

THE HIGH COURT  
JUDICIAL REVIEW

[2019 No. 356 J.R.]

BETWEEN

IVAN SEREDYCH

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(NO. 4)

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 16th day of December, 2019**

1. This application deals with an extremely unusual situation and one that doesn't seem to have any real general impact beyond its own peculiar facts. The three previous judgments in this matter were as follows:
  - (i). *Seredych v. Minister for Justice and Equality* [2018] IEHC 187 [2018] 3 JIC 2206 (Unreported, High Court, 22nd March, 2018), in which I dismissed an application for *certiorari* of a deportation order.
  - (ii). *Seredych v. Minister for Justice and Equality (No.2)* [2018] IEHC 307 [2018] 4 JIC 2308 (Unreported, High Court, 23rd April, 2018), in which I refused leave to appeal that decision.
  - (iii). *Seredych v. Minister for Justice and Equality (No. 3)* [2019] IEHC 730 [2019] 10 JIC 2903 (Unreported, High Court, 29th October, 2019), in which I granted *certiorari* of the refusal to revoke the deportation order after a significant change of circumstance, mainly the grant of permission to the applicant to make an application for international protection under the International Protection Act 2015.
2. I am now dealing with the State's application for leave to appeal the No. 3 judgment, and in that regard I have considered the relevant caselaw including *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, MacMenamin J., 13th November, 2006), *Arklow Holidays v. An Bord Pleanála* [2008] IEHC 2, *per* Clarke J. (as he then was), *I.R. v. Minister for Justice and Equality* [2009] IEHC 510 [2015] 4 I.R. 144 *per* Cooke J., and *M.A.U. v. Minister for Justice Equality and Law Reform (No. 3)* [2011] IEHC 59 (Unreported, High Court, 22nd February, 2011) *per* Hogan J. 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).
3. It is important to note from the outset that counsel for the respondent accepts that there is no presumption of entitlement to leave to appeal simply because it is the State that is seeking leave. In *N.E. v. International Protection Appeals Tribunal (No. 2)* [2019] IEHC 784 (Unreported, High Court, 18th November, 2019), at para. 3, I listed the fact that at that particular time I was aware of at least nine cases where applicants had been refused

leave to appeal, both by me in the first instance and by the Supreme Court on leapfrog applications: see *J.N.E. v. Minister for Justice and Equality* [2017] IESCDET 86, *Igbosonu v. Minister for Justice and Equality* [2018] IESCDET 51, *V.D. v. Minister for Justice and Equality* [2019] IESCDET 41, *A.M.C. v. The Refugee Appeals Tribunal* [2019] IESCDET 88, *Seredych v. Minister for Justice and Equality* [2018] IESCDET 157, *O.A. v. Minister for Justice and Equality* [2019] IESCDET 87, *M.S.R. v. International Protection Appeals Tribunal* [2019] IESCDET 123, *M.E.O. v. International Protection Appeals Tribunal* [2019] IESCDET 165 and *U.O. v. International Protection Appeals Tribunal* [2019] IESCDET 166 (there have been a few more since then). In terms of equality of arms, it certainly cannot be the case that the State has any preferential entitlement to, or presumption of, a grant of leave to appeal in cases where it, rather than an applicant, is seeking such leave.

4. In the present application, I have received helpful submissions from Ms. Siobhán Stack S.C. (with Mr. John P. Gallagher B.L.) for the respondent, and from Mr. Michael Lynn S.C. (with Mr. Anthony Lowry B.L.) for the applicant.
5. Five questions are proposed on behalf of the State.

