THE HIGH COURT

[2025] IEHC 50

[2019 No. 124 JR]

BETWEEN

X

APPLICANT

– AND –

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

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 30th January 2025.

SUMMARY

In this judgment I explain why I will not, pursuant to s.5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000 certify that my decision in these proceedings 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.

1. This is an application in which the respondent State actors, as the losing side in an asylum dispute, now claim that the judgment of the High Court (a) raises one or more (here two) points of law of exceptional public importance and that (b) it is desirable in the public interest that an appeal be brought to the Court of Appeal. Items (a) and (b) are the threshold criteria which must be satisfied under s.5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000 before the

High Court can grant the certification necessary, allowing an appeal to proceed from the High Court to the Court of Appeal. The State has failed to satisfy either of these criteria in the present application. The underlying background to these proceedings is helpfully set out by the Court of Justice in its judgment in Case C-756/21 *X v. IPAT* (ECLI:EU:C:2023:523). I will not, therefore, re-state the facts here. All that need be added is that following the judgment of the CJEU I gave a final judgment in this case.

2. It is helpful to provide a little background to this application. Back in 2021, I declined to make the type of order sought by the respondents and instead made a preliminary reference to the Court of Justice under Art.267 TFEU. That Court, I gratefully note, returned with a notably comprehensive and helpful judgment in 2023. In 2024, the matter came on for decision before me following on the judgment of the Court of Justice. Applying the law as stated by the CJEU I decided the application against the respondents. The respondents now wish to appeal my applying judgment [2024] IEHC 551. Obviously that judgment is potentially appealable; however, the respondents first have to (and, respectfully, they have failed to) satisfy the requirements of s.5 of the Act of 2000.

3. The two purported points of law of exceptional public importance identified by the respondents have been formulated by their counsel in the form of two questions. These are as follows. First, 'What is the correct threshold under Irish law that must be demonstrated to entitle a person to an order of *certiorari* where [this 'where' should really read 'if'] there has been a breach of the duty of cooperation under s.28 of the International Protection Act 2015?' And, second, 'Where there has been unreasonable delay in the delivery of a decision by the IPAT, is it sufficient under Irish law for an applicant to establish that the decision might have been different in the absence of such delay or must an applicant identify specific evidence that the delay affected the outcome of the dispute?'.

4. The fundamental problem with both questions is that they do not arise in or from my applying judgment of last year. Each of the two questions could only arise from the judgment of the CJEU itself and that judgment is unappealable. Moreover, even if either question did arise from my judgment (and neither does) there is no uncertainty in the applicable law following on the judgment of the CJEU; in fact that judgment has brought great certainty to the applicable law.

5. The questions raised are, in reality, so clearly directed at the judgment of the CJEU (and not at the judgment in which I merely applied the CJEU judgment) that I asked before and at the hearing of the within application whether a further reference to the CJEU was merited. Counsel for the respondents suggested to me that a further reference would likely be rejected for consideration on the basis that the respondents are (in their view) raising issues of Irish procedure. I respectfully agree with counsel that any further reference would likely be rejected for consideration but, to my mind, such rejection would occur on the basis that, despite the effort by the respondents to make it look like Irish-law issues now present, I would in fact be raising questions concerning a judgment that the CJEU has previously issued, which is clear in its terms, by which I am bound, and which is patently applicable to these proceedings as well as more generally. So I will not be making a further reference.

6. Even if I considered that the points of law posited were of exceptional public importance (and I do not for the simple reason that the applicable law is clear following on the judgment of the CJEU), I could not conclude, in the light of the helpful and comprehensive analysis undertaken by the CJEU in its judgment, that it is desirable in the public interest that an appeal now be brought.

7. I have been referred to *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 and *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2022] IEHC231 as identifying some principles that can helpfully be brought to bear in an application of this sort. I set out below a summary of those principles and make some comment concerning those principles in the context of 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.

As indicated above, the fundamental problem with both questions is that they do not arise in or from my applying judgment of last year. Each of the two questions could only arise from the judgment of the CJEU itself and that judgment is unappealable.

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

Whatever about being sparing, there is no potential for leave to be granted where, as here, the fundamental problem with both questions is that they do not arise in or from my applying judgment of last year. Each of the two questions could only arise from the judgment of the CJEU itself and that judgment is unappealable.

(iii) The law in question stands in a state of uncertainty.

Here the applicable law in question stands in a state of certainty following on the judgment of the CJEU.

(iv) Where leave is refused in an application for judicial review, a question may arise as to whether the same material can constitute a point of law of exceptional public importance.

I do not see that it is necessary to address this logical conundrum: as indicated above, the fundamental problem with both questions is that they do not arise in or from my applying judgment of last year. Each of the two questions could only arise from the judgment of the CJEU itself and that judgment is unappealable.

(v) The point of law must arise out of the decision of the High Court.

I have already made clear that, in my view, the fundamental problem with both questions is that they do not arise in or from my applying judgment of last year. Each of the two questions could only arise from the judgment of the CJEU itself and that judgment is unappealable and (whether directly or indirectly) unassailable in the Irish courts.

(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.

(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'.

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

As to points (vi), (vii) and (viii), even if I considered that the points of law were of exceptional public importance (and I do not for the simple reason that the law in this area is clear following on the judgment of the CJEU), I could not conclude, in the light of the helpful and comprehensive analysis undertaken by the CJEU in its judgment, that it is desirable in the public interest that an appeal now be brought to the Court of Appeal.

(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, e.g., in the daily operation of the law.

As mentioned, the CJEU judgment brings certainty to this area of the law. So much so that I have been referred to a previous case (*H v. IPAT* [2024] IEHC 598) which was decided, at least in part, on the basis of the judgment of the CJEU without any appeal being brought thereafter. Obviously, all sorts of considerations go into deciding whether or not to bring an appeal and I do not know why an appeal was not brought in that case. However, the fact that no appeal was brought arguably confirms my view that there is not some state of uncertainty in the applicable law. On the contrary, thanks to the CJEU, there is now certainty as regards the applicable law.

(x) Some affirmative public benefit from an appeal must be identified.

Respectfully I do not see that bringing certainty to an area in which there is no uncertainty, all on the strength of purported points of law of exceptional

public importance which do not arise in or from the judgment which it is sought to appeal suffices to satisfy the criteria of s.5 of the Act of 2000.

(xi) The deciding court (me) must take the intended appellant's case at its height and recognise that the deciding court may be wrong. Equally, the intended appellant must not use the application for leave to appeal as an opportunity merely to reargue the merits of the case as decided against it.

As indicated above, the fundamental problem with both questions is that they do not arise in or from my applying judgment of last year. Each of the two questions could only arise from the judgment of the CJEU itself and that judgment is unappealable. I note that (rightly) the intended appellants did not use the present application for leave to appeal as an opportunity to reargue the merits of the case as decided against it.

(xii) The point of law must be one which is actually determinative of the proceedings and not one which, if answered differently, would leave the result unchanged.

If (i) the purported points of law of exceptional public importance arise in or from the judgment which it is sought to appeal and (ii) there was no judgment of the CJEU bringing fulsome clarity to this area of the law, then the two questions presenting might be determinative. However, that is a hypothetical scenario. Neither (i) nor (ii) presents in reality.

8. For all of the reasons stated, the within application is respectfully refused.