THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 436 JR]

BETWEEN

I.R.M. AND SARAH JANE ROGERS AND S.O.M. (SUING BY HER MOTHER AND NEXT FRIEND SARAH JANE ROGERS)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

(No. 3)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of May, 2017

1. In *I.R.M. v. Minister for Justice and Equality (No. 1)* [2015] IEHC 873, Mac Eochaidh J. granted an injunction restraining the deportation of the first named applicant.

2. In *I.R.M. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 478, I dealt with the substantive judicial review application on a telescoped basis, and granted a declaration that the Minister, in considering an application to revoke a deportation order, is required to consider the current and prospective situation of the applicant concerned insofar as relevant to that application (including the prospective position, likely to arise on birth, of any child of the applicant unborn at the time of the application). The remaining relief sought was refused.

3. I now deal with an application for costs in the proceedings. Mr. Michael Conlon S.C. for the applicant applies for all costs of the proceedings, including reserved costs. Ms. Denise Brett S.C. for the respondents submits that a lesser percentage of costs should be awarded to the applicants, although she did not argue for any specific percentage.

The applicants have succeeded in the primary "event"

4. The primary rule in relation to costs is that they follow the event: *Dunne v. Minister for the Environment Heritage and Local Government* [2008] 2 I.R. 775. The primary issue in the present case, and the one which took up the majority of time, was whether the Minister was required, in considering an application to revoke a deportation order, to have regard to the likely prospective situation, as opposed to simply the current snapshot as of the date of her consideration. On that issue, the applicants were successful. The starting point therefore must be that costs should follow accordingly.

The State sought the determination of issues which were moot

5. As noted in the *I.R.M. (No. 2)* judgment, the State specifically requested that issues relating to the degree of consideration required for the unborn child should be decided upon, even though they were moot as of the date of the hearing. It should also be noted that one of the subsidiary issues, namely the entitlement to an injunction where a s. 3(11) application remains undetermined, was also moot by the time it was determined.

6. This is not a case, such as *Godsil v. Ireland* [2015] IESC 103 or *Cunningham v. President of the Circuit Court* [2012] IESC 39, where proceedings became moot prior to hearing and thus a hearing was unnecessary. Rather it is a case where the State has applied to have the hearing go ahead and have the issues determined even though they have already become technically moot.

7. The position that these matters should be determined is one that the State are maintaining in *appellate fora*, in that the respondents have already appealed to the Court of Appeal, and are in the process of making a leapfrog application to the Supreme Court, with a view to having these moot issues determined by one or other of those courts. Any meaningful hearing of such appeals will require the active participation of the applicants or of some amicus curiae to make the points which the applicants would have made.

8. It seems to me that where the State seeks to have a moot issue determined, it is impliedly taking on some responsibility in relation to the costs necessarily incurred by the other party, which after all, by definition, does not have anything tangible to gain from continuing to proceed with the litigation.

9. There were three core issues at the substantive hearing: the need to consider the prospective situation of the applicants, the question of whether the first named applicant could be deported despite the existence of an undetermined s. 3(11) application (and the related question of whether the second named applicant had an entitlement to have her partner present at the birth of her child), and whether the first named applicant was entitled to specific notice of the date of intended deportation. The applicants prevailed on the first issue, and the respondents prevailed on all other issues. However, both the first and second issues were moot as of the time of the hearing, because the birth had already taken place and because the applicants were no longer pursuing either injunctive relief or a revocation of the deportation order.

10. It seems to me that the mootness of these issues reinforces the case for awarding costs to the applicants, insofar as the hearing of those issues at the substantive stage is concerned.

The State appears to accept that the decision involves a matter of general public importance

11. The fact that the State are seeking to obtain leave for a leapfrog appeal to the Supreme Court under Article 34.5.4° of the Constitution necessarily involves an expression of view by the respondents that the decision involves a matter of general public importance, or that it is in the interests of justice that there be a leapfrog appeal, or both. Ms. Brett appeared to accept that the matter involved a question of general public importance in her submission. That is a further factor to be taken into account in favour of the applicants in terms of discretion afforded by O.99 of the Rules of the Superior Courts.