#### **Question 1A**

6. Question 1A asks "*Whether the Minister acted unlawfully and/or in frustration of the purpose of the International Protection Act, 2015, in maintaining the Deportation Order either at the time of the Applicant's departure from the State on 24 April, 2018?*"
7. Leaving aside the fact that the question doesn't make grammatical sense, in so far as one can inject meaning into it, it is premised on a misunderstanding. Paragraph 15 of the State's written legal submissions says: "*the Deportation Order had been previously upheld by this Court in Seredych v. Minister for Justice (No. 1) [2018] IEHC 187, and it is also settled law that an appellant under s.22 has no right to remain in the State pending determination of that appeal: P.N.S. v. Minister for Justice [2018] IEHC at para. 35, citing Article 39 Procedures Directive and Case C-239/14 Tall v. Centre public action sociale d'Huy ECLI:EU:C:2015:824, 17 December, 2015.*" That submission is completely irrelevant, because *P.N.S. (Cameroon) v. Minister for Justice and Equality* [2018] IEHC 504 [2018] 7 JIC 1607 (Unreported, High Court, 16th July, 2018) dealt with a totally different period. The period in issue in *P.N.S.* was the interval between the application for permission to reapply for protection being rejected at first instance and the application being rejected on appeal. The question there was the status of the applicant during that appellate interregnum. Here, this applicant has already come through that period and out the other side, and is in the fairly unusual situation of having received permission to reapply. So *P.N.S.* was decided in a totally different context. Paragraph 16 of the State's written submissions notes that: "*Insofar, therefore, as the judgment finds that the Minister, by maintaining the Deportation Order on 24 April, 2018, the day after leave to appeal the finding that the Deportation Order was valid was refused and the validity of the Order had therefore become final, it is submitted that it proceeds on the novel proposition that the Minister, by leaving a valid Deportation Order in place, was frustrating the purpose of the 2015 Act.*" That, of course, is a complete misreading. No

legal error was committed by the Minister on 24th April, 2018 by leaving the deportation order in place at that stage. Leaving it in place only became a problem following the applicant winning the appeal to the IPAT at a later stage. That, then, disposes of the question insofar as sense can be made of it. The Minister didn't act unlawfully at all prior to the IPAT decision allowing the applicant's appeal, so the question doesn't arise.

#### **Question 1B**

8. Question 1B is "*Whether the Minister acted unlawfully and/or in frustration of the purpose of the International Protection Act, 2015, in maintaining the Deportation Order either from the date of receipt of the recommendation of IPAT of 11 February, 2019, or on receipt of the Applicant's solicitor's letter of 21 February, 2019.*"
9. The very terms of the question show how utterly fact-specific the present application for leave to appeal is. The basic answer offered by the No. 3 judgment is that yes, the Minister did act unlawfully; and whether that be dated from the date of the IPAT decision or the formal request made on foot of that decision doesn't matter in any practical sense for the purposes of the present application and is a purely academic degree of fine detail.
10. Paragraph 21 of the respondent's submissions contends that: "*It is therefore respectfully submitted that the judgment is to the effect that the principle of frustration itself creates the obligations. This is a question which creates uncertainty in view of the fact that the Court accepted that the 2015 Act did not itself contain any provisions which would oblige the Minister to readmit the Applicant to the State.*" That, unfortunately, is a misreading. I said that the 2015 Act doesn't expressly provide for the application to give effect to the IPAT's recommendation, but that it implicitly so provides: see para. 14, which states that "*implicitly the grant of permission to make a reapplication is the start of a process and the minister is not entitled to frustrate that statutory process*". Admittedly, I phrased it slightly differently in para. 18 of the judgment, which Ms. Stack has animatedly seized on as meaning something different. I didn't mean anything different, and if I had only had the foresight to have anticipated Ms. Stack's fervent search for an appeal point, I would have phrased para. 18 of the judgment in a way that was less open to misinterpretation by saying that, while the rights claimed by the applicant are not expressly provided for in the 2015 Act, they are implicit in that Act because the IPAT recommendation has started a process that impliedly must be allowed to continue. The Minister's obligation not to frustrate that process then follows from the application of general public law principles to the obligations implicit in the legislation itself.

#### **Question 2**

11. Ms. Stack's next proposed question of exceptional public importance is "*Whether the High Court was correct to conclude that it was not necessary to decide whether Articles 32 and 34 of the Procedures Directive, 2005, require a Member State to readmit to its territory an applicant who is granted permission to make a re-application for protection and was present in that territory at the time of applying for permission to reapply for international protection but has left the territory before the determination of that application for permission because the authorities of the Member State have made a deportation Order requiring such an applicant to leave.*"

