THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 293

RECORD NUMBER 2021/007

Noonan J

Ní Raifeartaigh J.

Collins J

BETWEEN

J.O

B.O, G.O and P.O

(MINORS SUING BY THEIR MOTHER AND NEXT FRIEND

T.A.O

Applicants/Appellants

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr Justice Maurice Collins delivered on 3 November 2021

BACKGROUND

1. The Appellants appeal from the Order of the High Court (Ms Justice Burns) of 17 December 2020 (perfected on 19 December 2020) ("*the Order*") by which they were awarded one eighth of their costs of these proceedings. The Appellants say that they ought to have all of their costs. In the alternative, they say that they are entitled to a much higher proportion of those costs than the High Court Judge awarded.

2. The Order was made after a hearing on costs on 17 December 2020 and the Judge gave her reasons for it in an *ex tempore* ruling delivered immediately following that hearing. The costs hearing followed from a substantive judgment of the High Court given on 8 December 2020 ([2020] IEHC 648).

3. I shall set out the facts as briefly as possible. A more detailed statement can be found in the High Court's judgment of 8 December 2020.

4. The Appellants arrived in Ireland in April 2017 and immediately applied to the International Protection Office ("*IPO*") for international protection in the State. The Appellants are from Nigeria and had travelled to Ireland via the UK. In the

circumstances, a question arose as to which EU Member State – Ireland or the UK – was responsible for examining the applications, having regard to the provisions of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 ("*the Dublin III Regulation*"). Ultimately, the UK agreed to accept responsibility for the applications and agreed to accept the transfer of the Appellants to the UK and in July 2018 the IPO made a formal transfer decision in respect of the Appellants ("*the Transfer Decision*").

5. In July 2018, the Appellants appealed the Transfer Decision to the International Protection Appeals Tribunal ("*IPAT*") pursuant to Regulation 6 of the European Union (Dublin System) Regulations 2018 (SI No 62/2018) *("the 2018 Regulations*"). That appeal was ultimately determined against the Appellants, and IPT affirmed the Transfer Order on 9 November 2020 (subsequent to the institution of these proceedings).

6. Article 17(1) of the Dublin III Regulation provides that each Member State may decide to examine an application for international protection lodged with it by a third-country national or stateless person "*even if such examination is not its responsibility under the criteria laid down in this Regulation."*

7. Neither the 2018 Regulations nor the Regulations that it replaced (principally the European Union (Dublin System) Regulations 2014 (SI No 525/2014) expressly addressed Article 17 or identified the person or body by whom the option or discretion granted or recognised by it was exercisable in the State. Prior to the decision of the Supreme Court in *NVU v Refugee Appeals Tribunal and others* [2020] IESC 46, there

was significant uncertainty as to whether the Article 17 discretion was exercisable by the Minister for Justice and Equality ("*the Minister")* or by the bodies responsible for determining applications for international protection (originally the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal, now the IPO and IPAT). As and from 2017, the position of the Minister for Justice and Equality has been that the Article 17 discretion is exclusively exercisable by the Minister (having previously maintained a contrary position). Differing views had also expressed by different judges in the High Court. In *NVU*, O' Regan J concluded that the Article 17 discretion vested in the Minister ([2017] IEHC 490). However, some months later, in *MA (a Minor) v International Protection Appeals Tribunal* [2017] IEHC 677, in the context of making a reference to the CJEU pursuant to Article 267 TFEU, Humphreys J expressed a tentative view that the discretion was exercisable by the IPO and, in the event of an appeal, by IPAT. *NVU* then went on appeal to this Court and, in a judgment given by Baker J (Irvine and McGovern JJ agreeing) the Court held that the Article 17 discretion was exercisable by the "*determining body*", i.e. the IPO and IPAT: see [2019] IECA 183.

8. That decision was in turn reversed on appeal to the Supreme Court in a decision given on 24 July 2020. From that point onwards, it has been clear that the Article 17 discretion vests in the Minister exclusively.

9. While this issue was on its path to final resolution, a large number of cases in which the issue was raised were placed in a holding list in the High Court (the "*AZ Holding List*") which, we were told, ultimately included some 200 cases. By virtue of paragraph 8(2)

of High Court Practice Direction 81, the execution of the transfer decision was stayed in those cases pending the outcome of *NVU*. This stay is referred to in the papers as the "*global injunction"* and I shall use that nomenclature also.

