**THE HIGH COURT**

[2022] IEHC 571

**RECORD NO: 2021/465 JR**

**IN THE MATTER OF SECTION 5 OF**
**THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000**
**(AS AMENDED)**

**BETWEEN**

**G.A. AND N.G.**

**APPLICANTS**

**AND**

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

**RESPONDENTS**

**JUDGMENT of Mr. Justice Mark Heslin delivered electronically on the day of 14th October, 2022**

**1.** In its judgment of 23rd June 2022, the Court refused the Applicants' application for judicial review and dismissed the proceedings. The Applicants seek leave to appeal that decision. I have carefully considered the detailed written submissions, dated 20 July 2022, which were furnished on behalf of the Applicants, as well as the Respondents' replying submissions, dated 15 August 2022. These were of great assistance to the court and I am grateful to the parties' legal representatives.

**2.** Leave to appeal is governed by s.5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act") which provides that "*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.*"

**3.** The principles underlying an application for a certificate for leave to appeal are well-established. In *Glancré Teo v. An Bord Pleanála* [2006] IEHC 250, MacMenamin J, identified the following 10 key principles (and I have laid emphasis on certain of them):

"*1. The requirement goes substantially further than that **a point of law emerges in or from the case.** It must be one of exceptional importance being a clear and significant additional requirement.*

*2. The jurisdiction to certify such a case must be **exercised sparingly**.*

*3. The law in question stands in a state of **uncertainty.** It is **for the common good that such law be clarified** so as to enable the Courts to administer that law not only in the instant, but in future such cases.*

*4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (Kenny).*

*5. **The point of law must arise out of <u>the decision</u>** of the High Court and not from discussion or consideration of a point of law during the hearing.*
*6. The requirements regarding "**exceptional public importance" and "desirable in the public interest" are cumulative requirements** which although they may overlap, to some extent require separate consideration by the Court (Raiu v. Refugee Appeals Tribunal [2003] 2 I.R. 6).*
*7. The appropriate **test is not simply whether the point of law transcends the individual facts** of the case since such an interpretation would not take into account the use of the word "exceptional".*
*8. Normal statutory rules of construction apply which mean inter alia that "exceptional" must be given its normal meaning.*
*9. "**Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law.** Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.*
*10. Some **affirmative public benefit from an appeal must be identified.** This would suggest a requirement that **a point to be certified be such that it is likely to resolve other cases**.*" (emphasis added)

**4.** In *U. (M.A.) v. Minister for Justice, Equality and Law Reform* ( No. 3) [2011] IEHC 59 Hogan J noted that the fact that section 5 of the 2000 Act "*requires that the point of law be one of exceptional public importance underscores the expectation of the Oireachtas that the power to certify would be confined to special and unusual cases*."

**5.** The Applicants submit that nine questions arise from the judgment of the Court, although in reality many of these contain either further sub-questions or in some cases several distinct questions under one heading. They are as follows:

i. *What is the definition of a document within the questionnaire? Is the content of the Questionnaire sufficient to put an applicant on notice of requirement of obtaining particular as opposed to general documents, where some documents are provided by an applicant? Is the IPO, or on appeal the IPAT, required to explicitly state that the documents provided are significantly lacking?*
ii. *What is the precise definition of "documentation at his or her disposal" for purpose of Section 27, and in particular does this obligation include an obligation continue to seek documentation from the country of origin after arrival and if so what, if any, are the obligation of the authorities to so inform Applicants?*
iii. *What is the precise definition of "documentary or other evidence" for the purpose of Section 28, and in particular do written witness statements from family members and visas in a passport not amount to "documentary or other evidence" in particular in the context of s.28(7)?*
iv. *Can an applicant give evidence via affidavit and have it considered as equivalent to evidence under oath? How is this evidence different from any unsworn documentary statement?*
v. *What are new credibility findings on appeal such as to demand an oral hearing?*
vi. *In so far as the Applicants were deemed out of time to challenge the decision of the 2nd November 2020 to deny an oral hearing, at what point can such a decision be challenged, given the consequence or disadvantage is not experienced unless the appeal proceeds in an unfair manner? Is awaiting the substantive decision a basis for extending time?*

vii. *What are the criteria to be considered when considering whether an oral hearing is necessary?*

viii. *In a challenge to a designation of a safe country of origin, when must an applicant first pursue same, can an applicant not rely on the designation, must an applicant challenge same before the tribunal and what prejudice need be established by an applicant?*

ix. *Does Zalewski v WRC [2021] IESC 24 and the principles therein concerning the administration of justice, inter alia, the necessity for provision of oath, and the necessity of an oral hearing, not apply to International Protection applications or any immigrations matters? Are different principles concerning the administration of justice applicable in cases involving a designated 'safe country'?*

**6.** None of these questions, which are now posed on behalf of the would-be appellants *arise out of the decision* given by this Court. This Court's decision was one which turned on the particular facts as found from an analysis of the evidence; and the application to those facts of established legal principles. There was no uncertainty as regards any question of law, which this Court 's judgment clarified. In reality, the Applicants have raised a number of questions which are independent of the decision in this case and the answer to which has no relevance to the judgment given and the reasoning underpinning it.

