Neutral Citation: [2015] IEHC 162

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 424 J.R.]

BETWEEN

P. D. (NO. 2)

APPLICANT

-AND-

THE MINISTER FOR JUSTICE AND LAW REFORM, THE REFUGEE APPLICATIONS COMMISSIONER, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 12th day of March 2015

1. This is a decision on an application for costs in proceedings where the applicant secured an order of *certiorari* in respect of a decision of the Refugee Applications Commissioner ("ORAC"). Judgment was delivered on the 20th day of February 2015. The applicant's original written submissions argued that ORAC had unlawfully failed to decide whether the applicant was gay thereby failing to decide his core claim. The applicant's written submissions did not address the case law which describes the limited circumstances in which ORAC decisions may be judicially reviewed rather than appealed to the Refugee Appeals Tribunal.

2. The respondent delivered written submissions and, in view of the 'telescoped' nature of the application for leave/judicial review, also delivered a draft statement of opposition. The tenor of these texts was that it was premature to seek judicial review and that in any event ORAC had considered all aspects of the applicant's claim for asylum and no relief should issue even if this were an appropriate case in which to entertain a review of the first instance decision.

3. A wasted costs order was made against the applicant because the original hearing was aborted as the court felt that the argument in favour of judicial review instead of administrative appeal should be set out in written submissions, to give the respondent an opportunity to address the argument in their written submissions.

4. A new hearing date was set and supplemental written submissions were delivered which focused on this procedural issue.

5. During the course of the hearing the court raised the issue of whether the provisions of Article 9 of the Qualification Directive (a provisions which says that discriminatory laws or disproportionate punishment constitutes persecution *per se*) had any bearing on the case and drew the parties' attention to an earlier decision of this court which raised the issue as to whether claims of persecution by gay people were required to be treated in a particular way (*E.P.A. v. Refugee Appeals Tribunal* [2013] IEHC 85). Ultimately the parties addressed the court on this issue and made submissions on a fairly recent decision of the CJEU in (C-199/12, C-200/12 & C-201/12) *X,Y,Z v. Minister Voor Immigratie en Asiel* which described the duty of a decision maker when an asylum seeker claims a fear of prosecution for being gay. In the course of these submissions the applicant's case developed from a complaint alleging failure to decide whether the applicant was gay into a complaint that ORAC had not addressed the applicant's fear of prosecution on account of his sexuality.

6. The applicant argued that a claim of fear of prosecution was clearly made by the applicant to ORAC and that the approach described by the CJEU had not been followed. That argument was never made in written submissions and was made for the first time during the hearing.

7. The respondent argued the matter was not pleaded and was not addressed in written submissions, but that in any event that the applicant's real case was that of non-state persecution by his family and thus the rules regarding fear of prosecution were not of assistance to the applicant.

8. The court rejected the argument that the failure of ORAC to decide whether the applicant was gay was unlawful.

9. However, the court accepted that the applicant had clearly alleged a fear of prosecution for being gay and that this claim had never been assessed, much less assessed in accordance with the approach described by the CJEU. In addition, the court described the error as a significant jurisdictional defect which merited an order of *certiorari* where a simple appeal would not be an adequate response, though it might have provided a remedy. Therefore, the decision was quashed and the matter remitted to ORAC.

10. The default rule in relation to costs is that they follow the result of the case. In some cases, usually commercial matters of complexity and long duration which are capable of sub-division as to results, a court might decide costs by reference to 'who won what'. I am not urged to follow that approach here.

11. The applicant, naturally, invites the court to apply the default rule. The respondent says that no order as to costs should be made because the applicant lost its main point and that the applicant had a fortuitous win based on a point raised by the court.

12. Decisions on costs are as much a part of the attainment of justice *inter partes* as the substantive outcome of litigation. The rule that costs follow the event or the result of a case is almost invariably followed by civil courts because when costs mirror the outcome, that just result is reinforced. It is just that a party who has been put to the cost of establishing the correctness of their position should not thereby be out of pocket. The losing party faces the double penalty of paying their own costs and the costs of their opponents and this regime operates as an incentive to litigants not to pursue bad points.

13. The result in this case came about as result of exchanges between the parties and the court. Such dialogue in a civil case is

normal in the common law world. There is no doubt that the applicant made good use of a theme raised by the court and persuaded the court that ORAC had failed to deal with a very important part of the applicant's asylum claim. As a result, the respondent's robust defence of its decision failed factually and legally.

14. I cannot see that the justice of the case would be met by making no order as to costs. This might mean that the applicant could be indebted to his lawyers for the costs of an action he won or, depending on the nature of the arrangement with his lawyers, they would not be paid for an action in which they, eventually, got the ball over the line. Either result would be unfair. Contrarily, I see no unfairness in requiring the respondent to pay costs in respect of a case where it unsuccessfully defended a flawed decision. That the respondent lost the action on a point which emerged 'in the run of the case' without causing disadvantage to the respondent is not reason enough to reward the respondent by making no order as to costs - for that would be the effect of such an order. Neither is it reason enough to penalise the applicant, or his lawyers, for that too would be the effect of such an order. However, I think the justice of the case requires some account be taken of the manner in which the result was finally achieved.

15. I award the applicant the costs of the action on the basis of a one day case although it was at hearing for a day and half and for an hour or so on the aborted hearing date. The wasted costs order is set off against the second day of the resumed hearing in full satisfaction of the wasted costs order. No costs may be recovered in respect of the applicant's original written submissions because they did not address the point on which the applicant succeeded and failed to address the important procedural issues. I award the applicant 50% of the costs of the supplemental written submissions because they were correct about the circumstances in which it is permissible to review ORAC, though it transpired that they were right for the wrong reason because it was argued that the failure to decide the applicant's sexuality was reason enough to review ORAC and this, of course, was incorrect. In addition these supplemental submissions did not mention the applicant's fear of prosecution. The solicitor's instructions fee and counsel's brief fees are to be reduced by 25% to reflect the fact that no account was taken in the preparations for this case of the failure of the decision maker to decide or deal in any way with the applicant's fear of prosecution. None of the pre-trial work by the lawyers related to the point on which the applicant succeeded. It would be unfair to require the respondent to pay for all the pre-trial work of the applicant's lawyers where very little of that work produced the success ultimately achieved.