Neutral Citation no [2004] NIQB 16

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Judgment: approved by the Court for handing down

Delivered: **12/03/2004**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MANG YUN GAO FOR LEAVE TO APPLY FOR A JUDICIAL REVIEW

IM THE MATTER OF AN APPLICATION BY MEI CHAI YANG FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

WEATHERUP J

[1] These two applications are for leave to apply for a judicial review of decisions of the Immigration Appeal Tribunal notified to the applicants on 22 October 2003 and 14 January 2004 respectively, each refusing the applicants permission to appeal to the Immigration Appeal Tribunal.

[2] Mr Maguire of Counsel appeared on the leave applications on behalf of the Immigration Service to raise the preliminary issue that this Court does not have jurisdiction to entertain an application for judicial review of such a decision of the Immigration Appeal Tribunal. In essence it is contended on behalf of the proposed respondent that section 101 of the Nationality Immigration and Asylum Act 2002, which applies to decisions made after 9 June 2003, provides for a statutory review of such decisions of the Immigration Appeal Tribunal in the High Court in England and Wales. Accordingly the proposed respondent contends that there is an alternative remedy available to the applicants and in the circumstances leave to apply for a judicial review should be refused.

[3] Prior to the 2002 Act coming into effect the immigration appeal process could have involved first of all an adjudicator's decision, secondly an application to the Immigration Appeal Tribunal for permission to appeal to the Immigration Appeal Tribunal, thirdly a judicial review of a refusal of permission to appeal to the Immigration Appeal Tribunal, fourthly a hearing before the Immigration Appeal Tribunal and fifthly an appeal from the Immigration Appeal Tribunal to the Court

of Appeal. By the 2002 Act the third stage was displaced by Section 101 introducing the alternative remedy of statutory review in the High Court.

[4] Sections 101 to 103 of the 2002 Act provide as follows:-

> "Appeal to Tribunal
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> 101 (1) A party to an appeal to an adjudicator under section 82 or 83 may, with the permission of the Immigration Appeal Tribunal, appeal to the Tribunal against the adjudicator's determination on a point of law.
>
> (2) A party to an application to the Tribunal for permission to appeal under subsection (1) may apply to the High Court or, in Scotland, to the Court of Session for a review of the Tribunal's decision on the ground that the Tribunal made an error of law.
>
> (3) Where an application is made under subsection (2)-
>
> (a) it shall be determined by a single judge by reference only to written submissions,
>
> (b) the judge may affirm or reverse the Tribunal's decision,
>
> (c) the judge's decision shall be final, and
>
> (d) if, in an application to the High Court, the judge thinks the application had no merit he shall issue a certificate under this paragraph (which shall be dealt with in accordance with Civil Procedure Rules).
>
> (4) The Lord Chancellor may by order repeal subsections (2) and (3).
>
> Decision
>
> 102 (1) On an appeal under section 101 the Immigration Appeal Tribunal may-
>
> (a) affirm the adjudicator's decision;
>
> (b) make any decision which the adjudicator could have made;

(c) remit the appeal to an adjudicator;

(d) affirm a direction given by the adjudicator under section 87;

(e) vary a direction given by the adjudicator under that section;

(f) give any direction which the adjudicator could have given under that section.

(2) In reaching their decision on an appeal under section 101 the Tribunal may consider evidence about any matter which they think relevant to the adjudicator's decision, including evidence which concerns a matter arising after the adjudicator's decision.

(3) But where the appeal under section 82 was against refusal of entry clearance or refusal of a certificate of entitlement-

(a) subsection (2) shall not apply, and

(b) the Tribunal may consider only the circumstances appertaining at the time of the decision to refuse.

(4) In remitting an appeal to an adjudicator under subsection (1)(c) the Tribunal may, in particular-

(a) require the adjudicator to determine the appeal in accordance with directions of the Tribunal;

(b) require the adjudicator to take additional evidence with a view to the appeal being determined by the Tribunal.

Appeal from Tribunal

103 (1) Where the Immigration Appeal Tribunal determines an appeal under section 101 a party to the appeal may bring a further appeal on a point of law-

(a) where the original decision of the adjudicator was made in Scotland, to the Court of Session, or

(b) in any other case, to the Court of Appeal.

(2) An appeal under this section may be brought only with the permission of-

(a) the Tribunal, or

(b) if the Tribunal refuses permission, the court referred to in subsection (1)(a) or (b).

(3) The remittal of an appeal to an adjudicator under section 102(1)(c) is not a determination of the appeal for the purposes of subsection (1) above."

[5] Section 101 (2) provides that a party may apply for a review of the Tribunal's decision to the "High Court". Section 5 of the Interpretation Act 1978 provides that

> "In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule".

