**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2016 No. 774 J.R.]**

**BETWEEN**

**Y.Y.**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**(No. 13)**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 7th day of May, 2019**

1. This is the latest, although possibly the last, judgment in what has been something of a record-breaking case. I noted in a previous round of the proceedings that the application for leave to appeal to the Supreme Court in this case involved a record fifteen alleged points of exceptional public importance. The case has also involved a record-breaking number of post-nominal judgment numberings, of which this is number thirteen at High Court level and fifteenth ruling overall if one includes the Supreme Court determination and subsequent judgment.

2. I am dealing in the present judgment with costs of the proceedings to date. The parties have agreed that the appropriate approach is that set out in *Veolia Water UK Plc v. Fingal County Council (No. 2)* [2006] IEHC 240 [2007] 2 I.R. 81, and accordingly sixteen separate modules have been identified for costs purposes.

3. I should note that the applicant has identified the specific costs incurred under each module whereas the respondent has not. Thus insofar as I will mention specific items of expenditure claimed, that is in an attempt to identify the costs being sought by the applicant because the detail of what costs were incurred were provided by him. The respondent has not provided such detail so the absence of specific costs incurred by the respondent under any given module is not intended to exclude such appropriate costs as may be advanced on behalf of the respondent in the course of taxation. Also, mention of specific costs is purely by way of noting what is being claimed and does not predetermine the question of whether such costs are properly allowable on taxation.

**Module 1: pre-leave matters**

4. Module 1 concerns pre-leave matters. The leave application was originally intended to be moved on 17th October, 2016 and adjourned to 18th October, 2016 because of the volume of cases in the list. On that date the applicant was directed to put the respondent on notice of the leave application and of an application for an interlocutory injunction for 19th October, 2016. Costs of this module include the statement of grounds, grounding affidavit and affidavit of interpreter and written submissions for the leave application. It is agreed by the parties that costs of Module 1 will be awarded to the applicant.

**Module 2: application for *certiorari* of the deportation order and the first decision under s. 3(11) of the Immigration Act 1999**

5. Module 2 involved a considerable expenditure of court time. There was an amendment application, a short application on 12th December, 2016 and also then a substantive hearing of nine days on 26th October, 2016, 2nd, 3rd, 4th, 7th and 14th November, 2016 on 13th, 14th and 15th December, 2016. Judgment in *Y.Y. v. Minister for Justice and Equality (No. 1)* [2017] IEHC 176 [2017] 3 JIC 1306 (Unreported, High Court, 13th March, 2017) was delivered on 13th March, 2017. The other costs, apart from brief and instruction fees for the hearing dates, were costs of the mention dates on 21st October 2016, 24th October 2016, 5th December, 2016, 11th January, 2017, 20th January, 2017, 20th February, 2017 and 13th March, 2017. There was also a prison consultation through an Arabic interpreter on 17th November, 2016, a notice of motion seeking to amend and a supporting affidavit, a proposed amended statement of grounds of 9th December, 2016, applicant's written submissions of 12th December, 2016, a further consultation with an interpreter on 13th December, 2016, two further proposed versions of amended statement of grounds on 13th December, 2016, a table of country information prepared jointly by both sides and costs of taking judgment on 13th March, 2017.

6. In relation to Module 2 the applicant seeks costs of this module with the costs of the substantive hearing limited to seven days of hearing. The respondent vigorously contests the applicant's characterisation of the module and proposes that the appropriate order is no order as to costs. It is important in this regard to emphasise the multiplicity of points raised by the applicant, the diffuse nature of the challenge and the fact that the ground on which the applicant ultimately succeeded on appeal in the Supreme Court was relatively narrow in the context of this module overall. In the judgment in *Y.Y. v. Minister for Justice and Equality (No. 1)* at paras. 67 and 127 I summarised the various points made by the applicant under the headings of both the deportation order and the s. 3(11) decision. Under the heading of the deportation order, the applicant's points were

> (i). that the deportation decision was subject to EU law, which required such decisions to be made by the tribunal;
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> (ii). that general rule of law considerations compelled such conclusion; and
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> (iii). that art. 3 of the ECHR required independent review of the assessment of the claim, which could not be achieved unless the Minister was bound by the tribunal's views.