10. On 15 September 2020 – prompted presumably by the Supreme Court's decision in *NVU* – the Appellants' solicitors wrote to the Minister making an application for "*discretionary relief under Article 17(1)".* At that point, the Appellants' appeal before IPAT was still pending. The letter asserted that, if transferred to the UK, the Appellants' rights under the European Convention on Human Rights (the *"ECHR*") and Charter of Fundamental Rights of the European Convention ("*the Charter*") would not be guaranteed because (so it was said)*"the 'rule of law' no longer pertains in the UK*". The letter went on to assert specifically that the Appellants would be at risk of detention in the UK and suggested more generally that there were "*systemic deficiencies*" in the UK's international protection system. In that context, reference was made to the (UK) Internal Market Bill which, it was said, "*was widely viewed as a breach of international law."* Many of the points made in this letter repeated grounds which had already advanced by the Appellants before the IPO and IPAT (the Appellants had raised Article 17 before each body and asserted that they were vested with the discretion provided for by it). All of this led to a request to the Minister to cancel the Transfer Decision "*with immediate effect*" or, in the alternative, to provide an undertaking that the Appellants would not be transferred pending the determination of the "*application for Art 17 relief"*. Finally, the letter requested the Minister to grant "*discretionary relief under Art 17"* so as to permit the Appellants to continue with their application for international protection in the State. The letter threatened proceedings to enjoin the transfer unless a

satisfactory response was received by 30 September 2020.

11. In response, it was noted on behalf of the Minister that the Appellants' case was currently pending before IPAT.

12. On 5 October 2020 the Appellants withdrew their request for Article 17 relief from IPAT but at the same time made a detailed submission to the Tribunal asking it to set aside the Transfer Decision under Article 3(2) of the Dublin III Regulation.

13. The Minister's response did not satisfy the Appellants and on 19 October 2020 they applied *ex parte* for leave to issue these proceedings. The reliefs sought in the Statement of Grounds included a declaration that the transfer of international protection applicants to the UK would be in breach of Article 3(2) of the Dublin III Regulation (an issue which by then was also before IPAT) and *certiorari* of the Transfer Decision, as well as an order of *mandamus* to compel the Minister to determine the Article 17 request. In addition, an injunction restraining the removal of the Appellants was sought "*if required*." The grounds closely reflected the contents of the letter of 15 September 2020.

14. The Judge directed that the application for leave be heard on notice to the Respondents. Subsequently (on or about 16 November 2020), the Judge gave the Appellants permission to amend their Statement of Grounds. The Amended Statement of Grounds no longer sought the declaration regarding Article 3(2) or the order of *certiorari* but sought two new declarations, one to the effect that the "*uncertainty*" surrounding

Article 17 was in breach of the Appellants' right to fair procedures and effective remedies in Irish and EU law and the other to the effect that the "*imminent cessation*" of the application of EU law (and particularly the Dublin III Regulation) in the UK "*deprive[d] the implementation of any transfer decision of lawfulness*". These new reliefs were supported by additional grounds which asserted (*inter alia*) that the Appellants were entitled to an Article 17 decision prior to transfer and that the decision to transfer should be vitiated in light of the imminent withdrawal of the UK from the Common European Asylum System.

15. The Minister delivered a Statement of Opposition pleading to the Amended Statement of Grounds and opposing the granting of any of the reliefs sought by the Appellants.

16. The proceedings came on for hearing before Burns J on 27 November 2020, alongside a number of other similar applications (given the imminent end of the Brexit transition period on 31 December 2020, there were many challenges to transfers to the UK at that time). The hearing proceeded as a "*telescoped"* or rolled-up hearing whereby the Court would determine whether leave should be granted and, if so, would proceed to determine the substantive proceedings without the necessity for any further hearing. At that stage, the High Court had, on the application of the Minister, lifted the global injunction but had also made an order restraining the transfer of the Appellants to the UK, presumably pending the determination of the proceedings (no order appears to have been drawn recording the precise terms of the order). When the High Court came to deal with the issue of costs, the Appellants were awarded the costs of that application and that order is not the subject of appeal.

17. In any event, the hearing commenced on 27 November. One of the points of dispute was whether there was an obligation on the Minister to make a decision on the Article 17 application prior to the Transfer Decision being executed. The Appellants asserted that there was such an obligation. However, while the Minister accepted that she was obliged to make a decision on the application, her position was that a reasonable period for making that decision had not yet expired. She also maintained that, as a matter of law, she was not obliged to make a decision on the application in advance of the execution of the Transfer Decision. According to the Minister, a decision on the Article 17 application could lawfully be made after transfer. In the event that such decision was favourable to the Appellants, they would be permitted to return to the State and their applications for international protection would then be examined and determined here. The Minister apparently prayed in aid the provisions of Article 29(3) of the Dublin III Regulation in support of that position.

