NO REDACTION NEEDED

THE COURT OF APPEAL - UNAPPROVED

Court of Appeal Record No.: 2024/24
Judicial Review Record No.: 2022/435JR
Neutral Citation No: [2024] IECA 188

Binchy J.
Pilkington J.
Burns J.

BETWEEN/

CIARA BUTLER DUIGNAN

APPLICANT/APPELLANT

- AND -

CHIEF APPEALS OFFICER, SOCIAL WELFARE APPEALS OFFICE AND MINISTER FOR SOCIAL PROTECTION

RESPONDENTS

Court of Appeal Record No.: 2024/25
Judicial Review Record No.: 2022/457JR

BETWEEN/

CAROLINE HUGHES

APPLICANT/APPELLANT

- AND -

CHIEF APPEALS OFFICER, SOCIAL WELFARE APPEALS OFFICE AND MINISTER FOR SOCIAL PROTECTION

RESPONDENTS

JUDGMENT of Mr. Justice Binchy delivered on the 15th day of July 2024

1. By these appeals, each of the appellants appeals from a decision of the High Court (Simons J.) whereby he refused applications for costs advanced by each of the appellants in circumstances where it was agreed that the proceedings advanced by each appellant against the respondents had become moot.

2. The circumstances in which each appeal became moot may be simply stated. Ms. Duignan (whom I shall hereinafter refer to as the "first appellant") submitted an application for Domiciliary Care Allowance ("DCA") which was received by the respondents on 4th October 2017. That application was refused on 12th January 2018. The first appellant sought a review of that refusal, and by a further decision of 23rd October 2019, the respondents found that a revision of the original decision was not warranted.

3. Following upon the decision of the Supreme Court in the case of *McDonagh v. Chief Appeals Officer* [2021] IESC 33, [2021] 1 ILRM 385 ('*McDonagh*'), the solicitors for the first appellant wrote to the respondents on 31st May 2021, seeking to appeal the decision of 23rd October 2019. On 14th June 2021, the respondent wrote to the appellant's solicitors confirming that the appeal had been registered. Nothing further happened until the appellants' solicitors wrote a reminder to the respondents on 2nd March 2022, in which they referred to the obligation of the respondents to process appeals promptly, and proceeded to inform the respondents that in the absence of a decision in their client's favour, or the setting down of the matter for an oral hearing no later than 14 days from the date of their letter, that they would institute judicial review proceedings on behalf of the first appellant. In the usual way, they informed the respondents that if such proceedings were necessary, they would rely upon that letter to support an application for costs.

4. By letter dated 16th March 2022, the respondents replied to the solicitors for the first appellant requesting them to refrain from making application to seek leave for a judicial review. The letter stated that proceedings are not necessary and that they would not advance

or assist the first appellant's appeal. On 22nd April 2022, the respondents again wrote to the first appellant's solicitors, this time unprompted, in connection with both this matter and a number of other similar appeals, informing the solicitors for the appellants that the appeal applications would be accepted because they had been lodged promptly following the decision of the Supreme Court in *McDonagh*, and that they would be processed by the Social Welfare Appeals Office accordingly.

5. The background to the proceedings issued by Ms. Hughes (the "second appellant") is almost identical, save for what was described by the decision under appeal as a "*nuance*" as regards the second appellant, whose application for DCA had first been made in 2012, and the "*nuance*" relates to the period of time in respect of which the second appellant had been denied DCA. This arose in circumstances where the second appellant had successfully appealed the initial decision refusing her application, but in accordance with the relevant statutory provisions, payment of arrears was backdated for a six-month period only. Therefore, the second appellant did not receive payment of the benefit for the entire period commencing from the time she first applied, giving rise to a shortfall equating to in excess of three and a half years of the benefit, from 27th January 2012. Other than this nuance the two cases are identical in all material respects as regards developments from 16th March 2022 onwards.

6. On 11th July 2022, both appellants sought leave to issue judicial review proceedings, which applications were granted by Barr J. on 11th July 2022. The reliefs sought in the judicial review proceedings in each case included an order for *mandamus* compelling the first respondent to determine the appeals of the appellants and a declaration that each appellant is entitled to a determination of her appeal that is prompt and/or made within a reasonable period of time, having regard to the express and/or implied duties of the respondent pursuant to s. 311 of the Social Welfare Consolidation Act, 2005 (the "2005

Act") and article 6 of the Social Welfare (Appeals) Regulations, 1998 (S.I. 108/1998) (the "1998 Regulations"), the latter of which provides that:-

> *"The Chief Appeals Officer shall be responsible for the distribution amongst the appeals officers of the references to them under sections 257 and 257A and for the prompt consideration of such references."*

7. Following upon oral hearings that took place on 9th August and 12th August, 2022, the respondents decided to allow the appellants' appeals and so informed each of the appellants by letters dated 16th August 2022. These decisions obviously rendered the proceedings in each case moot. At the time of the decisions, the respondents had not filed a statement of opposition in either of the proceedings.

