THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 908 J.R.]

BETWEEN

M.A.M. (SOMALIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

[2017 No. 988 J.R.]

K.N. (UZBEKISTAN), E.M., F.M. (A MINOR SUING BY HER GRANDMOTHER AND NEXT FRIEND K.N.) and Y.M. (A MINOR SUING BY HER GRANDMOTHER AND NEXT FRIEND K.N.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

[2017 No. 730 J.R.]

I.K. (GEORGIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL, AND THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 13th day of March, 2018

1. In *M.A.M. (Somalia) & Ors. v. Minister for Justice and Equality (No. 1)* [2018] IEHC 113 I refused these three applications for relief by way of judicial review. I am now dealing with costs, as well as an application by Ms. I.K. for leave to appeal.

The application for leave to appeal

2. Mr. Brian Leahy B.L for the applicant in I.K. and Ms. Sara Moorhead S.C. for the respondents are helpfully agreed as to the criteria for leave to appeal (see *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, MacMenamin J., 13th November, 2006)). I have also discussed these criteria in a number of cases including *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016) para. 2, and *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017) at para. 72.

3. The first major difficulty for the applicant is that she was unsuccessful on four independent grounds;

(i). That the challenge was a collateral attack on a deportation order.

(ii). That it was *jus tertii*.

(iii). That there was no substance to her points on the merits.

(iv). That I would refuse relief on the grounds of discretion.

4. It seems to me that leave to appeal should only really normally arise where the question certified would make a difference to the outcome. Where, in this instance, the applicant's points of law would not result in the order being changed to one in her favour, it seems to me that she is in some difficulty in relation to the present application.

5. The second difficulty, although perhaps less problematic than the first, is that the applicant has not identified precise questions as such for the Court of Appeal but rather "*suggested issues*". Possibly these could be reformulated as precise questions of law, but the somewhat vague nature of the questions perhaps illustrates some of the difficulties involved for the applicant in the present application.

The proposed issues

6. Looking at the proposed issues as if they were precisely formulated questions, the first one is whether the proceedings were out of time. I did not in fact hold that the proceedings were out of time. The question was rather whether one can revisit previous decisions simply because a further decision is taken predicated on the validity of that previous decision. It is well settled law that that is not an appropriate procedure (see the Supreme Court decision in *L.C. v. Minister for Justice, Equality and Law Reform* [2006] IESC 44 [2007] 2 I.R. 133).

7. The second issue is whether the applicant's husband should have been an applicant in the judicial review application. While that is a point of law, it does not seem to be one of exceptional public importance.

8. The third issue is whether the decision-maker erred in the manner in which the question of the feasibility of the applicant's husband returning to Georgia was concerned, particularly by allegedly discounting the previous declaration of refugee status. It seems to me that question is predicated on a false premise in the sense that the Minister did not discount the previous declaration of refugee status. In any event, the question is very fact-specific. On these particular facts, given that the husband did return to Georgia, it seems to me the way that situation is dealt with by the Minister was not controversial and no real question arises, certainly not one of law anyway, under this heading.

9. The fourth suggested issue is the extent to which there is a loss of refugee status, by operation of law, on becoming a citizen. The applicant's submissions for leave to appeal accept that there can be a time lag between ceasing to be a refugee and the loss of a declaration (at para. 13) and then they go on to concede at para. 16 that one ceases to be a refugee upon ceasing to meet the definitional criteria. The State's view in response is that "*the applicant therefore appears to accept the pivotal ruling of the court at para. 24 of the judgment and accepts that her husband is no longer a refugee*" (para. 25 of the State's submissions).

10. Insofar as the applicant in this case has raised an issue about the loss of either refugee status or the condition of ceasing to be a refugee upon acquiring Irish nationality, it seems to me that not only is this a very simple point but on examination it is a point without any substance whatsoever. There is a unanimity of opinion, Irish, in the U.K., at European level, and internationally, as to the position, and there is no doubt that needs to be resolved by recourse to the appellate courts. The mere fact that this point affects a lot of people does not make it a point about which there is any doubt once one actually looks into it.

11. The fifth suggested issue is my comment that there was no need to interpret the qualification directive (Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted) as being more extensive than the Geneva Convention. The applicant seizing on that comment is probably characteristic of a scramble by applicants when looking for points for appeal to seize on any language in a judgment that can be regarded as of a general nature, and it seems to me the comment has been somewhat inflated by the applicants. The context of that comment was that there was no reason to interpret the qualification directive as being more extensive than the Geneva Convention unless the text otherwise clearly required, which it does not do here, and the comment is no more controversial than that. Again, no overarching point of law arises, as suggested by the applicant.

