Neutral Citation: [2017] IEHC 801

THE HIGH COURT

[2015 No. 435 J.R.]

BETWEEN

THOMAS BEN SEKONI AND ALIYAH OMOWUNMI BEN SEKONI (AN INFANT SUING BY HER FATHER AND NEXT FRIEND THOMAS BEN SEKONI)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 27th day of October, 2017

1. This is an application for costs by the applicants in the within proceedings which have become moot in the following circumstances.

2. The first named applicant, a Nigerian national, applied for and was refused asylum in the State. Following the refusal and in response to the proposal to deport him, the first named applicant applied to the respondent on 13th November, 2013, for leave to remain in the State on humanitarian grounds. In the course of the application he made reference, *inter alia*, to his relationship with a third party who had residence in the State since 2000 and who was as of November 2013 pregnant with the first named applicant's child (the second named applicant herein).

3. The second named applicant was born on 24th January, 2014. The Minister was advised of her birth by the applicant's solicitor on 6th August, 2014. Receipt of this communication was acknowledged on 7th August, 2014. It is accepted by the applicants that there was delay in advising the respondent of the birth. Some ten months later, on 16th June, 2015, the applicant's solicitor wrote to the Minister enclosing a colour copy of the first named applicant's passport and stating that any queries should be directed to the writer of the letter. This letter was acknowledged on 18th June, 2015.

4. On 8th July, 2015, the applicant's solicitor wrote to the Minister in the following terms:

> "We refer to the above and advise our client has been waiting since November 2013 for a decision on his leave to remain/Zambrano application.
>
> We enclose a copy of our letter dated 6th August 2014 enclosing a copy of his Irish citizen child's passport and the purpose of this letter is to ask you to make a decision on his application within10 days from the date hereof.
>
> We advise the long delay in making a decision on this application is causing stress for the family and our client's inability to work is affecting the welfare of his Irish citizen child.
>
> We hereby call upon you to make a decision on his application within 10 days from the date hereof, failing this we are instructed to make an application to court for an Order of Mandamuses to seek same. We await hearing from you within the aforementioned time."

5. By this time the application for leave to remain was with the respondent for twenty months.

6. By letter dated 9th July, 2015, the respondent replied to the request for an "early decision", essentially advising that the first named applicant was requested to submit:

- A colour copy of the biodata page of his Irish citizen child's Irish passport together with the child's original passport.
- The child's original Irish Birth Certificate.
- Two colour passport sized photographs of the first named applicant, signed on the back.
- Documentary evidence that the Irish citizen child has been living in the State since birth.
- Proof by way of the first named applicant's address in Ireland since the birth of the Irish citizen child, e.g utility bills.
- Documentary evidence of the role the applicant has played in the Irish citizen child's life since the child's birth such as to demonstrate the child's dependency on the applicant in the State.
- Any other information considered relevant.

7. The letter also advised that "in light of the fact that [the first named applicant's] application for right of residency in the State, accompanied by a right to work, based on his parentage of an Irish citizen child, is deficient in so many areas, it can be taken that a decision will not be made on that application within the next 10 days."

8. On 16th July, 2015, the applicant's solicitor provided the respondent with a number of documents, as follows: a colour copy passport relating to the second named applicant, passport photographs of the first named applicant signed on the back, a birth certificate in respect of the second named applicant, a letter from a crèche dated 14th July, 2015, by way of evidence of the first named applicant's involvement with the second named applicant, a letter from the second named applicant's medical practitioner; and a letter from a public health nurse. Included also was a letter from the first named applicant's partner which advised as to his involvement in the second named applicant's life, and a copy of a utility bill in respect of his then residence. The respondent was advised that the first named applicant was unable to provide proof of residing at the said address (where his partner also resided) as the landlord was not aware that he was residing there. The letter concluded by stating that a response was awaited and that the respondent should revert if further queries arose. This correspondence was acknowledged on 23rd July, 2015.