Application for Costs

8. Both proceedings came before the High Court on 10th November 2023 by way of a hearing in respect of costs only. Prior to that, the respondent had caused two affidavits (in each case) to be sworn in response to the costs application. Mr. Brian Duff, Deputy Chief Appeals officer swore affidavits of 31st January 2023. In each case, Mr. Duff summarised the history and timeline of each appeal. He averred that the average time taken to process a DCA appeal is eight months, and he acknowledged that in these cases it had taken 14 months, in the case of the first appellant, and 13 months in the case of the second appellant. By way of explanation as to why these cases had taken longer than average he averred: "*However, the issues which arise in cases such as these are complex and involve consideration of detailed documentation and the time taken to process individual appeals can vary according to the volume of appeals being dealt with by the Appeals Office and each Individual Appeals Officer at a particular time*."

9. The second affidavit sworn in each case was sworn by Ms. Elayne Hannon, the appeals officer responsible for handling the appellants' appeals. Ms. Hannon also swore her

affidavits on 31st January 2023. She deposed that the appeals had been assigned to her on 3rd May 2022. She referred to the grant of leave to issue judicial review proceedings in each case on 11th July 2022, and to the notification of the grant of leave to the respondents on 19th July 2022. She averred that on 22nd July 2022 she requested that oral hearings should be scheduled. These took place on 9th August 2022 (in the case of the first appellant) and 12th August 2022 (in the case the second appellant) and the decision in each case issued on 16th August 2022. Critically, from the point of view of the proceedings, Ms. Hannon averred that she had always intended to hold a hearing in each case around the time that the hearings were held and that the scheduling of the oral hearings was not a response to the grant of leave to issue the proceedings.

10. I should mention at this juncture that there is no dispute that Ms. Hannon was assigned the appeals on 3rd May 2022, nor is it disputed that the appellants had no knowledge of this at the time that they commenced these proceedings.

11. In an *ex tempore* decision delivered on 10th November 2023, Simons J. refused the applications for costs. He did so having reviewed and considered the relevant authorities, foremost amongst which is the decision of Murray J. in this court in *Hughes v. Revenue Commissioners* [2021] IECA 5 ('*Hughes*'), but also including *Matta v. Minister for Justice, Equality and Law Reform* [2016] IESC 45 ('*Matta*'), *Godsil v. Ireland* [2015] IESC 103, [2015] 4 IR 535 and *Cunningham v. President of the Circuit Court* [2012] IESC 39, [2012] 3 IR 222. I pause at this stage to mention that it has not been suggested that the trial judge did not allude to any relevant authorities so far as concerns the applications before him.

12. Simons J. cited the following passages from the judgment of Murray J. in *Hughes v. Revenue Commissioners*:-

> *"**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 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)."*

13. Of the authorities to which Simons J. referred, the case of *Matta* is the case the facts of which are most closely aligned with the facts of these appeals, it being a case which

concerned an application requiring the Minister for Justice to determine an application for a form of immigration permission. A favourable decision issued soon after the issue of proceedings. The High Court had found that there was no causal nexus between the bringing of the proceedings and the granting of the application. This conclusion was reached following upon a consideration of the evidence which included an affidavit sworn on behalf the Minister that the application had not been expedited as a result of the proceedings, and that the decision had issued sooner than might have been expected because a Garda clearance had been received earlier than expected. The deponent of the affidavit, a Ms. McEvoy, had not been cross-examined on her evidence. MacMenamin J., speaking for the Supreme Court, said that that Court, on appeal, "*should be slow to draw any different conclusion, in circumstances where Ms. McEvoy's evidence had been untested in cross-examination*", and the Supreme Court upheld the decision of the High Court not to award costs.

14. In this case, Simons J. noted that there had been evidence given by the relevant decision maker, Ms. Hannon, that she had not been influenced or motivated by the fact that judicial review proceedings had been taken. Rather, the decision in each case had been made as per the intended date and the decisions were not made in response to the grant of leave in the judicial review proceedings.