12. The sixth point is that the Minister, on the analysis in the substantive judgment, failed to conduct a pointless exercise of revoking the declaration of refugee status of the applicant's husband. I did not accept that there was an obligation to expressly revoke the declaration. The cessation of that declaration seems to be a necessary consequence of the applicant's husband ceasing to be a refugee and it does not seem that there could be anything that could be said by him or on his behalf to the contrary, so even with the benefit of the submissions on leave to appeal it is very hard to see how that can be anything other than a pointless exercise or how any question to the contrary could arise.

13. The seventh suggested issue is an allegation that the exercise of discretion against the applicant was inappropriate and that relief should not have been refused on that ground. That seems to me to be a relatively fact-specific complaint. It is well established that judicial review is a discretionary remedy (see the judgment of Lord Carnwath in *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, and my judgment in *Li v. Minister for Justice and Equality* [2015] IEHC 638 [2015] 10 JIC 2102 (Unreported, High Court, 21st October, 2015)). The Supreme Court in *Smith v. Minister for Justice and Equality* [2013] IESC 4 [2013] 1 I.R. 294 *per* Clarke J. (as he then was) at para. 6.1 referred to a range of factors that are appropriate in the discretionary context and it is certainly not a mechanical rule; nor is the substantive judgment suggesting that it is, and nor is the judgment setting the bar at an unreasonably low level, as suggested by the applicant. In terms of the range of factors, the applicant relies on a number of authorities which deal with what seem to me to be relatively different situations. I can endeavour to summarise some of the relevant factors as follows.

> (i). The misconduct at issue here is not to be equated with, for example, the context of a criminal matter where relief is sought *ex debito justitiae* (see *O'Keeffe v. Connellan* [2009] IESC 24 [2009] 3 I.R. 643, *The State (Vozza) v. O'Floinn* [1957] I.R. 227, *The State (Gleeson) v. Minister for Defence* [1976] I.R. 280)).
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> (ii). It is certainly the case that mere procedural unreasonableness is not a major factor for the purposes of discretion (see *Carr v. Minister for Education* [2000] IESC 73 [2001] 2 I.L.R.M. 272). That is not the sort of conduct at issue here.)
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> (iii). Likewise, where the judicial review concerns an investigation or a prosecution in relation to underlying alleged criminal or unlawful behaviour, that underlying behaviour is not a reason to decline judicial review on discretionary grounds if there has been a breach of fair procedures in the course of the investigation, prosecution or trial (see *Gama Construction v. Minister for Enterprise Trade and Employment* [2005] IEHC 210 [2007] 3 I.R. 472). Again, that is not an issue here. This is not a case where the applicant's underlying conduct is being held against her as a reason to overlook a flaw into the investigation of that conduct.)
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> (iv). Furthermore, the objective interests of third parties such as children could be a factor militating against discretion, although again that could hardly be said to be automatically decisive, irrespective of all other situations (see *Sivsivadze v. Minister for Justice and Equality* [2015] IESC 53 [2016] 2 I.R. 403 [2015] 2 I.L.R.M. 73). That factor seems to have limited relevance here.

14. However, while these situations are all well and good insofar as they go, it seems to me that Hogan and Morgan in their textbook *Administrative Law in Ireland,* 4th edn. (Dublin, 2010) at p. 867 go, I think, too far when they say that the discretionary nature of judicial review is "*exercised sparingly*". It seems to me it very much depends what sort of conduct we are talking about. Here I identified a number of matters:

> (i). Firstly, the fact that the applicant, by evasion, frustrated the operation of the statutory scheme itself, under which the decision she now challenges was made (see by analogy Clark J. in *O.S.D. v. Minister for Justice and Equality* [2010] IEHC 390 (Unreported, Clark J., 30th July, 2010).
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> (ii). Secondly, that she misled the Minister (see *O.S.D. v. Minister for Justice and Equality* and *R.C. v. Refugee Applications Commissioner* [2010] IEHC 490 (Unreported, Clark J., 15th July, 2010).
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> (iii). Thirdly and relatedly, she misled the court, given the significant omission from her affidavit (see comments of Finlay Geoghegan J. in *Dimbo v. Minister for Justice Equality and Law Reform* [2006] IEHC 344 (Unreported, High Court, 14th November, 2006).

(iv). And fourthly, that she frustrated the operation of a related scheme, in this instance not the deportation system itself but the requirement to give full particulars of any previous marriages for the purpose of the Civil Registration Act 2004.

(v). Finally, pointlessness is also a potential factor in relation to discretion, as noted by Clarke J. in *Smith*, and I did refer to that aspect in the substantive judgment.