18. The hearing did not conclude on 27 November and was adjourned for further hearing to 2 December 2020. On the resumption of the hearing, Counsel for the Minister indicated to the Court that she would make a decision on the Article 17 application by 15 December 2020. The hearing then proceeded to a conclusion and the Court reserved judgment.

19. The Court gave judgment on 8 December 2020. The Judge considered that the order of *mandamus* and the declaration regarding the uncertainty surrounding Article 17 no longer fell for consideration in light of the Minister's indication that she would

determine the Article 17 application by 15 December 2020 (Judgment, at para 13). She noted that a significant issue had arisen at the hearing as to when the Article 17 application had been made (the Appellants had argued that the application had been made in 2018 when they had requested the IPO to exercise discretion in their favour, whereas the Minister's position was that a valid application was only made in September 2020). However, the Judge thought that that issue, in the circumstances, was significant only in the context of costs (also at para 13). As we shall see, the Judge in due course took the view that the application to the Minister was made only in September 2020.

20. The Judge then proceeded to consider the Appellants' argument that the imminent cessation of the application of EU law in the UK made implementation of the Transfer Decision unlawful. In her view, the decision of the CJEU in Case C-661/17, *MA v International Protection Appeals Tribunal* [2019] 1 WLR 4975 – the decision on the reference that had been made by Humphreys J in the High Court - was determinative of the issues raised by the Appellants. The Dublin III Regulation remained operative in the UK until the end of the transition period and, accordingly, "*transfers to the United Kingdom must continue to be effected under the Dublin III Regulation unless the [Minister] exercises her discretion pursuant to Article 17 not to effect the transfer"* (Judgment, at para 16).

21. The Judge went on to criticise various aspects of the Statement of Grounds. While some of those criticisms appear to be focused on the Statement of Grounds as originally filed, at least some of her observations apply to the Amended Statement of Grounds also. In

her view, a "*significant portion*" of the legal grounds failed to relate to the reliefs sought and to the parties joined. She noted that the Transfer Decision was challenged even though IPAT had not been joined and also noted that the proceedings had been commenced prior to the Transfer Decision being affirmed by IPAT. She went on to address one specific ground relating to the Internal Market Bill, holding by reference to her own decision in *AHS v IPAT* [2020] IEHC 647 that the Bill did not raise substantial grounds to believe that there were systematic flaws in the asylum procedure and in the reception conditions for applicants for international protection in the UK such as would amount to a breach of Article 3(2) of the Dublin III Regulation (Judgment, at para 20). She also addressed a further ground complaining of the lack of a *"transparent system"* for determining Article 17 applications, noting that in *NVU* O' Regan J had found that there was no requirement for the Minister to publish a policy or criteria in respect of the exercise of the Article 17 discretion. The Judge noted that a formal application to the Minister to exercise her discretion under Article 17 had been made on 15 September 2020 and that the Minister had indicated that a decision on the application would be given by 15 December 2020, the Transfer Decision having only been confirmed on 9 November 2020. In her view, no issue arose in terms of transparency "*having regard to that timeline"* (Judgment, at paras 21-22).

22. The Minister actually made her decision on the Article 17 application on 16 December 2020. She did not exercise her discretion to have the Appellants' applications for international protection examined in this jurisdiction. However, the Appellants were not in fact transferred to the UK by 31 December 2021 and, as a result, Ireland was obliged to accept responsibility for determining their applications in any event.

THE COSTS RULING IN THE HIGH COURT

23. The Judge dealt with costs on 17 December 2020. As already noted, she awarded the Appellants the costs of the Minister's motion to lift the global injunction. She then addressed the costs of the proceedings. There were, she said, "*significant issues*" that the court was not happy about. She noted again that the proceedings had been brought while the appeal before IPAT was still pending which she characterised as "*quite unusual*". No transfer decision was in being at that time in light of the appeal before IPAT and there was no necessity for the proceedings at the time they were launched (the Judge was clearly aware that a transfer decision had in fact been made by the IPO and clearly meant that there was no *enforceable* transfer decision in being as of 19 October 2020 by reason of the operation of Regulation 6 of the 2018 Regulations). Furthermore, the application to the Minister had only been made on 15 September 2020 (the Judge did not accept that the application made to the IPO ought to be regarded as an application to the Minister). Therefore, in her view, the proceedings had been instituted in advance of IPAT determining the validity of the Transfer Decision and before the Minister had an opportunity to consider the Article 17 issue. Later in her ruling, the Judge observed that the proceedings were brought "*at a stage that was far too early"* and it is clear from the Judge's ruling that she was of the view that the Minister was entitled to await the determination of the appeal before IPAT before considering the Article 17 issue. As regards the form of the proceedings, the proceedings were drafted in a manner that was not appropriate though they had been got into "*some form of stateable basis*" by the time they were heard.