9. The within proceedings issued on 23rd July, 2015. By order of MacEochaidh J. of 27th July, 2015, the applicants got leave to seek

judicial review to seek an order of *mandamus* compelling the respondent to issue a decision in respect of the application for permission to remain in the State.

10. On 11th August, 2015, the respondent sought further supporting information from the first named applicant, to include his Nigerian passport and two new passport sized photographs. Reference was made to two previously submitted photographs being damaged and not fit for purpose. A sworn statement from the first named applicant's partner was also sought, fully outlining the financial and emotional support role being provided in respect of the second named applicant.

11. The requested information was provided under cover of letter dated 9th September, 2015.

12. On 7th December, 2015, the first named applicant was granted permission to remain in the State on a Stamp 4 basis for one year based on his parentage of the second named applicant, an Irish citizen child.

13. It is accepted that as of 7th December, 2015, the within proceedings became moot.

The applicants' submissions
14. In support of the application for costs, counsel for the applicants advances the following arguments. The application for the leave to remain was first submitted in November, 2013. Between then and 6th August, 2014, when the Minister was advised of the second named applicant's birth, no decision in respect of the leave to remain application had issued. Similarly, between 6th August, 2014 and 16th June, 2015, when the first named applicant forwarded a copy of his passport and updated his address details, no decision issued.

15. It is submitted that as a result of the delay, both of the applicants were prejudiced in circumstances where the first named applicant (being unlawfully in the State) was not in a position to provide for the second named applicant.

It is submitted that Mr. Nicholson's affidavit does not inform as to what was happening between November, 2013 and August, 2014, or between August, 2014 and July, 2015. Moreover, the photographs requested by the respondent via the letter of 11th August, 2015, had previously been forwarded to the Minister and there had been no request for any further photographic evidence or for any originals of documents already submitted. No explanation has been furnished as to why the information, which was sought between July and August, 2015, was not sought earlier, all of which could have been speedily furnished to the Minister had a request for same been made in 2014.

16. Following the provision, in September, 2015, of the requested information, it nevertheless took another three months for the Minister's decision to issue. No explanation for this delay has been forthcoming.

17. It is submitted that the first named applicant was entitled to a decision within a reasonable time. By the time the within proceedings issued, the decision was outstanding some eleven months from the time the Minister was advised of the second named applicant's birth and some twenty months from the date upon which the application for leave to remain was first filed.

18. It is submitted that the within proceedings became moot because of the unilateral action of the respondent in granting the permission to remain.

19. Insofar as the respondent contends that the proceedings became moot through the unilateral actions of the first named applicant in submitting the requested documents, counsel argues that that cannot be the case; the applicant never refused to cooperate at any point. It is submitted that the only unilateral action of the applicant was his application for leave to remain in November, 2013. At all relevant times the ball was in the respondent's court with regard to the request for documentation.

20. The respondent's assertion that the proceedings were rendered moot by external factors is an equally untenable position in the absence of any evidence put before the Court by the respondent as to what was happening vis-à-vis the first named applicant's application between November, 2013 and July, 2015. It is submitted that the Court is left entirely in the dark in this regard.

21. While the length of time it took to process the application could be construed an external factor, the position is that the respondent has not said why there was such a delay and/or if same was by reason of a lack of resources or otherwise. Had the respondent set out in her affidavit that the first named applicant had been treated like all similarly positioned applicants, that may have constituted an external factor but in the present case no explanation has been forthcoming. In this case, the respondent's unilateral action in issuing the decision has rendered the proceedings moot. Every action from July, 2015, has been a unilateral action on the part of the respondent. Equally, the absence of action between November, 2013 and July, 2015 constitutes the unilateral action on the part of the respondent.

