THE HIGH COURT

[2024] IEHC 164

[Record No. 2023/223 JR]

BETWEEN

J.I.D. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND M.D.) AND M.D.

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms Justice Marguerite Bolger delivered on the 20th day of March 2024

1. This is the applicants' application for the costs of instituting the within judicial review proceedings, which are now moot. For the reasons set out below, I am allowing this application.

2. In the substantive proceedings the first applicant sought the following reliefs:-

(i) An order for *certiorari* quashing the Minister's decision of 14 December 2022 refusing his permission to remain;

(ii) An order of *mandamus* compelling the Minister to make a determination of the first applicant's application for permission to remain as the dependent child of the second applicant who is a person with Stamp 4 permission to remain.

Background

3. The first applicant is the infant son of the second applicant and was born in the State on 18 September 2020. Both applicants made separate applications for leave to remain. The second applicant was granted permission to remain on 7 September 2022 which she incorrectly assumed would allow the first applicant permission to remain. The first applicant's application was refused on 10 November 2022 and a deportation order was made on 8 February 2023 but never served. On 19 April 2023, after these proceedings had been mentioned in court for the purpose of stopping time but before the application for leave was

made, the Minister revoked the deportation order pursuant to s. 3(11) of the Immigration Act 1999. The parties agree that that revocation rendered these proceedings moot but the Minister says she did not know about the proceedings when that decision was made and there was no causal nexus between that decision and the proceedings.

4. The applicant contends an entitlement to costs on the basis that it was reasonable to issue the proceedings given the Minister's confirmed intention to make a deportation order. The Minister says it was unreasonable to commence the proceedings because in a letter of 14 December 2022, she had made it clear that a deportation order would not be enforced against the first named applicant and that he would be granted permission to remain in due course.

What the applicants were told prior to the commencement of proceedings

5. The court must assess whether it was reasonable for the applicants to commence the proceedings in the light of what they had been told, which requires consideration of the correspondence prior to the commencement of the proceedings.

(i) The Minister's letter of 10 November 2022

6. This letter confirmed the Minister's decision to refuse the first applicant permission to remain pursuant to s. 49 of the International Protection Act 2015 and said *"[y]ou no longer have permission to remain in the State and you must now return voluntarily to your country of origin or be deported"* and that if the first applicant did not do so, the Minister *"will make a Deportation Order in respect of you under section 51 of the 2015 Act. Once this is made and served it will require you to leave the State and remain out of the State indefinitely."*

(ii) The Minister's letter of 14 December 2022

7. This letter was in response to the applicants' solicitors query whether the first applicant was covered by his mother's permission to remain. The Minister confirmed that he was not and referred to the previous letter of 10 November 2022 as having made the applicant aware of the *"positions vis a vis voluntary return and the making of a deportation order"*. It referred to the mandatory provision in s. 51 (*"the Minister shall"* make a deportation order) which can only be negated by a decision that such an order cannot be made owing to the provisions of s. 50, a step that had not been reached here and which the letter advised the applicants' solicitors *"may not be a realistic hope for your client family to*

cling to vis a vis Master JID's longer-term position in the State. This being the case, Master JID would seem to be on something of an inevitable path towards having a deportation order has been made in respect of him."

8. The Minister's correspondence does anticipate the possibility of the applicant securing a right to remain but does not make a definitive commitment to that outcome. It makes it very clear that a deportation order will be made, and that whatever steps may be taken to consider a future right to remain will not be taken until after that deportation order is made.

9. In her written submissions, the Minister asserts that her letter of 14 December 2022 made it clear that she had no intention of deporting the first applicant. I do not agree. The letter was clear that a deportation order would be made. The Minister's previous letter had advised the applicant what they were required to do now that the first applicant no longer had permission to remain, *i.e.* that he should leave voluntarily or be deported. That letter told the applicants that, once the deportation order was made and served, the first applicant would have to leave the State and stay out indefinitely. Whilst the deportation order that was made was never served, the applicant made what seems to me to be a reasonable point, *i.e.* once the deportation order had been made, it had to be acted upon unless revoked. There was a period of some weeks between when the deportation order was made and when it was revoked during which the order could have been acted upon and the first applicant could have been deported.

Was it reasonable to bring these proceedings?

