well-established law on the scope of review of deportation orders and the jurisprudence did not appear to be before the courts prior to the decisions in *MAH* and *Talukder*. In accordance with the decision of Barniville J at para. 33 of *Rushe v. An Bord Pleanála* [2020] IEHC 429 the application of clear and established legal principles to the facts of a particular case renders it more difficult for an applicant to satisfy the cumulative requirements of establishing a point of law of exceptional public importance and desirable in the public interests that an appeal be brought to the Court of Appeal.

(g) in the events, the distinguishing feature identified in *Talukder* as between *ANA* and *Talukder* did not survive the decision of Burns J in *Huang. Huang* does not appear to have been brought to the attention of Hyland J prior to the decision in *Talukder* and accordingly the argument as to such a distinguishing feature is of no assistance to the above applicant.

**9.** The argument by the applicant that there is a conflict as between the judgment in *Huang* and *Talukder* does not in my view arise on foot of the within judgment and therefore it cannot be said to fulfil the requirement that the point of law must arise out of the court's decision and not merely out of some discussion at the hearing.

**10.** There is clearly a degree of uncertainty by virtue of the jurisprudence to date on the respondent's consideration of the matters identified in s.3(6)(f) of the 1999 Act, as to when a comment as to past and present status might adversely impact on an individual's prospects of employment.

**11.** I am not satisfied that such uncertainty reaches a threshold that it is in the common good that the uncertainty be resolved for the benefit of future cases. Even if I am incorrect in this regard given that the requirement of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements the uncertainty identified is not sufficient to satisfy both such requirements having regard to the high threshold involved and the balance of the within considerations of the applicable principles involved.

**12.** I am satisfied that the decision of Humphreys J in *Lin* does not conflict with the within judgment, as identified at para. 42 of the within judgment. In *Lin* the assessment made by the respondent erroneously recorded that the applicant's employment prospects potentially competed with Irish jobseekers, however in that matter the applicant was in fact the owner of his own business and therefore the decision was based upon a clear erroneous assumption. Furthermore, as quoted at

para. 42 Humphreys J did comment that errors in relation to employment prospects might not necessarily be fatal in every case.

**13.** In my view neither question (1) part (a) or (b) or question (2) fulfils the principles governing the grant of a certificate of leave to appeal.

**Question 3**

**14.** This question arises because it is argued that para. 43 of the within judgment quotes from *AS & Ors v. Minister for Justice* [2020] IESC 70 which said decision referred to the prior decision of Clarke J in *Re Worldport Ireland Limited* [2005] IEHC 189. Both judgments aforesaid are to the effect that where there are conflicting decisions of courts of coordinate jurisdictions a later decision is to be preferred if reached after full consideration of earlier decisions. In *Worldport* aforesaid the requirement was said to be a general rule to be departed from only where there is a clear basis for same.

**15.** The applicant contends that *Talukder* was the latest judgment in the sequence of judgments referable to the consideration of s.3(6)(f) of the 1999 Act and therefore should have been followed but was not.

**16.** As the decision in *Huang* does not appear to have been brought to the attention of Hyland J prior to the judgment in *Talukder* it cannot be said that there was full review of earlier decisions.

**17.** Furthermore, as was pointed out on behalf of the respondent the instant judgment did deal with additional matters over those dealt with in *Talukder* for example the materiality or otherwise of the asserted error, prior jurisprudence and the involvement of discretionary grounds based upon the conduct of the applicant.

**18.** I am satisfied therefore that there was no breach of the *Worldport* principles on judicial comity.

**Question 4**

**19.** Under this heading the applicant argues that the obiter findings made in the within judgment against the applicant should not be held to be a bar to his obtaining a certificate to appeal. In this regard it is common case that there was a finding by the respondent which was not appealed by the applicant to the effect that his marriage was one of convenience only. It is a matter of fact, on a review of the papers, that the applicant has given different dates, without explanation, as to when he and his former wife separated. Finally, the applicant has previously argued to the Minister that returning him to Pakistan would breach the prohibition on refoulement. However, the applicant has since returned to Pakistan voluntarily and the applicant has not raised before this Court any adverse treatment suffered by the applicant by State or State-sponsored authorities in Pakistan since his return.

**20.** By reason of the foregoing, this question does not reach the threshold required by the principles earlier identified to secure certification for leave to appeal, in particular having regard to the judgment of Humphreys J in *YY v. Minister for Justice and Equality No. 2* [2017] IEHC 185 where the Court found at para. 80 of the

judgment that it was not in the public interest that an applicant, who has from the outset abused the immigration system, should be granted a further mechanism to perpetuate a presence in the country.

**21.** Based upon the foregoing judgment and the judgment of the Court of Appeal in *PS* which was dealt with at para. 55 of the within principle judgment the applicant has not demonstrated an entitlement to secure certification for leave to appeal.

**Costs**

**22.** Section 169(1) of the Legal Services Regulation Act 2015 provides that a party who is entirely successful is entitled to an award of costs against the party who is not successful unless the court orders otherwise having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties. This Court must give reasons where the entirely successful party is not afforded costs.

**23.** Given that: -

(a) Leave to appeal to the Court of Appeal has not been afforded.

(b) The within proceedings did not involve separate and distinct issues.

(c) The Respondent was entirely successful.

(d) This is not a test case and there is no evidence to suggest that other cases are awaiting the outcome of this matter.

(e) The applicant is a businessman and there is no suggestion that payment of costs would involve undue hardship or give rise to any form of "chilling effect".

(f) The applicant argues that because the principal judgment in this matter has clarified prior uncertainty, with the applicant contributing to such clarification, it is appropriate that the costs order would reflect the applicant's contribution.

**24.** Having regard to all of the foregoing, I am not satisfied that the asserted clarification of prior uncertainty warrants a departure from granting costs to the entirely successful party and therefor an order for costs in favour of the respondent will be made, to be adjudicated upon in default of agreement.