Neutral Citation Number: [2008] IEHC 280

THE HIGH COURT
JUDICIAL REVIEW

2007 17 J.R.

BETWEEN

OMAR HALOWANE

APPLICANT

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Ms. Justice Finlay Geoghegan on costs delivered on the 30th day of July, 2008

1. The applicant, by a notice of motion issued on 12th January, 2007 returnable for 12th February, 2007, sought leave to issue an application for judicial review seeking orders of *certiorari* and *mandamus* against the respondent.

2. On 19th February, 2007, the solicitor for the respondent informed the solicitor for the applicant by fax that humanitarian leave to remain would be granted to the applicant and sought an adjournment on consent for one week to enable a letter with the decision to issue. I assume that such adjournment on consent was made.

3. On 21st February 2007, a letter on behalf of the respondent was sent to the applicant, informing him that the respondent had decided to grant him temporary leave to remain in the State until 20th February, 2010, and setting out the usual directions as to what should be done in implementation of the decision.

4. There were then a series of letters from the Chief State Solicitor to the applicant's solicitor which were originally sent on a without prejudice basis but which have now been disclosed to the court on consent. On 1st March, 2007, the Chief State Solicitor wrote, stating:

> "The applicant has been granted temporary leave to remain in the State until 20/02/2010, thus rending judicial review proceedings 2007/17 J.R. moot.
>
> In consideration of the striking out of judicial review proceedings 2007/17 J.R. with no order, the respondent agrees to pay the sum of €7,500 plus VAT within eight weeks from the date of settlement in full and final settlement.
>
> I look forward to hearing from you in advance of the return date."

5. The solicitors for the applicant responded to this letter by fax sent on 2nd March, 2007, in the following terms:

> "We refer to your letter dated 1st March, 2007, with your settlement proposal in relation to the above matter. This settlement proposal will be acceptable provided that it is amended to read as follows, 'the applicant's reasonable costs to be paid by the Minister for Justice, Equality and Law Reform, such costs to be taxed in default of agreement'.
>
> We note that this matter is to be mentioned before the courts again on 12th March, 2007.
>
> We look forward to hearing from you shortly.
>
> Thanking you for your attention to this matter."

6. On 6th March, 2007, the Chief State Solicitor wrote in similar terms to that of the 1st March, 2007, with an increased figure being offered for costs. This elicited an identical response by letter of 12th March, 2007. By letters of 12th March, 2007, and again, 27th March, 2007, the Chief State Solicitor wrote in similar terms, but each time increasing the amount being offered for costs. These letters again elicited an identical response from the solicitor for the applicant by letter of 30th March, 2007.

7. The matter was due to be listed before the court on 16th April, 2007, and on 11th April, 2007, the Chief State Solicitor wrote, again repeating the amount of €12,500 plus VAT offered in the letter of 27th March, 2007, and referring to an award made by MacMenamin J. in another case in the sum of €10,500 plus VAT, "where a settlement had been offered by the respondents and the applicant had not entered into any meaningful negotiations".

8. In that letter, it was also indicated that if the proposal was not acceptable the respondent would seek a costs hearing. Such a costs hearing was subsequently sought and was adjourned from time to time and ultimately heard by me. In the meantime, an affidavit had been sworn by a solicitor in the office of the Chief State Solicitor on 2nd July, 2007, setting out in substance the above facts. Written submissions on behalf of the applicant and respondent on the question of costs were also prepared.

9. At the costs hearing counsel for the applicant sought an order for the applicant's costs to date of that hearing, such costs to be taxed in default of agreement.

10. Counsel for the respondent at the hearing did not dispute on the facts of the application for leave to issue judicial review, and the decision made in the applicant's favour by the respondent on 20th February, 2007, that the applicant was entitled to an order for costs (to be taxed in default of an agreement) but submitted that such order should only be up to and including the first date upon which the respondent made an offer to the applicant in respect of costs i.e. 1st March, 2007. In the alternative, it was contended that the court should order that only a specified proportion of the taxed costs to date be paid.

11. The respondent is, correctly, conscious of the significant costs incurred in relation to applications for judicial review concerning immigration and asylum decisions. Where, as on the facts of this case, the respondent reacts promptly after the issue of proceedings and makes a decision which resolves the matters in dispute between the applicant and the respondent, the court will always be vigilant to ensure that the proceedings are brought to an end as swiftly as possible and that an applicant is not permitted to incur any unnecessary costs so as to minimise any potential exposure of the respondent to costs.

