[2019] IEHC 704

THE HIGH COURT
JUDICIAL REVIEW
[2019 No. 598 J.R.]

BETWEEN

SAIM SHAHEEN KHAN AND GAELLE SAURON

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 22nd day of October, 2019

1. In *Khan v. Minister for Justice and Equality* (No. 1) (Unreported, High Court, 25th September, 2019) I dismissed the applicants' proceedings in which the main claim was for a substantive injunction preventing the deportation of the first-named applicant. Mr. Paul O'Shea B.L. for the applicants now applies for leave to appeal, which is opposed by Mr. John P. Gallagher B.L. for the respondent. I have considered the law in relation to leave to appeal as set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, MacMenamin J., 13th November, 2006), *Arklow Holidays v. An Bord Pleanála* [2008] IEHC 2, per Clarke J. (as he then was*), I.R. v. Minister for Justice and Equality* [2009] IEHC 510 [2015] 4 I.R. 144 *per* Cooke J., and *M.A.U. v. Minister for Justice Equality and Law Reform* (No. 3) [2011] IEHC 59 (Unreported, High Court, 22nd February, 2011) per Hogan J. I have also discussed these criteria in a number of cases, including *S.A. v. Minister for Justice and* Equality (No. 2) [2016] IEHC 646 [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016) (para. 2), and *Y.Y. v. Minister for Justice and Equality* (No. 2) [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017) (para. 72).

2. Mr. O'Shea has proposed a number of questions of purported exceptional public importance which essentially go to the issue of whether I was substantively correct in the original ruling. However, there has been a significant development since then which is that the deportation order was revoked on 18th October, 2019, when the first-named applicant was recognised as a permitted family member. Mr. O'Shea acknowledges that the case is now moot but wants to appeal because he wants to deal with the question of costs.

3. Even assuming for the sake of argument, without in any way accepting, that Mr. O'Shea is correct that there are weighty questions of EU law requiring appellate determination if not reference to Europe, this case is not a suitable vehicle to further ventilate such issues. There are two main reasons for that. The most obvious one is that the case is moot. The second reason is that the first-named applicant did not challenge either the deportation order or the refusal of the review application and under those circumstances his argument that he has been deprived of an effective remedy falls flat.

4. One might possibly have stretched the point to give slightly more sympathetic consideration to the present application if we only had the second problem, but adding

the first makes this leave to appeal application an utterly quixotic endeavour. Appellate courts should not be asked to labour in vain, so even if, which I am not to be taken as endorsing, there is some point buried in this procedural tangle, the present case is a bad vehicle to explore it. The criterion of the public interest does not favour leave to appeal. Accordingly the application is dismissed.

Postscript – Costs

5. The question of costs in this case has become more convoluted than usual due to the intervention of human fallibility (well, let's be specific, judicial fallibility). It might be helpful to recapitulate the sequence of events. On 25th September, 2019, I dismissed the substantive judicial review. Sarah-Jane Hillery B.L. who then appeared for the respondent asked me to deal with costs straight away, but I (wrongly, I now think) put it off until after the leave to appeal application. In the intervening period I had occasion to be reminded of the clear jurisprudence that a costs order in a certificate case itself requires leave to appeal so I then took the view that it would be more appropriate procedurally to deal with costs before the leave to appeal issue, and I raised that with the parties when the leave to appeal application was first listed, on 21st October, 2019. I had thought (again, wrongly I now would say) that I had given Mr. O'Shea a sufficient opportunity to address that issue so I then made a costs order in favour of the respondent on 21st October, 2019, although that order was not perfected. The leave to appeal application was then adjourned to 22nd October, 2019, when the foregoing ruling rejecting that application was given. Following that, Mr. O'Shea raised the issue of costs again and essentially submitted that he had not had a full opportunity to make submissions on costs on 21st October, 2019. With the agreement of the parties, I consulted the DAR. Having done so, I am satisfied that a misunderstanding arose. I take it from Mr. O'Shea that he had intended to make submissions on costs, whereas on the day I had (obviously wrongly) understood that he wasn't making any submission. Mr. Gallagher very courteously suggested, although he is far too diplomatic to put it precisely like this, that if only I had gone with Ms. Hillery's submission that costs should be dealt with immediately on the conclusion of the substantive hearing, then this whole misunderstanding wouldn't have arisen. He's probably right about that, but nonetheless, the situation did arise so I have to deal with it.

6. The first point to be made is that, having consulted the DAR, there can be no criticism of the applicants' lawyers for not fully arguing the costs issue on 21st October, 2019. Given that the order of 21st October, 2019 had not been perfected and also given that it is important that parties feel they have had a full opportunity to make submissions, the appropriate course was to direct that the order not be perfected and that the question of costs be reopened for further submission.

7. I have now heard submissions from counsel on that issue. Mr. O'Shea asks for costs because the proceedings became moot by reason of the unilateral act of the Minister in revoking the deportation order. That may be so but it is not an act that is causally connected to the proceedings, so on the Supreme Court caselaw, *Cunningham v. President of the Circuit Court* [2012] IESC 39 [2012] 3 I.R. 222, *Godsil v. Ireland* [2015]

IESC 103 [2015] 4 I.R. 535 and *Matta v. Minister for Justice and Equality* [2016] IESC 45 (Unreported, Supreme Court, 26th July, 2016) per MacMenamin J., in particular, which I endeavoured to summarise in *M.K.I.A. (Palestine) v. International Protection Appeals Tribunal* [2018] IEHC 134 [2018] 2 JIC 2708 (Unreported, High Court, 27th February, 2018), the court should lean in favour of no order as to costs. Certainly there is no basis for costs to be given to the applicants.

8. Mr. Gallagher also applies for costs, and his strongest point was that the case wasn't yet moot at the time of the substantive decision. Unlike for example in Cunningham, the court did actually adjudicate on the merits as between the parties. That would certainly lean in favour of viewing the situation as giving rise to an "event" which costs should follow. On the other hand I have to have regard to the fact that such an approach potentially introduces a significant distortion into the applicants' position on appeal. If the case wasn't moot, the applicants might have had a better prospect of getting leave to appeal and might by definition have had a better prospect of making headway in such an appeal. Because the case is now moot, if costs followed the "event" such as it was, there is a significant prospect (subject only to the hypothetical possibility of the Supreme Court granting leave to appeal notwithstanding the mootness of the proceedings) that the applicants will be lumbered with costs at High Court level of a case that has become moot half-way through its natural life-cycle. That could be seen to be slightly unfair on the applicants, maybe particularly so in circumstances where one applicant is now very much on track for settled status and the other applicant is an EU national.

9. When I dismissed the proceedings I said I was doing so without much enthusiasm, and I probably feel an equal lack of enthusiasm now about making no order as to costs. While I place the strongest possible reliance on the default rule of costs following the event, that rule can be modified in certain instances including in moot cases, and the appropriate modification in the circumstances which I've discussed above is to make no order as to the costs of either the substantive hearing or the leave to appeal application.