



THE COURT OF APPEAL

UNAPPROVED

NO REDACTION NEEDED

Appeal Record No.: 2019 55

Donnelly J.

Ní Raifeartaigh J.

Power J.

Neutral Citation Number [2021] IECA 242

BETWEEN/

**K.G, K.J.S. and E.G. (AN INFANT SUING BY AND THROUGH HER MOTHER
AND NEXT FRIEND K.J.S.)**

APPELLANTS

- AND-

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 24th day of September

2021

The issue in the case

1. This is an appeal in respect of a decision made by the High Court on the costs of proceedings which had become moot on a date after the institution of the proceedings. The decision of the High Court was to make no order as to costs. The appellants submit that they should have been awarded their costs. The case raises the question of how to apply the

authorities on costs in a case which has become moot since the commencement of proceedings, including in particular *Cunningham v. President of the Circuit Court & DPP*,¹ *Godsil v. Ireland*,² *Matta v. Minister for Justice and Equality*³ and *P.T. v. Wicklow County Council*.⁴ The application of the principles set out in those authorities depends in this case upon a number of matters, including (a) the specific chronology of events, (b) the specific terms on which leave to bring judicial review proceedings was sought and obtained and (c) identification of the ‘event’ which can be said to have rendered the proceedings moot.

2. An important feature of the case is that the High Court judge who granted leave did so in more confined terms than those upon which leave had been sought by the appellants. As will be seen in further detail below, the appellants had sought an injunction preventing the deportation of the first named appellant as well as declaratory relief, but the ‘leave’ judge did not grant leave to seek the injunctions but instead confined the leave to the declaratory relief only. A key question is whether the Minister’s decision in July 2018 to grant an undertaking not to deport, which issued *after the leave had been granted*, was caused by institution of the proceedings and/or what precise connection it had with those proceedings, in circumstances where the appellants had *not* been given leave to agitate the legal question of injunctive relief in the proceedings. The appellants contend that the Minister’s reversal of position on the giving of an undertaking was caused by the proceedings and that the undertaking was the event which caused the proceedings to become moot; and they contend that the Minister’s undertaking constituted a “unilateral act” within the meaning of the relevant authorities and, therefore, that a costs order should be made against the Minister. The respondent contends that the proceedings did not become moot until the Minister granted the first named appellant’s

¹ [2012] IESC 39, [2012] 3 IR 222

² [2015] IESC 103, [2015] 4 IR 535

³ [2016] IESC 45

⁴ [2019] IECA 346

application for residence as a “permitted family member” in December 2018 and that this decision was made in the ordinary course of events simply because the application was made, and not because court proceedings had been brought. The latter was the interpretation favoured by the trial judge. The dispute therefore centres upon how to identify the event which caused mootness.

Facts and timeline

3. The first named appellant is a Mauritian national, the second named appellant is a Polish citizen, and the third named appellant is their child who is of pre-school age. The chronology of dates is relevant to the legal issues in this case.

4. The first named appellant arrived in the State on the 3 October 2007 on a student permission. It was cancelled because he was not attending his course. He undertook to leave the State by the 27 December 2008 but did not do so and remained in the State unlawfully thereafter. According to the affidavit of one of the State deponents, a deportation order was made on 24 June 2011. He remained in the State and was ultimately arrested in 2018, some 7 years later.

5. Meanwhile, the second named appellant, who is a Polish national and therefore an EU citizen, arrived in the State in May 2012 and met the first named appellant in August 2013. They formed a relationship, moved in together in 2014, and their child was born on the 7 January 2015. At no stage during this period did the first named appellant seek to regularise his position, and the deportation order remained extant. It appears to be the case that the first named appellant did instruct a solicitor in January 2018 to make certain applications on his behalf in order to regularise his position, but that the solicitor did not implement his

instructions. When matters came to a head with the first named appellant's arrest in June 2018, he instructed a different solicitor to deal with his affairs.

6. The first named appellant was arrested on 14 June 2018 and detained in Cork prison. At this point and for the first time, correspondence was entered into with the Minister by the (newly instructed) solicitor and three applications were made on the appellant's behalf. This was some 7 years after the making of the deportation order, and some three years after the birth of the child (the third named appellant). The flurry of activity was undoubtedly prompted by the first named appellant's arrest, detention and impending deportation.

7. The solicitors for the first named appellant made a number of applications on his behalf. They made (1) a request to revoke the deportation order under s.3(11) of the Immigration Act 1999, (2) an application for an EU residence card as a "permitted member" pursuant to the European Communities (Free Movement of Persons) Regulation 2015, S.I. 548/2015 (hereinafter "The 2015 Regulations"), and (3) an application for permission to reside in the State pursuant to the decision in *Zambrano*.⁵ In addition, they made at least three applications to the Minister for an undertaking that he would not be deported pending the outcome of these applications. The Minister refused to grant any such undertaking on a number of occasions: the 20 and 21 June 2018, the 25 June 2018, and the 27 June 2018, each of which refusal was on a date *prior* to the institution of judicial review proceedings.

8. On 2 July 2018, an application for leave to bring judicial review proceedings was made. Part of the application consisted of an application for an injunction. However, and importantly,

⁵ *Zambrano v Office national de l'emploi* (ONEm), C-34/09, European Union: Court of Justice of the European Union, 8 March 2011.

Keane J. (the ‘leave’ judge) granted partial leave only; he granted leave to seek declaratory relief only and refused leave in respect of the injunction sought. He made the application returnable for one week later. There is no formal record of what Keane J. said on this date or why he refused leave in respect of the injunction.

