Neutral Citation [205] IEHC 767

THE HIGH COURT

Record No.2015/459JR

BETWEEN

NACER BENLOULOU

APPLICANT

– and –

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 3rd December, 2015.

Part 1: Background.

1. Mr Benloulou is an Algerian national. He moved to France in 1984 and holds a valid carte *de séjour* that entitles him to stay in that jurisdiction. On 19th February 2014, Mr Benloulou was transferred from France to Ireland pursuant to a European Arrest Warrant to face prosecution for having been illegally resident in Ireland at some previous time. On 17th July of this year, he was acquitted of all the charges laid against him and immediately released. Unfortunately, because he has no connection with Ireland, Mr Benloulou found himself without shelter, without food, without money, without medication, without transport and even without the possibility of returning to France. He was apparently told by Air France that it could not fly him to France if his sole form of I.D. was *a carte de séjour*. He was apparently told by the French Embassy that it was unable to assist him in terms of providing suitable travel documents. And, as there is no Algerian Embassy in Dublin, he seems to have been unable to access whatever, if any, diplomatic or consular assistance an embassy would typically provide to nationals in Mr Benloulou's position. To cap all of this, the Irish authorities denied that they had any responsibility to facilitate Mr Benloulou's return to France. So, not unlike the ill-fated Mr Navorski (Tom Hanks) in "*The Terminal*", Mr Benloulou found himself trapped in a place where he did not want to be, unable to go where he wanted to be, and, as his acquittal demonstrates, all through no fault of his own. Things were so bad that Mr Benloulou's solicitor, who is to be applauded for this, lent Mr Benloulou some money to tide him over. Meanwhile attempts were being made by Mr Benloulou's legal team to seek some sort of remedy via the courts.

2. On 30th July last, an application for leave to bring a judicial review application against the Minister for Justice, Ireland and the Attorney General was brought to the High Court. The net issue arising in the application was whether and to what extent a person who is surrendered to the State under a European Arrest Warrant, and who is tried and acquitted here, must be facilitated in returning to the State that has surrendered him, in circumstances where it has proved impossible for him so to do (here because Mr Benloulou did not, and perhaps still does not, possess a passport, was outside the Schengen Area and was otherwise precluded from entry into France).

3. As drafted, the application to the High Courtinitially indicated that various reliefs were being sought. Several of these were later dropped, until all that remained was an application seeking (a) that the respondents promptly take all necessary steps to enable Mr Benloulou to be returned to France, (b) damages, and (c) certain ancillary reliefs. Me Benloulou's team went before the President of the High Court on an *ex parte* basis on31st July; he directed that the application proceed on notice and be heard on 5th August. On the Minister's application, the hearing was adjourned to 7th August so that a replying affidavit could be provided. Meanwhile, on 6th August, a Department of Justice official wrote a letter of considerable humaneness to Mr Benloulou indicating that if he applied for a temporary travel document (an exceptional form of travel document that the Irish authorities can lawfully issue), the authorities would waive the 'residency in Ireland' requirement that is a usual pre-requisite to the issuance of such a document and, all being in order, he would be granted same. On 7th August the High Court again adjourned proceedings, this time until 14th August, it by now appearing that the temporary travel document would largely resolve the impasse that had arisen.On the same day, Mr Benloulou made application for the temporary travel document. On 11th August, his application was approved. And on 13th August, he jetted back to France.

Part 2: Present Application and Some Applicable Case-Law.

4. Counsel and the solicitor who brought Mr Benloulou's judicial review application have come now to court seeking costs. As the court understands matters, the State opposes the application on the basis that most of the reliefs initially sought have been abandoned, and that neither of the two principal remaining reliefs sought (the return of Mr Benloulou to France and damages) has been ordered by the court.

