THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 601 J.R.]

BETWEEN

YUXIN LIN (A MINOR SUING BY HER FATHER AND NEXT FRIEND MINGHONG LIN), MINGHONG LIN, HAI HONG WANG

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 11th day of February, 2019

1. In *Lin v. Minister for Justice and Equality (No. 1)* [2018] IEHC 780 (Unreported, High Court, 18th December, 2018) I rejected an application for *certiorari* of what was described as a "*decision*" to refuse to consider an application for permission under s. 4 of the Immigration Act 2004 in respect of the first-named applicant and for *certiorari* of a proposal to deport the first-named applicant. The proceedings were held up for many years by reason of a misconceived notion that the case was covered by the point ultimately decided in *Luximon v. Minister for Justice and Equality* [2018] IESC 24 [2018] 2 I.L.R.M. 153. However, the fundamental distinction with *Luximon* is that these applicants never had permission to be in the State, unlike the applicants in *Luximon*. The applicants now apply for leave to appeal and I have received helpful submissions from Mr. Colm O'Dwyer S.C. (with Mr. James Buckley B.L.) for the applicants, and from Mr. Rory Mulcahy S.C. (with Mr. Anthony Moore B.L.) for the respondent.

2. I have considered the caselaw on leave to appeal as set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, MacMenamin J., 13th November, 2006) and *Arklow Holidays v. An Bord Pleanála* [2008] IEHC 2, *per* Clarke J. (as he then was). 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) (para. 72).

Applicants' first proposed question

3. The applicants' proposed first question of exceptional public importance is "*does the Minister have a power to process a residence application made on behalf of the child born in the State, which is made directly to the Minister and in which reliance is placed upon a power conferred by s. 4 of the Immigration Act, 2004 and the principles in* Saleem v. Minister for Justice Equality and Law Reform *[2011] IEHC 223".*

4. The problem for the applicants is that insofar as the case turns on the central question of the scope of s. 4 of the 2004 Act, that has already been clarified by the Supreme Court. As noted in para. 4 of the No. 1 judgment, the Supreme Court has already held that "*the obvious focus of s. 4 is not to set some general template for all permissions granted, but rather to make provision for the decision of immigration officers at point of entry to the State*" *per* O'Donnell J. in *Sulaimon v. Minister for Justice and Equality* [2012] IESC 63 (Unreported, Supreme Court, 21st December, 2012) at para. 19. It follows that the only application the first-named applicant could possibly have brought was pursuant to the Minister's executive discretion, but the Minister's failure to exercise any such discretion is not directly challenged in the proposed question. However, even if it was, there is no coherent basis to say that the Minister's decision in that regard is unlawful.

5. The height of the first-named applicant's case now is that she made an application under s. 4 of the 2004 Act and argued at the hearing that the Minister was in breach of the Act for not considering it. Then the applicants appear to have realised that that posture was somewhat problematic because s. 4 does not apply, which is the core point decided in the No. 1 judgment under this heading. So they now rephrase the question for the purposes of appeal by in effect asking whether the Minister has an independent power to process an application that (wrongly) purports to be made under s. 4. That was not the case made at the hearing. Indeed it somewhat implies that the case that was so made and pleaded has been holed below the waterline.

6. To demonstrate how unfair the process now is to the respondent, Mr. Mulcahy indicated that outlining the contours of any such new alleged obligation will take him well outside his instructions to defend the case as pleaded.

7. Grounds 1, 2 and 3 of the statement of grounds are all premised on the argument that the Minister was incorrect in the interpretation and implementation of the 2004 Act. No argument was pleaded that the whole matter was one of non-statutory executive discretion which had been wrongly exercised. A case cannot undergo a fundamental transmogrification for the purposes of appeal simply because a moving party has been unsuccessful at first instance and thinks that they would have a better crack at things by reconfiguring their case and making a totally different and indeed inconsistent point on appeal. To create such a legal Frankenstein would be to improperly cast an appellate court into the role of deciding the point at first instance. Nor does finding oneself in an appellate forum liberate a party from the inconvenient confines of the pleadings. I would therefore uphold the submission at paras. 11, 12, 16 and 17 in Mr. Mulcahy's written submissions that this is a point that simply does not arise out of the case as pleaded.

Applicants' second proposed question

8. The second proposed question of exceptional public importance is "*in the event that the Minister does have such a power, should it be exercised by the Minister prior to issuing a proposal to deport such a child, if no such proposal had been made by the time of the residence application".*

9. That does not arise having regard to the position under the heading of the first question, but in any event the point has been clarified by the Supreme Court and the Court of Appeal as referred to in para. 7 of the No. 1 judgment. As stated by Denham J. in *Bode v. Minister for Justice and Equality* [2007] IESC 62 [2008] 3 I.R. 663 at 695: "*The appropriate process within which to consider constitutional or convention rights of applicants is the process under s. 3 of the Act of 1999. This is the relevant statutory scheme … Consequently, it is my view that there is no free-standing right of the second applicant to apply to the Minister. The appropriate procedure is under s. 3 of the Act of 1999, as amended, with the potential right to apply under s. 3(11) in the future if the need to*

make such an application should arise." The same point is made by Ryan P. in *A.B. v. Minister for Justice and Equality* [2016] IECA 48 (Unreported, Court of Appeal, 26th February, 2016) at para. 47.

Public interest in an appeal
10. Even if, counterfactually, the applicant had a point of exceptional public importance, an appeal would not be in the public interest. If an appeal were not allowed it does not mean that the first-named applicant will be deported. All it means is that the first-named applicant's interests will be assessed in the context of an alternative and (as held by the Supreme Court and Court of Appeal as mentioned above in *Bode* and *A.B.*) more appropriate statutory procedure, namely submissions under s. 3 of the Immigration Act 1999. An appeal is therefore neither necessary nor appropriate for the purposes of ensuring that any relevant rights or interests of the first-named applicant are duly considered in accordance with the statutory scheme.

Order
11. The application is refused.