24. For all of that, the Judge went on, the Appellants clearly had had a "*win*" in that the Minister had agreed to determine the Article 17 application by 15 December 2020. However, that "*win*" was limited in terms of its nature and extent and there were a lot of other matters where there had not been any event or any win for the Appellants. A *"significant argument"* had been made about the effect of the UK withdrawal. As regards the effect prior to 31 December 2020, the position was clear from *MA* and the Appellants could not have succeeded on that issue in light of that decision. As regards the period post 31 December 2020, a significant amount of time had been taken up with that issue notwithstanding the Minister's indication that she would make a decision by 15 December 2020.

25. Re-iterating that the court was not happy that the proceedings were instituted or how they were instituted, the Judge indicated that she was not going to grant the Appellants a quarter of their costs (the order that she had made in at least one of the cases which had been heard with these proceedings). She would impose "*a form of penalty in relation to the difficulties with the proceedings*" which she had expressed and would grant an order for one eighth of the costs, to be adjudicated in default of agreement. That is the order the subject of this appeal.

ARGUMENT

26. The Appellants say that the Minister's announcement that she would make a decision on the Article 17 application by 15 December 2020 had the effect of rendering the proceedings "*substantially moot*". *Mandamus* had been the "*primary relief"* sued for. That, and the other "*main issue"* – whether the Minister was obliged to make a decision on the Article 17 application prior to transfer – were rendered moot. The principal purpose of the proceedings was to obtain a Ministerial decision and thus the Appellants had been "*entirely successful"* for the purposes of section 169(1) of the Legal Services Regulation Act 2015 (the "*LSRA*"). They were therefore entitled to the entirety of their costs. In any event, they had been "*substantially successful"* and costs should follow in their favour. The change in the Minister's position was a *"unilateral act"* which was brought about by the proceedings and which resulted in the Appellants obtaining "*the main relief*". In such circumstances, having regard to authority including *Cunningham v President of the Circuit Court* [2012] 3 IR 222, *Godsil v Ireland* [2015] 4 IR 535, *Matta v Minister for Justice and Equality* [2016] IESC 45, *MKIA (Palestine) v International Protection Appeals Tribunal* [2018] IEHC 134 and *Hughes v Revenue Commissioners* [2021] IECA 5, the Appellants were entitled to their costs. Finally, the Appellants said that the Judge was wrong to impose any costs penalty. Any problems about the terms of the original Statement of Grounds had been resolved by the time the proceedings came on for hearing. Insofar as the Judge criticised the proceedings as premature because they were commenced before IPAT determined the Regulation 6 appeal, that determination had been given on 13 November, before the hearing commenced and before the Minister committed to a decision by 15 December. Even if

some deduction was warranted (and the Appellants noted that in other "*similar cases*", the applicants had been awarded a quarter of their costs), a "*less drastic deduction"* was appropriate.

27. In her submissions, the Minister disputes the suggestion that the Appellants were entirely or substantially successful. As the Judge had acknowledged, they had had a "*win*" but it was a limited one. Even taking the Appellants' arguments at their height, the Judge was entitled and obliged to have regard to the factors set out in section 169(1) LSRA in exercising her discretion on costs. The Judge had taken the view that the proceedings had been brought prematurely, that the Appellants had raised issues which had already been determined (and in respect of which the Appellants were not successful) and that various matters had been pleaded inappropriately. Having regard to section 169(1)(a), (b) and (c) the Judge was clearly entitled to decide to award the Appellants only a portion of their costs and had sufficiently explained her reasons for doing so.

28. In the course of the appeal hearing, the Court inquired whether the *Cunningham* line of authority had been opened to the Judge. Counsel for the Minister indicated that, as far as he could recall, it had not been opened. Counsel for the Appellants did not recall either way.

ANALYSIS

Appellate Review of Costs Orders

29. It is important at the outset to identify the approach to be adopted by this Court when it is asked to review costs orders made by the High Court.

30. This issue has been considered in a number of Supreme Court decisions and also in many decisions of this Court. These decisions are not always expressed in precisely the same language and some differences of emphasis and nuance are discernible. However, the following propositions can, I think, be advanced with a measure of confidence:

(1) While costs orders are discretionary, this Court nonetheless has *"full appellate jurisdiction in respect of such orders": Godsil v Ireland* [2015] IESC 103, [2015] 4 IR 535, per McKechnie J (Dunne and Charleton JJ concurring) at para 65, citing *In bonis Morelli; Vella v Morelli* [1968] IR 11.