5. The court has been referred to a trio of relevant authorities by the parties. Paramount among them is the decision of the Supreme Court earlier this year in *Godsil v. Ireland and the Attorney General* (Unreported, Supreme Court, 24th May, 2015). That was a case in which Mrs Godsil had been adjudicated a bankrupt but wanted to stand for election in last year's European Parliament elections. At the time it was not possible for an undischarged bankrupt to stand in such an election. Mrs Godsil brought a challenge to this ban but before matters were adjudicated upon, the State changed the relevant legislation so that she could now stand for office.

6. Abstracting the details of *Godsil* ever so slightly, it is clearly a case on 'all-fours' with the present case: the State is perceived by an applicant to have committed some wrong; legal proceedings are commenced; the alleged wrong is corrected independent of the litigation but prompted by the legal proceedings. How then are costs to be allocated when there is no victory as such in proceedings, but there is a victory in terms of securing the true objective sought? Or, to put matters otherwise, how are costs to be allocated when proceedings have been rendered moot by virtue of a respondent taking such steps as were clearly the central objective of the now moot proceedings?

7. In his judgment in *Godsil*, McKechnie J., in a consideration of the 'costs follow the event' rule observes as follows, at paras.58–64:

> "***58***. *It seems to me that even where the substantive point has become moot, the first inquiry which a court must make on a follow on cost application, is to decide whether or not there exists an 'event' to which the general rule can be applied….*
>
> ***59***. *It will be recalled that the essential aim of these proceedings was to achieve a situation whereby the appellant would not be barred, solely on the basis of her un-discharged bankruptcy status, from being nominated for or running in the European Parliamentary elections of 2014. She asserted a legal right to do so in defiance of the statutory provisions above referred to which, ex facia and in a way permitting of no argument, prevented her from so doing….*
>
> ***61***. *As it happened the Houses of the Oireachtas enacted amending legislation which had the effect of repealing the relevant provision of the 1992 Act. If this had not occurred but if successful in the High Court she would have obtained a Declaration that the provisions in issue were, inter alia, unconstitutional, with the effect that they would have been*

erased from the statute book; giving rise to precisely the same legal result as in fact happened.

***63**. The actions of the respondents, despite their protestations that the same were driven by policy considerations, can only reasonably be understood…as being in direct response to the proceedings as issued….Therefore, I am entirely satisfied that in this case, there exists an 'event', by which the issue of costs should be determined.*

***64**. For the reasons above stated…I cannot see any reason why costs should not follow the event….I cannot find anything in the case which, either in justice or in logic, would justify anything less than a full cost order in this regard."*

8. In reaching these conclusions, McKechnie J. appears to have viewed with disfavour the assertion by Cooke J. in his judgment in *Nearing v. Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 211, para.17, that:

"Where litigation does not proceed to trial because, for practical purposes, the relief is no longer needed, an applicant can only be said to have 'won the event' if the matter had become moot by the withdrawal of a defence in recognition and concession that the claim made was well-founded and was entitled to succeed."

9. Of this last assertion, McKechnie J. observes, at para. 57 of his judgment in *Godsil: "This manner of describing what an 'event' is for cost purposes would seem to suggest a more strict or technical approach than the more straightforward query as to 'who won the event'"* – and it is this more straightforward query that McKechnie J. favours.

10. Given this binding authority, which is directly 'on point', the court does not consider it necessary to consider the decision of the High Court in *Gilani v. The Minister for Justice and Equality* [2012] IEHC 193, or indeed the decision of the High Court of England and Wales in *R. (Henderson) v. Secretary of State for Justice* [2015] EWHC 130 (Admin), to which the court was also referred by counsel.

Part 3: Conclusion

11. It is clear that the principal relief sought in, and the true objective of, Mr Benloulou's application was his prompt return to France. It is equally clear that this was achieved and that this constitutes the 'event' for the purposes of the within application and, more particularly for the 'costs follow the event' rule. True, Mr Benoloulou's return to France was not ordered by the court. Nor did he win damages, although this was never really what he was about; he just wanted to go home. This last end was achieved, the bringing of the judicial review application was clearly a critical factor in achieving same, and it is therefore to Mr Benloulou that the court now awards costs.