12. The problem here is that Ms. Stack simply didn't make this point at the hearing. She never said that the court couldn't separate a national law from an EU law interpretation, and she only dreamed up that point after getting an adverse judgment. The normal approach is, of course, that where national law implements EU law, the two interpretations go hand in hand. I think this is of extremely limited relevance in the present context because the specific feature of the national legislation at issue here is procedurally very much an Irish innovation. There is nothing whatsoever in the directive about having to get permission to reapply for international protection. The legislation defines an "*applicant*" in s. 2 as someone who has actually made the reapplication following the grant of such permission. There is nothing like this in the procedures directive.
13. The way this issue evolved at the hearing was that the applicant's submissions clearly separate the challenge "*as a matter of Irish administrative law*" (para. 38(a)) from the EU law-based challenge, and relying under that latter heading on art. 39 of directive 2005/85 (para. 38(b)). The primary challenge was in Irish administrative law: see paras. 39-57 of the submissions. The applicant did not turn to EU law until he got to the second question in para. 38 of the submissions. Thus the two points were addressed separately at the hearing from the outset.
14. Admittedly the respondent's submissions are differently structured. They majored on the argument that the procedures directive didn't confer the right alleged (presumably Ms. Stack thought that was her best point); but they also included a section as to whether the IPAT decision was binding on the Minister, which doesn't contain any positive reference to EU law other than the negative statement that the procedures directive didn't apply to the applicant: see para. 54 – 64. The State's submissions don't say that I couldn't interpret the legislation without first interpreting the directive, which is the core point that the State is now majoring on and is claiming to be one of exceptional public importance. If it was that important presumably it might have deserved a mention at the hearing.
15. A party, whether the State or an applicant, cannot simply reconfigure its case having got an adverse judgment and make new points at the leave to appeal stage in an *esprit d'escalier*. Nor should a party be allowed to disguise the fact that this is what it is doing. There are, in addition, more fundamental practical and principled problems with Ms. Stack's argument insofar as it applies on these particular facts.
16. On the practical side, the argument that I would first have to determine the meaning of EU law and then take that into account in terms of whether the 2015 Act should be interpreted on a narrow basis, conferring nothing more than what is conferred by EU law, would have resulted in significant delay. In this case I would not have decided that myself without the benefit of a reference to Luxembourg and consequently it could be 18 months or more before I moved on to the question of what national law means.
17. This brings us to the really fundamental problem in principle with the State's argument, which is that directive 2005/85 expressly says that it doesn't preclude more favourable provisions in national law. Article 5 provides that: "*Member States may introduce or*

*maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this directive.*" So even if I was to get an answer from Luxembourg sometime in 2021 to the effect that the directive doesn't require the State to readmit the applicant (a point obviously not reached in this case), it is still entirely open to national law to allow for such a right. Here, on the particular, very unusual facts of the present case, I held that such a right was implied in the legislation. That *methodological approach* is not incompatible with EU law, even if one were to hypothesise that I am wrong on the particular outcome of the *application of that methodology* to the specific facts of this case. Therefore, Ms. Stack's claim of inconsistency with *P.N.S.* falls flat. Sure, the matter is perhaps put differently in *P.N.S.*, but the common law method means that the results in cases, and particularly the way in which those results are expressed, may depend on how those points are argued. Here, the case having been argued in a particular way, Ms. Stack has now thought better of things after the event and decided to offer new arguments for the first time at the leave to appeal stage. That is not a correct procedure, but even if it was, art. 5 of the directive is an answer to it.

### **Question 3**

18. Ms. Stack's next proposed question of exceptional public importance is "*may the Court refuse to grant reliefs which would have the effect of re-admitting the Applicant to the territory of the State where it would appear that s.12(1) of the 2015 Act precludes the granting of the ultimate relief, i.e. subsidiary protection?*"
19. That, unfortunately, is a complete and utter misunderstanding of the statutory process. The determination of whether the applicant is going to be excluded from protection is a matter for the protection decision-making bodies having heard evidence and legal submissions. It is not something that arises *a priori*, even though it not in dispute that the applicant has committed an offence. This is not a matter of discretion.

### **Question 4**

20. Ms. Stack's next proposed question of exceptional public importance is "*Whether the exercise by the Minister of his discretion under s.3(11) of the Immigration Act, 1999, is part of the same statutory process as that provided for in the 2015 Act, including s.22 of the 2015 Act, such that the Minister is bound by the decisions of the International Protection Appeals Tribunal and/or the findings contained in those decisions so as to be bound to revoke a Deportation Order on the basis of those decisions or findings?*"
21. The problem for the State is that that question is wholly unreal on the particular facts of this case. Where the applicant is outside the State and has been given permission to reapply for international protection, the only way to so reapply is to be readmitted to the State and the only way to do that is to have the deportation order revoked, if there is one. Thus the road from permission to reapply, which the applicant has, to the actual reapplication, runs directly through revocation of the deportation order. It is not some side-process or some later process that could rationally be viewed as separate. No reasonable person could be in any doubt about that. As the applicant's submissions point out at para. 12, I didn't differ from the Supreme Court decision in *Y.Y. v. Minister for*

*Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109. I simply explained why this was a different situation. Another pertinent aspect distinguishing this from *Y.Y.* is that in that case, there was a significant passage of time and considerable new evidence as to conditions in Algeria which was before the Minister and not before the Refugee Appeals Tribunal at the time of the earlier decision. There is nothing like that here.