The applicant failed on all of those points and that conclusion was undisturbed on appeal to the Supreme Court. In relation to the s. 3(11) process, a number of further points were made as follows:

> (iv). the decision was wrongly treated as *ad misericordiam*;
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> (v). it was wrongly arrived at on the basis of the incorrect premise of the standard to be applied was different to that considered by the tribunal;
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> (vi). the Minister failed to properly consider Strasbourg and UK caselaw put forward by the applicant;

(vii). the Minister failed to deal clearly with the applicant's evidence regarding secret detention centres in Algeria and the Minister's finding lacked a proper evidential basis and failed to explain why country material supporting the applicant was not operative;

(viii). the decision appeared to apply a judicial review test at first instance;

(ix). the decision failed to give adequate reasons or was unreasonable; and

(x). the correct legal test had not been applied in that the Minister failed to consider the significance and durability of changes in line with the cessation provisions of the 2004 qualification directive which the applicant submitted reflected a test under art. 3 of the ECHR.

7. It is clear when one looks at the wide suite of points made by the applicant under the s. 3(11) heading that while the applicant was ultimately successful in the Supreme Court on the question of failure to give adequate reasons, he cannot be regarded as having been successful on the bulk of other points made by him.

8. So while the applicant lost on all points in the High Court, much of what he sought leave to appeal on was not the subject of a grant of leave to appeal; and on such appeal he formally won only on one point, namely, the level of reasons in the s. 3(11) decision. The most appropriate way to deal with the question of costs at this juncture is for me to consider what I would have done if I had originally adopted the position that prevailed following the Supreme Court judgment: namely, to have upheld the challenge to the s. 3(11) decision on the reasons point. Had I taken that approach I would have adjourned the challenge to the original deportation order, a challenge which the applicant ultimately would have gone to lose, as he in fact did; and I would have granted *certiorari* of the first s. 3(11) decision. In those circumstances, taking what appears to be the best perspective of how the matter should have been dealt with had I adopted the view that was to prevail in the Supreme Court, the most appropriate approach would be to treat the deportation order and the s. 3(11) process separately for costs purposes. I suggested to the parties that the best view was that the costs fell approximately 50/50 as between those two aspects. Mr. Michael Lynn S.C. and Mr. David Leonard B.L. for the applicant indicated they could not disagree with that and Mr. Remy Farrell S.C. with Ms. Sinead McGrath B.L. for the respondent indicated likewise. Thus it appears that a 50/50 approach measuring the costs of the deportation order issue in Module 2 as being equal to the costs of the s. 3(11) issue in Module 2 is the appropriate one.

9. As regards the costs of the challenge to the deportation order, they should follow the event, and while the challenge to the deportation order would have been adjourned in 2017 had I taken the approach that was ultimately to commend itself to the Supreme Court, that challenge did ultimately fail, so those costs would ultimately have been ordered to the respondent.

10. As regards costs in favour of the applicant to the successful challenge to the s. 3(11) decision, it is important to note that the applicant did not succeed on all points of challenge. The Supreme Court was to some extent critical of what Mr. Farrell calls the "*sawn off shotgun*" approach taken by the applicant. In the Supreme Court determination *Y.Y. v. Minister for Justice and Equality* [2017] IESCDET 38 at para. 10, the Supreme Court noted that: "*The High Court judge observed with some merit that the application was something of a scattergun approach. Regrettably that approach has been repeated here. Some of the points are simply tendentious. Others are irrelevant, since even if there was merit in a particular observation in respect to statements made in the judgment, they would not amount to a valid ground of appeal, as even if this Court took a different view it would not result in a different outcome. … The practice of formulating multiple points of criticism of a judgment without apparent consideration of whether the issue presented can withstand any fair investigation, or whether it is an important or necessary part of the reasoning of the decision sought to be appealed from, is one which must be deprecated. Apart from the difficulties which such a practice presents for this Court, it also creates a real risk that the proliferation of points of little substance will obscure a point which may have merit."*

11. While those observations related particularly to the application for leave to appeal, the Supreme Court in the substantive judgment, *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109, was to return to the theme more broadly. O'Donnell J. at para. 23 noted that the applicant's submissions contained "*an assertion not previously made*" which was only introduced at the s. 3(11) stage. That submission "*also contained information which appeared to be incorrect*". At para. 79 O'Donnell J. noted that "*much of the interaction between the applicant and the Minister here consisted at every stage of generalised statements detached from the precise focus of the case, submitted without any link being made to the particular case on behalf of the applicant, and responded to by a collection of generalised and sometimes enigmatic statements on the part of the Minister."* At para. 82 O'Donnell J. said that "*it can be said that the applicant's case only became focused, to the extent that it did, at the stage of the revocation application*."