15. Simons J. noted that, as had been emphasised by Murray J. in *Hughes,* it is no function of the court in applications such as these to determine the merits of the judicial review proceedings, but rather the function of the court is to seek to find whether or not there has been "*an event*" on the basis of which costs can be allocated. He concluded that in this case there was no such event, and that it is clear from the evidence that the making of the decisions was not prompted or expedited as a result of the proceedings. Therefore, it cannot be said that either of the appellants obtained any practical benefit in instituting the proceedings. He found that the decisions of the respondents on the appellants' applications would have

eventuated within the same time-frame even if the judicial review proceedings had not been issued. That being the case, the judge concluded that the most appropriate order to make was that there be no order as to costs.

16. In arriving at this conclusion, Simons J. accepted, as had been submitted by the appellants, that such a conclusion could give rise to a potential unfairness, but he went on to say that the only basis upon which the court could assess costs by reference to the merits of the case(s) would be in circumstances where first, opposition papers had been filed and, secondly, the case(s) had been brought on for hearing. He said that it was not open to the court in these cases to decide on the basis of the limited papers before it whether or not the delay was unreasonable such as to justify the bringing of judicial review proceedings. He expressly stated that the applicable test was that set out by Murray J. in *Hughes v. Revenue Commissioners* and by MacMenamin J. in *Matta v. Minister for Justice*, and that that was the test that he was applying.

Notice of Appeal

17. The appellants advanced five grounds of appeal which may be summarised as follows:

(i) The High Court judge erred in failing to find that it was reasonable for the appellants to issue the proceedings in circumstances where there had been no meaningful progress in the processing of their appeals after more than ten months and the respondent had given no indication as to when decisions would be issued on the appeals. The effect of the judgment, it is claimed, is to allow the respondent to delay impermissibly in issuing decisions on appeals, which will have a chilling effect on applicants seeking to protect their rights.

(ii) The High Court judge erred in failing to find that an event had occurred for costs purposes i.e. the delivery of decisions on the appeals of the appellants on 16th August 2022, following upon the issuance of the proceedings, and in failing to

conclude that by reason of this event the appellants had been "*entirely successful*" for the purposes of s. 169(1) of the Legal Services Regulation Act, 2015. The appellants claim that the judge erred in placing emphasis on an issue that was not material i.e. that the proceedings were rendered moot prior to the delivery of the statement of opposition.

(iii) The judge erred in failing to find a causal nexus between the proceedings and the determination of the appeals and in failing to distinguish the within proceedings from *Matta v. Minister for Justice*.

(iv) The judge erred in forming a view that without the delivery of opposition papers he was precluded from any consideration of the merits of the substantive proceedings and erred in his interpretation of the judgment of Murray J. in *Hughes v. Revenue Commissioners*. As a result, the judge fettered his discretion and failed to consider the relevance of the timeline of events to the obligations of the respondent under the 1998 Regulations.

(v) The judge erred in the exercise of his discretion in making a costs order that was outside the scope of the options reasonably open to him.

Submissions on Appeal

Submissions of Appellants

18. Counsel for the appellants submitted that Simons J. erred in his application of the principles elucidated by Murray J. in *Hughes v. Revenue Commissioners*. He submitted that the mootness in these proceedings has occurred solely because of the actions of the respondents, and that being so, Simons J. should have inquired whether or not those actions could reasonably have been taken before the proceedings, or before all of the costs ultimately incurred in the proceedings were suffered (per para. 32 of the judgment of Murray J. in *Hughes*). Counsel stressed that he made no criticism of the appeals officer who he said dealt

with these appeals expeditiously following their assignment to her, but he submitted that there was no explanation provided by the respondents in the delay leading up to that assignment, which was a delay of slightly more than ten/eleven months. It was submitted that the 2005 Act is a remedial statute and there is an express obligation imposed on the respondents by regulation 6 of the 1998 Regulations to act promptly.

19. Counsel referred to the averment of Mr. Duff that while appeals normally take an average of eight months to process, these appeals took 14 and 13 months respectively. While Mr. Duff averred that cases such as these are complex and involve a consideration of detailed documentation, it was submitted by counsel for the appellants that this is not an adequate or acceptable reason for what counsel described as the "*extensive delay*".

20. Counsel further submitted that Simons J. fettered his discretion by what counsel described as a rigid and inflexible application of the principles in *Hughes v. Revenue Commissioners*, notwithstanding that Murray J. had emphasised that the propositions discussed by him in the paragraphs cited above represent a general approach rather than a set of fixed, rigid rules.