22. Alternatively, if the Court takes the view that the proceedings were not rendered moot by the unilateral actions of the respondent and is of the view that the proceedings have been rendered moot because of external factors or events, then the test is whether the applicants acted reasonably in bringing the proceedings at the time they did. Counsel submits that in bringing the proceedings when they did, the applicants acted reasonably. There was no other option by 23rd July, 2015. Had the second named applicant been a citizen of any other EU state, the respondent would have been obliged to issue a decision within six months. Yet the second named applicant, an Irish citizen, was treated less favourably than other EU citizens and in circumstances where the first named applicant had not even been granted temporary permission to remain. Had the respondents made the request for documents at an earlier stage, same could have been sent in by the first named applicant and the decision would have issued earlier.

23. There is no merit in the respondent's argument that *mandamus* would not have been granted because there was no refusal by the Minister. There was egregious delay from November, 2013 to July, 2015. That is tantamount to a refusal of the application. In this regard, counsel cites the *dictum* of Cooke J. in *Nearing v. Minister for Justice, Equality and Law Reform* [2009] IEHC 489, at para. 20:

> *" Thus, the issue in this case is one as to what is "a reasonable time" in these circumstances. It goes without saying, perhaps, that what is reasonable depends on the circumstances. It goes without saying, perhaps, that what is reasonable depends on the circumstances of each case, including the nature of the decision sought, the particularities of the applicant's position, and the impact that any delay may have and also on the conduct of the administrative decision maker in dealing with such applications, together with any explanation given for the time taken. Mandamus does not issue against an administrative decision maker simply because there is a duty to make a decision. Mandamus lies to make good an illegal default in the discharge of a public duty. There must have been, either expressly or by implication, a wrongful refusal to make a decision or such an egregious and unjustified delay in dealing with the application as to be tantamount to a refusal in its effect. The matter was put as follows by Geoghegan J. in Point Exhibition Co. Ltd. v. The*

Revenue Commissioners [1993] 2 I.R. 551, at p. 555:-

> *"… the applicant was entitled to a decision one way or another within a reasonable time. The respondents quite obviously did not make such a decision within any time span that could be regarded as reasonable.*
>
> *Accordingly, the applicant is entitled to treat the delay as refusal and to seek an order of mandamus directing the granting of the licence.""*

24. At the very most, a decision in respect of the application for leave to remain should have issued within six months of the letter of 6th August, 2014, letter.

The respondent's submissions

25. Counsel for the respondent contends that the most important factor in this case is that the proceedings were issued at a time when the Minister did not have all the relevant information. Same did not become available to the Minister until 9th September, 2015.

26. It is submitted that significantly, the first named applicant did not issue proceedings during the period November, 2013 and 8th July, 2015 – the period in respect of which he complains of inactivity on the part of the respondent. He issued proceedings only after the respondent had engaged by virtue of the letter of 9th July, 2015. Thus, the first named applicant cannot rely on the respondent's delay in the absence of any correspondence from him prior to 8th July, 2015. In this regard counsel relies on what is set out by Cooke J. in Nearing:

> *"[30] Had this application come on for hearing in the first week of May, 2009, the court is satisfied that mandamus would not have issued. In those circumstances the applicant is not entitled to costs. In view of the stance adopted by the Minister, no order for costs will be made.*
>
> *[31] However, the court would emphasise that while applicants are always entitled to access to the court, where judicial review is sought to compel the making of a decision of this type the proceedings are taken at the applicant's risk. It ought not to be assumed in these cases that because, following the grant of leave, the relief claimed becomes moot, the court will always regard an outstanding issue of costs as a discrete ancillary issue to be decided by asking the question whether it was reasonable for the proceedings to have been commenced. If an applicant in such circumstances is to avoid having costs awarded against him when an action does not proceed to judgment, the entitlement to the relief claimed must be proved. An applicant may be tempted to commence proceedings in the hope that the resulting pressure on the respondent will accelerate the decision and move him up the queue. That is something neither the court nor the respondent can prevent, but where the gambit fails, there is no reason why the public purse should bear the cost the applicant has risked."*

27. It is submitted that had the within proceedings come before the Court for the determination within the time periods at issue, *mandamus* would not have issued in circumstances where the Minister was unable to act because all of the relevant documentation was not available to her.