15. So it seems to me there are no cast-iron rules in relation to discretion. It must be approached on a case-by-case basis, having regard to the principles established in the case law. Factors going to discretion clearly lie on a spectrum; from those that should not enter into the picture at all, such as the underlying misconduct that is being investigated if the challenge is to an investigation, on to those where it may have some but perhaps not great weight, such as for example the technical breach of immigration law in the case of a person who fails to leave the State by the time specified in a deportation order but who nonetheless wishes to in a timely manner challenge the order, right up to the matters that can and do have legitimate significant weight, such as frustrating the operation of the scheme that is itself under challenge, misleading the decision-maker under that scheme and misleading the court. It seems to me this case is very much on the upper end of that spectrum. So the most that Mr. Leahy can say is that I misapplied the law in relation to discretion; but the case-specific misapplication of established law on any particular subject is not a ground for leave to appeal.

Order in relation to leave to appeal
16. So it seems to me that in all those circumstances no point of law of exceptional public importance coming within the terms of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 has been made out, and it seems to me in the light of the multiple reasons why I refused relief that the public interest test would not be satisfied either. The order will be that the application for leave to appeal will be refused.

Costs
17. I am now turning to costs in relation to these three matters. I have heard helpful submissions on this matter from Ms. Rosario Boyle S.C. (in K.N.), Mr. Colm O'Dwyer S.C. (in M.A.M.) and Mr. Brian Leahy B.L. (in I.K.) for the respective applicants, and Ms. Sara Moorhead S.C. for the respondents.

18. The general rule is that costs follow the event, save in exceptional circumstances (*Dunne v. Minister for the Environment* [2007] IESC 60 [2008] 2 I.R. 775 [2007] 1 I.L.R.M. 264).

19. The first point made is that these are test cases within the meaning of the decision of Clarke J. (as he then was) in *Cork County Council v. Shackleton* [2007] IEHC 241 [2011] 1 I.R. 443. However, it seems to me that this is not a case where the legislation is ambiguous or problematic. In fact, on the contrary, the legislation is very clear and as I have pointed out in the decision refusing leave to appeal that there is a unanimity of opinion, both Irish and internationally, in relation to the automatic ceasing of a person to be a refugee on acquiring nationality of the host State. So therefore it seems to me that there is no analogy with Shackleton as applied in *O'Keeffe v. Hickey* [2009] IESC 39 [2009] 2 I.R. 302 and *P.O. v. Governor of Dóchas Centre* [2017] IEHC 243 (Unreported, Barton J., 7th April, 2017). The mere fact that the case is a lead case for the purposes of a group of subsequent cases does not make a case a test case within the *Shackleton* doctrine. Given the simplicity of the point ultimately arrived at, it seems to me that this is not a case in the category of novel or important constitutional issues, or obscure areas of law, as discussed in *Collins v. Minister for Finance* [2014] IEHC 79 (Unreported, High Court, 27th February, 2014).

20. Ms. Boyle somewhat adventurously submits that *"a literal interpretation supports the applicants' case"* but in the substantive judgment I held that this was not so. Perhaps the applicant's best point is that the State, for a period of time, took an incorrect approach, but that was since reversed and it seems to me that the fact that the Minister received and acted upon incorrect legal advice for a period of time does not create an ongoing liability on the part of the Minister to pay the costs of applicants who wish to pursue that incorrect legal position following its correction on behalf of the Minister.

21. So while it is true that there may well be a number of other cases (Ms. Boyle estimates around 40) where the judgment in this case is determinative, that in itself is not an automatic or decisive factor to depart from the general rule (see para. 8 of *O'Keeffe v. Hickey*). Nor is it particularly relevant that the applicants are not persons of means as opposed to property developers, as in *Shackleton*, as suggested by Ms. Boyle.

22. Another point was made to the effect that the proceedings in *K.N.* where in some sense chosen by the court to be part of this trio of cases, but that is not a correct description of how matters came to this particular point. The proceedings in *I.K.* where listed in any event, and when it became clear that the main question in that case was going to affect other cases relating to family reunification, I invited interested parties to make their interest known in terms of being heard with the *I.K.* proceedings and in that sense the applicants in *M.A.M.* and *K.N.* where volunteers for the purposes of the present hearing. As there was an oversubscription of such volunteers I had to determine which particular cases would be added to the mix.

Order in relation to costs
23. There being insufficient grounds to depart from the default position, I will dismiss the applicant's application for costs in *I.K.* and *K.N.* and in those cases award costs to the respondents, to be taxed in default of agreement. In *M.A.M.* there is a slightly different element in the sense that the applicant only discovered on receipt of the State's written submissions that s. 47(9) of the International Protection Act 2015 was not being applied, which had previously been suggested. So it seems to me that the appropriate order in that case would be to acknowledge that the State's previous representations had encouraged the applicant to challenge the application of s. 47(9) which amounted to approximately half of the applicant's points, so balancing costs that the applicant might be entitled to under that heading against the costs that the respondents would be entitled to in relation to the unsuccessful points, it seems to me that I should make no order as to costs up to the date of delivery of the State's written legal submissions, but the respondent will be entitled to the costs of the substantive hearing and subsequent applications, again to be taxed in default of agreement.