9. The precise terms of the reliefs originally sought were as follows:

- (1) An injunction enjoining the Minister from removing the first applicant from the State until such time as a decision has been arrived at on applications currently pending before him;
- (2) Such declaration(s) of the legal rights and or legal position of the applicant and/or persons similarly situated as the court considers appropriate;
- (3) An interim and/or interlocutory injunction preventing the Minister from removing the applicant from the State pending the determination of the proceedings.

10. The wording of relief (2) sought above mirrors the wording in Practice Direction 78 (High Court), which provides at number 8(c) as follows:

“An applicant may however in any case, in addition to substantive relief by way of certiorari or mandamus, seek as a sole declaratory relief “Such declaration(s) of the legal rights and/or legal position of the applicant and/or persons similarly situated as the court considers appropriate”, or a relief to the like effect. The precise terms of any such declaration sought can then be addressed by way of legal submissions within the confines of the legal grounds pleaded in the statement of grounds.”

11. It is important to note that the ‘leave’ judge, Keane J, granted partial leave only; he granted leave to seek the declaration(s) at (2) above but not the injunctive relief sought at (1) or (3). Further, he limited the relevant ground to ground F(1), which reads as follows:

“The applications pending before the respondent disclose a fair question to be tried concerning the position of the first named applicant in the State and raised the real possibility that the first named applicant may be granted residence in the State. The applicants have presented an arguable case for the revocation of the deportation order (either by way of discretion or by operation of law) and for the first named applicant to be granted permission to reside in the State on the basis of his relationships with the other applicants herein.”

12. One might have thought that this particular ground related more to the injunctive relief than the other grounds, insofar as it contains phrases such as “a fair question to be tried”, “an arguable case” and the like. However, it also refers to “the position of the first named applicant in the State” and pleads that revocation of the deportation order should be granted together with permission to remain “on the basis of his relationships with the other applicants”. Thus, it is clear that the basis on which leave was given to seek this relief concerned the question of the first appellant’s relationship with the other appellants (under EU law) and rights or potential rights arising from those relationships.

13. The case was made returnable for one week thereafter. The notice of motion was served by hand on 2 July 2019. Four days later and by letter dated 6 July 2019 sent from the CSSO to the solicitor for the appellant, the Minister gave an undertaking in the following terms:

“We are instructed to confirm that the Minister will grant an undertaking not to deport the first named applicant pending the outcome of Mr. G’s application

pursuant to section 3(11) of the Immigration Act 1999 made on the 18th June 2018.

We understand that Mr. G is currently detained in Cork Prison and in light of the Minister's undertaking it is appropriate that he be released as soon as possible. We understand this has been communicated to Cork Prison and they are making the necessary arrangements for his release.

Finally, no doubt you are aware that that these proceedings are returnable to Monday 9th July 2018. The Minister will be seeking an adjournment to take advices from Counsel. The recent Practice Direction (HC 78) provides for a six week adjournment on the first return date. If you can consent to same we can advise the Court accordingly on Monday and advise you of the next date the matter is listed.”

(emphasis added)

It will be noted that the undertaking was confined to a decision on the application to revoke the deportation order.

14. Counsel on behalf of the Minister points out that this was during the month of July and that the courts' long vacation was approaching. The proceedings were adjourned from time to time thereafter.

15. Meanwhile the applications submitted to the Minister were processed. On 17 September 2018, the appellants submitted DNA evidence confirming that the first named appellant was the father of the child. The EU Treaty Rights Unit of the Department conducted an examination of the application to be treated as a permitted family member under article 5(2) of the 2015 Regulations. On 25 September 2018, a Ms. Sloan of that unit prepared a submission recommending that the first named appellant should be given such recognition, subject to the revocation of the deportation order. On 2 October 2018, a Ms. Adamson prepared a submission

recommending the revocation of the deportation order. That recommendation was approved by more senior officials and on the 9 October 2018 their recommendation was accepted and the deportation order was revoked. On 6 December 2018, a decision was made to recognize the first named appellant as a permitted family member and to grant him a residence card (Exhibit JB 3). By letter dated 6 December 2018, Ms. Adamson wrote to the first named appellant indicating that the Minister had decided to grant him residence card on the basis that he was a permitted family member within the 2015 Regulations. The Minister also informed him that the deportation order had been revoked. It may be noted that the undertaking had come to an end on 9 October 2018, the date upon which the decision was made not to deport the appellant.

16. On 21 January 2019, the High Court was informed of what had occurred; the order made on that date (and perfected some days later) records that the court was informed that the case was ‘settled’ and that there was an argument as to costs. The perfected order strikes out the proceedings and makes no order as to costs.

The High Court judgment on costs

17. The High Court (Humphreys J.) referred to the principles established by the Supreme Court in cases such as *Cunningham v. President of the Circuit Court*, *Godsil v. Ireland* and *Matta v. Minister for Justice and Equality*. He also referred to his own judgment in *M.K.I.A. (Palestine) v. International Protection Appeals Tribunal*.⁶ He drew a distinction between the costs of moot proceedings overall and the costs of any particular element of them. Dealing with the overall proceedings, he said that the proceedings were not rendered entirely moot by the release of the first named applicant from custody or by the undertaking or by the revocation of

⁶ [2018] IEHC 134, [2018] 2 JIC 2708

the deportation order; they were finally rendered moot only by the grant of permission under the EU Free Movement Directive 24/38/EC. He then asked the question as to what the “event” was for the purposes of the law on costs. He said that insofar as the applicant sought to assert rights by way of EU free movement, to a limited extent there was an “event” in the sense of an acknowledgment in the Minister’s decision of those rights but that the real problem for the applicant was whether that event was related to the proceedings. The trial judge was of the opinion that it was not. He said that the primary causative factor as to why the application was granted was simply the fact that it had been made. Once an applicant makes an application, he said, it will be decided by the Minister in due course at some time and the fact that an applicant seeks injunctive or declaratory relief does not fundamentally change the dynamic in that regard. This inclined him towards ‘no order as to costs’. He said that an applicant is not entitled to costs simply because he or she issues proceedings seeking declarations about an application that is going to be decided anyway. He also pointed out that the grant of declaratory relief is equitable and discretionary and that simply because something is legally or factually the case does not mean that the person is necessarily entitled to a form of declaration from the court.