28. Reliance is also placed on the dictum of McGovern J. in *Viridian Power Limited v. the Commissioner for Energy Regulation* [2014] IEHC 614, at para. 9:

> *" If the case becomes moot, then there are three broad categories into which it could fall:*
>
> *(a) The case could become moot due to the unilateral act of one party, in which case the general rule is that that party should be liable for the costs of the proceedings (see Cunningham v. President of the Circuit Court [2012] 3 I.R. 222);*
>
> *(b) the case could become moot due to wholly external events beyond the control of either party, in which case the appropriate order will usually be no order as to costs (see Telefonica O2 Ireland Ltd. v. Commission for Communications Regulation [2011] IEHC 380); or*
>
> *(c) as considered in Cunningham v. President of the Circuit Court , the case may become moot due to a decision of one party to the proceedings which, it was claimed, was due to external events. Current jurisprudence suggests that in such a case, the Court, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs.*
>
> *The applicant claims that this case falls within category (a) and the respondent claims that it falls within category (c)."*

29. Counsel submits that the applicable principle in the present case is set out in para. 9(c) of *Viridian*.

30. It is submitted that as the proceedings became moot by external circumstances, the Court should make no order as to costs.

31. It is also submitted that even if the second named applicant was a citizen of another EU state, the decision could not have issued until the Minister had the necessary documentation. Furthermore, at all relevant times the onus was on the first named applicant to furnish such documentation, which was not done until 9th September, 2015. Following this, he received a decision within three months.

Considerations

32. As to the issue of costs where proceedings become moot, the law is aptly set out in *Cunningham v. President of the Circuit Court* [2012] IESC 39. In summing up the general principle, Clarke J. stated, at para. 4.7:

> *"…a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot."*

33. As to how this general principle should be applied, he opined:

> *"4.8 It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the*

unilateral action of one of the parties, on the other hand. In particular there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors. To take a simple example, one might envisage a criminal prosecution which was, on any view, wholly dependent on the evidence of an individual who unfortunately had died before the case could commence. If there had been a challenge, on judicial review grounds, to that prosecution which was not finalised, and if, as here, the D.P.P. were to enter a nolle prosequi because of the death of the only real witness, then it might superficially be said that the judicial review challenge had become moot by reason of the unilateral action of the D.P.P. but in truth the real reason why the judicial review challenge had become moot would have been because of the death of the witness which made it necessary for the D.P.P. to bring the criminal process to an end.

4.9 In that context it is, of course, important to note that statutory officers and bodies have an obligation to exercise their powers in a proper manner. If circumstances change then it is, of course, not only reasonable but necessary for such officers and bodies to reflect the new circumstances by adopting a position (even if different) which takes into account the circumstances as they have come to be. The mere fact, therefore, that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one party.

4.10 If there were no change in underlying circumstances and if the statutory officer or body had simply changed his or its mind or adopted a new and different view, then such a characterisation might be appropriate. Where, however, there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot by reason of the unilateral act of one party, on the one hand or, in reality have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand. The result of any such analysis should play an important role in the court's consideration of the justice of where the costs of proceedings rendered moot should lie.

4.11 It does, however, seem to me that, where the immediate or proximate cause of proceedings becoming moot is the action of such a statutory officer or body but where it is sought to argue that the true underlying reason is an external factor outside the control of that officer or body, it is incumbent on the officer or body concerned to place before the court sufficient evidence to allow the court to assess whether, and if so to what extent, it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. Against those general observations it is necessary to turn to the circumstances in which these proceedings became moot."

34. Furthermore, Clarke J found:

"5.1… a virtual absence of evidence as to the true reasons why the D.P.P. came to the view that the criminal proceedings against Ms. Cunningham were no longer sustainable. It is true, of course, as was noted by counsel for the D.P.P. in oral argument, that the well established jurisprudence of this court makes clear that the D.P.P. cannot be obliged to give reasons for decisions as to whether or not to prosecute. However, it seems to me that counsel for Ms. Cunningham was also correct when she suggested that there was no barrier, in an appropriate case, to the D.P.P. giving reasons and that it also followed that there may be consequences of an absence of reasons being given.

