THE COURT OF APPEAL

CIVIL

APPROVED **NO REDACTION NEEDED**

Court of Appeal Record Number: 2023/319

High Court Record Number: 2023/1147JR
Neutral Citation Number [2024] IECA 138

Noonan J.
Binchy J.
Meenan J.

BETWEEN/

M.G. & N.O. & M.G. (AN INFANT SUING BY HER FATHER AND NEXT FRIEND M.G) AND N.G. (AN INFANT SUING BY HER FATHER AND NEXT FRIEND M.G.)

APPELLANTS

- AND –

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

RESPONDENTS

JUDGMENT of Mr. Justice Charles Meenan delivered on the 10th day of June 2024

1. This is an appeal from the judgment and order of the High Court (Hyland J.) refusing the appellants leave to seek certain reliefs by way of judicial review. The High Court did grant leave on other grounds sought by the appellants.

2. Section 5 (6) (a) of the Illegal Immigrants (Trafficking) Act 2000 (as Amended) (the Act of 2000) provides that the determination by the High Court of an application for leave

to apply for judicial review is final and no appeal lies from the decision of the High Court, except with the leave of the High Court which shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance. The trial judge certified two questions for consideration by this Court which I will set out later in the judgment.

Background: -

3. The trial judge helpfully set out the factual background to this application in her *ex tempore* decision of 27 October 2023:

(i) The first appellant is a national of Georgia born in 1976. The second named appellant is the wife of the first named appellant, was born in 1975 and is also a national of Georgia. The third and fourth named appellants are the children of the first and second named appellants, born in 2008 and 2016 respectively. They are both nationals of Georgia.

(ii) The first named appellant came to Ireland and applied for international protection on 8 September 2022. The second named appellant came to Ireland with her two children and applied for international protection on 16 January 2023.

(iii) The appellants' claims for international protection are based on the same set of circumstances in that the first named appellant was targeted for exposing an individual to prosecution and subsequent imprisonment, resulting in that both he and his family were at risk in Georgia from the actions of individuals acting on behalf of the imprisoned person.

(iv) The factual basis for the appellants' claims for international protection were rejected by the International Protection Office (IPO), at first instance, as lacking in credibility.

(v) The appellants appealed the decision of the IPO to the first named respondent (the Tribunal). Though the Tribunal accepted the factual basis for the applications, the appellants' claims for international protection were rejected on other grounds by a decision issued on 7 September 2023 (the impugned decision).

(vi) The appellants fear that, if returned to Georgia, they may encounter persecution as a result of the actions of a criminal and his associates/family members.

Decision of the High Court, 27 October 2023: -

4. In the statement of grounds, the appellants seek at para. (d) (i):

"An order of *certiorari* quashing that part of the impugned decision of the first respondent dated 7 September 2023 ('the impugned decision') in which it was found there to be no basis to consider that there was any nexus to a Refugee Convention ground in the claims made by any of the applicants;"

5. So far as the first named appellant was concerned, the trial judge, having considered the decision of the Tribunal, stated: -

"..I can discern no argument whatsoever as to why the Tribunal erred in finding that no nexus had been established."

6. In relation to the second, third and fourth named appellants, reliance was placed on the following passage from the judgment of Humphreys J. in *BK v The Refugee Appeals Tribunal & Ors* [2017] IEHC 746: -

"The claim of persecution by reason of family membership

9. It was submitted that a family could be a social group (see AVB & Ors. v Refugee Appeals Tribunal & Ors [2015] IEHC 13; see also James C. Hathaway and Michelle Foster, The Law of Refugee Status (2nd Ed. (Cambridge, 2014) in particular pp. 447 - 449). This, however, is a situation where a criminal threat was made against one

individual and the threat was then allegedly expanded to cover one other member of his family who was attacked and killed. It may be that a family member secondarily targeted could claim to be a member of a social group but that is not the case here. The applicant has to show that he is a member of a social group.