18. He also pointed out that the applicants had had since the 7 January 2015 ample opportunity and time to make an application based on his family situation, but only in fact made the application when the first named applicant was in custody, thus depriving the Minister of a reasonable time to make the necessary enquiries.

19. As to the injunctive element of the case, the trial judge said that this was rendered moot by the Minister’s undertaking but that the question of this relief was not a live issue at that point in any event because the injunction had been refused by Keane J.. While in other cases an undertaking might amount to a concession by the State as regards the injunctive aspect of

the case, that was not so here because the applicants had been unsuccessful in relation to obtaining leave in respect of the injunction and were not taking any steps to challenge that.

20. The trial judge came to the conclusion that the only way to act consistently with the Supreme Court case law in relation to mootness was to make no order as to costs. He said that if the case could have been credibly distinguished from other cases where a person is in a queue awaiting a decision, then it might have been possible to give more favourable consideration to an order of some kind in their favour, but obtaining leave to institute proceedings seeking declaratory relief did not withstand serious analysis of a credible basis for such a distinction because, he said, “*such an approach would rapidly erode the Supreme Court’s jurisprudence on the issue*”. In all the circumstances he made no order as to costs.

Grounds of Appeal

21. The appellant appealed on the ground that the trial judge erred in refusing to grant the appellants the costs of the proceedings as against the respondent. It was pleaded that the proceedings were rendered moot by the Minister’s unilateral decision to release him from custody and to undertake not to deport him pending a decision being made on the application for the revocation of the deportation order against him; and that the trial judge erred in determining that the proceedings in the High Court were rendered moot by virtue of the application made to the Minister being granted. The proceedings had become moot long in advance of any decision being made on the application and with the Minister’s unilateral decision in giving an undertaking not to deport the first named appellant.

22. The respondent opposed the appeal and pleaded that the trial judge correctly applied the principles in the case law relating to the disposition of costs in cases which have become moot.

It was pleaded that the case only became moot when the appellant was granted a residence card; it was pointed out that leave had only been granted to seek declaratory relief as to the legal rights and position in the State and that the ‘leave judge’ had refused to grant leave to seek an interlocutory injunction or an injunction as a final remedy. The sole issue in the proceedings was therefore whether or not the appellants were entitled to a declaration of some sort based on the merits of his applications to the Minister. Accordingly, the trial judge was correct in finding that the undertaking not to deport him and his release from custody did not render the proceedings moot as no issue of injunction or release from custody arose in the proceedings.

The submissions of the parties

23. The appellant submits that there should be an award of costs in his favour. He cites the decisions in *Cunningham, Godsil, Matta, P.T. v. Wicklow County Council* and *M.K.I.A. v I.P.A.T.* He contends that the relevant “event” was the Minister’s undertaking to release him, which occurred on a date after leave was granted, the Minister having previously refused to give any such undertaking. He says that the total reversal of attitude on the part of the Minister can only be construed as an acknowledgment of the legal validity and necessity of the proceedings. He argues in the alternative that if the “event” was the subsequent substantive decision on his applications, he is entitled to costs as the proceedings were necessary to protect his position until that decision. He argues in the alternative that if there was “no event”, the Court should consider the reason that the proceedings became moot and that there was nothing external which operated upon the respondent; instead there was a unilateral *volte face* on the part of the Minister.

24. The respondent emphasises the matters in respect of which Keane J. did *not* grant leave, namely the application for an injunction restraining deportation pending the Ministerial decision upon his various applications and/or an interlocutory injunction restraining deportation pending the determination of the court proceedings. The effect of the grant of leave on narrower grounds than had been sought was to confine the scope of the proceedings to an argument as to the entitlement of the appellant to a *declaration* in the terms sought. The order confining leave to the declaration(s) was not appealed. The Minister submits that the trial judge correctly analysed the facts of the case in light of the authorities and that the proceedings became moot only when the respondent decided to treat the first named appellant as a permitted family member of the second named appellant on the 6 December 2018, with the effect that he could obtain a residence card. They say that the appellants' argument that the proceedings became moot when the first named appellant was released from custody and an undertaking not to deport was given ignores the narrow basis on which Keane J. granted leave and on which the proceedings proceeded thereafter. The only issue left in the proceedings was whether he was entitled to a declaration of some form as to his rights or legal position, but he was not entitled to seek an injunction restraining his deportation.

25. The respondent says that the undertaking reduced the urgency of a hearing of the case, bearing in mind that the end of the legal year was approaching, but says that the undertaking cannot be interpreted as a concession that an appellant was entitled to remain in the State as of right. The only effect was to remove the urgency that might otherwise have existed and was a reasonable step for the respondent to do given the imminence of the legal vacation. It did not affect the underlying legal issue of whether he had an entitlement to be in the State and therefore the grant of the undertaking was not to be interpreted as an event which rendered the proceedings moot.

26. The respondent points out that the appellants could have appealed the refusal to grant leave to seek an injunction or could have chosen not to issue the motion on the basis that there was little practical benefit in bringing an action seeking purely declaratory relief in circumstances where they had received the undertaking; however, they decided to proceed despite that situation obtaining.