**Order**

22. One can endeavour to summarise the many problems with this application as follows:

- (i). This case arises on extremely unusual facts. There is no evidence whatsoever and nothing beyond the speculative to suggest that it affects anyone else or will affect anyone else. As to whether this has even ever happened before, Ms. Stack claims it may have happened but that is not a comment of evidential status and I have been given no information whatsoever to back that up. I strongly suspect that an examination of the detail of those other cases, assuming they exist, would show significant factual distinctions. I might add that I say that on the basis that I've never encountered anything like this in my time in charge of the asylum list, or before that in my tour of duty as a judge on the list, or in practice in this area. Evaluating Ms. Stack's on-her-feet claim is not an exercise that is possible anyway in absence of any meaningful evidence, and of course if a party wants to make a point such as that the case has general implications, it must make such a point at first instance so it can be scrutinised by the mechanisms available at that level, rather than parachuting in such details at appellate level.
- (ii). There is no substance to any of the State's points. Many of them are utterly specious or a reconfiguration of the case in an *esprit d'escalier*, and the remaining points are misunderstandings.
- (iii). The State's written and oral legal submissions barely touch on the actual statutory criteria for leave to appeal. That tells its own story. Those criteria are manifestly not satisfied, and nor indeed is this a borderline case. There is virtually no point of law at all because the result emerges from extremely unusual facts. Insofar as there is any point of law, the central point is very uncontroversial; namely that the Minister should not frustrate the legislative intent that a person given permission to reapply for protection should be able to act on that permission. There can be no uncertainty in the law as regards that pivotal and determinative issue, but even if there was, any such alleged uncertainty arises because of the very unusual facts here that creates no general issue or one of public importance, still less one of exceptional public importance.
- (iv). Even if I am wrong in how I applied to the facts of this particular case the general principle that the Minister should not frustrate the statutory purpose, the most the State can say is that that is simply an error in the judicial administration of known principles. Mere error correction is not a point for which leave to appeal should be granted.

(v). Looking at the procedural history of this particular matter, there was more generality to the points sought to be raised by the applicant in his unsuccessful application for leave to appeal the challenge to the original deportation order, which Ms. Stack successfully opposed in both the High Court and the Supreme Court. Equality of arms must come into the picture at some point. It would not give the appearance of justice being done for the court to grant the State leave to appeal under such circumstances without something a lot more tangible than what they have presented, just because they, rather than the applicant, are on the losing side this time around.

23. I hope I might be forgiven for failing to resist the temptation to add the following. The State's playbook for appellate manoeuvres is fairly transparent at this stage. First, create a panic buy by claiming that the floodgates have been opened. Secondly, pique the intellectual interest of the appellate forum by asserting that the trial judge got matters hopelessly wrong. And finally, activate the principle that danger invites rescue by pleading that only such a forum can save the day. Appellate fora are robust enough to see through such tactics but in the present case they fall flat anyway. There are no floodgates. I would be reasonably confident that the category of persons affected by the point decided on in this case has a net membership of approximately one. As far as the points Ms. Stack spent most time on for this application are concerned, I couldn't have got them wrong in the No. 3 judgment, hopelessly or otherwise, because at the substantive hearing those points were ones that were never made. And as far as saving the day is concerned, the whole case is essentially an interlocutory issue – what should happen pending the determination of the applicant's re-application. The State wants the applicant to stay abroad (at best from his point of view, postponing the reapplication indefinitely); the applicant wants to be here. But either way the current proceedings relate to a temporary situation. There will be a future decision as to whether the applicant is going to get protection or not, and at that point his legal position in this jurisdiction will crystallise one way or the other. If it crystallises negatively then the State will obviously have options available in that situation. We are talking about a battle here, not the outcome of the whole war.
24. The application for leave to appeal is refused.