

THE HIGH COURT

[2018 No. 788 JR]

BETWEEN

MH AND SH (A MINOR SUING BY HER MOTHER AND NEXT FRIEND MH)

APPLICANTS

– AND –

MINISTER FOR JUSTICE AND EQUALITY (NO. 3)

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 13th October, 2020.

I

Nature of Application

1. This is an application for costs, and a stay on any orders that the court may make in these proceedings.

II

Summary of Proceedings to this Point

2. By way of recapitulation:

on 23 February 2017, the respondent wrote to Ms MH to indicate that she did not fulfil "*the criteria in respect of a permitted family member as set out in Regulation 3(5) of the [EC (Free Movement of Persons) Regulations 2015]*". Regulation 3(5) has nothing to do with those criteria. However, this decision was not challenged in time and so must stand. (Even so, one might have thought that such an error might have informed the respondent's stance in these proceedings, but it did not).

on 21 August 2018, the respondent issued a deportation order against the applicants. The deportation decision-making process was informed throughout by the notion that Ms MH was not her brother's sister. Since that decision was made, Ms MH has taken a DNA test which has shown that she is her brother's sister. That DNA test came after the decision of 21 August 2018. (Even so, one might have thought that it might have informed the respondent's stance in these proceedings, but it did not).

on 22 July 2020, the court issued a judgment (see [2020] IEHC 360) indicating that it would quash the deportation orders for the various reasons set out in that judgment;

on 27 August 2020, the respondent sought leave to appeal the court's judgment of 22 July to the Court of Appeal. That was an intriguing application that included, *e.g.*, contentions that (i) in a 7½ page, double-spaced judgment the court had managed to raise 5 points of law of exceptional public importance, (ii) part of the court's original judgment meant the precise opposite of what it expressly stated, and (iii) taking 18 months to make a decision after the respondent was in possession of all of the information necessary to take that decision "*is not so extreme, it is not seven or eight years*".

on 2 September 2020, the court refused the leave sought (see [2020] IEHC 436).

the respondent has indicated an intention to request of the Supreme Court that it hear an appeal in this matter, doubtless in the hope that, if such appeal be heard (and it may not be), the Supreme Court may yet find that, *inter alia*, for the respondent to take 18 months to reach a decision after having all the information necessary to take that decision is unobjectionable.

III

Costs

3. The Department concedes that Ms MH has won overall but maintains that the respondent should be granted the extra costs incurred in dealing with the *Chenchooliah* dimension of this case. In this regard, the court notes that:

the reference that yielded the judgment in *Chenchooliah v. Minister for Justice and Equality* Case C-94/18 [ECLI:EU:C:2019:693] was not relied on by the applicants in their opening remarks at the initial hearing;

at the initial hearing, the court asked before lunch about the possible relevance of what was then the *Chenchooliah* reference. After lunch, counsel for the respondent indicated at the end of his reply, *inter alia*, that

"I would say that Chenchooliah would probably not decide this case...because this is a case of an OFM....So I'm not clear if it would actually determine or have a bearing on this case, but it could do, it definitely could do, and I would be wrong to say to you anything other than that....I'm not sure where that leaves you but you may want to take a view on that".

In other words, in the context of a deportation order, and the potentially personally catastrophic consequences for the applicants of such an order proceeding wrongly, the court was told by counsel for the State that 'There is an ECJ case out there that we don't think will have a bearing on this case, *"but it could do, it definitely could do"*'.

after both sides were done, the court queried whether the applicants preferred the court to await the European-level decision. Counsel for the applicants indicated that *"We'll wait"*, and counsel for the respondent then interjected *"That's why I mentioned it to you, Judge"*.

4. On balance, it seemed and seems to the court that in the end everyone, the court included, considered it appropriate that the court await the outcome of the *Chenchooliah* reference (certainly no-one disagreed). The advisability of the court's awaiting the outcome of that reference only became apparent as a result of the submissions by counsel for the respondent, following on a query by the court. However, the respondent, let alone counsel for the respondent, is hardly to be blamed for answering a question truthfully.
5. It seems to the court that the applicants came to court to vindicate their position at law, and succeeded in doing so, albeit not winning on every point (few ever do). To the extent that the court awaited the *Chenchooliah* decision, which proved not to impact on the case

in the end, it does not seem that anyone is to blame for that. So it seems to the court that the fairest way to proceed is to make no order as to costs in this respect.

IV

Stay Application

6. As mentioned, the respondent has stated that it is its intention to apply to the Supreme Court for that court to hear an appeal. The Department has no right of appeal in this regard. However, the possibility presents that such an appeal may yet be heard. In this context, the respondent has asked that the court place a stay on such orders as the court now proposes to make. How is justice to be done between the parties in this context?
7. By way of general precept, it seems to this Court that the correct way for the High Court to proceed in the face of alleged error is to temper its actions so as to ensure that the least possible harm is done in the event that the Court of Appeal (being the usual forum for High Court appeals), rightly or wrongly (for it may itself be reversed on appeal) takes a different view of matters.
8. Does that general precept hold good where (a) the court has found in an application made under s.5(6) of the Illegal Immigrants (Trafficking) Act 2000, as amended, especially an application as blithely optimistic as that made in the within proceedings, that the s.5(6) criteria for leave to appeal have not been met? In other words, having just found that there are no points of law of exceptional public importance presenting in the appeal which it was sought to bring to the Court of Appeal, does it do the least possible harm between the parties for the court then to state 'But there is a chance you might get an appeal on before the Supreme Court on the basis of some perceived public importance to, or public interest in, that appeal being heard, so the court will stay its orders pending the chance, outside or otherwise, that you will be allowed by the Supreme Court to bring on that appeal'?
9. As ever, each case will, to some extent, turn on its own facts. This Court's general inclination/practice is that if a party wants to try to bring an appeal to the Supreme Court, it is not for the court to stand in its way. Due humility requires that every trial judge acknowledge the possibility of ultimately being perceived to have erred. However, there will be instances in which a trial court in proceeding in accordance with the general precept identified above is being asked, in essence, to engage in a moral wrong that would see it compound the consequences of one or more legal wrongs which it has found to present. Here, mindful of what the court considers to be the needless suffering that was inflicted on Ms MH and her daughter in having to wait a – still-unexplained – 18 month period for a decision to issue after the respondent had all the information necessary to take that decision (and that, unfortunately, is not the sole wrong which the court found to present in this case) – the court in the very particular circumstances presenting must decline to join in extending the suffering of mother and daughter and thus will not grant a stay on its orders of *certiorari*.

V

Conclusion

10. For the reasons aforesaid, the court will: (i) grant the orders of *certiorari* sought in respect of the deportation orders; (ii) will make no order as to costs in respect of the *Chenchooliah* portion of the proceedings; and (iii) will otherwise make an order for costs for the entirety of the High Court proceedings (both the judicial review proceedings and the unmeritorious leave to appeal application) in favour of Ms MH and her daughter.