27. They also point to the terms of ground F (1) and say that a declaration to this effect would be sterile and of no utility because in effect it would say no more than that there was an arguable case that he should be granted permission to remain.

28. It may be noted that they refute the appellants' suggestion that the grant of residence was retroactive to the date of application (see para. 43 of their submissions), given that the application (and ultimate grant) was as to being a 'permitted family member' under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548/2015). They point out that it is firmly established that an application for recognition as a permitted family member of an EU citizen does not give rise to an entitlement to remain in the State pending a decision on an application, citing *C.A. v. Governor of Cloverhill Prison*.⁷ In light of the language of the regulations and the decision in *C.A.*, the respondent submits that the first named appellant could not have been entitled to a declaration that he was entitled to remain in the State pending the outcome of his applications, and it would also have been inconsistent with the refusal of Keane J. to grant leave to seek an injunction.

⁷ [2017] IECA 46, [2017] 2 JIC 2713

29. Once the respondent received the application, it was inevitable that a decision would be made in due course and that is what occurred. The present proceedings did not bring about the respondent's decision to grant a residence card; he would have made that decision whether these proceedings had been brought or not. The proceedings therefore did not become moot due to a factor within the respondent's control which had a causal nexus to the proceedings.

30. The respondent also points out that it is well established on the authorities that where an application for revocation of a deportation order has been made and refused, the courts will only exceptionally enjoin the enforcement of the deportation order.

31. They also point out that the first named appellant is the author of his own misfortunes having resided unlawfully in the State from 2008 and being the evader of a deportation order from 2011 until 2018. He disclosed his family circumstances to the respondent only after his arrest for the purpose of deportation and might never have faced arrest and impending deportation had he disclosed his situation and applied for a residence card at an earlier time. The emergency that he faced was of his own making. Counsel accepted in oral submissions that the appellant had gone to a solicitor in January 2018 but that apparently the solicitor did not progress the application; nonetheless, that was still some three years after the birth of the appellant's child and some seven years after the deportation order, and the situation from the Minister's point of view was one of complete non-engagement until the first named appellant's arrest in June 2018

Analysis

The unusual aspect of this case

32. As can be seen from the submissions of the parties, therefore, there is a key dispute as to what action can be said to have rendered the proceedings moot and whether that action can be said to have been caused by the proceedings. The appellants say that the relevant event is the undertaking (and decision to release from custody) given by the Minister in July 2018 which would not have been given but for the proceedings; the respondent says the relevant event is the decision in December 2018, granting residence and informing the appellant of the revocation of the deportation order, which would have happened in any event and was not caused by the institution or maintenance of the proceedings. As set out in the timeline above, the deportation order was revoked on the 9 October 2018, and the decision regarding the first named appellant's residence was made on 6 December 2018. In order to resolve these competing characterisations of the situation, it is necessary to examine more closely the precise framework of analysis used in previous authorities.

The principles identified in the leading authorities

33. One of the leading decisions is of course that of the Supreme Court in *Cunningham v. President of the Circuit Court*. The appellant had been prosecuted for offences relating to the contamination of blood products and brought judicial review proceedings to restrain the prosecution on the grounds of undue delay. It was refused by the High Court and she appealed to the Supreme Court but the prosecution entered a *nolle prosequi* before the Supreme Court heard the case. The entry of the *nolle prosequi* by the DPP was therefore the significant event under scrutiny; but more particularly, *the reason for* the entry of the *nolle prosequi* was the focus of this examination. The court granted the appellant the costs of the High Court action.

Clarke J., citing his previous judgment on the issue in *Telefonica O2 Ireland Limited v. Commission for Communications Regulation*⁸ held:

“4.7... in summary, and for the reason set out in Telefonica, a court, without being overly prescriptive as to the application of the rule should, in the absence of significant countervailing factors, ordinarily being in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot.”

34. He acknowledged that in cases where statutory officers have changed a decision as a result of external factors or an underlying change of circumstances, it might be difficult to say whether the mootness was caused by the external event or the unilateral action of the officer. However, he said that where a statutory officer or body seeks to rely on external factors or an underlying change in circumstances, the onus is on them to advance sufficient evidence so that a court can be satisfied that this is the real reason for their actions:

“4.11. It does, however, seem to me that, where the immediate or proximate cause of proceedings becoming moot is the action of such a statutory officer or body but where it is sought to argue that the true underlying reason is an external factor outside the control of that officer or body, it is incumbent on the officer or body concerned to place before the court sufficient evidence to allow the court to assess whether, and if so to what extent, it can be fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances.”

⁸ [2011] IEHC 380, [2011] 10 JIC 1104

35. Clarke J. held that the court was not provided in that case with sufficient evidence by the respondent to explain in full its decision to enter a *nolle prosequi* and he held that, on the evidence before the court, the proceedings had become moot as a result of its unilateral action, and costs were awarded to the appellant.

36. Thus, the classification or taxonomy described by Clarke J. in *Cunningham* was as between (1) a unilateral action on the part of the one of the parties and (2) an external circumstance or factor outside the control of the parties; depending on which of these had caused the proceedings to become moot, the outcome would be an order for costs against that party, or no order for costs, respectively. This would suggest that the Court should ask itself in the present case whether what rendered the proceedings moot was a unilateral action (such as a change of mind) on the part of the Minister, or an external circumstances or factor outside the control of the parties. However, that begs the question as to what action rendered the proceedings moot. Before one seeks to classify that action as an external circumstance or unilateral act, one has to identify the relevant action or event. I will return to this later.