**7.** In truth, the foregoing statement is sufficient to dispose of this application for a certificate because none of the questions now posed constitute a point of law which *emerges in or from the case* which this Court dealt with. Thus, the would-be appellants do not even get as far as demonstrating that there is *any* point of law which should be addressed by way of appeal, still less a point of law *of exceptional importance.*

**8.** Rather than confine this ruling to the foregoing, I now propose to make certain comments on the questions posed. I do so in order that the would-be appellants, who doubtless will be disappointed at this ruling, have a better understanding of why it was made. However, it needs to be emphasised that none of the following comments take away from the reality that this Court has made its judgment. The decision and the Court 's reasoning is contained within the '4 walls' of the judgment itself, nowhere else. Thus, any observations which follow are made simply in the hope that the Applicants, who have not established an entitlement to appeal, might better understand why.

**9.** Regarding Question (i), the Applicants argue at para. 8 of their submissions that the Court 's decision "*can only be based on a finding that they* [the Applicants] *did not submit documents as defined within the questionnaire, as opposed to documentation simpliciter*". The Court made no such finding. The Court noted, at para. 32 of the judgment, that the questionnaire contained firstly, "*an explicit request that an applicant provide **all information** relevant to their application"* and secondly, "*a request for **any documents** capable of giving independent support to the account proffered by an applicant*." The Court 's judgment was not based on a finding that the documents submitted by the applicant were not documents at all, or were not documents which came within a particular definition. Rather, the documents submitted by the applicant in this case were not supportive of the Applicant's claim (see para. 38 of the judgment); and that documents which were capable of offering support (namely dental records and business records) were not submitted, despite repeated requests (see para. 39).

**10.** The Applicants also assert, at para. 12 of their submissions, that they should have been put on notice that the absence of documents as to employment and dental work was a matter adverse to the applicant's credibility. The Court found that the Applicants were, in fact, on notice as to the lack of supportive documentary evidence by the decision of the IPO (see paras.

61, 70 and 72 of the judgment) and that, on the facts, the Applicants had every opportunity to provide all necessary information and documentation; were fully on notice of their obligation to so provide; and failed to either adduce such information or provide an explanation for its absence (see paras. 94 and 95 of the judgment).

**11.** Regarding Question (ii) the Applicants, at paras. 17 and 18 of their submissions, enquire as to when the s.27 duty to co-operate arises; what the obligation of Applicants is post arrival to the State; and also assert that the Applicants were not aware of Irish law prior to their arrival. The Court found (see para. 28 of the judgment) that "*at all material times, the Applicants had legal advice and assistance, there is no question of the Applicants being unaware of the statutory duty imposed on them per s. 27 of Part 4 of the 2015 Act."* The definition of "*documentation at his or her disposal"* was not at issue and the Court made clear at para. 97 of its judgment that "*the statutory obligation per s. 27 of the 2015 Act, coupled with the repeated instructions in the Questionnaire, made it more than clear to the applicant what documents he should obtain and the fundamental importance of obtaining them immediately*." That the documents were, in fact, at the first named applicant's disposal is also evident from the fact that, at his request, the applicant's son was readily able to obtain both evidence concerning his dental treatment and evidence concerning his business after the decision of the IPAT (see para. 51 of the judgment).

**12.** Question (iii) relates to the definition of *"documentary or other evidence*" under s. 28 and whether witness statements from family members and visas in a passport could amount to such evidence. At para. 20 of their submissions the Applicants assert that the Court determined that the statements and visas did not constitute "*documentary or other evidence".* That is not so. The Court did not determine that passport and witness statements are not documents. Rather, it determined that they were not, on the facts of this case, documents which provided objective support of the Applicants claim (see para. 59 of the Court's judgment).