5.2 It is, of course, the case that it is entirely appropriate for the D.P.P. to keep pending criminal proceedings under review and it is equally appropriate for the D.P.P. to discontinue such proceedings in the event that circumstances change in a way which leads the D.P.P. to the view that the proceedings should no longer go to trial. However, where, as here, this court is required to assess whether, and if so to what extent, it can truly be said that there were changes in underlying external circumstances which led to the discontinuance of the criminal trial then it is impossible for this court to carry out any reasonable analysis of the situation without information and evidence."

35. The learned Judge went on to characterize the case, at para. 7.1 as:

" one which has become moot by reason of the unilateral action of the D.P.P. If it was desired by the D.P.P. that this court should treat these proceedings as having become moot by reason of external factors, then it was incumbent on the D.P.P. to place sufficient evidence before the court to enable the court to determine the extent and materiality of such factors and whether they arose, or were reasonably discoverable, before or after the costs in this case were incurred. The D.P.P. failed to put forward such evidence.

7.2 In addition, it does not seem to me, for the reasons already analysed, that there are any sufficient weighty countervailing factors such as might lead the court to depart from what should be the general rule that costs of an issue which has become moot by the unilateral action of one party should be awarded against that party."

36. The first observation which the Court makes in the present case is that it does not "*fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand*".

37. The respondent did not make contact with the applicant between November, 2013 and 7th August, 2014. The 7th August, 2014, correspondence to the applicant was solely an acknowledgement of the applicant's solicitor's letter advising of the birth of the second applicant. However, it can also be said that between November, 2013 and 6th August, 2014, the applicant let matters lie as far as enquiring as to the progress of his case, and indeed in not informing the respondent of the birth of the second named applicant, who was born on 24th January, 2014, until 6th August, 2014. Thereafter, no correspondence passed between the parties after the 7th August, 2014, (when the respondent acknowledged receipt of the letter of 6th August, 2014 advising of the second applicant's birth) until 16th June, 2015, when the applicant's solicitor furnished the respondent with a copy of the applicant's passport.

38. By 8th July, 2015, when the applicant's legal representative wrote requesting a decision within ten days, the application was outstanding for some twenty months from the date of the original application, including some eleven months from the time the respondent was apprised of the second named applicant's birth. The applicants' submission to the Court is that a decision should have issued from the respondent within ten days of the 8th July, 2015, letter. However, the response which the applicant received on 9th July, 2015, was that his application was deficient and further information was requested, with the first named applicant being advised that a decision would not issue within ten days. The applicants argue that this response has to be seen in context. It was received in

circumstances where, up to that point in time, the first named applicant had never been advised that further documentation was required. This, to my mind, is noteworthy. There was no explanation as to why it took eleven months to seek such information after the respondent was advised in August, 2014, of the birth of the second named applicant. Nor has the respondent, in the within proceedings, offered any explanation why it took almost a year to seek the information listed in the letter of 9th July, 2015.

39. Counsel for the applicants urges the Court to adopt the approach set out in para. 5.2 of *Cunningham*, as similarly to Clarke J., the Court is not being told by the respondent what happened between November, 2013 and July, 2015, to prevent the application being progressed, save that the respondent regrets the delay which ensued between August, 2014 and June, 2015.