12. When the question of leave to appeal to the Court of Appeal on the primary issue was canvassed, I was inclined to the view that the declaration granted did not indirectly impugn a decision that was subject to s. 5, and thus leave was probably not required. I did not in the end have to decide the point as the application was not pursued. However, if leave had been required, I would have had

little difficulty in finding that a point of law of exceptional public importance was involved. While the question of the rights of the unborn generates an almost reflex assumption that the relevant context is the law on abortion, the basic point emerging from the No. 2 judgment was that the position of the unborn child is a wider legal question. If a hopefully non-contentious empirical observation may be ventured, published figures indicate that there were 65,909 births in Ireland in 2015 and 3,451 abortions in that year performed in the UK on women giving Irish addresses as well as 26 abortions in the State. Thus, in broad terms, 95% of the time the position of the unborn falls to be considered other than in an abortion context, and generally in a context (such as this case) where there is a broad identity of interest between parents and unborn child. For the consideration of the rights arising in such a general situation to be overwhelmed or deformed by the special or pathological case, where there is not such an identity of interest, would be a significant distortion of law. To the extent that these applicants have identified the ramifications of this issue, that raises a point of law of public importance which may allow a more generous approach to costs to be considered as a factor in the overall situation. Lest there be any misunderstanding however I do not wish to be taken as in any way reflecting on whether the leapfrog application should be granted, as, even assuming that there is a point of general importance here, the question of whether it should be pursued directly or only considered after exhaustion of the Court of Appeal route, is entirely a matter for the Supreme Court.

Costs of the injunction are partly related to the issue on which the applicants prevailed
13. It is clear from a reading of the *I.R.M. (No. 1)* judgment that Mac Eochaidh J. granted the injunction based both on the issue of the need to consider prospective rights of the unborn child and the issue of the presence of the father at the birth of the child. Thus, it seems to me that the costs in relation to the injunction are partly related to the issue on which the applicants were ultimately successful, and partly related to an issue on which they failed.

14. At the end of the *I.R.M. (No. 1)* judgment, Mac Eochaidh J. has added an addendum to the effect that he "*refused an application for the applicants' costs*" because "*leave to seek judicial review has not yet been granted and it is possible that leave might be refused. If this were to occur, the costs of the interlocutory application might be seen in a different light*". The order made on 1st August, 2015, is however quite explicit that costs were reserved rather than refused, and the rationale for the decision on costs as set out at para. 42 of the *I.R.M. (No. 1)* judgment is clearly a rationale for reserving rather than refusing costs. Viewed in context, it is clear that the word "*refused*" at para. 42 of the judgment means "*refused to grant at this stage, but rather reserved*". Thus, I am entitled and required to determine those costs now.

15. I should however note that my decision that the applicants did not have any entitlement to have the deportation restrained pending the determination of a revocation application, and nor was there any right to have the first named applicant present at the birth, militated against the grant of an injunction to the applicants. There would thus seem to exist some basis for departing from awarding full costs of the injunction to the applicants. It seems to me in particular that an injunction should not be granted to restrain deportation on the grounds that an application to revoke is pending. Such applications need to be discouraged as they clearly fundamentally undermine the effective implementation of immigration law. Applications to revoke deportation orders do not have suspensive effect. These were points that were emphatically made in the No. 2 judgment. It would certainly be a breach of correct procedure if an application for an injunction were to be made without drawing the attention of the court concerned to this particular finding.

The application was not so complex as to bring the Veolia Water doctrine into significant focus
16. In *Veolia Water v. Fingal County Council (No. 2)* [2007] 2 I.R. 81, Clarke J. indicated that where multiple issues arose in the context of a lengthier case, a court could structure the costs order to reflect the extent to which parties had succeeded or failed on the various issues. It is clear however from the judgment of McKechnie J. in *Godsil* at para. 53 that such an approach is not automatic: "not all cases will be suitable for such analysis and even when applied, the overall picture must not be lost sight of."

17. In the present case, the issues on which the applicants failed were minor in the overall context, and the majority of the case was concerned with the issue on which they succeeded. In my view, the length of the case was not significantly added to by the presence of those other issues on which they were unsuccessful. Under those circumstances, it seems to me that the Veolia Water doctrine is only of limited relevance, although it might be appropriate to provide a limited discount for the issues on which the respondents did not prevail (having due regard to the countervailing point that some of them were ones the State acquiesced in having determined).

