[2019] IEHC 827

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 770 J.R.]

BETWEEN

Z.I. (GEORGIA) AND P.T.

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of November, 2019

1. The applicants made a claim for international protection on 19th November, 2017. On 28th March, 2018 they were notified that that had been rejected, as had leave to remain. They appealed to the International Protection Appeals Tribunal but were notified on 21st November, 2018 that that had also been rejected. On 23rd November, 2018 they sought a review of the leave to remain decision under s. 49(7) and (9) of the 2015 Act. On 8th August, 2019, that review was refused and the applicants were so notified on 14th August, 2019. So far, so conventional.

2. The complication in this case was that on 19th August, 2019 the applicants' solicitor wrote *after* the s. 49(9) decision, making further submissions on the issue of *refoulement*. On 20th August, 2019 the Department replied reminding the applicants that they were only entitled to one review under s. 49(9) and citing my decision in *A.W.K. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 631 [2018] 11 JIC 0504 (Unreported, High Court, 5th November, 2018). The Department's letter said that the representations already submitted would be considered in relation to *refoulement* prior to any deportation order and that any submissions regarding change of circumstances that were made after the deportation order would be considered under s. 3(11) of the Immigration Act 1999. On 30th August, 2019, deportation orders were made against the applicants.

3. On 9th September, 2019, the applicants' solicitor sent in further correspondence about *refoulement*, although he did not know at that stage that the deportation orders had already been made so he consequently did not know that his correspondence would be dealt with under s. 3(11) of the 1999 Act.

4. On 27th September, 2019, the deportation orders were served and on 29th October, 2019 the statement of grounds in the present proceedings was filed, the primary relief being *certiorari* directed at the deportation orders.

5. Initially one ground was pleaded, namely failure to give reasons for the conclusion that *refoulement* would not arise, notwithstanding the applicants' correspondence. The proceedings were amended on 25th November, 2019 to add a second ground regarding failure to consider the submissions. On 28th November, 2019, the s. 3(11) application (which, as noted above, is what the September correspondence was treated as) was rejected. That in the applicants' view rendered the proceedings largely moot. The other notable recent development was that on 27th November, 2019 the respondent filed an

affidavit in the proceedings exhibiting a minute showing consideration having been given to the August, 2019 representations prior to the making of the deportation orders.

6. It is agreed that these proceedings can be struck out but an issue has arisen about costs and in that regard I have received helpful submissions from Mr. Michael Conlon S.C. (with Mr. David Leonard B.L.) for the applicants and from Ms. Sarah K.M. Cooney B.L. for the respondent. Both sides look for their costs against each other.

General principles

7. In my judgment in *M.K.I.A. (Palestine) v. Minister for Justice and Equality* [2018] IEHC 134 [2018] 2 JIC 2708 (Unreported, High Court, 27th February, 2018), I endeavoured to summarise the Supreme Court jurisprudence on moot proceedings, notably as set out in *Cunningham v. President of the Circuit Court* [2012] IESC 39 [2012] 3 I.R. 222, *Godsil v. Ireland* [2015] IESC 103 [2015] 4 I.R. 535 and *Matta v. Minister for Justice and Equality* [2016] IESC 45 (Unreported, Supreme Court, 26th July, 2016) (MacMenamin J.). There I noted that the first inquiry was whether there was an event to which the general rule could be applied, and that an act that could only be regarded as an explicit acknowledgment of the legal validity of the proceedings was such an event. Thus the event must normally be in some way caused by the applicant's proceedings. If the proceedings became moot due to a factor outside the control of either party then the default order is no order as to costs, and likewise if the proceedings became moot due to a factor within the control of one party but that had no causal nexus with the proceedings. If the proceedings became moot due to factor which was within the control of one party that *did* have a causal nexus, then the default order should be costs in favour of the other party.

Is there an event?

8. The question of whether there is an event in the *Godsil v. Ireland* sense is not altogether straightforward. Mr. Conlon submits that the fast-tracked making of a s. 3 (11) decision is an event, although that cannot really be said to be one in his favour. Ms. Cooney submits in essence that the event is the applicants withdrawing the proceedings, also not something in their favour. However, this is not a case of the pure withdrawal of a viable case. The thrust of the position is that the applicants are withdrawing the case because of developments over the past 48 hours on 27th and 28th November, 2019, which have overtaken the original complaint in large measure. It appears therefore that the case is best characterised as having become moot rather than having simply been withdrawn. On that basis I think it is best viewed as not involving an event giving rise to a presumption in favour of costs for one party or the other. The court should therefore lean in favour of no order unless it can be said to have become moot due to the unilateral act of one party which was caused by the proceedings.

Why did the proceedings become moot?

