THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 31 J.R.]

BETWEEN

B. A. AND R. A. [COSTS]

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY AND THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

EX TEMPORE JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 16th day of November 2015.

1. This is an application for costs in respect of these proceedings where two broad issues were litigated by the applicant; the first concerned the legality of the making of certain statutory instruments by the Minister for Justice, concerning a new regime for subsidiary protection, and the second concerned a provision of those regulations concerning the definition of torture.

2. The applicant had a personal interest in the second of these issues in that the narrative underlying her claim for subsidiary protection involved facts which, had the original definition of torture been that which had been used to assess her claim, it would have precluded her from advancing at least some of the case she wished to make. She was successful in arguing that the definition of torture in those regulations was unlawful and was not a proper transposition of the parent directive.

3. My view is that the applicant is entitled to an order for her costs in respect of that matter.

4. What complicates this application is that she also presented a second and more difficult legal case concerning the legality of transferring the function of deciding first instance matters on subsidiary protection applications to the Refugee Applications Commissioner, that function being transferred to the Commissioner from the Minister, and the fact that the European Communities Act 1972 was used in order to make the statutory instrument under which the power was transferred.

5. It is difficult in many ways to see how the applicant had anything other than a mere technical interest in the modality used by the State to transfer that function. Nonetheless, she did of course have standing to maintain the challenge. The challenge was lost. The challenge in respect of that matter was more detailed and took up significantly more time than the challenge in respect of the torture matter.

6. In accordance with the principles in *Veolia Water U.K. plc v. Fingal County Council* (No. 2) [2006] I.E.H.C. 240 and the principles enunciated in Order 99 rule 1(3) and (4) of the Rules of the Superior Courts, costs follow the event. However, the principles in *Veolia Water* permit the Court to effectively ask itself – what was the event? It is possible for there to be more than one event in a case. It is also proper in an appropriate case for the Court to ensure that costs follow each of the events as may have been identified. There can be no doubt but that the State succeeded in respect of the 1972 Act transfer of functions matter.

7. I believe that this case is of sufficient clarity to permit the Court to say that there were two events in the case. The applicant won one of the events - the torture matter. The respondent won the second matter - the transfer of functions matter. So there are two events in respect of which the Court must now make an order as to costs.

8. The applicant has urged upon me that if the Court identifies that there are, in fact, two events and two victors in the case, the normal rule as to costs should not apply. The applicant further argues that there were issues of sufficient public interest, complexity, novelty and importance in the case as to warrant a more sympathetic view of the costs issue than that which would normally apply, which would be a pure order for costs in favour of the applicant.

9. In this respect the Court refers to its own judgment in the decision in *C.A. & T.A. [Costs] v. The Minister for Justice and Equality and Ors* [2015] I.E.H.C. 432 which was a challenge to what was referred to as the "direct provision" regime in this country. That challenge came as part of a general public campaign expressing disquiet with the manner in which the State extended reception facilities to asylum seekers and a significant finding of breach of rights to privacy was made in that case, although most of the points pursued by the applicant in the case were lost.

10. The Court described the action as a "campaigning case" and did not criticise it on that basis. The Court decided in its discretion to order the respondent to pay the applicant 20% of the costs of the proceedings less 25% of that sum, to be taxed in default of agreement, plus €1500 and V.A.T.. and not to award the State, though it had won many of the other points, the costs in respect thereof.

11. The Court noted in particular that it was desirable that costs orders should not have a chilling effect on public interest litigation where persons would otherwise not be able to take the action but for the regime which allows costs to be paid on a "no foal, no fee basis". So in an appropriate case great issues of the day or true public interest issues may be pursued by persons with no funds by lawyers who are willing to take a punt, as it were, on being paid one day if they win some or all of the case.

12. That was the basis of the Court's rationale in C.A. I have been asked to effectively follow the same approach in this case. My view is that the *Arku* case does not share sufficient qualities of public interest in order to attract that particular approach. Ms. *Arku* had one objective and that was to pursue litigation in respect of the manner in which her subsidiary protection application was being assessed by the State. She had no other objective and she did not represent a class of persons all of whom were making the same complaint. It was a limited technical case designed to achieve at least one personal benefit for her, which was achieved; but I cannot

see what benefit would have been achieved had she brought down the house of cards, as it were, and required the State to enact primary legislation to transfer the function from the Minister to the Refugee Application's Commissioner, a campaign which she pursued but which she absolutely failed in. That part of her case, as it turns out, was close to unstateable, notwithstanding the passion with which it was argued by counsel for the applicant.

13. In those circumstances, I am going to make an order for costs in favour of the respondent for that part of the case in which the State succeeded and in respect of the applicant for that part of the case in which the applicant succeeded. Rather than having other State officials determine what the proper share of costs is going to be, my decision on this is that the applicant is entitled to an order of 30% of the taxed costs in this case and that the respondent is entitled to an order of 70% of the taxed costs in this case.