12. Given that Module 2 was a nine day hearing it is a very different situation to, for example, a one day hearing where a party advances a number of points and is successful only on one of them. There the points lost do not really add much to the costs of the hearing and would not normally detract from an order following the event in favour of the party that won on the one successful point. Mr. Farrell submitted persuasively that the nine-day length of Module 2 was "*very much a function of the number of points raised by the applicant".*

13. Even if one were to take the most generous possible view in favour of the applicant by awarding the full costs of the s. 3(11) challenge, that would need to be offset against the costs to which the respondent is entitled under the heading of the deportation order and measuring both as equal on the basis of a 50/50 approach, which was not disagreed with by the parties, the net order would be no order as to costs of Module 2. In a sense that is a favourable position from the applicant's point of view because had a strict *Veolia Water* approach been applied the applicant could have been required to pay eight-tenths of the costs of Module 2 given that only one of the ten points was successful to be set off against the nine on which the applicant lost.

14. Mr. Lynn finally argued that because of the stay granted by the court, the original deportation order could not be implemented, so he "*didn't lose*" the challenge to the deportation order. That unfortunately is not a jurisprudentially accurate description of what happened. The grant of an interim or interlocutory stay or injunction does not carry with it an automatic entitlement to costs at the end of the day. It addresses a different question, that of the balance of justice in the interim versus an actual legal entitlement to relief. I emphasise that the important feature for present purposes is that the vast majority of the scattergun points made by the applicant at the original hearing failed. He only succeeded on one point after nine days plus an appeal so no order as to this module is in many respects a favourable one in that situation.

**Module 3: leave to appeal application**

15. Module 3 related to the application for leave to appeal under s. 5 of the Illegal Immigrants (Trafficking) Act 2000. That involved a short application on 20th March, 2017 and judgment in *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185 [2017] 3 JIC

2405 (Unreported, High Court, 24th March, 2017) delivered on 24th March, 2017. The costs involved were the applicant's written submissions of 16th March, 2017 and taking judgment on 24th March, 2017. The applicant sought costs of the module and the respondent argued that costs should follow the event and be awarded to the respondent because the application was refused.

16. It is true that the applicant did lose the application and it is also true that the grant of leave to appeal by the Supreme Court in favour of the applicant was based on a different, and to some extent more permissive test, and indeed that this is technically speaking a different event; but it is a closely related event. I did note in the leave to appeal judgment *Y.Y. v. Minister for Justice and Equality (No. 2)* at para. 2 that the applicant had advanced no less than sixteen complex and technical grounds to the challenge not counting sub-grounds as well as the allegation that there were fifteen points of law of exceptional public importance arising from the decision. Nonetheless, it is clear that the Supreme Court in the context of a leapfrog application in a certificate case expects an applicant to have previously made an application to the High Court for leave to appeal to the Court of Appeal: see *Grace v. An Bord Pleanála* [2017] IESC 10 (Unreported, Supreme Court, 24th February, 2017), *O.M.R. v. Minister for Justice and Equality* [2017] IESCDET 14. Such a procedure has a number of possible advantages that immediately strike one:

> (i). the Supreme Court is not then dealing with the question of the suitability of issues for appeal on a completely first-instance basis;
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> (ii). that court has the benefit, such as it may be, of such proposed questions having been weighed, assessed, considered and discussed by the High Court; and
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> (iii). that court may also perhaps be an a position to take a more sceptical view of questions that are formulated for the first time for the purpose of the leapfrog appeal and that were not submitted to the High Court for certificate purposes.

17. The Supreme Court is by definition not in any way constrained by any views expressed by the High Court in that context, but at least it is given something to work with. Thus the applicant must be regarded as having been correct to apply for leave to appeal; and in the context where he obtained leave to appeal to the Supreme Court from that court, the leave to appeal application to the High Court was a necessary preliminary step, so he should therefore recover costs of the leave to appeal application. Thus the costs of Module 3 will be awarded to the applicant.