37. In *Godsil v. Ireland*, the circumstance which led to the case being moot was, somewhat unusually, the enactment of legislation. The appellant was an undischarged bankrupt who wished to run in elections to the European Parliament but was prevented from doing so by the legislation, the constitutional validity of which she then challenged. The legislation was amended to remove the prohibition before her proceedings were heard, thereby rendering her proceedings moot. The High Court made no order as to costs and she appealed to the Supreme Court, which made an order for costs in her favour.

38. McKechnie J. said that the principles set out in *Cunningham* were subject to two important caveats, namely that there were no “significant countervailing factors” and that there was no “event” which costs could follow. He confirmed that the overriding starting point was to apply the usual rule that costs follow the event and that this required an assessment of whether there had been an event. If one could be identified, there would be no necessity to resort to the principles discussed in the *Cunningham* case. He found that there had in fact been an event, since the only reasonable explanation for the hasty amendment to the legislation under challenge was the existence of the court proceedings. He regarded this as an explicit acknowledgment and admission of the legal validity of the challenge and granted an order for costs in favour of the appellant. It is interesting to note that he describes the “event” as an acknowledgment and admission of the legal validity of the challenge. In other words, it is the construction which is to be put upon the action which rendered the proceedings moot which matters, not merely the action itself; was the enactment of the legislation an acknowledgment of the validity of the plaintiff’s proceedings? Because he construed it to be such, the answer was yes. This analysis suggests that the Court should seek to identify what action rendered the proceedings moot and ask whether the action was in effect an acknowledgment or admission of the legal validity of the challenge.

39. The decision in *Matta v. Minister for Justice and Equality* is interesting for its emphasis on the need for a causal link between the bringing of the proceedings and the event which renders the proceedings moot, particularly as it arises in the context of the processing of an application by the Minister in the ‘ordinary course’ of events. The applicant had sought a residence permit and naturalisation on an expedited basis in light of his employment situation. No undertaking was given to expedite his applications and he brought proceedings to compel the Minister to take the decisions. The Minister subsequently granted the residence permit,

rendering the proceedings moot. The High Court made no order for costs and the applicant and respondents appealed and cross-appealed respectively.

40. The High Court had found as a fact that there was no causal link between the bringing of proceedings and the granting of the residence permit, even though they were close in time. The respondent filed an affidavit from an official saying that the issuing of the proceedings had no bearing on the speed with which the residence permit application was determined, and the factor that dictated the speed was the need to obtain third party input from the Gardaí. He was not cross-examined on this averment and the Supreme Court held that the trial judge was entitled to draw the inferences that she did.

41. McMenamin J. distinguished *Godsil* on the basis that the applicant in that case did not have any entitlement to a decision by the State defendants; in the instant case, the appellant was always entitled to a decision albeit that he had to join a queue of applications. The fact that a decision was made *after* the institution of the proceedings did not always mean that it was *caused by those proceedings*. This approach requires the Court to ask the question: what action on the part of the Minister in the present case caused the proceedings to become moot? Again I will return to this later.

42. Murray J. recently set out a summary of the principles in *P.T. v. Wicklow County Council*. Murray J. described the proper approach as follows:

“18. The proper approach to allocating the costs of moot proceedings is not in controversy. The starting point is that costs follow the event. That is subject to the

discretion of the Court to order otherwise. Where proceedings have become moot, the Court should thus enquire in the first instance as to whether there is an 'event'. This will arise where the action causing the mootness is undertaken in response to the proceedings (Godsil v. Ireland and the Attorney General [2015] 4 IR 535). Where there is no 'event' in this sense, and where the mootness is attributable to a factor outside the control of the parties, the Court will ordinarily lean in favour of making no order as to costs (Cunningham v. President of the Circuit Court [2012] 3 IR 222, 230). Where, however, the mootness results from the unilateral act of one of the parties, the Court will ordinarily lean in favour of an order for costs against that party. The latter propositions are both subject to there being no significant countervailing factors (id.).

19. In circumstances in which the mootness arises because a statutory body makes a new decision in the exercise of its legal powers, the Court will look at the circumstances giving rise to that new decision. If the new decision is caused by a change in the relevant circumstances occurring between the time of the first decision, and of the second, the Court might not treat the new decision as a 'unilateral act' and may accordingly make no order as to costs (Cunningham v. President of the Circuit Court [2012] 3 IR 222 at 230-231). If, however, there has been no such change in circumstances so that the body has simply changed its mind, costs may be awarded against it (id.). If the respondent wishes to contend that there has been a change in circumstances – described by Clarke J. in Cunningham as an 'external circumstance' – it is a matter for it to place before the court sufficient evidence to allow the Court to assess whether and if so to what extent it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. (Cunningham v. President of the Circuit

Court [2012] 3 IR 222 at 231-232; Phelan v. South County Dublin County Council [2019] IECA 81). *In conducting this analysis, the Court should not embark upon a determination of the merits of the underlying case.*

20. *It is important to emphasise that these various propositions combine to describe an overall approach to the allocation of costs incurred with moot proceedings, and should not be interpreted as prescribing a rigid formula to be mechanically operated without regard to the particular features of each case. They are thus properly viewed as presenting a guide to the application of the Court's general discretion in the allocation of costs in a particular context (see Telefonica 02 Ireland v. Commission for Communications Regulation [2011] IEHC 380 at [6.4]). They should not be applied inflexibly or in an excessively prescriptive manner (Cunningham v. President of the Circuit Court [2012] 3 IR 222 at 230 and see MKIA v. the International Protection Appeals Tribunal [2018] IEHC 134 at para. [5])."*

