

THE HIGH COURT

JUDICIAL REVIEW

RECORD NO. 2023/1147/JR

Between:

GR AND CK

AND DR (AN INFANT SUING BY HER FATHER AND NEXT FRIEND GR)

AND TR (AN INFANT SUING BY HER FATHER AND NEXT FRIEND GR)

Applicants

- and -

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

Respondents

Decision of Ms. Justice Hyland of 4 December 2023

Introduction

1. This is an application for leave to appeal in respect of a judgment I delivered on 27 October 2023 refusing in part leave to seek judicial review on certain grounds and granting leave in respect of other grounds. The applicant has sought leave to appeal in respect of the refusal. I have decided to grant leave but have reformulated the

applicant's questions as it does not appear to me that the questions as originally formulated met the test for leave to appeal.

Leave to appeal

2. That test is imposed by s.5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000 as amended by s.34 of the Employment Permits (Amendment) Act 2014 (the "2000 Act as amended") which provides as follows:

"The determination of the High Court of an application for leave to apply for judicial review ... shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision 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 Supreme Court."

3. By virtue of s.75 of the Court of Appeal Act 2014, the reference to the Supreme Court in s.5 of the 2000 Act as amended should now be construed as a reference to the Court of Appeal.
4. The principles applicable to an application for leave to appeal are well established, being identified in cases such as *Glancre v ABP* [2006] IEHC 250, *Arklow Homes v ABP* [2008] IEHC 2 and *Cork Harbour Alliance for a Safe Environment v ABP & Ors* [2022] IEHC 231 and those principles have informed my decision.

Nature of Challenge

5. The challenge here was to a decision of International Protection Appeals Tribunal (the "IPAT") of 7 September 2023 refusing the applicants international or subsidiary protection. Therefore, the applicants were required to satisfy the Court that they had

established substantial grounds. The statutory test is identified at s.5(2) of the 2000 Act as amended in relevant part as follows:

“An application for leave to apply for judicial review under the Order ... shall be made within the period of 28 days commencing on the date on which the person was notified ... and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision ... is invalid or ought to be quashed.”

6. The test in relation to whether substantial grounds have been identified has been addressed in various decisions, most notably in *McNamara v An Bord Pleanála* [1995] 2 ILRM 424. The *McNamara* test was endorsed by the Supreme Court in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360. The purpose of the filtering mechanism established by s.5(2) is to ensure that only cases that raise substantial grounds are permitted to proceed to a full hearing (unless the case is compromised, or a telescoped hearing is directed). It is to be distinguished from the normal threshold for leave in judicial review hearings i.e., that of arguable grounds. Insofar as I can ascertain, there have been relatively few refusals of leave to apply for judicial review on the basis of a failure to establish substantial grounds in judicial reviews in the field of asylum, immigration and citizenship (“AIC”) where the respondent is not on notice of the leave application. As discussed further below, this factual context informs my view that it is desirable in the public interest that the appeal be certified.
7. One might ask how a ground can be considered not to be a substantial ground for the purposes of leave but yet meet the much higher test in section 5(6)(a). I seek to explain below why I consider this to be the case here.

Question in respect of grounds 3 and 4

8. The facts of the case are set out in my *ex tempore* judgement of 27 October 2023. Reliefs 3 and 4, and my view on same, may be found at paragraph 21 to 27 of the judgment. In short, in seeking those reliefs, the applicants argued that the International Protection Office (“IPO”) is obliged to make a decision on each of the six statutory questions identified by the International Protection Act 2015 each time it is faced with an application for international or subsidiary protection. On the applicants’ case, this is so even if a negative finding is made on any of those grounds, despite that fact that the scheme of the Act obviates the necessity to proceed any further in considering an application if an applicant fails to establish a previous ground. Those requirements are (i) well-founded fear of persecution/risk of persecution, (ii) nexus between the persecution and a refugee Convention ground, (iii) the availability or otherwise of State protection, (iv) the availability or otherwise of internal protection (v) relocation alternative and (vi) exclusion. Equally, it is said by the applicants that the IPO is obliged to adjudicate upon each and every one of those requirements even if, for example, an applicant has fallen at the first hurdle and failed to establish well-founded fear of, or risk of, persecution. The applicants argue that the IPO and IPAT must go through each requirement as if the applicant had circumvented the previous requirement, even if a contrary conclusion is reached by the relevant statutory body. This obligation is said to derive from the entitlement of the applicants to a fair hearing and a fair appeal.
9. It will be readily apparent that the point raised by the applicants is one that would, if correct, have implications for the determination of every claim for international/subsidiary protection both before the IPO and before the IPAT. In this case, they argue that the decision of the IPAT was unlawful because it came to a