40. In the affidavit of Owen Nicholson sworn on behalf of the respondent on 28th January, 2016, the delay between 6th August, 2014 and June, 2015, is accepted as attributable to the respondent. Mr. Nicholson avers as follows:

> "Although there was a regrettable delay between august 2014 and June 2015 which can be attributed to the Respondent, I say that the First Applicant (who was legally represented at all times) did not write once throughout this period seeking an update in relation to his application. Rather, he issued the within proceedings on the 23rd day of July, at a time when the Respondent was in direct communication with him having sought supporting documentation from him, and at a time when he knew his application was deficient"

41. Accordingly, as can be seen, the respondent's principal ground of opposition to costs being awarded to the applicant is that at the time of the institution of the proceedings, it was clear to the first named applicant, from correspondence he received from the respondent on 9th July, 2015, that his application was deficient. Counsel for the respondent contends that this is evidenced by the first named applicant's own reply dated 16th July, 2015, where his solicitor admits that the applicant is not able to furnish certain of the information requested on 9th July, 2015. It is also contended by the respondent that the applicant was clearly aware, from 9th July, 2015, that the respondent could not issue a decision in ten days in light of the deficit in information which had been provided up to that time. Accordingly, it is argued that there is no merit in the applicant's argument that the respondent's failure to issue a decision was tantamount to a refusal to do. It is asserted that the first named applicant has not pointed to any factor which could lead him to the conclusion that the respondent was refusing to do her duty. It is submitted that the first named applicant does not come within the circumstances outlined by Cooke J. in *Nearing*.

42. Counsel for the respondent's contention is that whatever way one looks at it the respondent's unilateral actions did not render the proceedings moot. It is asserted that the matter can be looked at in two ways. First, the proceedings were rendered moot by the first named applicant's unilateral actions, after the proceedings issued, in providing the respondent with the necessary documentation. Based on what is said to be the premature instituting of the within proceedings, it is submitted that the respondent would be entitled to seek her costs. Counsel stated however that the respondent was not seeking that the Court would award costs against the applicants. The respondent requests the Court to make no order for costs.

43. Counsel for the respondent also submits that the respondent's decision was only capable of being issued once the necessary and relevant documentation had been furnished, in other words, the decision was only capable of being made due to underlying external factors outside of the respondent's control. It is contended that this is in accordance with the principles set out *Cunningham*, in particular paras. 4.9 and 4.10 thereof.

44. I note that in *Mansouri v. Minister for Justice, Equality and Law Reform* [2013] IEHC 527, McDermott J. found that the proceedings in that case were rendered moot because of external factors beyond the control of the parties, but found that the respondent had not informed the applicant of these external matters and thus awarded the applicant 50% of the costs. McDermott J. relied on *Cunningham* and on the judgment of Herbert J. in *SG & NG v. Minister for Justice, Equality and Law Reform* [2006] IEHC 371, which he stated was relevant "*to the exercise of judicial discretion and the awarding of costs in cases of this kind and within the other considerations outlined in the Cunningham case*."

45. As summarised by McDermott J., at para. 23, the factual matrix in SG & NG was as follows:

> *"…the applicants withdrew an application for leave to apply for judicial review but sought the costs of the proceedings to date. In their initial proceedings they sought leave to apply for an order of certiorari quashing deportation notices issued by the Garda National Immigration Bureau against both applicants. The proceedings were initiated on 24th October, 2003, and were returnable for 5th November, 2003. On 14th March, 2006, the Minister for Justice, Equality and Law Reform revoked the deportation orders made in respect of the applicants and granted them temporary leave to remain in the State. Medical reports had been supplied to the Minister on 13th January, 2004 and 12th January, 2006. Herbert J. in the course of his judgment determined that there was nothing in the second medical report which was not also and more comprehensibly dealt with in the first medical report of 13th January, 2004. He found that the decision to revoke the deportation orders and to grant the applicants temporary leave to remain on 14th March, 2007, could have been made in January or February, 2004 rather than 14th March, 2007, and that no explanation had been advanced as to why this was not done."*

