THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 723 J.R.]

BETWEEN

H.F.A. (PAKISTAN)

APPLICANT

AND

THE INTERNATIONAL PROTECTION OFFICE, THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 13th day of November, 2017

1. The applicant was the subject of a decision of the Refugee Applications Commissioner on 19th October, 2015 to transfer his protection claim to the U.K. pursuant to the Dublin III regulation (604/2013). He appealed that decision on 9th November, 2015. On 2nd March, 2016 the Refugee Appeals Tribunal made a decision upholding the transfer.

2. The time period for implementing the transfer commences to run from the final decision. The relevant time period is six months, or eighteen months in the event of an absconding applicant. There was then a registered letter sent to the applicant (I will come back to the precise address) requiring him to report on 15th March, 2016, which he failed to do. The letter was returned as not called for. On 19th September, 2017, a leave application was opened before Barr J. and an injunction obtained restraining the transfer of the applicant from the State until the matter came back to the asylum list. I have heard helpful submissions from Mr. Conor Power S.C. (with Mr. Eamonn Dornan B.L.) for the applicant and from Ms. Cindy Carroll B.L. for the respondent. As it is agreed that the transfer now cannot be effected the only issue is costs, and both sides seek their costs against each other.

3. Mr. Power essentially argues that costs should follow the event and Ms. Carroll resists that on two grounds. Firstly, that the applicant is an evader and essentially procured the situation whereby he cannot now be transferred and secondly, failure to make proper disclosure in the *ex parte* application on 19th September, 2017.

Was the applicant an evader?

4. With great respect to Mr. Power's argument that the address on the letter should have been at a particular number at Oak View, "*Royal Oak*", Santry, in circumstances where the words "*Royal Oak"* were omitted, it seems to me this is something of a drunk driving point. There is nothing to suggest that the letter was not delivered and it was then returned in due course to the GNIB as not called for. I find on the material before me that it is more likely than not that the applicant received the notice of delivery of the registered letter but did not pick the letter up. That conclusion is reinforced by the fact that Mr. Power has no instructions to the effect that he did not receive that notice of attempted delivery. It seems to me then the expiry of the eighteen month period is down to the applicant's failure to pick up the registered letter. So to that extent the whole situation was procured by the applicant's wrongdoing. Thus it seems to me to that the principle of *ex turpi causa non oritur actio* going back to *Everet v. Williams* (1725) 2 Pothier on Obligations 3, 9 L.Q.R. 197, applies here by analogy to the question of costs. On exercising the discretion conferred by O. 99 of the Rules of the Superior Courts I would refuse the applicant costs under this heading.

Was there failure to make disclosure?

5. Independently of that Mr. Power submits that the fact that Barr J. was told that the applicant was not an evader is "*not legally relevant*". Again, with respect, that seems to be a fundamental misunderstanding. Non-disclosure is relevant where equitable or discretionary relief is sought, and that certainly applies in judicial review and it also applies in any *ex parte* application. Here we have both. There was a failure to outline to the court the fact that the applicant omitted to pick up the registered letter, so I reject the submission by Mr. Power that there was "*no misleading of the Court whatsoever*". To my mind that is clearly an inaccurate assessment of the situation that transpired before Barr J. The requirement to disclose all material facts has been outlined on numerous occasions in caselaw including, but by no means limited to, the decisions of Hedigan J. in *Dean v. DPP* [2008] IEHC 87 and of Kearns P. in *McDonagh v. Watkin* [2013] IEHC 582. I accept the assurances that solicitors and counsel for the applicant were not aware of the situation but I find on the balance of probabilities that the applicant was so aware, and again in exercising the discretion under O. 99 I would refuse to award costs for this reason.

Order

6. Taking all factors into account in the exercise of the discretion conferred by O.99, there will be no order as to costs.