decision on nexus, in circumstances where the IPO had not arrived at any conclusion on nexus because it rejected the claim that there had been a well-founded fear of/risk of persecution.

10. However, for the reasons explained in my judgment, I concluded that the applicants had not established substantial grounds in respect of grounds 3 and 4. Notwithstanding this conclusion, the question as to whether I correctly applied the substantial grounds threshold as identified in s.5(2) warrants certification in my view due to the breadth of the applicants' argument and its potential ramifications.

11. The applicants identified four questions in their written submissions on leave to appeal on the arguments raised at grounds 3 and 4. In my view, those questions are duplicative and do not focus on the key question i.e., whether I was correct to conclude that the grounds were not substantial. I have therefore decided to certify only the following question:

“Was the trial judge correct in her conclusion, that the arguments raised by the applicants in relation to the alleged breach of fair procedures/breach of a right to an effective appeal, where IPAT made a determination on nexus in the absence of any finding by the IPO on nexus, did not raise substantial grounds?”

Question in respect of ground 1 - nexus

12. The second matter identified by the applicants raises a substantive rather than procedural issue i.e., whether being a member of the first named applicant's family was a particular social group for the purposes of nexus to a refugee Convention ground. It does not therefore have the same potential to apply to as wide a range of cases as the previous issue. However, the question as to whether the identification of that argument by the applicants in this case met the substantial grounds threshold is one which appears to be of exceptional public importance for the following reasons. In my

decision, I make it clear that it is for an applicant to establish substantial grounds based on the facts and law identified by it, and that burden rests wholly on the applicant. I concluded that the applicant simply had not met that burden based on the material before me.

13. In the leave to appeal application, the applicants identified the decision of McDermott J. in *K.A. (A minor) v Refugee Appeals Tribunal & Anor* [2015] IEHC 244 in support of their argument that the ground in relation to the failure of the IPAT to accept that the family was a particular social group for the purposes of nexus to a refugee Convention ground was indeed a substantial ground. In that case, leave having been granted, McDermott J. concluded the argument met the substantial grounds threshold but concluded that the decision was not vitiated on the basis of that argument.

14. That case was invoked at the leave to appeal stage. But it was not identified or relied upon in the judicial review leave application, either in the oral or written submissions. In fairness to counsel for the applicants, he pointed out that *KA* was being relied upon to support his claim that the law was in conflict on this question, and therefore the appeal should be certified. However, it points up the issue that I consider warrants certification of the appeal: i.e., whether a judge is entitled to simply consider the material identified by an applicant when considering whether substantial grounds have been established or is there any more onerous obligation on a trial judge considering an application for leave to seek judicial review. If it is the former, it will mean that the decision as to whether substantial grounds have been established in any given case will depend on the extent to which an applicant has identified relevant legal principles and case law in support of its argument. That seems to me to be a necessary corollary of the obligation placed by s.5(2) on a court not to grant leave unless it is satisfied that there

are substantial grounds for contending that the decision is invalid or ought to be quashed.

15. This issue is one that arises out of my decision and involves a point of law of exceptional public importance, and it is desirable in the public interest that an appeal be taken. In the circumstances, I have decided to certify the following question:

“Was the trial judge correct in proceeding on the basis that the material provided by the applicants in respect of their argument on nexus being established by membership of a family group was insufficient to establish substantial grounds in the circumstances of the case?”