21. So far as *Matta v. Minister for Justice* is concerned, it was submitted that that case is distinguishable because it is clear from the judgment of MacMenamin J. that there was before the High Court in that case detailed evidence in which it was explained that applications of the kind with which those proceedings were concerned were placed in a queue and dealt with in strict chronological order. On that basis, *inter alia*, the High Court in that case had found that there was insufficient evidence to establish any causal link between the bringing of the proceedings and the subsequent grant of the long-term residency application, even though they were close in time. There is no equivalent evidence in these proceedings, and it was submitted that the judge placed an undue reliance on *Matta*.

22. In his written submissions, counsel had submitted that in these cases there is, in fact, a causal nexus that was absent in *Matta*, and that the issuing of the proceedings in these cases precipitated the decision in the appellants' appeals. However, counsel resiled from this position at the hearing of this appeal, and accepted that the decisions of the appeals officer were not made consequent upon these proceedings, and that the appeals officer had acted expeditiously following her assignment to these appeals, which occurred on 3rd May 2022, prior to the issue of the proceedings, but unknown to the appellants. Counsel submitted that had the appellants been aware of this development, then the proceedings would not have been issued. Counsel then focused his criticism on the delay on the part of the respondents up to the point in time when the cases were assigned to the appeals officer, a delay which he says has not been explained.

23. Counsel submitted that Simons J. erred in forming the view that, without a statement of opposition he was precluded from any consideration of the merits of the substantive proceedings, and that the judge applied an interpretation of *Hughes v. Revenue Commissioners* that was unnecessarily stringent having regard to what Murray J. said in para. 34 of his judgment in that case. In oral submissions, counsel submitted that there must be a "*middle ground*" between a full consideration of the merits and no consideration at all of the factual matrix leading to the decisions that rendered the proceedings moot. It was submitted that the decision of Simons J. would have a chilling effect on persons seeking to vindicate their rights, while at the same time it would lead to unnecessary litigation.

24. It was further submitted that the judge failed to have regard to s. 169(1) of the Legal Services Regulation Act, 2015 (the "2015 Act"), which preserves the principle that "*costs follow the event*", and requires the Court, when addressing costs, to have regard to a range of factors including the conduct of the parties, before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues in the

proceedings. In this case, the respondents, it is submitted had been guilty of delay in spite of reminders, and it was reasonable for the appellants to issue the proceedings.

Submissions of Respondents

25. Counsel for the respondents submitted there was no error on the part of the High Court judge such as could justify the intervention of this Court to overturn the costs orders made, or at all. On the contrary, the judge correctly applied what are now well settled principles as regards costs in proceedings that have become moot.

26. It was submitted that Simons J. correctly concluded that there had been no "*event*" on the basis of which costs may be allocated in accordance with s. 169 of the 2015 Act. The appellants were always entitled to a decision on each their applications, like the applicant in *Matta*, and it is further clear from the affidavits sworn by the appeals officer that the decisions were neither expedited nor prompted by the proceedings. Therefore, there is no causal nexus between the proceedings and the decisions of the respondents, and the appellants obtained no benefit from the proceedings. It cannot therefore be said that the appellants were entirely successful in the proceedings, as contemplated by s. 169(1) of the 2015 Act.

27. In reply to the submission of the appellants that the High Court judge should have embarked upon a consideration of whether or not the respondents might reasonably have made their decisions prior to the issue of the proceedings – as suggested by Murray J. in para. 32 (c) of *Hughes* – counsel for the respondents submitted that this proposition does not apply, as it cannot be said that the decisions of the respondents resulted from the actions of the appellants alone, because the appellants were entitled to and were always going to receive a decision.

28. It was further submitted that this was made clear to the appellants in the letters issued by the respondents to the solicitors for the appellants on 16th March and 22nd April 2022

respectively, and it was unreasonable for the appellants to have issued proceedings in light of the contents of those letters. Even if the applications made by the appellants took longer than the average time for such applications, the delay involved was nowhere near approaching the kind of egregious delay discussed by Cooke J. in *Nearing v. Minister for Justice* [2009] 4 IR 211, [2009] IEHC 489, which Cooke J. said might be considered as tantamount in its effect to a refusal of an application. I address the judgment in *Nearing* below.

29. While it was acknowledged by counsel for the respondents that the court has a discretion in such cases to enter upon a consideration of the merits of the proceedings, this was not a case in which it was appropriate to do so, and the High Court judge was correct not to do so in circumstances where, firstly, the delay in these cases was not so excessive as to warrant the intervention of the Court, and, secondly, the proceedings were at such an early stage when they became moot. In regard to the latter, the respondents rely upon the decision of the Supreme Court in *Odum v. Minister for Justice and Equality* [2023] IESC 3, [2023] ILRM 164.