43. Murray J. applied those principles in circumstances where the appellants sought relief by way of judicial review of a decision of the Council refusing their application for emergency homeless accommodation. The decision had been made in April 2017. Following a hearing on 20 July and 21 July, the High Court refused the reliefs sought. An appeal was filed on the 7 December 2017 but this was rendered moot by a decision of the Council dated 20 February 2018 to provide financial assistance towards the cost of the appellants' temporary emergency accommodation on a week to week basis. Murray J., applying the above principles, took the view that the appropriate order was no order as to costs. He held that the decision of the 20 February 2018 had arisen not because of the proceedings but because of intervening events, namely the furnishing of new information to the Council:

“23. ...The affidavit evidence tendered by the respondent both clearly asserts and convincingly establishes that the decision of 20th February was not made in response to the proceedings or the appeal. It was attributed to additional documentary evidence, and a series of events after 4th April which pointed to the conclusion that the residence of the appellants in Ireland was sufficiently permanent to warrant the view that the availability of accommodation in Malaysia would no longer be practicable. Those events – the passage of time, the alteration in the first named appellant’s immigration and employment status, and the fact that the second named appellant was in her second year of schooling – were indisputable.”

Thus, Murray J. observed, the appellant’s concession that the decision of 20 February was not an “event” was correct. Later, at paragraph 43, he said:

“43. It follows that the decision of the respondent of 20th February 2018 was a fresh decision based on new circumstances and not a simple revisiting of the decision of April 2017. That decision was not causally linked to the fact of the proceedings or the appeal.”

44. Murray J. set out the same framework of analysis at paragraphs 29-34 of his judgment in *Hughes v. Revenue Commissioners* [2021] IECA 5 and elaborated somewhat further as follows:

“29. Until the decision of the High Court in Telefonica O2 Ireland Ltd. v. Commission for Communications Regulation [2011] IEHC 380, the courts in practice often resolved these issues on a case by case basis, sometimes looking not as much to the cause of the mootness as to the more general question of whether it was, in all the circumstances, reasonable for the litigant seeking the costs up to the point the action became moot, to have incurred them. That, for example, was the

course taken in Garibov v. Minister for Justice, Equality and Law Reform [2006] IEHC 371 and it reflects the approach adopted in England and Wales (see for example the unreported judgment of the English High Court of 22 May 1996 in R v. Independent Television Commission ex parte Church of Scientology). While maintaining flexibility and allowing each case to be determined on its particular facts, that approach suffers from the difficulty both that in some (but not all) cases it embroils the Court – at least to some extent – in the underlying merits of the case, and in that it may result in inconsistencies in the approach to an issue which (if the number of reserved judgments on the question is anything to go by) arises with remarkable frequency.

30. In Telefonica the High Court proposed, and in Cunningham v. v. President of the Circuit Court [2012] IESC 39 [2012] 3 IR 222 the Supreme Court developed, a more structured approach. This has evolved further in Godsil v. Ireland and the Attorney General [2015] IESC 103 [2015] 4 IR 53, and Matta v. Minister for Justice, Equality and Law Reform [2016] IESC 45, the relevant principles being helpfully distilled and summarised by Humphreys J. in the course of his judgment in MKIA (Palestine) v. IPAT [2018] IEHC 134 at para. 6). This approach focuses not on the merits of the underlying action but instead on the cause of the mootness. Garibov and the approach it suggests must be taken as no longer representing the law in this jurisdiction in the light of these decisions and the different emphasis they propose (see the comments of MacMenamin J. in Matta at para. 22). The essential structure now put in place by these cases can, I think, be reduced to three broad propositions.

31. First, where the mootness arises as a result of an event that is entirely independent of the actions of the parties to the proceedings, the fairest outcome will

generally be that the parties should bear the costs themselves. Neither is responsible for the mootness, and neither should have to pay for costs rendered unnecessary by an event for which they bear no responsibility.

32. Second, however, where the mootness arises because of the actions of one of the parties alone and where those actions (a) can be said to follow from the fact of the proceedings so that but for the proceedings they would not have been undertaken, or (b) are properly characterised as ‘unilateral’ or – perhaps – (c) are such that they could reasonably have been taken before the proceedings, or before all of the costs ultimately incurred in the proceedings were suffered, the costs should often be borne by the party whose actions have resulted in the case becoming moot. In the first of these situations, it can be fairly said that there was an event which costs can and should follow in accordance with conventional principle. In the second, it will frequently be proper that the party who is responsible for the unilateral action which results in the mootness should bear the costs. In the third, it might be said that where a party who could reasonably have acted so as to prevent the other party from incurring costs failed to do so, it is proper that they should have to discharge those costs.

33. The third general proposition addresses the particular position of statutory bodies. Agencies with obligations in public law cannot be expected to suspend the discharge of their statutory functions simply because there are extant legal proceedings relating to the prior exercise of their powers. They must be free to continue to exercise those powers in accordance with their legal obligations. At the same time, it would be wrong if under the guise of exercising their powers in the normal way, the statutory authority both effectively conceded an extant claim, and avoided the legal costs that would otherwise attend such a concession. The cases

strike a balance between these two considerations by suggesting that where the mootness arises because a statutory body makes a new decision in the exercise of its legal powers, the court should look at the circumstances giving rise to that new decision in order to decide whether it constitutes a ‘unilateral act’ for these purposes. If the new decision is caused by a change in the relevant circumstances occurring between the time of the first decision, and of the second, the Court might not treat the new decision as a ‘unilateral act’ and may accordingly make no order as to costs. If, however, there has been no such change in circumstances so that the body has simply changed its mind, costs may be awarded against it. If the respondent wishes to contend that there has been a change in circumstances it is a matter for it to place before the court sufficient evidence to allow the Court to assess whether and if so to what extent it can fairly be said that this is so. This requires the respondent to establish that there was a change in the underlying circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. In conducting this analysis, the Court should not embark upon a determination of the merits of the underlying case.