Allegation of lack of good faith did not go to the issues to be decided
18. Ms. Brett makes much of the failure by the first named applicant to disclose a relationship with another woman that was going on almost simultaneously with his relationship with the second named applicant, and that resulted in the birth of another child around the same time. The existence of that situation was not made known to the applicant's legal advisors, and if it had been, I am sure that it would have featured in the course of the application from the outset. However, despite this unsatisfactory situation, the fact remains that the other relationship and child were simply not directly material to anything which I had to decide. It has not been suggested that the relationship between the first and second named applicants was not ongoing at all material times, and in those circumstances, the fact that the first named applicant had other immediately prior relationships is just not all that relevant. Consequently, it does not seem to me to be in the interest of justice to hold his failings in terms of disclosure against him at the costs stage.

Allegation in relation to delay in the proceedings
19. Finally, Ms. Brett launches a series of objections to the applicants' conduct at the proceedings, alleging that delay has been occasioned unnecessarily. Specifically, she relies on the following:

> (a). the applicants failed to ensure "the appropriate level of specificity" in their pleadings, necessitating a number of amendments of the statement of grounds;
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> (b). following judgment being reserved I drew the parties' attention to a number of authorities and afforded the opportunity for submissions. Ms. Brett says that "such additional matters were not promulgated by either party to the proceedings but attracted additional costs and court appearances … for which it is respectfully submitted the respondents should not be liable";
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> (c). following the judgment there were then a number of further mention dates, in the context of which there was some delay or uncertainty on the part of the applicants as to whether they would be cross- appealing and if so in relation to what.

20. On the first point, it is the case that the applicants took five attempts to get their statement of grounds right. However as O'Donnell J. said in *O'Neill v. Appelbe* [2014] IESC 31 (Unreported, Supreme Court, 10th April, 2014) at para. 11 procedural mistakes are "*rarely the exclusive province of one party*".

21. On the second point, that the respondents should not be required to meet any costs arising from authorities which were raised by me, this submission lacks merit. While a court may choose to identify further authorities that have not been mentioned by the parties, it is not necessarily required to do so. The extent to which it should may be a matter of opinion, but the parties can take it that in this case or in any other case, I did so in a spirit of fairness of procedures, to allow comment on matters which seemed potentially relevant. Therefore, such a procedure is simply a part of the run of the case, and of the give and take which the ultimate winner can recover for. The State's complaints in relation to these authorities are particularly unconvincing where the State did not take up the opportunity to make any meaningful submissions on those authorities. Rather, Ms. Brett wanted to know exactly what specific point each authority was being considered for. Unfortunately it is not the role of the court to spoon-feed parties in this matter. Any genuine attempt to read and consider the authorities would have enabled the State to answer that question for itself. Indeed in other cases where I have applied a similar procedure, parties (including the State) generally have had little difficulty in identifying the salient issues arising from additional caselaw. The requirements of fair procedures are not so extensive as to require me to embark on a detailed catechetical explanation in the event of identifying any additional material. It is the role of the parties to assist the court (a role the State did not seek to take up in relation to this material) rather than vice versa.

22. Finally, on the third point under this heading, the State's attempt to fix the applicants with blame for mention dates between October, 2016, and January, 2017, requires particular chutzpah in circumstances where the State made a series of applications at that stage of the proceedings which were neither pursued nor indeed properly explained.

Order

23. The primary factor is that the applicants succeeded on the main issue. However even if they had not succeeded, the position that the issue is one of public importance, and further or alternatively that the State sought the determination of the point notwithstanding that it was moot, would have led me to award the applicants the bulk of their costs on the primary issue in any event. However, some discount from full costs is appropriate having due regard to all the circumstances including the finding that some of their arguments for an injunction were baseless; that a certain amount of time was wasted such as with multiple versions of the statement of grounds; and that the applicants were unsuccessful on certain points. As against that, there are other factors relevant to the O. 99 jurisdiction leaning in favour of the applicants as set out in this judgment. Taking all factors into account, I will make an order in favour of the applicants for 85% of the costs of the proceedings, including the costs of the injunction and other reserved costs, to be calculated on the basis that it was appropriate for the applicants to have had solicitors and two counsel at all stages.