10. The fundamental problem for the applicant under this heading is that he is not being persecuted because he is a member of a family. Mr. Conlon submits it would be strange if a secondary target could be held to be at risk even though a primary target would not qualify, but that situation is expressly envisaged in Hathaway at p. 447 ..."

In considering this, the trial judge stated: -

"..It is true that Humphreys J. acknowledged that it may be that a family member secondarily targeted could claim to be a member of a social group, but that was not the case in the matter before him. In my view, that observation cannot be treated as authority for the proposition that a family of a person threatened by another person must be considered to be a particular social group."

7. The trial judge also considered the decision of the Tribunal on the issue and concluded: -

"16. In my view, the applicants have failed to establish substantial grounds to identify why this finding is unlawful or incorrect. The submissions made do not identify why this family must be considered to be a particular social group. They simply refer to the decision of Humphreys J. without seeking to explain why this family could be considered to form a particular social group. In these circumstances, I conclude that no substantial grounds have been adduced in respect of this argument."

8. The trial judge also considered the reliefs sought at para. (d) (iii) and (iv) of the statement of grounds together. The appellants had submitted that, at first instance, the IPO had made no finding on the *"nexus issue"* as it had found that there was no factual basis to

the fears expressed by the appellants. On appeal, the Tribunal had accepted that there was a factual basis to the appellant's fears and then proceeded to consider the *"nexus issue"*. The appellants submitted that this was in breach of their right to fair procedures in that the *"nexus issue"* was being considered at an appeal stage even though it had not been considered at first instance.

9. The trial judge found that there had been no breach of fair procedures, that the applicants were legally represented and must have understood the *"nexus issue"* would be addressed by the Tribunal if they were successful on their assertion that the IPO had been incorrect about persecution. The trial judge stated: -

> *"25. The applicants are also seeking to make an alternative, radical argument and one which they have not supported by case law. That argument is that in every appeal, the first instance decision maker must address all the aspects of a decision which may potentially be dealt with by the second instance decision maker. In other words, it is contended that because the question of nexus was not addressed by the first instance decision maker, there is automatically a breach of the right to an effective remedy and fair procedures. In relation to the question of an effective remedy, the applicants have not identified any grounds, let alone substantial grounds to support the proposition that an effective remedy in the context of a decision of the Tribunal requires it to limit itself to considering matters that were the subject of a finding by the IPO, and that each element of the requirements to be satisfied to establish international protection must be the subject of a finding by both the first instance and the second instance body…"*

The trial judge thus refused leave to seek the reliefs sought at (d) (iii) and (iv).

Application for leave to appeal: -

10. The trial judge gave her ruling on 4 December 2023. The trial judge granted leave on two questions which were formulated by the court.

11. The first question related to reliefs (d) (iii) and (iv): -

> *"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 remedy, where IPAT made a determination on nexus in the absence of any finding by the IPO on nexus, did not raise substantial grounds?"*

12. The second question related to ground 1, the *"nexus issue"*. In the application for leave, the appellants referred to the decision of McDermott J. in *KA (a Minor) v Refugee Appeals Tribunal & Ors.* [2015] IEHC 244. The trial judge observed that this decision had not been referred to during the leave hearing in either oral or written submissions stating: -

> *"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.."*

The trial judge certified 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?"*

Consideration of questions: -

13. In the course of her ruling of 4 December 2023, the trial judge referred to s. 5 (2) of the Act of 2000 which provides that, in applications such as this, 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"*. The trial judge also referred to the oft cited decision in *McNamara v An Bord Pleanála* [1995] 2 ILRM which was endorsed by the Supreme Court in *The Article 26 and the Illegal Immigrants (Trafficking) Bill* 1999 [2000] 2 IR 360 which addressed the test as to whether substantial grounds had been identified in a particular case.