34. Each of these three propositions – it must be stressed – present a general approach rather than a set of fixed, rigid rules. The starting point is that the Court has an over-riding discretion in relation to the awarding of costs, and the decisions to which I have referred are intended to guide the exercise of that discretion. They are thus properly viewed as presenting a framework for the application of the Court's discretion in the allocation of costs in a particular context and should not be applied inflexibly or in an excessively prescriptive manner (PT v. Wicklow County Council [2019] IECA 346 at paras. 18 and 19).”

45. Before I proceed to apply these principles, I should say that the parties opened authorities such as *C.A.*, *Zambrano*, and *K.A. v Belgium*⁹ to the Court in the course of the appeal hearing. These cases concern the legal parameters of a right to remain in a Member State after a deportation order (or equivalent) has been made and the proposed deportee asserts that he or she has a valid claim for residence based upon EU law, such as under the ‘qualifying family member’ provisions of the 2015 Regulations (as in *C.A.*), or a valid claim to residence derived from the EU citizenship rights of a dependent family member (*Zambrano*, *K.A. v Belgium*). The case of *P.N.S. v Minister for Justice and Equality*¹⁰ was also cited for guidance as to when an indirect challenge to a deportation order may be characterised as an impermissible collateral attack or a permissible challenge based on supervening events (*P.N.S.*). However, it seems to me that the Court should exercise caution to avoid embarking on what would, in effect, constitute a decision on the merits of the case which is now agreed to be moot. As Murray J. points out in *Hughes*,¹¹ the courts have since *Cunningham* moved away from this approach and towards analysis of what caused the mootness (see para. 29 of *Hughes*), and that “*the Court should not embark upon a determination of the merits of the underlying case*” (para. 33), subject to the caveat he set out at paragraph 55 of his judgment as to a case which is “noticeably weak or self-evidently strong”. For the purposes of the present appeal, the primary focus should be whether, having regard to those authorities, the pleadings in the case, and the actions of the parties, there remained anything ‘live’ in the proceedings after the Minister gave his undertaking not to deport pending his decision on the applications and released the appellant from custody.

⁹ *K.A. and Others v Belgium*, Case C-82/16, 8 May 2018.

¹⁰ [2020] IESC 11, [2020] 3 JIC 3101

¹¹ [2021] IECA 5 [2021] 1 JIC 1511

Three sub-questions

46. The dispute for resolution in the present case arises from the difficulty of identifying precisely when and how or why the case became moot. Logically, before one can answer questions such as “Was the decision which rendered the proceedings moot caused by an external factor or unilateral action on the part of the Minister?” or “Was there a causal connection between the institution of proceedings and the decision of the Minister which rendered the proceedings moot?”, one has to ask the prior and important question: “What *was* the event which rendered the proceedings moot?”. The answer to that question lies at the heart of the dispute in the present case. There can be no doubt that it was *an* action of the Minister which rendered the proceedings moot; but which action? Was it (a) the undertaking given in July 2018? Or (b) the decision on the application for a residence card made in December 2018?

47. There are a number of factors which complicate the giving of the answer to the above question. They may be identified by posing a number of sub-questions. First, precisely why did the Minister give the undertaking when no leave had been granted to pursue the injunctive relief? Secondly, why did the appellants not abandon the proceedings once they had received the undertaking? Thirdly, what precisely was left in the proceedings once the injunctive relief was excised from the case along with all grounds other than ground F(I), by reason of the refusal of the Keane J. to grant leave in respect of the injunctive relief?

48. As to the first of these sub-questions (“Why did the Minister give the undertaking?”), counsel on behalf of the Minister in oral argument referred to the practice of the usually assigned ‘list’ judge (Humphreys J.) during this period by way of context. He said that the practice of this judge was not to grant injunctions but to facilitate early hearing dates instead. In those circumstances, he said that the Minister had adopted a practice of giving undertakings

on the understanding that an early hearing date would be assigned. Further, it was argued that it was significant that leave was granted in this particular case in July and that the long court vacation was approaching. Accordingly, counsel submitted, the giving of an undertaking was a pragmatic response to the situation but in no way constituted an acknowledgment or admission of the correctness of the appellants' position, particularly when one considers that leave to seek injunctive leave was not granted. I note, however, that no evidence as such was laid before the Court as to why the undertaking was given and that above stemmed from counsel's submission only. In *Cunningham*, as noted at paragraph 34 above, it was pointed out that it was important for a party to lay appropriate evidence before the court if it wanted the court to accept a particular fact which was relevant to why the case became moot. Therefore, in truth, there is no evidence before the court as to why the Minister granted the undertaking.

49. As to the second sub-question ("Why did the appellants not abandon their proceedings once the undertaking had been given?"), it is difficult to reconcile the appellants' argument that the undertaking brought the case to an end by rendering it moot (as they now do), while standing over the legitimacy of keeping the proceedings alive after the undertaking had been given and until the December 2018 decision on the residence card was made by the Minister. Either there was something live left in the case after the undertaking was given or there was not; if the latter was the position, the case should have been discontinued at that point. If the appellants had abandoned their proceedings in July 2018, they would have a much stronger argument that the undertaking had rendered the proceedings moot. However, they chose not to abandon or discontinue the proceedings, thus suggesting that something else remained 'live' notwithstanding the Minister's undertaking not to deport the first named appellant pending the determination of his appeal of the deportation order. This raises the next sub-question.

