THE HIGH COURT

[2016 No. 846 S.S.]

IN THE MATTER OF THE CONSTITUTION AND IN THE MATTER OF AN ENQUIRY PURSUANT TO ARTICLE 40 OF THE CONSTITUTION

BETWEEN

PEPS ONONKEWAGBE AND GRAZIA EDOKHAMEN (A MINOR SUING BY HER MOTHER AND NEXT FRIEND PEPS ONONKEWAGBE)

APPLICANTS

AND

THE GOVERNOR OF THE DOCHAS CENTRE AND THE CHILD AND FAMILY AGENCY

RESPONDENTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 7th day of April, 2017.

1. The Applicants are foreign aliens who had been the subject matter of deportation orders dated 28th November, 2008, which were not complied with. Ultimately, on 26th July, 2016, the first Applicant was arrested in her home at the Mosney Accommodation Centre, County Meath pursuant to s. 5 of the Immigration Act, 1999 as substituted and amended by s. 78 of the International Protection Act, 2015 for the purposes of giving effect to the deportation orders. The first Applicant packed bags for herself and her daughter, the second Applicant. She complied with her mother's requests to get dressed and go with her to Dublin Airport. Shortly before the time for boarding the aircraft on which they were to be flown out of the State the Applicants were requested to board the plane, however, they refused to cooperate further with the deportation process as a consequence of which the first Applicant was arrested and incarcerated in the Dochas Centre at Mountjoy and the second Applicant was taken into care by the second Respondent.

2. It was against this background that the Applicants instituted these proceedings under Article 40 of the Constitution for an enquiry into the lawfulness of their detention and in respect of which the judgment of the Court was delivered on 10th August, 2016, on foot of which the detention of the Applicants was found to be lawful.

3. Each of the parties have sought orders for their costs in respect of which written and oral submissions have been made and considered by the Court. It is not considered necessary to repeat or summarise these for the purposes of this judgment. Suffice it to say that the Respondents point of departure on their applications was that having regard to the well settled principles applicable to the exercise by the Court of its jurisdiction to make an award for the costs of the proceedings there were no good or sufficient reasons or special circumstances which would warrant a departure by the Court from the general rule that costs should follow the event.

4. Additionally, the Respondents contend that as the Applicants chose not to apply at the commencement of the proceedings for legal aid under the Custody Issues Scheme for which, given the nature of the proceedings and their limited financial circumstances, it is likely they would have qualified, they ran the risk that in the event they were unsuccessful they would be exposed to costs orders in favour of the Respondents in addition to having to meet their own costs whereas under the Scheme such risk would have been avoided.

5. The kernel of the central controversy between the parties is concerned with whether or not there are special circumstances or factors in this case which warrant the Court in departing from the ordinary rule that costs follow the event.

6. Not surprisingly the Applicants take issue with the submissions of the Respondents and in their turn submit that there are such special circumstances in this case, that these are evident from the judgment delivered by the Court and that they found the basis upon which the Court's discretion could and should be exercised by making an award for some or all of their costs.

The law.

7. The jurisdiction of the Court to make an order for costs in civil proceedings is to be found in s. 14 (2) of the Courts (Supplemental Provisions) Act, 1961, the Civil Liability and Courts Acts and in the Rules of the Superior Courts, 1986, as amended. Order 99 Rule (1) (4) of the RSC provides that costs shall follow the event unless the Court orders otherwise, accordingly, the provision recognises that the Court retains a discretion in the exercise of its jurisdiction which in turn is governed by what are now well established principles.

8. Having regard to the authorities opened to the Court on the subject I see no reason to depart from the view of the law concerning the ambit of the discretion which I expressed in *A.Q. v. The Minister for Health* [2016] IEHC 556, where at para. 5 of the judgment it is stated:

> *"There is no hard and fixed rule or principle which determines the ambit of the Court's discretion and in particular there is no overriding principle which directs that it must be exercised in favour of an unsuccessful party in specific circumstances or in a certain class or category of case rather it is to be exercised in a reasoned fashion having due regard to the special circumstances of the particular case and where the interest of justice so require."*

9. The rational for the power to make or refuse an order for some or all of the costs of a party in legal proceedings is to be found in the constitutional right of access to the courts and as a means to aid the efficient and effective administration of justice by ensuring the appropriate fair and proper conduct of litigation. In general it may be said that where the circumstances are such that the citizen is required to have recourse to the courts for the purposes of asserting legal interests or having legal rights vindicated it would, in principle, be unjust if in contested proceedings which were successful the citizen is to be visited with the costs involved and so too it may be said for the party who, if successful, contests the claims made, a principle which finds its expression in the rule that costs follow the event. See *Veolia Water U.K. Plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81 and *Godsil v. Ireland* [2015] IESC 103.

10. Where departure from the ordinary rule falls for consideration the Court is required to exercise its discretion on a reasoned basis indicating or identifying factors or a combination of factors which, in the particular circumstances of the case and in the interests of justice, warrants the departure. See *Dunne v. Minister for the Environment, Heritage and Local Government* [2008] 2 I.R. 775.

11. When consideration is had, as it must be, for the principle on which the rule is founded, it is necessary that any departure from it must be rooted in the special circumstances of the particular case and mandated by the requirements of justice.

12. In this case the Applicants submitted that the particular circumstances involved a determination on legal issues of special and

general public importance over and above the interests of the litigants alone and that in relation to those issues this was a "test case" of the type identified by Clarke J. in his judgement delivered on 12th October, 2007, in *Cork County Council v. Shackleton and Anor*, subsequently reported at [2011] 1 I.R. 443, and adopted by the Supreme Court in *O'Keeffe v. Hickey and Anor* 2 I.R. 302.

