THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 364 J.R.]

BETWEEN

M.E.O. (NIGERIA)

APPLICANT

AND

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

RESPONDENTS

[2018 No. 296 J.R.]

BETWEEN

U.O. (NIGERIA)

APPLICANT

AND

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

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of February, 2018

1. In *M.E.O. (Nigeria) v. International Appeals Tribunal (No. 1)* [2018] IEHC 782 (Unapproved, High Court, 7th December, 2018) I rejected challenges to tribunal decisions refusing international protection to these two applicants. The applicants now seek leave to appeal and I have considered the law in that regard *Glancré 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., *Raiu v. Refugee Appeals Tribunal* (Unreported, High Court, 26th February, 2003) *per* Finlay Geoghegan J., and *Callaghan v. An Bord Pleanála* [2015] IEHC 493 (Unreported, High Court, 24th July, 2015) *per* Costello 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). I have received helpful submissions from Mr. Paul O'Shea B.L. for the applicants, and from Mr. David Conlan Smyth S.C. (with Ms. Elizabeth Cogan B.L.) in *U.O.* and Mr. Alex Finn B.L. in *M.E.O*. for the respondents.

Applicants' proposed question

2. Mr. O'Shea's proposed question of exceptional public importance is the same in both cases: "*Is the standard of proof to be applied in the assessment of past and present events of* "balance of probabilities coupled, where appropriate with benefit of the doubt" *as found by O'Regan J. in* O.N. v. Refugee Appeals Tribunal *[2017] IEHC 13, the correct standard to be applied in assessing (a) and (sic) facts in international protection cases, and (b) whether an applicant is a member of a particular social group (here, a homosexual)?*" Mr. O'Shea has clarified that the reference to "*and facts*" should be "*the facts".* The bipartite structure of the question is puzzling in the sense that whether an applicant is a member of a particular social group is a fact in an international protection case and thus point (b) seems to be subsumed within point (a).

3. Ground 1 of the statement of grounds as pleaded in these cases contends that *"in applying the standard of proof of the* 'balance of probabilities' *the first-named respondent applied the incorrect standard of proof – both in relation to past events and in relation to the question of the likelihood of future persecution/serious harm. In relation to past events the correct approach is that set out in* Karanakaran v. Secretary of State for the Home Department *[2000] 3 All ER 449. In relation to future persecution/serious harm the correct standard is that of a reasonable degree of likelihood that the applicant would be persecuted for convention reason/suffer serious harm."*

4. Much of this ground has fallen away. English caselaw does not give rise to grounds for judicial review in Ireland. The claim in relation to future persecution or serious harm has collapsed following the No. 1 judgment, although one would not know that from the formulation of the proposed question of public importance, which has not taken on board the substantive judgment in that regard which identifies that a more flexible test towards future harm is in fact currently applied.

5. The legal basis for the difficulty with the standard of proof as regards past events is not identified in the statement of grounds, which I held in the No. 1 judgment to be a fatal inadequacy. While at least five possible headings were discussed for the legal basis of such a standard of proof (constitutional law, the ECHR as applied by the European Convention on Human Rights Act 2003, international law, common law or EU law), the applicant's argument now appears to be focused on EU law, at least in the limited sense that only European law is referred to in the legal submissions seeking leave to appeal. But which EU law? The Charter? The qualification directive? We have not been told. Mr. Conlan Smyth argues that the applicants' focus on EU law is because "*he wants to get himself before the European Court".*

6. In the light of the substantive judgment, it would almost be an insult to the intelligence of the appellate courts to state why, in my opinion (rightly or wrongly), this case is not a suitable vehicle for elucidation on appeal of the question of the standard of proof, or *a fortiori* for a reference to the CJEU. As appears from the No. 1 judgment, there were three fundamental and independent problems with the application.

> (i). A reasonable degree of likelihood test would not have benefited these applicants on the facts (see para. 7 of the No. 1 judgment). These are not borderline cases.

(ii). The point made is not adequately or properly pleaded (see para. 8 of the No. 1 judgment). To allow the applicants to proceed by way of appeal with this point on these open-ended pleadings is to improperly endorse a permanently mutating case and to create a huge unfairness to the respondents. As Mr. Conlan Smyth puts it, it would be to allow the applicants to "*throw all the darts and see if one hits the target".*

(iii). Independently of the foregoing, the unfortunate fact remains from the applicants' point of view that no reasonable or plausible legal basis has been put forward for the test proposed. Therefore, no real ground of uncertainty in the law has been shown. As I indicated at para. 9 of the No. 1 judgment, Mr. O'Shea's argument did not amount to a whole lot more than casting about internationally for different tests and urging the most favourable ones on the court. If anything, the submissions made at the leave to appeal stage have reinforced that conclusion. Mr. Conlan Smyth is correct to say at para. 19 of the written submissions that "*no uncertainly as to the law arises merely because other jurisdictions may or may not apply their own differing standards of proof in international protection cases when the state of the law in Ireland as to the standard of proof in civil case is certain and when there is no mandated international standard short of which it is alleged Ireland falls short. An alleged variation across jurisdictions does not create a legal uncertainty for the purposes of grounding an appeal"*. The fact that the decision as to the standard of proof is one of the High Court rather than an appellate court is not in itself a ground to contend that there is uncertainty in the law. As wickedly but justifiably put by Mr. Conlan Smyth at para. 12 of his written submissions, "*it appears the central grievance of the Applicants is that a* mere [emphasis in original] *High Court decision has formed the basis of the law in this area, but that is not an adequate basis for an appeal to either of the appeal courts without a genuine argument that the O.N. judgment is in error".*

7. Finally, the applicants have objected to my comment at para. 16 of the No. 1 judgment, in particular my having said that "*As this case demonstrates, the potential success (defined in terms of creating procedural mayhem) of such challenges doesn't even depend on coming up with a new point; nor indeed does it require detailed, or perhaps any, thought having been given to the legal basis of the application, as amply illustrated here*." The applicants defensively riposte that they and their legal representatives have no interest other than obtaining a lawful and fair assessment of their protection claims. Under this heading we are possibly at cross-purposes. I am not suggesting that the applicants or their lawyers are acting improperly. What I am suggesting is that Irish public law potentially allows vast - in my view undue - latitude to applicants to create procedural mayhem and to try to bring the system to a juddering halt; latitude that these applicants are (lawfully) seeking to avail of here. The point now being made, which Mr. O'Shea accepts could be made by almost every protection applicant, is not new; and it is hard to identify any conspicuous evidence of its supposed legal basis having been thought through. Certainly such evidence cannot be identified in the statement of grounds. Perhaps formally any individual applicant is only concerned with ensuring that their applications are dealt with in a "*lawful*" manner (defined of course exclusively by reference to an applicant's demands, which are functionally equivalent to a requirement to be treated in a "favourable" manner); but the level of focus in the asylum and immigration list on systemic points is such that the identification of any one such point unleashes a cascade of similar applications (often, perhaps co-incidentally, brought by the same lawyers), albeit that each individual one is in theory made only by a self-interested applicant.

Order

8. The applications are dismissed.