14. Dealing with the first question, I am satisfied that it should be answered *"yes"*. The trial judge correctly observed that no legal authority was cited for such a proposition. The appellants had relied on the Supreme Court decision in *Stefan v The Minister for Justice, Equality and Law Reform* [2001] 4 IR 203. In this case, the complaint was that a portion of the applicant's evidence was omitted from documentation and thus not considered at first instance. In answer to judicial review proceedings, the respondent submitted that the issue could be resolved by way of an appeal. Denham J. (as she then was) rejected this as there had been a clear want of fair procedures at first instance which could not be cured by an appeal. The trial judge was correct in stating that in the instant case there was no want of fair procedures at first instance.

15. It does not follow that every issue has to be decided at first instance if a decision on one issue can be determinative of the matter. An example would be a personal injuries action decided at first instance on the issue of liability. On appeal, by way of a full re-hearing, the decision on liability may be reversed and damages assessed notwithstanding that there had been no assessment of damages at first instance. The only requirement is that the rules of fair procedures were followed at both hearings.

16. The answer to the second question is also *"yes"*. The trial judge was correct in refusing leave based on the decision of Humphreys J., relied on by the appellants. There was no duty on the trial judge to engage in legal research of her own, that is the duty of the appellant's legal representative. The decision of McDermott J. in *KA* ought to have been brought to the attention of the trial judge at the leave application but was not.

17. Though this Court has answered both questions certified by the trial judge in the affirmative, this Court retains a discretion as to whether or not, in the circumstances of the case, leave should be granted. This Court considered the judgment of McDermott J. in *KA*. In the course of his judgment, McDermott J. considered *K v Fornah* [2007] 1 AC 412 stating: -

> *"-- The House of Lords allowed the claimant's appeal holding that 'a particular social group' constituted a group of persons who shared a common characteristic other than their risk of persecution, which distinguished the group from the remainder of society, or who were perceived as a group by society. It held that membership of a family could ordinarily be regarded as membership of a particular group. Furthermore, it was held that a claimant who asserted persecution for reasons of family membership did not have to establish that a primary family member was being persecuted for a Convention reason.."*

Later in his judgment the judge continued: -

> *" -- The Tribunal rejected the existence of the blood feud as a Convention reason upon which the applicant's parents, or indeed any other member of the family, could possibly have succeeded after a full assessments of the facts. This is part of the careful analysis which must occur when the causal connection and the association between membership of the family and the Convention ground is asserted: It is part of the 'careful scrutiny' advocated by Lord Hope. It is clear that the Tribunal could not find*

> *such a causal connection based on a claim of blood feud. For the above reasons, although I am satisfied that the applicant has established 'substantial grounds' upon which to advance the leave application, I am not satisfied having considered the evidence, submissions and statement of opposition that the applicant has established that the decision is vitiated on these grounds."* (emphasis added)

It is clear from the above that McDermott J. did consider the *"nexus issue"* to be substantial grounds, notwithstanding the fact that in the particular case the evidence was not supportive.

18. This Court is of the view that the judgment in *KA* does establish that there are substantial grounds for granting leave to seek the relief at para. (d) (i) of the statement of grounds, subject to the amendment that it relates to the family of the first named appellant (the second, third and fourth named appellants) and not to the first named appellant himself.

Conclusion: -

19. By reason of the foregoing, this Court will grant leave to the second, third and fourth named appellants to seek the following relief by way of judicial review: -

> "An order of *certiorari* quashing that part of the impugned decision of the first named respondent dated 7 September 2023, in which it was found that there was no basis to consider that there was any *nexus* to a Refugee Convention found in the claims made by the second, third and fourth named appellants/applicants."

20. As for costs, the provisional view of this Court is that there be no order as to costs in respect of the appeal. Although costs would normally be reserved where leave is granted on an *ex parte* basis, this Court is of the view that the issue in respect of which leave has been granted arose by reason of the failure on the part of the appellants to bring to the attention of the trial judge the authority referred to at para. 17 above. Should the appellants wish to take issue with this provisional view, they may do so by furnishing written submissions (not to exceed 1,000) within 14 days of the date hereof.

21. As this judgment is being delivered electronically, Binchy and O'Moore JJ. have authorised me to state that they agree with it.