[2019] IEHC 226

THE HIGH COURT

2018 No. 882 JR

Between:

X AND Y (A MINOR SUING BY HER MOTHER AND NEXT FRIEND X)

Applicants

– and –

THE MINISTER FOR JUSTICE AND EQUALITY (2)

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 3rd April, 2019.

1. This judgment concerns an award of so called 'Francovich damages' following on the court's judgment in *X & anor v. MJE* [2019] IEHC 133 (the 'Principal Judgment'). The rationale for awarding damages was set out in the Principal Judgment. This judgment is concerned solely with quantum. It would be fair to say that there is a relative paucity of Irish case-law on the awarding of so-called 'Francovich damages', the court being referred in this regard to *THP (otherwise known as NTP) v. The Chief Superintendent of the Garda National Immigration Bureau and ors* (Unreported, High Court, O'Malley J., 10th June, 2015) and *Ogieriakhi v. MJE and ors* [2017] IESC 52. The following general observations might perhaps usefully be made:

(1) EU law falls principally to be applied by national courts.

(2) Since the EU does not have its own procedural law governing sanctions, the formulation of applicable procedural rules falls to individual Member States but is subject to certain EU-law constraints.

(3) The application of national rules on sanctions runs the risk of (a) impeding the effective application of EU law (thus affecting its primacy) and (b) jeopardising the uniform application of EU law (because of diverging national laws).

(4) These twin risks have been met by the European Court of Justice in a line of case-law running from Case C-213/89 *Factortame I* in which the Court has recognised the principles of equivalence and effectiveness as constraints with which national procedural laws on sanctions must comply.

(5) Those constraints are a practical expression of the principles of primacy and direct effect of EU law.

(6) The principle of equivalence requires that national procedural rules on sanctions for breach of EU law may not be less favourable than those governing similar domestic actions.

(7) The principle of effectiveness requires that national procedural rules on sanctions must not render virtually impossible or excessively difficult the exercise of rights conferred by EU law.

(8) There is a longstanding line of EU case-law tracing back to Case C-14/83 *Von Colson and Kamann* that the obligation to guarantee the full effectiveness of EU law requires that a sanction imposed by an EU Member State in the event of infringement of EU law must be such as to guarantee real and effective legal protection and have a deterrent effect.

(9) It is clear from, *e.g.,* Joined Cases C-46 and C-48/93 *Brasserie du Pêcheur and Factortame (Factortame IV)* that the amount of damages levelled by a national court must be commensurate with the loss or damage sustained so as to ensure the effective protection of the rights of the injured parties.

2. A particular difficulty that presents in these proceedings is that although, following the delivery of the Principal Judgment, a separate hearing was held on quantum, no affidavit evidence was tendered by Ms X detailing the actual losses/injury that she suffered between 17.09.2018 and 14.10.2018. It was mentioned at hearing that Ms X could not produce receipts for such expenses as she incurred. This is accepted. However, it would have been of assistance if she could have tendered evidence even as to her recollection of such expenditure as she incurred during the roughly month-long period between the two stated dates.

3. The effect of the foregoing is that the court, having due regard to the principle of equivalence, has little evidence on which to go on in terms of identifying such losses as could and would typically be the subject of damages under Irish law. It appears from her grounding affidavit that Ms X paid her rent to end-October with the last of her money and otherwise had no money. Separate from accommodation costs during the time when material reception conditions should have been available to Ms X and her daughter when their application for international protection was made, the court considers that it can also take judicial notice of the fact that Ms X would have had to meet the incidental needs of herself and her daughter from 17.09.2018 to 14.10.2018, i.e. meals, limited clothing requirements (mother and daughter had already been living in Ireland and so were possessed of clothing) and toiletries. There is also the non-payment of the relatively paltry cash-in-hand that would have been paid to Ms X by the State had she been in direct provision during the said timeframe. The court is mindful too that what occurred following on and as a result of the breach of Art.17 of the Reception Conditions Directive (Directive 2013/33/EU), cannot but have been a very stressful event for Ms X who had the particular pressure that comes with being responsible for an infant child. Counsel for Ms X suggested on his feet that Ms X had been forced to borrow some money as a result of what occurred; however, there is no evidence to this effect before the court. Having regard to all of the foregoing and having due regard also to the principle of effectiveness (and so the need to ensure that a sanction for infringement of EU law is such as to guarantee real and effective legal protection and have a deterrent effect), the court will award a total of €1,500 jointly to the applicants by way of damages.

4. As to costs, there were five key issues in the proceedings, identified in the Principal Judgment as Points [A] to [E]. The Minister succeeded on Points [A], [B], [C], [E] and the reg.4 limb of [D]. Ms X and her daughter enjoyed a notable victory in respect of the Art.17 limb of Point [D]. In all the circumstances presenting, it seems to the court that the fairest way to treat with costs is (i) to make no order as to costs in respect of the application/hearing that led to the Principal Judgment, but (ii) to award to the applicants the costs of the quantum hearing.