9. The present application illustrates that causation is not always a totally simple issue. Mr. Conlon submits in essence that the reason the matter is not going ahead is because the applicants' complaint that the submissions were not considered has now been addressed. The applicants' solicitor complains on affidavit at para. 5 that the Minister's unilateral act

in making a s. 3(11) decision and expediting the s. 3(11) process in an unusual fashion, deciding the matter quickly and notifying the applicants by email after close of business on the day before the substantive hearing ensured that the proceedings were rendered moot.

10. How best to view the matter of causation is to look very specifically at the individual claims in the proceedings and to see why each individually does not fall to be determined by the court. As noted above there are now two grounds in the proceedings, each relating to two pieces of correspondence, thus making a total of four points in the case, which can dealt with as follows:

    (i). As regards failure to consider the August correspondence, that is moot because we now know that the Minister *did* consider the August correspondence. The applicants only found that out two days before the hearing for the simple reason that the relevant minute was not exhibited until then and very properly the applicants have dropped that point immediately.

    (ii). As regards failure to consider the September correspondence, the submission was made by the applicants that correspondence received between the making and the service of a deportation order must be considered (see para. 17 of the applicants' submissions) prior to such service. Mr. Conlon now says that that point is moot because the submissions were considered in the s. 3(11) process. That does not logically follow. Compare lack of reasons with lack of consideration at all. A decision that lacks reasons is not automatically invalid because the court can direct further reasons: see *Krupecki v. Minister for Justice and Equality* (No. 2) [2018] IEHC 538 [2018] 10 JIC 0112 (Unreported, High Court, 1st October, 2018), whereas failure to consider something at all is a context where the court leans more in favour of quashing the decision. Thus the reason the second point is moot is because the applicants are not pursuing it, although in fairness that is substantially coloured by the context of the new recent developments. The fact that they are not pursuing the point does not particularly surprise me because it is a totally groundless point anyway. The decision-maker does not have to revoke or suspend decisions if an applicant belatedly fires in something in the short interval between the making of a decision and its formal notification. It is perfectly reasonable to treat any post-decision correspondence as an application to revoke a finalised decision even if the correspondence is received before the decision is notified.

    (iii). As regards the lack of reasons for rejecting the August correspondence, skeletal reasons are given in the supplementary note to file dated 30th August, 2019. The applicants were not aware of this until two days before the hearing and have immediately reacted by withdrawing this point. Mr. Conlon also notes that more detailed reasons are given in the s. 3(11) decision so to that extent is not proceeding with the point and acknowledged that even if there was a lack of reasons, the Minister has now provided reasons: see *Krupecki* again.

(iv). As regards lack of reasons for rejecting the September correspondence, reasons have now been provided, rendering that claim moot, but they were only provided after close of business on the day before the hearing in the form of the s. 3(11) decision.

11. Thus, one can conclude that the proceedings are moot due to a combination of three factors:

(i). New information furnished by the State in an affidavit delivered on 27th November, 2019.
(ii). The s. 3(11) decision delivered on 28th November, 2019.
(iii). The decision of the applicant not to pursue the meritless point 2 above regarding the Minister's failure to hold off on serving the deportation order pending the consideration of post-decision submissions.

12. An important consideration here is that applicants generally should not be disincentived from dropping meritless points or from dropping points where new information comes to light rendering them unviable. Thus the court should lean against penalising applicants unduly in such circumstances.

Were the factors rendering the proceedings moot internal or external to the proceedings?

13. It is true that there is a certain onus on a respondent to show that the reason for mootness is external rather than internal to the proceedings: see *per* Clarke J., as he then was, in *Cunningham v. The President of the Circuit Court* [2012] IESC 39 [2012] 3 I.R. 222 at para. 38, relied on by Peart J. in *Phelan v. South Dublin County* Council [2019] IECA 81 (Unreported, Court of Appeal, 20th March, 2019). However, that principle has limited relevance here because it is clear why the various developments happened.

14. As regards the new information furnished by the State and the affidavit delivered on 27th November, 2019, that is an act of the respondents which does have a causal nexus to the proceedings. However, given that the new information is unfavourable to the applicants' case, the delivery of that affidavit is not a reason to grant the applicants their costs.

15. As regards the s. 3(11) decision on 28th November, 2019, that was also an act of the respondents but it is a mischaracterisation for the applicants to call it unilateral. It was not caused by the proceedings - it was caused by the s. 3(11) representations having been made. They were bound to be decided sometime and now have been. The fact that it was before the hearing is to be welcomed and doesn't mean that the decision was *caused* by the proceedings in the *Godsil* sense.

16. As regards the applicants not pursuing the meritless point number 2 above, that is certainly not due to any act of the respondents, which of course is a factor that leans against the applicants. But in fairness to the applicants, this was fairly peripheral to the broad thrust of the case.

17. Overall therefore there is just not sufficient reason either way to depart from the default position of no order as to costs.

Order

18. Accordingly, having considered all relevant matters, I dismiss the proceedings with no order as to costs.