30. In *Odum*, the Supreme Court was addressing a situation where the applicant had brought proceedings by way of judicial review seeking to quash a deportation order made by the Minister. The proceedings had been fully heard in the High Court, where the applicant was unsuccessful. He appealed to the Supreme Court, but before the appeal came on for hearing, the proceedings were rendered moot by the introduction of a new scheme which the applicant availed of successfully. The Supreme Court nonetheless decided to hear the appeal, for reasons that are not of relevance to this appeal, but in the course of his judgment, in a passage relied upon in this appeal by the respondent, O'Donnell C.J. said:-

> *"Where the event that renders a case moot occurs at a relatively early stage of the proceedings, or at least at a point before substantial costs have been incurred in*

participating in a lengthy trial, costs may be relatively low and certainly in themselves would not usually justify the court in proceeding to hear a case which is in law moot. In such cases justice can be done between the parties by applying the factors identified by the court in its decision in Cunningham v President of the Circuit Court [2012] IESC 39; [2012] 3. I.R. 222 in allocating costs in a fair and principled way. However, it is different when an order for costs has been made against a party at the conclusion of a case which that party contends ought never to have been made. …"

31. It is convenient to mention at this stage that *Cunningham* involved proceedings in which the second named respondent had entered a *nolle prosequi* in criminal proceedings taken against the applicant, after the applicant's application to dismiss the proceedings on grounds of delay had been dismissed by the High Court, and while the applicant's appeal from that decision was pending. As such, it is of limited, if any assistance to these proceedings, involving, as it does proceedings that became moot owing to the unilateral act of one of the parties. Here there is no such unilateral act, as the decision of the respondent in these proceedings was always going to issue, and the issue in these proceedings is the delay on the part of the respondent in giving that decision.

Discussion and Decision

32. Both parties agreed that the decision of this court in *O. v. Minister for Justice and Equality* [2021] IECA 293 is the principal authority applicable to appeals concerning costs. At para. 30 thereof, Collins J. set out six principles, numbers five and six of which are as follows:-

"(5) Furthermore, an appellate court 'should not simply substitute its own assessment of what the appropriate order ought to have been but should afford an appropriate deference to the view of the trial judge who will have been much closer to the nuts and bolts of 'the event' itself": Nash v DPP [2016] IESC 60; [2017] 3 IR 320,

per Clarke J. (as he then was) (Denham CJ. and O'Donnell, Dunne and Charleton JJ. concurring), at para. 67.

(6) Absent some error of principle on the part of the trial judge, an appellate court should intervene only where it "feels that the exercise by the trial judge of an assessment in relation to costs has gone outside the parameters of that margin of appreciation which the trial judge enjoys': Nash, at para. 67. Where the costs order is 'within the range of costs orders which were open to the trial judge within the margin of appreciation which must be afforded to a High Court judge', there will be no basis for an appellate intervention: Nash, para. 73."

33. The central argument advanced on behalf of the appellants in the court below was that there was a causal nexus between the issue of the proceedings and the decisions of the respondents to allow the appeals of the appellants. Once that argument was abandoned in this Court, the case made by the appellants in essence was that it was reasonable for them to issue proceedings in circumstances where there was a delay (in each case) in the issue of a decision by the respondent, and that in spite of reminder letters, there had been no indication given as to when decisions would be given. Furthermore, the delay has not been explained, and therefore cannot and should not be excused having regard to the duty imposed on the respondent by the 1998 Regulations to issue decisions on appeals promptly, and also having regard to the remedial character of the 2005 Act. Finally, the appellants claim the High Court judge erred in failing to consider the application of the third proposition discussed by Murray J. in *Hughes v. Revenue Commissioners*, and specifically that the judge should have considered whether or not the decision of the respondent on the appeal in each case were decisions that the respondent could reasonably have taken sooner.

34. Taking this last point first, it is unclear if this argument was made at all in the court below. The judgment of Murray J. in *Hughes* is not referred to at all in the written

submissions of the appellant to the High Court, and at the hearing of this appeal, counsel was unable to say whether or not this particular argument was made to Simons J. Generally speaking, if a party wishes to contend on appeal that a judge of first instance erred by failing to address a particular issue or argument, that party must establish that the issue or argument was raised before the first instance judge, because a judge will not usually be held to have erred in failing to address an issue or argument that was not raised before him or her. In this instance, it has not been established that this argument was made to the High Court judge.