50. The third sub-question is: “What was left in the judicial review proceedings after leave to seek injunctive relief was refused?”. It is difficult to escape the conclusion that the appellants did not abandon the proceedings even after the Minister’s undertaking was given because, clearly, there was an important relief which they had sought and which remained outstanding. What was this relief and on what basis was it being sought?

51. As we have seen, the declaratory relief on which leave was given was in rather general terms: “Such declaration(s) of the legal rights and or legal position of the applicant and/or persons similarly situated as the court considers appropriate”. However, the ground on which leave was given is instructive (F(1)): “The applications pending before the respondent disclose a fair question to be tried *concerning the position of the first named applicant in the State* and raised the real possibility that the first named applicant may be *granted residence in the State*. The applicants have presented an arguable case for the revocation of the deportation order (either by way of discretion or by operation of law) and for the first named applicant to be granted permission to reside in the State *on the basis of his relationships with the other applicants herein.*”

52. It is my view that the issue which remained live in the proceedings was whether or not the appellants were entitled to a declaration that the first named appellant had the legal right to reside in Ireland based on his family relationships and, in particular, his paternity of the third named appellant. It was this “something else” that remained live in the proceedings. The grant (or refusal) of such a declaration could not, of course, had been considered by the court unless and until the Minister had first been given an opportunity to decide upon the application for residence. Therefore they proceedings did not become moot until the Minister ruled positively

on the first named appellant's residence application and the relevant "event" rendering the proceedings moot was the Minister's decision on the residence application.

Application of the principles identified in the authorities to the present case

53. Having regard to the above, how then should the principles identified in the case law be applied to this case? The case does not necessarily in my view fit easily into the classification or taxonomy set out in those authorities because of the factors identified above. However, as Murray J. has helpfully explained, the propositions identified "*present a general approach rather than a set of fixed, rigid rules*"; "*the starting-point is that the Court has an over-riding discretion in relation to the awarding of costs*", and the principles "*should not be applied inflexibly or in an excessively prescriptive manner*" (para. 34. *Hughes*).

54. In my view, having regard to the unusual circumstances of this case, the following is the appropriate way to characterise events in these proceedings. The appellant had requested an undertaking that he not be deported pending decisions on his applications; this had been refused three times by the Minister. The appellants then sought leave to bring judicial review proceedings but secured partial leave only (as described in detail earlier). Even though the injunction was no longer a live issue in the proceedings, the Minister then changed his mind and gave an undertaking not to deport. The Court has no formal evidence as to why this undertaking was given. As a matter of common sense, there appears to be a clear causal link between the bringing of the proceedings and the giving of the undertaking. However, such evidence grounding the Minister's change of mind is only necessary if it can be established that the undertaking was, in fact, the 'event' which brought the proceedings to an end.

55. If the appellant had chosen to terminate the proceedings after the Minister had given the undertaking, he would have a much stronger argument that the Minister's undertaking was a "change of mind" caused by the proceedings and that the Minister's decision thereby rendered the proceedings moot. However, in circumstances where an undertaking not to deport was received in the absence of injunctive relief and the appellant continued to maintain the proceedings and to seek important declaratory relief, it seems to me that the correct conclusion is that the undertaking did not bring to a close all the live issues in this particular case.

56. I have characterised what was still live in the case above as whether a declaration should be granted that the first named appellant was legally entitled to reside in the jurisdiction on the basis of his relationship to his Union child. This was, in my view, the outstanding declaratory relief which was sought that remained live until the Minister made a positive decision on the residence application in December 2018. Only then was the uncertainty as to the first named appellant's legal entitlement to reside within the State definitively and legally brought to an end.

57. That being so, I have reached the conclusion that the event which rendered the proceedings moot was the decision of the Minister on the residence application in December 2018.

58. Having identified the event which rendered the proceedings moot, the remainder of the analysis is straightforward. Was the decision of the Minister in December 2018, being the decision which rendered the proceedings moot, *caused by* the proceedings? The answer is no. It was, as the trial judge held, simply a decision made in the ordinary course upon the applications which had been submitted, and the decision was based upon the evidence and

carried out in the ordinary way. The decision would have been made in this manner and to this effect whether or not the appellant brought his judicial review, similarly to the situation in *Matta*. Accordingly, it cannot be said that there was a causal link between the judicial review proceedings and the decision of the Minister which rendered the proceedings moot.

59. To the extent that it might be argued that the failure to give an undertaking to deport had itself rendered necessary the institution of the proceedings, this feeds back into the point made earlier that the undertaking did not in fact bring an end to the proceedings. There is also the following dimension. The first appellant had a history of disregard for the State's immigration laws and was very much the author of his own misfortune given his conduct in the preceding decade and in the years following the birth of his child in particular. It was only when matters came to a head when he was arrested in the summer of 2018 that he ensured that applications were swiftly made to the Minister on his behalf, at which point he also sought immediate reassurances that he would not be deported. The tightness of the timescale of events just before the courts' long vacation was something for which he himself was responsible and that is a matter which may be taken into account by the court in its general discretion concerning the matter of costs.

60. In those circumstances and for those reasons, I would uphold the decision of the trial judge in making no order as to costs and dismiss the appeal.

61. As this judgment is being delivered electronically, I should say that Donnelly and Power JJ. have authorised me to say that they are in agreement with it.

62. As to the costs of the appeal, the Court's provisional view is that the costs should follow the event. If either side wishes to contend for a different order, they will have liberty to apply to the Court of Appeal Office within 21 days for a brief supplemental hearing. If such hearing is requested and results in an order in the terms I have provisionally indicated above, the party that requested the hearing may be liable for the additional costs of such hearing. In default of receipt of such application within 21 days, an order in the terms proposed will be made.