***13.*** With respect to Question (iv) the use or status of affidavit evidence was not an issue that arose in the case. While the Court observed (see para. 136) that as a matter of law that "*There does not appear to be any impediment in respect of the ability of an applicant for international protection to furnish an affidavit"* the Court went on in the same paragraph to note that "*the ability of an applicant for international protection to provide evidence under oath by means of an affidavit is certainly not in issue in the present proceedings*." The Court 's judgment was not based on any determination as to either the use or the status of affidavit evidence. Rather, as was made clear at paras. 44 and 59 in the judgment of the Court , it involved the distinction between *"on the one hand, documentary or other evidence which provides objective support for an application as opposed to a narrative account by an applicant* [or close family member] *of what is said by them to have occurred."*

**14.** Question (v) asserts that IPAT raised the issues of the lack of evidence of dental treatment and the lack of records concerning the first named applicant's business, for the first time on appeal. The Court set out (see para. 76 of the judgment) that this was not the case; that the IPO had addressed this under the heading of "*The applicant's lack of evidence*"; and that the first two aspects of the applicant's lack of credibility that were addressed in the 's. 39 Report' concerned lack of medical treatment, in particular lack of dental treatment, and lack of records in relation to the business. Like all questions now posed, this question does not arise from the judgment of the Court .

**15.** Regarding Question (vi), the Court set out (from para. 122 of the judgment) the distinction between the decision of 2 November 2020 in relation to the refusal to hold an oral hearing (the *mode* of appeal) and the decision of 9 April 2021 (in relation to the *merits* of the appeal).

As of the 2nd November 2020 decision, the Applicants knew they would not have the opportunity to make oral submissions. The time limits in O.84 of the RSC are well established, and as the Court noted (see paras. 127-9 of the judgment) there was no "*good and sufficient reason*" for time to be extended; and the failure to apply for leave to challenge the decision of 2nd November 2020 could not be said to be "*outside the control of"/ "not reasonably have been anticipated"* by the Applicants. Again, the issue was decided by this Court with reference to well-established principles applied to the particular facts of this case.

**16.** In relation to Question (vii), as noted at para. 121 of the judgment, s. 43 of the International Protection Act, 2015 makes clear that the 'default' position was for a 'papers-only' appeal to proceed. At para. 125 of the judgment, the Court noted that the Applicants had failed to comply with statutory time-limits for bringing an appeal against the decision of 2nd November 2020 to refuse an oral hearing. Again, this question does not arise from the judgment of the Court.

**17.** With regard to Question (viii), the Court held in its judgment that the Applicants failed to challenge the designation of Georgia as a safe country of origin at any stage until after adverse decisions issued from IPAT. As the Respondents note at para. 25 of their submissions, the law is clear that any challenge by way of judicial review "*shall be made within three months from the date when grounds for the application first arose."* Furthermore, failure to challenge the designation in time was only one of the four grounds (see para. 184 of the judgment) as to why the Applicants' challenge to the designation failed. These included (ii) the Applicants' acceptance of the designation in the context of submissions made pursuant to s. 33 of the 2015 Act; (iii) their failure to adduce any evidence of a breach by the Minister of their obligations pursuant to s. 72 of the 2015 Act; and (iv) that IPAT had decided that the first named applicant's claim did not run counter to country of origin information; nor would a different designation have set aside the adverse credibility findings.

***18.*** Finally, with respect to Question (ix), the Court made clear (see paras. 130-132 of the judgment) that *Zalewski* was distinguishable from the present case, firstly, as the factual context of the adjudication of an employment claim is wholly different from the assessment of an application for international protection; and, secondly, that a central issue in *Zalewski* concerned the obligation to conduct WRC hearings in public, whereas the 2015 Act requires international protection assessments to be conducted in private. Furthermore, it is well established that the principles of administration of justice and the obligations of fair procedures apply to decision-making bodies in international protection. Yet again, the question posed does not arise from the Court 's judgment in this case.

**19.** The Applicants do not satisfy the test in section 5 of the 2000 Act. This Court 's decision is rooted firmly in the facts, as found, and the application to same of already-established legal principles. Nothing was decided which has an effect beyond the facts of this particular case. Nor do I consider that there is any point of law of exceptional public importance. It is uncontroversial to say that it cannot be in the public interest to permit an appeal where the law is already clear and in respect of a question or questions which do not arise from the case decided. S.5 of the 2000 Act and the principles outlined by MacMenamin J in *Glancré Teo* do not permit a would-be appellant to use the appeal to seek an 'advisory opinion' on a question which did not determine the outcome of the case decided by this Court. Accordingly, and despite the undoubted sophistication of the detailed submissions on the matter which were furnished on behalf of the Applicants, the Court must refuse to certify any of the aforesaid questions.