13. As to that, the Applicants identified two particular matters which fell for consideration by the Court which involved the construction of statutory provisions namely s. 5 (11) of the Immigration Act 1999 as substituted by s. 78 of the International Protection Act 2015 and ss. 12 and 13 of the Childcare Act 1991. Insofar as the first of these provisions is concerned they contended that this was the first time on which the Court was required to consider whether the provisions of s. 5 (11) permitted the designated member of An Garda Siochana or the designated Immigration Officer, as the case may be, to enter a dwelling for the purpose of making an arrest of a person pursuant to s. 5 (1) of the Immigration Act 1999. The relevant provisions were set out in the principle judgment and will not be repeated here. Suffice it to say that s. 5 (11) does not contain any express provision which enables the Immigration Officer or the member of An Garda Síochána entering the dwelling for the purposes of effecting such an arrest to be accompanied by other immigration officers or members of An Garda Síochána.

14. The Applicants had submitted that in the absence of such a provision and in the absence of any invitation to enter the dwelling, the presence of other gardaí in the applicants dwelling with the arresting officer was unlawful and thus tainted the arrest of the first Applicant.

15. The first Respondent submitted that that point was without merit and drew the attention of the Court to the wording of section s. 6 (2) of the Criminal Law Act, 1997 which was almost identical, moreover, no such point had ever been taken arising from the presence in a dwelling of other members of the gardaí with the officer making the arrest. It had always been the case that the officer designated to affect a search and make an arrest on a premises was entitled to be accompanied by other officers. Had there had been any proper basis in law for the proposition advanced on behalf of the Applicants it would have long since been taken and adjudicated upon, however, the first Respondent was not in a position to open an authority to support the proposition and it appeared that the point, if taken, had never been decided or, if it had, the case was unknown.

16. The Applicants submitted that the wording of s. 5(11) of the Act of 1999 was not identical to s.6 (2) of the 1997 Act which in any event contained a statutory provision relating to the powers of search and arrest of a premises which made express provision for the designated officer to enter the premises alone or accompanied by other officers. In this regard reference was made to other statutes which contained provisions enabling an officer entering a premises to search or make an arrest to be accompanied by other officers such as s. 7 (2) of the Aliens Act 1935 as amended by s. 4 of the Immigration Act 2003 and s. 29 (6) of the Offences Against the State Act 1939 as substituted by s. 1 of the Criminal Justice (Search Warrants) Act 2012.

17. For reasons already set out in the principal judgment, the Court found that the member of An Garda Síochána or the Immigration Officer entering a dwelling for the purposes of effecting an arrest under s. 5 (1) of the Immigration Act 1999 is entitled to be accompanied by other officers.

18. Having regard to the nature of the point raised in the context of an application under Article 40.4 of the Constitution and having regard to the fact that it was accepted by the parties that this was the first time that the meaning of s. 5 (11) of the Act, fell to be considered, and in the absence of case authority for the proposition that without express statutory authorisation or a warrant empowering an officer to enter a premises for the purposes for carrying out a lawful search or making a lawful arrest to be accompanied by other officers for that purpose, that the officer may nevertheless be accompanied by other officers in performance of that duty, in my judgment it cannot be fairly said that the issue raised was without merit, moreover, for the future the decision of the Court has a general application which will enure for the benefit of the State through its law enforcement agencies in respect of the entry into any dwelling for the purposes of effecting an arrest under s. 5 (1) of the Act.

19. Similarly, having regard to the functions, purposes and objects for which the second Respondent was established, the significance of ss. 12 and 13 of the Childcare Act, 1991 as amended, was emphasised in the forceful submissions made on behalf of the second Respondent during the course of the enquiry as accepted and evidenced in the principle judgment of the Court. However, I do not accept the submission now being made that the points raised and arguments advanced on behalf of the Applicants were "utterly baseless" a categorisation which, having conducted the enquiry is in my judgment unwarranted notwithstanding the resolution of those issues in favour of the Respondents.

20. On the contrary the provisions of s. 12 (1) of the Act fell to be interpreted for the first time in circumstances which could well be repeated at any of the seaports or airports of the State from which foreign aliens are being deported. Giving the words employed in s. 12 (1) a strictly literal meaning produced what was found to be a strained interpretation which would have produced an absurd result, namely, where a police officer was already in a premises at the time when the events giving rise to the invocation of the authority conferred by the section to enter and remove arose, the officer would have to leave and re enter the premises whereas this is not necessary on the purposive construction given to the provision

21. Accordingly, I am satisfied in all the circumstances, that the case is one which meets the requirements for the category of 'test case' in the sense spoken of by Clarke J. in Shackleton which warrants the Court in the exercise of its discretion to depart from the general rule that costs follow the event.

22. Insofar as the submissions in relation to the failure on the part of the Applicants to make application at the commencement of the proceedings pursuant to the provisions of the Custody Issues Scheme are concerned, it was quite properly accepted on behalf of the Applicants that in the exercise of its discretion in circumstances such as the present that the absence of an application to utilise the Scheme at the commencement of the proceedings was properly one of the factors be taken into consideration by the Court, though was not determinant of the issue. I accept that submission.

23. Having regard to the findings made and conclusions reached the Court considers in all the circumstances that the justice of the case is best served by making no order as to the Respondents costs and by allowing the Applicant's half of their costs, to include any reserved costs which, having regard to the nature purpose and object of the second Respondent as a State agency, should be paid by the first Respondent when taxed and ascertained.