12. It can happen that a decision or other action taken by the respondent, subsequent to the commencement of an application for leave to issue judicial review, may render the application moot, but, nevertheless, the respondent contends that, even if the decision or other actions have rendered the application moot, the applicant is not entitled to any order for costs against the respondent. In

such cases it is sometimes necessary to have a short costs hearing and to consider, in a summary way, the application for leave and the parties' submissions on costs.

13. This is not such a case. At no point in time has the respondent sought to submit or contend that the applicant is not entitled to recover at least some costs. In the correspondence in March 2007, the respondent sought to insist that the applicant accept an amount or amounts which the respondent was prepared to offer in respect of the applicant's costs and was unwilling to submit to an order for costs with the amount of same to be determined by taxation in default of agreement.

14. In the general scheme of costs in the High Court, pursuant to O. 99 of the Rules of the Superior Courts, it is a matter for the High Court to determine the substantive entitlement of an applicant or respondent to an order for costs and the normal mechanism for determining the amount of the costs is taxation. The Court does exceptionally measure costs or a contribution thereto. However, in general, this is the function of the Taxing Masters and not of the Court. Counsel for the respondent sought to rely on O.99 r. 5 (1) and (2) but expressly stated that he was not asking the court to exercise the discretion given it under O.99 r. 5 (2) (a) to direct "that a sum in gross be paid in lieu of taxed costs". He submitted that the court should direct, in accordance with O.99 r. 5 (2) (c), that taxed costs only be paid up to a specified date in the proceedings i.e. 1st March, 2007. In support of that submission he pointed to the failure of the applicant's solicitors to engage in any negotiations in March 2007 on the sum to be paid by the respondent in respect of costs. He submitted that such failure should deprive the applicant of an entitlement to an order for costs which included the subsequent steps in the proceedings all of which related to the costs issue.

15. The Court has express jurisdiction pursuant to O.99 r. 5 (2) (c) to direct that taxed costs only be paid up to a specified date in the proceedings. This is a jurisdiction which the court exercises from time to time. If, on the facts of this case, the applicant had, in the Court's view, sought unnecessarily to prolong the proceedings after the date upon which he received the substantive decision from the respondent in his favour, then it might have been appropriate to make an order for costs up to a particular date.

16. However, on the facts of this case, the position is quite the contrary. The applicant, through his solicitors, acknowledged on 2nd March, 2007, that he was prepared to have the proceedings struck out provided an order for his reasonable costs to be taxed in default of agreement was made. This is the form of order for which counsel for the respondent contended at the hearing in July 2007. However, by reason of the unwillingness of the respondent in March 2007 to agree to such an order for costs, the proceedings remained before the court and the respondent sought the costs hearing.

17. Whilst the Court will always encourage parties to settle their differences, including in relation to costs, it does not appear to me to be any part of the proper function of the High Court in relation to costs to effectively force parties to enter into negotiations in relation to the amount of costs as part of settlement of proceedings by limiting their order for costs if they fail to do so.. It may often be both desirable and common sense for both sides to do so. However, where, as in this instance, a respondent has to accept, on the facts, that the applicant is entitled to recover costs against him, then the manner in which he can stop the clock ticking against him in relation to the amount of the costs is to submit to an order for costs with the normal provision that such costs be taxed in default of agreement. Thereafter, he can, and probably should, enter into negotiations with an applicant in relation to the quantum of those costs so as to avoid taxation. He then does so in a context where the date up to which the applicant is entitled to costs has already been determined by the order for costs made by the High Court. A reasonable sum agreed to be paid within a specified period should normally be more attractive than taxation to most parties and their solicitors.

18. On the facts of this application, I have concluded that the applicant cannot be considered responsible for the fact that the proceedings continued after March 2007. It was the respondent who sought a hearing in relation to costs in circumstances where, on 2nd March, 2007, the applicant had agreed to strike out the proceedings, provided an order for his reasonable costs to be taxed in default of agreement was made. The respondent at the costs hearing agreed that such an order is appropriate. It is the respondent's refusal to agree to that order in March 2007, and insistence on a costs hearing, which has caused the additional costs incurred by the applicant up to and including the costs hearing.

19. Further, as the applicant was not under any obligation to either accept an amount offered for or in lieu of costs by the respondent in March 2007 or to enter into negotiation on the amount of such costs it appears to me it would be unjust to limit the applicant's costs to 1st March, 2007.

20. The applicant is entitled to an order for costs up to and including the costs hearing, such costs to be taxed in default of agreement. Any such taxation (which I hope may be avoided by some common sense negotiations now between the solicitors for the respective parties), will be in respect of proceedings in which the respondent rendered the substantive application moot by the decision of 20th February, 2007, prior to any leave hearing and that thereafter the only issue in dispute between the parties was one of costs, with a single hearing.