Schedule 1 provides that "High Court" means in relation to Northern Ireland, Her Majesty's High Court of Justice in Northern Ireland. Similarly the words "Court of Appeal" mean in relation to Northern Ireland, Her Majesty's Court of Appeal in Northern Ireland.

[6] The previous legislation was the Immigration and Asylum Act 1999. Under the 1999 Act the decision of the Immigration Appeal Tribunal to refuse permission to appeal was subject to judicial review and such applications were heard in the High Court in Northern Ireland. Ali Reza Razeghi's Application [2002] NIQB 66 was such a case. Appeals from the Immigration Appeal Tribunal under the 1999 Act were to the Court of Appeal and were dealt with in the Court of Appeal in Northern Ireland as in Liu Bi Xia's Application [2002] NICA 19. Such appeals to the Court of Appeal were provided for by paragraph 23 of Schedule 4 of the 1999 Act, which was in terms similar to section 103 of the 2002 Act.

[7] The definitions in Schedule 1 of the Interpretation Act 1978 apply "unless the contrary intention appears". The proposed respondent contends that the statutory context of Section 101 of the 2002 Act indicates a contrary intention to applications being made to the High Court in Northern Ireland and that such applications are intended to be heard in the High Court in England. In Section 101(3)(d) it is provided that on application to the "High Court" the Judge may issue a certificate that the application has no merit. It is then provided that the certificate should be dealt with in accordance with Civil Procedure Rules. The Civil Procedure Rules 2003 (SI 2003 No 364) introduced Rules 54.21 to 54.27 in relation to applications to

the High Court in England under Section 101(2) of the 2002 Act. Rule 54.26(4) provides for the issue of a certificate under Section 101(3)(d) of the 2002 Act. The Civil Procedure Rules do not apply in Northern Ireland. There have been no equivalent rules introduced into the Rules of the Supreme Court (Northern Ireland).

[8] Further, the Civil Procedure Rules set down a procedure for statutory reviews in England. Rule 54.22 provides for the application for review; rule 54.23 provides for the time limit for applications; rule 54.24 provides for the service of applications; rule 54.25 provides for determining the applications; rule 54.26 provides for service of the order and rule 54.27 provides for costs. In particular rule 54.25 sets out a framework for decision making by the High Court. Paragraph 4 provides that where the Tribunal has refused permission to appeal the Court will reverse the Tribunal's decision only if it is satisfied that the Tribunal may have made an error of law and either the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. Paragraph 5 provides that where the Tribunal has granted permission to appeal the Court will reverse the Tribunal's decision only if it is satisfied the appeal would have no real prospect of success and there is no other compelling reason why the appeal should be heard. Equivalent rules have been introduced in Scotland into the Rules of the Court of Session, chapter 41 part XI, to regulate statutory review under section 101 of the 2002 Act.

[9] If the reference to the "High Court" in Section 101 means the High Court of Justice of Northern Ireland then Part II of Order 55 of the Rules of the Supreme Court (Northern Ireland) would apply, namely the general rules in relation to appeals, references and applications under statutory provisions. This would provide a different framework for decisions in the High Court in Northern Ireland to that which arises under the Civil Procedure Rules and the Rules of the Court of Session, and would contain no provision for the determination of statutory reviews of Immigration Appeal Tribunal decisions on permission to appeal, other than that which is set out in the 2002 Act. The proposed respondent contends that it would be curious if a legislative scheme that operates throughout the United Kingdom should have been intended to operate in the High Court in Northern Ireland without the introduction of equivalent Rules to those introduced in England and Wales and in Scotland, so that it would operate under a different regulatory system in this jurisdiction.

[10] That applications under section 101(2) of the 2002 Act should be made to the High Court in England is said by the proposed respondent to be consistent with the present practice in appeals from adjudicator's decisions that involves the Immigration Appeal Tribunal sitting in England. Applications for permission to appeal to the Immigration Appeal Tribunal are dealt with on paper by the Immigration Appeal Tribunal in England. The proposed respondent contends that it is consistent with that structure that statutory review of a decision of the Immigration Appeal Tribunal to refuse permission to appeal to the Tribunal should also be heard in England.