35. In any case, however, I agree with the argument advanced on behalf of the respondent that the third proposition discussed by Murray J. is not readily applicable to the facts of this case. This is not a case in which the respondent claims that there was a change in circumstances, for which it bore no responsibility, that gave rise to the favourable decisions on the appeals of the respondents. As has been said already, and as the appellants have acknowledged, it was always the case that the respondent was going to give decisions on the appeals, and the respondent had made that plain in correspondence prior to the issue of the proceedings. The futility in trying to apply this proposition to the facts of this case can readily be seen by considering the question proposed by Murray J.: could the actions of the respondent reasonably have been taken before the issue of the proceedings? The answer to this question in this case is inevitably yes, because the respondents could in theory have given favourable decisions on the appeals by return of post, but for obvious reasons that is of no help to the appellants in this case.

36. As to whether it was reasonable for the appellants to issue the proceedings on account of the delay and the failure of the respondents to give any indication of a time frame within which the decisions might issue, it is now well established – and this was accepted by counsel for the appellants in answer to a question from this court – that the entitlement to costs in proceedings that have become moot is not to be assessed by asking the question whether or

not it was reasonable to issue the proceedings, as had been suggested in the decision of *Garibov v. Minister for Justice* [2006] IEHC 371. In *Matta*, MacMenamin J., at para. 22, said that *Garibov* should be regarded as decided on its own facts.

37. The possibility that a delay in giving an administrative decision was so long as to be tantamount to a refusal was considered by Cooke J. in *Nearing*. That case was concerned with an application for a long-term residency permit. The applicant's solicitors corresponded with the Minister and were informed as to the progress of the application, and, specifically, its place in the queue. Eventually, the applicant ran out of patience and issued proceedings seeking an order for *mandamus* compelling the Minister to determine the application. This was more than one year and eight months after the application. At para. 20, Cooke J. stated, *inter alia*:-

> *"Thus, the issue in this case is one as to what is "a reasonable time" in these circumstances. ...Mandamus does not issue against an administrative decision maker simply because there is a duty to make a decision. Mandamus lies to make good an illegal default in the discharge of a public duty. There must have been, either expressly or by implication, a wrongful refusal to make a decision or such an egregious and unjustified delay in dealing with the application as to be tantamount to a refusal in its effect. ..."*

38. The respondent in *Nearing* had provided evidence as to the volume of applications and that it operated a system of handling applications in chronological order. The appellants here lay much emphasis on the fact that there was no equivalent evidence in this case, and that the delay in giving decisions on the appeals of the appellants remains unexplained. This is true, but I do not consider that it avails the appellants, because the question as to whether or not the delay was or was not egregious, or was or was not as prompt as may have been be required by the 1998 Regulations (which have since been repealed and replaced) goes to the

merits of the proceedings, and it is well settled that, save in limited circumstances such as those discussed by O'Donnell C.J. in *Odum*, the court should not embark upon a consideration of the merits when considering costs in proceedings that have become moot (see, for example para. 33 of the judgment of Murray J. in *Hughes v. Revenue Commissioners*, *supra*).

39. The trial judge correctly placed considerable reliance upon *Matta*, not least having regard to the similarities between *Matta* and the instant case. While the appellant sought to distinguish *Matta* on the basis that the respondent in that case had provided an explanation for the delay in the issue of a decision, that distinction, to the extent that it was of assistance to the appellant at all, was rendered insignificant once the appellants conceded that there was no casual nexus between the proceedings and the decisions of the respondents on the appeals.

40. For the foregoing reasons, I am satisfied that not only was the decision of the judge well within the margins of his discretion, it was also unimpeachable in its application of the relevant authorities and the principles derived therefrom, and it follows that the appeal should be dismissed.

41. Since the respondents have been entirely successful in this appeal, my preliminary view is that they are each entitled to an order for their costs incurred in connection with this appeal as against the appellants. If the appellants wish to contend for a different order then they may, within 14 days from the date of delivery of this judgment, request the registrar to schedule a brief hearing, not to exceed 30 minutes (15 minutes to each side), for the purpose of making submissions as to why the court should make a different costs order. However, in that event, should the appellants be unsuccessful in persuading the court to depart from the order indicated above, then they may be held responsible for the costs of the additional hearing.

42. Since this judgment is being delivered remotely, Pilkington J. and Burns J. have authorised me to confirm their agreement with it.