THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 379 J.R.]

BETWEEN

SEYDA SHAISTA ABBAS AND SYED HUSSAIN ABBAS

APPLICANTS

AND
THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the day of 23rd July, 2018

1. The first-named applicant is a British national exercising her EU law rights in Ireland. The second-named applicant is her brother, living in Pakistan. On 25th September, 2017 an application was made for a visa for the second-named applicant. The applicants rely on the free movement directive 2004/38/EC, which provides that an application of this nature should be dealt with as soon as possible and on the basis of an accelerated procedure.

2. On 12th February, 2018 a change of address was notified. On 14th February, 2018 the respondent sought further information from the first-named applicant. On 8th March, 2018 a reply was received in that regard.

3. On 24th April, 2018 a letter of demand was sent by the applicants' solicitors, also including a number of enclosures and running in total to 20 pages. The respondent complains that the letter was both a fourteen-day warning letter and was also providing additional information that needed to be assessed. On 9th May, 2018, the application was refused but the applicants were not immediately notified of that. On 14th May, 2018, leave in the present proceedings was granted, the primary relief being *mandamus* to make a decision on the application. On 18th May, 2018 the refusal was notified to the second named applicant.

4. As the substantive relief relates to *mandamus*to make a decision that has already been made, the matter is now moot so the only question is costs. Both sides seek their costs against each other.

5. I have received helpful submissions from Mr. Ian Whelan B.L. for the applicants and Ms. Silvia Martinez B.L. for the respondent.

6. Mr. Whelan's express submission was that "*I don't accept that there has to be a causal nexus*" between the institution of the proceedings and the matter becoming moot. Unfortunately, this does not chime with the current mainstream case law on the subject. I discussed the principles at issue in *M.K.I.A. (Palestine) v. International Protection Appeals Tribunal* [2018] IEHC 134 [2018] 2 JIC 2708 (Unreported, High Court, 27th February, 2018) and at para. 6(v) noted that Supreme Court caselaw established that if the proceedings are moot due to a factor which is within the control of one party but that has no causal nexus with the proceedings or which relates, as it is put in *Cunningham v. President of the Circuit Court* [2012] IESC 39 [2012] 3 I.R. 222, to an underlying change in circumstances, there is no event in the *Godsil v. Ireland* [2015] IESC 103 [2015] 4 I.R. 535 sense, so the court should lean in favour of no order: see *per* MacMenamin J. in *Matta v. Minister for Justice and Equality* [2016] IESC 45 (Unreported, Supreme Court, 26th July, 2016) at para. 20. Recent Supreme Court caselaw including *Cunningham*, *Godsil* and *Matta* represents the primary approach the court should take, and the alternative approach taken in various High Court cases relied on by the applicants and mentioned at para. 22 of the applicant's submissions, such as *Mansouri v. Minister for Justice, Equality and Law Reform* [2013] IEHC 527 (Unreported, McDermott J., 29th January, 2013), represents only a fall-back approach, which is how I read McDermott J.'s judgment in any event. What rendered the proceedings moot was the fact that the application was decided upon. That is not causally connected to the relief sought in the proceedings. That is averred to by Mr. Daniel Liddy on behalf of the Minister at para. 18 of his affidavit. In any event, that is beyond doubt if for no other reason than that the application was decided upon prior to the leave being sought, albeit that the applicants were unaware of that.

7. Such a conclusion is reinforced by the judgment of MacMenamin J. in *Matta* at para. 21, where he said that that case "*concerns a situation where the appellant was always entitled to a decision (that is an event), one way or the other, but was in a queue. The fact that a decision is made after the institution of proceedings did not necessitate that a costs order be made in those circumstances*". Admittedly such an approach means that an applicant runs a bit of a gauntlet between the date when leave is applied for and the date when the judicial review proceedings can get a hearing date; and is at risk of no order for costs even if he or she does have some sort of a point. Possibly in some alternative legal universe one could envisage a range of reasonable options that could include hypothetical costs rules that were more favourable to applicants but all I can do in the present legal universe is to apply the law as set down by the Supreme Court. The best way to avoid any possible difficulties for the parties is to try to have cases heard as soon as possible, a process that will hopefully be further facilitated by the President's recent High Court Practice Direction HC 78, but a process that nonetheless depends, as always, on resources, which can be impacted upon by a number of factors.

Order

8. Applying the Supreme Court case law referred to above, the appropriate order is that there be no order as to costs.