Neutral Citation: [2016] IEHC 577

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 186 JR]

BETWEEN

S. F. (a minor suing by his father and next friend J. F.)

APPLICANT

AND

SECRETARY GENERAL OF THE DEPARTMENT OF EDUCATION AND SKILLS,

FIRST RESPONDENT

AND

THE MEMBERS OF THE APPEALS COMMITTEE

SECOND, THIRD AND FOURTH RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 3rd day of October, 2016

1. The applicant is a secondary school student who is said to suffer from autism and a number of associated conditions. On the 17th of September, 2015, the applicant's school was contacted by a social worker with the HSE who informed the school that the HSE had been advised by An Garda Síochána that a complaint had been made concerning the applicant of a very serious sexual assault against two other boys in a different school. On the 23rd of September, 2015, the school's board of management decided to suspend the applicant on a protective basis because of the potential risk to other students. The applicant was initially suspended for a period of ten days but the suspension was renewed from time to time until the applicant's solicitors wrote to the board of management on the 5th of November, 2015, enclosing a Notice of Appeal pursuant to s. 29 of the Education Act 1998. Pursuant to this notice, the first respondent convened an Appeals Committee whose members were the second, third and fourth respondents.

2. The Appeals Committee held a hearing into the case on the 8th of December, 2015. By letter dated the 5th of January, 2016, the Appeals Committee refused the applicant's appeal.

3. Following the making of the complaint, the applicant became the subject matter of an investigation by An Garda Síochána and an assessment by the Child and Family Agency, now Tusla. The agency wrote to the school on the 23rd of November, 2015, prior to the appeal hearing indicating that they were not in a position to advise the school whether the applicant should be in school or not pending the undertaking of a credibility assessment by a specialist team in respect of the alleged victims. Thereafter it was necessary for a specialist psychology assessment to be carried out on the applicant and all of these matters were still pending as of the date of the appeal.

4. Following the respondent's decision, and while the Tusla and Garda investigations were ongoing, the applicant applied to this court for leave to seek judicial review. Two reliefs were sought, first an order of certiorari quashing the Appeals Committee decision of the 5th of January, 2016, and secondly, an order remitting the matter back to the first respondent to be dealt with in accordance with law. In practical terms, this meant that if the claim succeeded, it would be remitted back to a newly constituted Appeals Committee for a new decision to be taken. The leave application was made on the 18th of March, 2016, when leave was granted by the court. Opposition papers were filed on the 27th of April, 2016, and an affidavit was sworn by the second respondent on that date. All issues raised by the applicant were fully contested.

5. On the 4th of May, 2016, the board of management of the school decided to revoke the applicant's suspension and he returned to school. This decision was arrived at following receipt of a risk assessment report completed by a psychologist on behalf of Tusla and it would appear that the decision by the board of management to lift the suspension was predicated upon this report. This in turn had the effect of rendering the applicant's proceedings herein moot and the matter was listed for hearing before me to determine the issue of costs. The applicant seeks his costs of the proceedings up to the date of the leave application. The respondents seek their costs in full. In essence, the applicant argues that the "event" for the purposes of O.99 r. 1 in this case was the lifting of the applicant's suspension and the costs should follow that event. The respondents on the other hand argue that the lifting of the applicant's suspension was entirely unrelated to the proceedings and as the claim has now been withdrawn, the applicants are entitled to their costs.

In *Cunningham v. President of the Circuit Court* [2012] 3 I.R. 222, Clarke J., delivering the judgment of the Supreme Court, considered that as a general rule (at para. 24):

> "a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot."

6. Similar views were again expressed by the Supreme Court in *Godsil v. Ireland and the Attorney General* [2015] IESC 103 where McKechnie J., speaking for the court, commented on the earlier decision of Clarke J. in the following terms:

> "[45.] In his judgment, with whom the other members of the Court agreed, Clarke J. stated that in normal circumstances where a case or an appeal had become moot by reason of the unilateral act of one party, then costs should be awarded against that party. Where that result followed from circumstances outside the control of either party, then ordinarily there should be no order for costs. Obviously there will be cases which do not fit comfortably into either of these categories: such, in the Court's view, will require individual consideration."

7. These principles were applied more recently by the Court of Appeal in *Benloulou v Minister for Justice and Equality* [2016] IECA 181 where Finlay Geoghegan J. said (at para. 16):

> "It appears to me that in taking that approach which obviously bound the High Court as it does this court, the question which the High Court had to address and which this Court has to address is whether the step taken by the respondent in a humane way and without acknowledgment of any legal liability, but which rendered the proceedings moot were to be considered as an event for the purposes of O. 99, r. 1(4). *Godsil* suggests that such a step should be considered to be an 'event' for the purposes of Order 99 rule 1(4) in circumstances where it can only reasonably be understood as being in direct response to the proceeding. In *Godsil* it was the proceedings as issued, in this case it is that the step taken by the Minister which rendered the application for leave moot can only be reasonably to be understood as being in direct response to the application for leave and having viewed it in that way it appears to me that the trial judge was entitled to consider that applying the approach of *Godsil* that he should consider that there was an event which indicated that the costs should follow that event and be awarded in favour of the applicant."

8. In *Cunningham*, Clarke J. was also of the view that the court may not, save in wholly exceptional circumstances, determine the substantive issues in the proceedings in order to arrive at an "event" for the purposes of O.99.

9. In the present case, it seems to me that the proceedings did not become moot as a result of any unilateral act of the respondents. The mootness arose as a result of the decision of a non-party, the board of management of the school, taken on the back of other investigations, ongoing at the time of the leave application, by other agencies again not party to the proceedings. The matters which gave rise to the moot were outside the control of either the applicant or the respondents. Furthermore, they appear to be quite unconnected to the existence of these proceedings. Indeed, even if these proceedings had been successful, they would not have brought about the event which the applicant now relies upon as constituting the moot viz. the lifting of the suspension. Had the matter proceeded to trial and the applicant been successful, the respondent's decision would have been quashed and remitted for further consideration by a new Appeals Committee which may well have come to the same conclusion but in any event a conclusion by then likely based on new evidence not available to the first Appeals Committee. In those circumstances, I am satisfied that there is no event which can be relied upon by the applicant in this case for the purposes of O.99.

10. With regard to the respondent's application for costs, the dicta of Clarke J. above cited suggests that where the moot arises from circumstances outside the control of either party, in the ordinary course of events there should be no order as to costs. The decision of Herbert J. in *Garibov v. Minister for Justice, Equality and Law Reform* [2006] IEHC 371 suggests that the test which should be applied by the court is to ask the question whether in the circumstances it was reasonable for the applicants to have commenced their application for leave to seek judicial review. However, it does seem to me that a determination of the reasonableness or otherwise of such a decision necessarily involves, to some extent at least, a consideration of the merits of the case, something which the Supreme Court subsequently indicated was impermissible save in wholly exceptional circumstances, which do not arise here.

11. Taking all matters into account, in my view the justice of the case requires that there should be no order as to costs.