**Module 4: application for stay pending appeal**
18. The stay application was made on 24th March, 2017 and took half a day, and judgment was delivered in *Y.Y. v. Minister for Justice and Equality (No. 3)* [2017] IEHC 334 [2017] 3 JIC 2409 (Unreported, High Court, 24th March, 2017) on 24th March, 2017. It is agreed that the applicant should be awarded costs of this module.

**Module 5: application to amend the proceedings to include second s. 3 (11) decision**
19. This module included a re-amendment of the amended statement of grounds on 2nd October, 2017 after a short hearing, and an application to further amend the proceedings on 17th October, 2017, also involving a short hearing, resulting in judgment in *Y.Y. v. Minister for Justice and Equality (No. 4)* [2017] IEHC 690 [2017] 10 JIC 1706 (Unreported, High Court, 17th October, 2017). Costs claimed were brief and instruction fees, the amended statement of grounds re-amended retrospectively on 2nd October, 2017, a motion seeking to amend, dated 13th October, 2017, a grounding affidavit of Gavin Booth and an amended statement of grounds dated 13th October, 2017. Under this heading it is agreed that the applicant should be awarded costs of this module.

**Module 6: application for *certiorari* of second s. 3 (11) decision**
20. This module involved a substantive one-day hearing on 7th November, 2017 and judgment in *Y.Y. v. Minister for Justice and Equality (No. 5)* [2017] IEHC 815 [2017] 12 JIC 1907 (Unreported, High Court, 19th December, 2017). Other costs claimed apart from brief and instruction fees were a notice of motion seeking *certiorari* dated 20th October, 2017, an affidavit of Gavin Booth of 20th October, 2017, and applicant's written submissions of 1st November, 2017. In this regard it is agreed that the costs of Module 6 be awarded to the applicant.

**Module 7: hearing on the appropriate consequential order**
21. Module 7 concerns the hearing on the appropriate consequential order following the quashing of the second s. 3(11) decision of 27th September, 2017. That involved a short hearing on 21st December, 2017 and judgment in Y*.Y. v. Minister for Justice and Equality (No. 6)* [2017] IEHC 811 [2017] 12 JIC 2111 (Unreported, High Court, 21st December, 2017). The applicant seeks costs of this module and the respondent asks for no order as to costs. In relation to this issue, given that the applicant was unsuccessful in his submission on the question of the consequential order he cannot reasonably expect to be awarded costs and therefore I will accept the respondent's proposal to make no order as to costs of this module.

**Module 8: application to amend following third s. 3(11) decision**
22. This involved a short hearing on 9th July, 2018; other costs claimed were a further amended statement of grounds dated 26th June, 2018, and affidavit of Gavin Booth of 26th June, 2018. In this regard it is agreed that the applicant should be awarded costs of this module.

**Module 9: application for *certiorari* of third s. 3(11) decision**
23. This involved a substantive one-day hearing on 24th July, 2018 and judgment in *Y.Y. v. Minister for Justice and Equality (No. 7)* [2018] IEHC 459 [2018] 7 JIC 3134 (Unreported, High Court, 31st July, 2018). Other costs claimed apart from brief and instruction fees were the applicant's written submissions of 13th July, 2018, and an affidavit of Gavin Booth of 18th July, 2018. Under this heading it is agreed that the applicant should be awarded the costs of this module.

**Module 10: a hearing on the appropriate consequential order following quashing of the third s. 3(11) decision**
24. This module involved a short hearing on 25th September, 2018 and judgment in *Y.Y. v. Minister for Justice and Equality (No. 8)* [2018] IEHC 537 [2018] 9 JIC 2505 (Unreported, High Court, 25th September, 2018). Other costs claimed apart from brief and instruction fees were for the applicant's written submissions of 11th September, 2018. The applicant seeks costs of this module and the respondent proposes no order as to costs. This module is similar to Module 7. While I accept Mr. Lynn's point that among the various questions I put to the parties under this heading was whether the s. 3(11) decision should be quashed in full or in part, and while in the end I did quash it in full, that was a very marginal part of the discussion. The respondent's submissions on that issue were not all that vigorous, saying only that the decision should be quashed to the extent of the flaws identified (para. 7(1) of the written submissions). Mr. Lynn does not recall it as having been particularly contested by way of oral submission but on any view the applicant was unsuccessful on the thrust of the points made in this module so again he cannot reasonably expect an order for costs in his favour. Again, it appears that I should accept the respondent's proposal to make no order as to costs here. When one looks at the judgment in *Y.Y. v. Minister for Justice and Equality (No. 8)* [2018] IEHC 537 [2018] 9 JIC 2505 (Unreported, High Court, 25th September, 2018) it is clear that the point about quashing the decision in full only took up one sentence out of the entire judgment

and the respondent was successful on the principal issues, so on one view no order as to costs could even be regarded as generous to the applicant under the heading of this module.