[11] The proposed respondent drew attention to other statutory provisions in which there were express arrangements to include the High Court of Justice in Northern Ireland. For example Section 14 of the Data Protection Act 1984 provides for an appeal from the decision of the Tribunal on a point of law "to the appropriate court" and that court is stated to be the High Court of Justice in England or the Court of Session in Scotland or the High Court of Justice in Northern Ireland depending on the address of the appellant. In that instance the appeal is to the appropriate "court" so the Interpretation Act 1978 does not operate, but express provision is made for Northern Ireland. In the Banking Act 1987 Section 31 provides for an appeal from a Tribunal "to the Court" which is defined as the High Court or the Court of Session or the High Court in Northern Ireland. Again the Interpretation Act 1978 would not operate, and again express provision is made for Northern Ireland. Section 6 of the Pensions Appeal Tribunals Act 1943 provides for appeal from a Tribunal to a judge of the High Court nominated by the Lord Chancellor. Section 14 modifies the procedures in relation to Northern Ireland by substituting for references to the High Court references to the Supreme Court. Once more the Interpretation Act 1978 would not apply, but a different format is adopted to include Northern Ireland. Finally the Tribunals and Enquiries Act 1992 Section 11 provides for an appeal from a Tribunal to the High Court and Section 11(8) provides modifications to the procedure in relation to proceedings in Northern Ireland. In each instance there is express provision for Northern Ireland. There are other statutory examples where reference is made to the High Court, and by reliance on the Interpretation Act that would mean the High Court in Northern Ireland. It is only in the last example advanced by the proposed respondent that the statutory reference is to the "High Court" so that the Interpretation Act could operate for those words to mean the High Court in Northern Ireland, and in that example there were statutory modifications to provide for that outcome. In the present case there would be a need for statutory modifications to address the reference to the Civil Procedure Rules in section 101(3)(d).

[12] The applicants contrast the proposed conduct of these statutory reviews in the High Court in England with appeals from the Immigration Appeal Tribunal that until the present time been taken to the Court of Appeal in Northern Ireland. Order 61 rules 11 and 12 of the Rules of the Supreme Court (Northern Ireland) provide for applications for leave to appeal to the Court of Appeal from the Immigration Appeal Tribunal and for appeals from the Immigration Appeal Tribunal under section 9 of the Asylum and Immigration Appeals Act 1993. This provision was replaced by the 1999 Act and now the 2002 Act. There is no contrary intention appearing in section 103 of the 2002 Act and it appears to be the position that appeals from the Immigration Appeal Tribunal to the "Court of Appeal" will continue to be made to the Court of Appeal in Northern Ireland.

[13] The applicants contend that if the Court of Appeal in Northern Ireland retains jurisdiction it would be anomalous if the High Court in Northern Ireland has no jurisdiction. However the process that engages the Court of Appeal does not

involve an appeal from the High Court to the Court of Appeal, where it would be extraordinary if an appeal from the High Court in England were to be to the Court of Appeal in Northern Ireland. The process that engages the Court of Appeal involves an appeal from the decision of the Immigration Appeal Tribunal to the Court of Appeal, and these appeals have proceeded in Northern Ireland under the previous legislation.

[14] The starting point is that by virtue of the Interpretation Act 1978 the reference in Section 101 of the 2002 Act to the "High Court" means the High Court in Northern Ireland. This applies subject to any contrary intention. There is such a contrary intention in Section 101(3)(d) in the reference to a certificate of no merit to be dealt with in accordance with Civil Procedure Rules. Section 101(3)(d) does not apply to the Court of Session. I accept the arguments of the proposed Respondent referred to above. I conclude that the reference to High Court in Section 101(2) of the 2002 Act means the High Court in England and not the High Court in Northern Ireland.

[15] If, contrary to the finding above, the reference to "High Court" in section 101 of the 2002 Act were a reference to the High Court in Northern Ireland, the procedure would be by way of statutory review under Order 55 of the Rules of the Supreme Court. Accordingly this application for leave to apply for Judicial Review would not be the correct procedure and would be dismissed.

[16] The applicants contend that if a review of an Immigration Appeal Tribunal's decision to refuse permission to appeal is required to be undertaken by way of statutory review in the High Court in England there is no effective remedy for applicants in Northern Ireland because of the practical difficulties of complying with that procedure. Accordingly the applicants contend that Judicial Review in Northern Ireland remains a means of challenging such a Tribunal decision, as there is no alternative remedy that is effective.

[17] I do not accept this argument. An application to the Immigration Appeal Tribunal for permission to appeal to that Tribunal under Section 101(1) of the 2002 Act is made to that Tribunal in England in accordance with the applicable rules. I apprehend no greater practical problems in seeking a statutory review of that decision of the Immigration Appeal Tribunal in being required to make that application to the High Court in England. If the statutory review is successful the substantive appeal to the Immigration Appeal Tribunal will also be heard in England. Each process will have practical difficulties for applicants in Northern Ireland but I do not accept that the conduct of a statutory review which is undertaken on paper in England presents such problems as render the procedure ineffective.

[18] For the reasons set out above I am satisfied that the applicants for leave to apply for judicial review have an alternative remedy by means of statutory review

in the High Court in England and in those circumstances I refuse leave to apply for judicial review.