

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2019/ 529 JR

BETWEEN:

PM

APPLICANT

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

Judgment of Ms Justice Tara Burns delivered on the 19th day of January, 2021

1. This matter had been listed for hearing on 18 November 2020. However, this date was vacated as a result of the proceedings becoming moot. The Applicant is now seeking his costs in the matter which is objected to by the Respondent.
2. Leave to apply by way of Judicial Review was granted by the High Court on 29 July 2019 on foot of a Statement of Grounds dated 25 July 2019 wherein the reliefs sought were an Order of Mandamus requiring the Respondent to make a decision on the Applicant's application for a review of a decision of the Respondent refusing him labour market access permission and a declaration that the European Communities (Reception Conditions) Regulations 2018 (SI 230/2018) failed to transpose EU Directive, 2013/33 into Irish Law correctly.
3. When the proceedings were served on the Respondent, it became apparent that the Respondent had already made a decision regarding the Applicant's application for review which refused to grant the review. A successful application to amend the Statement of Grounds was brought which was based on an amended Statement of Grounds dated 17 January 2020. The reliefs sought in the amended Statement of Grounds were an order of Certiorari of the decision refusing to review the decision and the declaratory relief regarding the European Communities (Reception Conditions) Regulations 2018.
4. It transpired that the Applicant had submitted a further application for labour market access permission on 9 December 2019 which application was granted on 8 January 2020 thereby rendering the relief of Certiorari in the amended Statement of Grounds moot. This had not been averred to in the affidavit of the Applicant's solicitor sworn on 17 January 2020, nor in written submissions filed on behalf of the Applicant in the trial proper on 28 February 2020. The Respondent filed an additional affidavit exhibiting this permission on 9 July 2020.
5. Nonetheless, the Applicant proceeded with the case regarding the declaratory relief sought. The lawfulness of the European Communities (Reception Conditions) Regulations 2018 (SI 230/2018) was challenged which provides that Labour market access will not be granted to protection applicants until "*a period of 9 months, beginning on the application date, has expired, and, by that date, a first instance decision has not been made in respect of the applicant's protection application*". The Applicant asserted that the domestic regulations were contrary to the underlying EU Directive 2013/33 which provided that "*Member States shall ensure that applicants have access to the labour*

market no later than 9 months from the date when the application for international protection was lodged”.

6. The Respondent’s position was to fully controvert the Applicant’s claim.
7. On 21 October 2020, the Respondent made a public statement to the effect that, on foot of the work of an Inter-Departmental Group on Direct Provision, the Respondent intended to reduce the waiting period before an application could be made for labour market access permission from 9 months to 6 months from the date of first application for international protection. This had the effect of rendering these proceedings moot.
8. The Applicant claims that this change of policy by the Respondent has a casual nexus to the proceedings. The Respondent does not accept this. On the morning of the cost hearing, the Respondent sought leave to file an affidavit of Anthony Doyle which explained the origin of the proposed legislative change. This was not objected to by the Applicant, although the question of whether the deponent had direct knowledge of the facts averred to was questioned.
9. Mr Doyle, who is an Assistant Principal Officer in the Labour Market Access Unit of the Department of Justice and Equality averred that a significant review of the direct provision system had been carried out by an Inter-Departmental Group on Direct Provision. This group’s remit was to consider reception conditions and the pressures on the direct provision system generally which included a review of labour market access permission. This group held its first meeting on 29 May 2019 and reported its recommendations to the Respondent in December 2019. The report was exhibited in Mr Doyle’s affidavit. It made recommendations regarding the procurement of accommodation; the international protection process; vulnerability assessment; management of State services to applicants during the process; better provision for children; access to health services; access to the labour market; enabling people to leave the State supported accommodation; contingency planning for numbers arriving; and governance.

The Law on Costs

10. In *MKIA (Palestine) v. The International Protection Appeals Tribunal* [2018] IEHC 134, Humphreys J helpfully summarised the principles applicable in an application for costs as follows:-
 - “(i) *The first inquiry that a court is required to make is to decide whether or not there existed an ‘event’ to which the general rule that costs follow the event can be applied (see Godsil).*
 - “(ii) *An act that could only be regarded as an explicit acknowledgment and admission of the legal validity of the plaintiff’s challenge is such an event, as in Godsil.*
 - “(iii) *Thus the event must normally in some way be caused by the applicant’s proceedings; per MacMenamin J. in Matta.*

- (iv) *If the proceedings are moot due to a factor outside the control of either party, the view should be taken that there is no event in the *Godsil* sense and therefore the default order is no order as to costs, as discussed in *Cunningham*.*
- (v) *If the proceedings are moot due to a factor which is within the control of one party but that has no causal nexus with the proceedings or which relates, as it is put in *Cunningham*, to an underlying change in circumstances, then again there seems to be no event in the *Godsil* sense, so the court should lean in favour of no order (see per *MacMenamin J. in Matta at para. 20*).*
- (vi) *Finally, if the proceedings are moot due to a factor within the control of one party that does have a causal nexus with the proceedings then there is an event in the *Godsil* sense and the default order should be costs in favour of the other party (see *Cunningham and Godsil in particular*)”.*
11. The Applicant argues that the present case is very similar to *Godsil v. Ireland* [2015] 4 IR 535: that the matter which rendered these proceedings moot was the announcement by the Respondent of a proposed change in the legislative scheme and that these proceedings must, as a matter of probability, have been the cause of her making this announcement.
12. The facts averred to by Mr Doyle do not support this proposition. It is clear that the Inter-Departmental Group was set up two months prior to the leave application in this matter having been brought. It is also clear that this Group considered a wide range of issues regarding the reception conditions for asylum seekers and that labour market access permission was but one of a number of matters which it was concerned with. It is further clear that the Respondent made her announcement on foot of the report and not the Applicant’s proceedings.
13. Accordingly, there is no causal nexus between the announcement by the Respondent and the Applicant’s proceedings.
14. Relying on *Godsil*, Counsel for the Applicant further complains that the relevant recommendations of the Inter-Departmental Group were not brought to the Applicant’s attention at an earlier stage which would have allowed the Applicant to consider his position. I do not agree that this was required of the Respondent. Simply because a departmental group made recommendations to the Respondent regarding labour market access permission did not mean that the law in this regard would in fact be altered. Further, the recommendation made by the Inter Departmental Group was not reflective of the declaratory relief sought by the Applicant. A further point of distinction with *Godsil* is the time period involved: in the instant case - labour market access permission was under review since May 2019 with the Inter-Departmental Group reporting to the Respondent in December 2019 and the Respondent announcing that she intended to make a legislative change in October 2020; whereas in *Godsil* - the legislative amendment rendering those proceedings moot was passed in approximately six weeks.

15. Accordingly, the appropriate order regarding costs in the instant case is one of no order.
16. Indeed, the various issues which arose in this case in terms of Mandamus being sought of a decision already made; the proceedings being amended to seek to challenge a decision which was no longer operative; the failure by the Applicant to place before the Court in an appropriate manner the decision granting him labour market access permission; and the maintenance by the Applicant of these proceedings although the matter remaining at issue had no significance to him, renders me firmly of the view that no order as to costs is the most preferred cost order which this Applicant could benefit from.