**Module 11: application to amend proceedings following fourth s. 3(11) decision**
25. This involved a short application to amend on 10th December, 2018, an affidavit of Barry O'Donnell of 6th December, 2018 and a further amended statement of grounds dated 10th December, 2018. It is agreed under this heading that the applicant should be awarded 50% of the costs of this module.

**Module 12: application for *certiorari* of the fourth s. 3 (11) decision**
26. This involved a substantive hearing of two days on 15th and 18th January, 2019 culminating in the judgment *in Y.Y. v. Minister for Justice and Equality (No. 9)* [2019] IEHC 27 [2019] 1 JIC 2808 (Unreported, High Court, 28th January, 2019). Other costs claimed were the applicant's written submissions dated 8th January, 2019. The applicant seeks 50% of his costs of this module. The respondent argues that costs should follow the event and be awarded to him. It is true that I did identify a possible error in the Minister's approach in the course of this module but that error is dealt with in a later module and the applicant is given credit for that there. It would be double counting to allow a benefit under this heading. The order made at para. 20 of the judgment in *Y.Y. v. Minister for Justice and Equality (No. 9) is*: *"(i) that the proceedings be dismissed insofar as they challenge the latest s. 3(11) decision on the grounds as currently pleaded; and (ii) that the proceedings be adjourned to allow the applicant an opportunity if he wishes to seek an amendment to the pleadings regarding the issue of reports of incommunicado detention as referred to in the judgment."*

27. The punchline of Module 12 was that the applicant's challenge as it then stood was dismissed so costs follow the event and must be ordered in favour of the respondent.

**Module 13: application to amend**
28. This involved a short amendment application on 11th February, 2019, culminating in the judgment in *Y.Y. v. Minister for Justice and Equality (No. 10)* [2019] IEHC 77 (Unreported, High Court, 11th February, 2019). Other costs claimed by the applicant were an affidavit of Michael Clements filed on 8th February, 2019 and a further amended statement of grounds filed on 15th February, 2019. It is agreed that there should be no order for the costs of this module.

**Module 14: hearing on the appropriate order following the court's decision in principle that there was a *prima facie* problem with the fourth s. 3(11) decision**
29. This involved a short hearing on the appropriate order on 25th February, 2019 and judgment in *Y.Y. v. Minister for Justice and Equality (No. 11)* [2019] IEHC 122 (Unreported, High Court, 25th February, 2019). Other costs claimed by the applicant were the applicant's written submissions of 18th February, 2019. The applicant seeks costs of the module, whereas the respondent submits that no order should be made. As the applicant broadly succeeded under this heading, costs of the module follow the event in favour of the applicant.

**Module 15: application to amend**
30. This was a short hearing that took place in the Monday list on 25th March, 2019. The applicant's other costs were for a further amended statement of grounds of 22nd March, 2019. It is agreed by the parties that no order for costs should be made in relation to this module.

**Module 16: application for *certiorari* of fifth s. 3(11) decision and of deportation order**
31. While the original schedule of costs did not include the *certiorari* of the deportation order which in the end was something of a formality because no additional arguments were advanced on behalf of the applicant, there was agreement in oral submissions on costs by Mr. Lynn that the deportation order should be included as part of Module 16.

32. Module 16 involved a hearing on 1st April, 2019. The applicant's other costs apart from brief and instruction fees were for an affidavit of Michael Clements. There was also an amended statement of opposition from the respondent. It is agreed that the respondent be awarded costs of this module.

**General matters**
33. It is agreed by both sides that insofar as different orders are made under different modules, all costs would be set off against each other resulting in a single net figure, and furthermore that set-off would also apply between these costs and any other orders made within the proceedings by any court, which may include any future orders that may be made prior to payment of the present costs. The applicant has already got the benefit of a costs order in relation to the Supreme Court appeal, although that has not been agreed or taxed as yet. All costs are to be taxed in default of agreement. By consent, I will make no order as to the costs of the costs hearing itself.