Neutral Citation: [2015] IEHC 747

THE HIGH COURT

[2014 No. 529 J.R.]

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED)

BETWEEN

QINGZHOU LI AND HUIMIN WANG

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of November, 2015

1. Following my decision refusing certiorari in this case (*Li v. Minister for Justice and Equality* [2015] IEHC 638), I invited further submissions from the parties on any consequential matters including the question of whether I should grant a declaration as to the legal position.

2. Ms. Rosario Boyle, S.C. (with Mr. Anthony Lowry, B.L) for the applicants has submitted that I should make declarations relating to the rationale for the refusal of the applications for permission to be in the State in this case, and the extent to which those permissions were refused on procedural, rather than substantive grounds. Ms. Boyle also states that a declaration of the type sought would be of benefit to her clients in relation to a future application to the Minister that they wish to make.

3. Ms. Sinead McGrath, B.L, for the respondent is not herself applying for the making of any declaration, and states that there is no necessity for a declaration of the type sought by the applicants because the issues involved in the declarations sought are sufficiently clarified in the judgment.

4. Neither party made any applications other than as to the foregoing matters and as to costs.

Application for a Declaration

5. Ms. McGrath submitted that the precise declarations now sought by the applicants went somewhat beyond both the declaration sought in the original pleadings and that signalled in correspondence prior to the initial hearing dealing with this issue on 9th November, 2015 (further submissions were made on 17th November, 2015). Despite this, I would in principle be prepared to entertain the application in the form it was made at that hearing. Given that I had specially listed the question of whether any declarations should be made in the light of the substantive judgment, I had intended that both sides should have the opportunity to apply for any declarations they thought appropriate having considered that judgment. Indeed, I would have received any proposal for a declaration from Ms. McGrath even though she had not hitherto suggested that such a declaration should be made.

6. Ms. Boyle submitted, in addition to the matters referred to above, that in the case of *Hussein v. Minister for Justice and Equality* (10th November 2015), which was decided after the substantive judgment in the present case, it was made clear by the State that there was no fettering of the Minister's discretion regarding a decision on refusal of renewed permission to be in the State, whereas there was *"no such clarification in this case"* and that she should therefore have the benefit of a declaration *"to clarify matters".*

7. Having carefully considered the submissions made, I am of the view that the matters sought to be clarified by way of the proposed declarations are already sufficiently clear from my earlier judgment dealing with the merits of this application. Indeed, the precise declarations sought by the applicants seem to be something of an oversimplification of the position as set out in my judgment. I held that while the essential ground of refusal related to their failure to apply from outside the State, the Minister was required to, and did, nonetheless take all circumstances into account, but those considerations were not deemed to outweigh that essential ground. No significant further benefit would be achieved by making a declaration, and I therefore, decline to do so. Matters would be otherwise if there was some identifiable added value in granting a declaration, for example, by facilitating a party in applying for leave to appeal if they might be handicapped in doing so in the absence of a declaration against which such appeal could be brought. No such considerations arise in the present case having regard to the nature of the applications made.

Applications for Costs

8. Ms. McGrath has applied for costs on the basis that they should follow the event. Ms. Boyle resists this and has also asked me to award *"some costs"* to the applicant in the circumstances, particularly having regard to what she says was a clarification of the law achieved as a result of the proceedings.

9. She has also submitted that at or prior to the hearing of this case, the State should have furnished more information to the applicants and the court about the potential relevance of the pending Hussein case, and has suggested that their failure to do this complicated the hearing and should have an impact on costs. I would entirely reject the submission made in relation to that aspect. Hindsight is of course perfect vision. Ms. McGrath has made clear that she was not aware of the extent to which the *Hussein* case might overlap with issues in this case and in any event has submitted that some of the questions of statutory interpretation only came to the fore at the hearing in the present case, and I accept what she says in both respects.

10. The starting point in respect of costs must, of course, be that an award of costs follows the event. In the present case, there are also a number of considerations that might be seen to reinforce the case for costs following the event, and I have already set out these discretionary factors in my judgment on the merits. Ms. McGrath has, not unnaturally, laid some emphasis on these in her submission on costs.

11. However, if, having regard to *"all … circumstances of the case"*, there is *"sufficient reason to … depart from the general rule that costs follow the event"*, the court may exercise a discretion to do so (*Dunne v. Minister for the Environment, Heritage and Local Government* [2008] 2 I.R. 775 per Murray C.J at p.780). As against the factors supportive of the default position, there are a number of countervailing factors as follows:

> (i) The applicants have, through their legal representatives, achieved a measure of clarification of certain legal issues, some of which have an element of complexity and novelty, as set out in my judgment. Of course, paragraph 33 of my judgment and the discussion that follows from it must now be interpreted in the light of the subsequent decision of the Supreme Court in the case of *Hussein*.
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> (ii) In respect of some of the issues in the present case, and even making allowance for points subsequently addressed in Hussein, I did not altogether uphold some of the submissions made on behalf of the State. While the *Veolia Water* approach of analysing which party was successful on each discrete element of a claim, rather than on the overall event, would appear primarily to apply in the context of "complex cases" (*Veolia Water UK plc v. Fingal Co. Council* (No. 2) [2007] 2 I.R. 81 at p. 84 per Clarke J.) and would not generally be appropriate to relatively short hearings such as the present one, the fact that a private party engaged in public law litigation against the State has succeeded in demonstrating that at least some elements of the State's submissions were not to be altogether accepted is a factor that can legitimately be borne in mind in addressing the question of whether the usual order should be made, either at all or to its fullest extent.
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> (iii) To some extent the litigation arose from the complexity and difficulty of the legislation concerned, the Immigration Act 2004, the drafting of which is to some degree opaque and unsatisfactory and for which the Minister has to be held to have substantive responsibility (see *Cork Co. Council v. Shackleton*, Unreported, Clarke J., 12th October 2007, approved in *O'Keefe v. Hickey* [2009] IESC 39 per Murray C.J. at para. 7.)
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> (iv) There are likely to be other cases of a similar nature that may benefit from at least some of the points decided in the present case (indeed I have already decided one since the judgment in the present proceedings, *Leng v. Minister for Justice and Equality* [2015] IEHC 681, which relied on aspects of the substantive decision in the present case at paras. 19, 44 and 49) (see O'Keefe v. Hickey [2009] IESC 39 *per* Murray C.J. at paras. 9 and 10.)

12. Starting, therefore, with the presumption that costs follow the event, and weighing the factors reinforcing that conclusion with the countervailing factors, I consider that the appropriate order in the present case, having regard to the analysis set out above, is to make no order as to costs.

Order

13. For the foregoing reasons, I will order:-

> (i) that the application for a declaration be refused and that the application for leave be dismissed in respect of all reliefs sought; and
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> (ii) that there be no order as to costs.