10. The second applicant gives, at paras. 14 and 15 of her affidavit grounding the Statement of Grounds, the following explanation for instituting the proceedings:

> *"14. I say and am advised that the Minister's refusal to make any determination of my son's application under s.49 of the 2015 Act, or in his discretion, is contrary to our right to family and private life under EU law and/or the Constitution. I am concerned that, if my son is issued with a deportation order, I would be required to leave the State and return to Georgia and to remain outside the State as my son would be excluded.*
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> *15. Whereas, the Minister suggests that my child might eventually be granted permission to remain, I am concerned that he would be issued with a deportation*

order, which must be acted upon unless it is revoked. I do not understand, if the Minister believes that my son should be entitled to permission to remain, why this is not granted now."

11. The applicant was never given an explanation for the Minister's refusal of permission to remain pursuant to s. 49(4) of the 2015 Act, which section required consideration of the applicant's family and personal circumstances. The applicants asserted that the Minister's refusal to allow the first applicant leave to remain pursuant to s. 49(4) of the 2015 Act was in breach of the first applicant's Constitutional and Convention family and private life rights and that the deportation order was, therefore, unlawful. The applicants sought *mandamus* to compel the Minister to make a decision allowing the first applicant to remain, in effect to exercise her jurisdiction under s. 49(4) of the 2015 Act.

12. The Minister intended to and ultimately did make a deportation order which the applicants believed was unlawful. I do not consider the applicant could have been reasonably expected to tolerate the making of the order and to wait to see whether their case would be considered under s. 11(3) of the Immigration Act 1999, as the Minister had suggested could be expected, particularly given the absence of any explanation for the Minister's refusal to grant permission to remain pursuant to s. 49(4) of the 2015 Act.

Mootness

13. The basis for the Minister's decision, that rendered the proceedings moot, was s. 3(11) of the 1999 Act, *i.e.* a revocation of the deportation order, rather than the equivalent of the *certiorari* and *mandamus* that the applicants sought in the proceedings. I do not have to determine whether that decision, which allowed the applicant to remain, was connected to the proceedings, as can be seen from the Court of Appeal decision of Murray J. in *Hughes v. Revenue Commissioners* [2021] IECA 5. Murray J. distilled the jurisprudence into the following three propositions of how mootness could occur:-

(1) By an event independent of both parties;

(2) By the unilateral conduct of one of the parties following from the fact of the proceedings;

(3) Where a statutory body makes a new decision, the court should look to at the circumstances to decide whether it constitutes a *'unilateral act'.* If the new decision is caused by a change in relevant circumstances occurring

between the time of the first and second decision, this might not be treated as a *'unilateral act'*, as opposed to if the body simply changed its mind.

14. Murray J. described these propositions, at para. 34 of his decision, as presenting *"a general approach rather than a set of fixed, rigid rules. The starting point is that the Court has an over-riding discretion in relation to the awarding of costs, and the decisions to which I have referred are intended to guide the exercise of that discretion."*

15. The Minister says she was unaware of these proceedings before she invoked s. 3(11) in revoking the deportation order that had been made in respect of the first applicant, as she had previously indicated she might do. The situation does not fall neatly into any of the three propositions set out by Murray J. However, neither did the facts in *Hughes,* where the collective agreement that was being challenged in the proceedings was superseded by a new collective agreement after the proceedings had been instituted, an event that Murray J. said, at para. 45, *"was not an event that occurred independently of any of the parties, but neither can it be properly characterised as 'unilateral'."*

16. This Court's overriding discretion in awarding costs must take account of whether it was reasonable for the applicant to institute the proceedings in all the circumstances that applied at the time. The applicants were facing a deportation order which is a significant legal event with dramatic consequences for the first applicant and for his parents. Whilst the legal basis for the Minister's decision that rendered the proceedings moot was different to the applicants' grounds for their challenge, the net result is the same, *i.e.* the deportation order was set at nought and the first applicant was given permission to remain.

17. The applicants could have taken their chances in allowing the deportation order to be made and hope it would be revoked as had been indicated in the Minister's correspondence. However, that did not afford the parents of this young infant child the assurances they wanted or needed and, in circumstances where their infant child's application to remain pursuant to s. 49(4) had already been refused by the Minister without any or adequate explanation about the consideration (if such consideration took place) of the first applicant's private and family life, including his dependency on his mother who had been given permission to remain in the State.

18. It was reasonable for the applicants to institute these proceedings seeking to challenge the deportation order and compel the Minister to grant the first applicant

permission to remain as a dependent child of the second applicant who had previously been granted permission to remain. They are, therefore, entitled to their costs.

19. My indicative view is that the applicants' costs should include the costs of making this costs application. I will put the matter in for mention before me on 16 April 2024 at 10.30am for the purpose of making final orders.

Counsel for the applicants: Eamonn Dornan BL

Counsel for the respondent: Hugh McDowell BL