46. Furthermore, McDermott J. quoted Herbert J. in S.G. & N.G., at para. 23, as follows:

> *"What is before the court is an application to seek judicial review. Without dealing with the application fully on its merits it would be impossible and, indeed improper, for the court to endeavour to predict the outcome of the application. It appears to me that the question which the court must ask in considering this application for costs is, whether in the circumstances it was reasonable for the applicants to have commenced their application for leave to seek judicial review.*
>
> *In considering whether it was reasonable for the applicants to have instituted these proceedings on 24th October, 2003, the court cannot reasonably have regard to events which developed after that date and could not have been reasonably predicted prior to that date. Subsequent events might be relevant to the question of whether it was reasonable of the applicants to have persisted in their application in certain circumstances. In my judgment so far as the present application for costs is concerned, the court has to consider whether:-*
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> *The decision to commence these judicial review proceedings was a proportionate reaction in the applicants to the situation arising from the decisions and actions of the respondents, their servants or agents;*
>
> *The decision to commence these judicial review proceedings was clearly based upon identified, existing and relevant constitutional, statutory and additionally or alternatively legal rules and principles;*

The decision to commence these judicial review proceedings was on its face manifestly, (as distinct from arguably) frivolous or obviously unstateable and for the purpose of delay;

Any alternative course of action was reasonably available to the applicants which would not have exposed the respondents to the risk of incurring legal costs;

The applicants had afforded the respondents a reasonable opportunity, in so far as the particular circumstances of the case would permit of addressing and responding to their claims before commencing these proceedings."

47. In all the circumstances of this case, I am minded to take an approach somewhat similar to that taken by McDermott J. in *Mansouri*. Accordingly, I determine that the case does not fall into the category of cases where it can be categorically stated that the mootness was caused by the unilateral act of the respondent; neither would it be fair to say that it was rendered moot by the first named applicant's unilateral actions on 9th September, 2015, after the proceedings issued, in providing information sought by the respondent. This is so because, to my mind, the type of information which the respondent requested on 11th August, 2011 (and indeed on 9th July, 2015) could have been requested at a much earlier stage, namely between 6th August, 2014 and 16th June, 2015. It seems that the request for further information which emanated on 9th July, 2015, was only triggered by the applicants' solicitor's letter of 8th July, 2015. I am also satisfied that the mootness cannot be said to be due to entirely external events, such as the furnishing by the applicant of relevant documentation, as contended for by the respondent. As to this argument, I would again remark that it was not outside the respondent's control to seek information from the applicant between November, 2013 and 6th August, 2014, or indeed in the period between 7th August, 2015 and 16th June, 2015. Therefore, mootness by virtue of external factors outside of the control of the respondent, as argued for by the respondent, is too simplistic an approach in circumstances where there were relatively long periods of time where it was open to the respondent to seek further information from the first named applicant, which was not done until 9th July, 2015 and then only set in train on foot of the applicant's solicitor's letter of 8th July, 2015, calling on the respondent to issue a decision on the application within ten days.

48. In arriving at my decision, I take into account the respondent's argument that the present proceedings were instituted on 25th July, 2017, some seven days after the applicants' solicitor's response to the request for information which emanated on 9th July, 2015. Counsel for the respondent cites Cooke J. in *Nearing* as authority for the proposition that had the proceedings gone to trial, *mandamus* would not have issued. I note however that in *Nearing*, there was substantial evidence as to how the application to the respondent in issue in that case was being processed and Cooke J. found that the respondent's replies to enquiries gave "*a coherent and transparent account of the way in which it operated and the progress that was made*". (at para. 21)

49. As far as the present case is concerned, the Court proposes to adopt the approach of Herbert J. in *S.G. & N.G.* that it would be impossible for the Court to predict the outcome of the case without dealing with the judicial review application fully. Therefore, I will approach it from the perspective of whether it was reasonable for the applicants to have commenced their application.

50. I have already rehearsed the delays in the processing of the application for leave to remain. However, the Court has to factor into its consideration that given that the applicants' solicitor responded on 16th July, 2015, to the request for information, and in the letter invited the respondent to revert with any further queries as might arise, that the issuing of proceedings could be regarded as somewhat precipitous, albeit the proceedings issued against a backdrop where there was inertia on the part of the respondent, not really explained in these proceedings. In all the circumstances, I believe that it is fair and just that the applicants be awarded one third of their costs.