(2) It follows that the Court " *may substitute its own discretion in place of that of the trial judge": Mangan v Independent Newspapers* [2003] 1 IR 442**,** per McCracken J (Geoghegan and Fennelly JJ concurring) at 447.

(3) The jurisdiction "*is not dependent on having to establish an error of law or otherwise on proving that in the exercise of such discretion the trial judge acted erroneously"* (*Godsil,* at para 65)

(4) At the same time, however, an appellate court "*will, in general, be slow to interfere with the exercise of a trial judge's discretion in awarding costs": MD. v ND* [2015] IESC 66, [2016] 2 I.R. 438, per McMenamin J (dissenting in the result), at para 46.

(4) Furthermore, an appellate court "*should not simply substitute its own assessment of what the appropriate order ought to have been but should afford an appropriate deference to the view of the trial judge who will have been much closer to the nuts and bolts of "the event" itself": Nash* ***v*** *DPP* [2016] IESC 60; [2017] 3 I.R. 320, per Clarke J (as he then was) ((Denham CJ and O' Donnell, Dunne and Charleton JJ concurring), at para 67.

(5) Absent some error of principle on the part of the trial judge, an appellate court should intervene only where it "*feels that the exercise by the trial judge of an assessment in relation to costs has gone outside of the parameters of that margin of appreciation which the trial judge enjoys": Nash,* at para 67. Where the costs order is "*within the range of costs orders which were open to the trial judge within the margin of appreciation which must be afforded to a High Court judge",* there will be no basis for appellate intervention: *Nash*, para 73.

Sections 168 and 169 LSRA and Order 99 RSC

31. The issues of costs here fell to be determined by reference to the new regime introduced by Sections 168 and 169 LSRA (which came into effect in October 2019) and the recast

Order 99 RSC (which came into effect in December 2019).

32. These provisions have been considered in a number of decisions of this Court, including two decisions to which we were referred, *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183 and *Higgins v Irish Aviation Authority* [2020] IECA 227.

33. In *Higgins v Irish Aviation Authority*, Murray J (Noonan and Binchy JJ agreeing) considered that the costs provisions of the LSRA, viewed in the light of Order 99, Rule 3(1) RSC, required the court to address the following four questions:

> *"(a) Has either party to the proceedings been 'entirely successful' in the case as that phrase is used in s.169(1)?*
>
> *(b) If so, is there any reason why, having regard to the matters specified in s.169(1)(a) – (g), all of the costs should not be ordered in favour of that party?*
>
> *(c) If neither party has been 'entirely successful' have one or more parties been 'partially successful' within the meaning of s. 168(2)?*
>
> *(d) If one or more parties have been ' partially successful' and having regard to the factors outlined in s.169(1)(a)-(g) should some of the costs be ordered in favour of the party or parties that were 'partially successful' and if so, what should those costs be?"* (at paragraph 9)

34. As is apparent from *Higgins*, each of these questions potentially gives rise to further issues and argument – not least what is meant by the term "*entirely successful*" in section 169(1) – but they nonetheless provide a useful framework for analysis.

The Cunningham Jurisprudence

35. *Cunningham* and the jurisprudence following from it addresses the issue of where costs should fall when proceedings become moot. In *Hughes v Revenue Commissioners* [2021] IECA 5, Murray J (Costello and Pilkington JJ agreeing) extracted three broad propositions from the cases. The first is that where proceedings have become moot as a result of an event entirely independent of the actions of the parties to the proceedings, the fairest outcome will generally be that the parties should bear their own costs. The second is that, where mootness arises because of the actions of one of the parties alone and where those actions (a) can be said to follow from the fact of the proceedings so that but for the proceedings they would not have been undertaken, or (b) are properly characterised as '*unilateral'* or – perhaps – (c) are such that they could reasonably have been taken before the proceedings, or before all of the costs ultimately incurred in the proceedings were suffered, the costs should often be borne by the party whose actions have resulted in the case becoming moot. The third and final general proposition identified by Murray J is addressed to the particular position of statutory bodies and recognises that agencies with obligations in public law cannot be expected to suspend the discharge of their statutory functions simply because there are extant legal proceedings arising from a prior exercise of their powers and must remain free to

exercise those powers in accordance with the legal obligations. At the same time, it would be wrong to permit a statutory authority, under the guise of exercising their powers in the ordinary way, to effectively concede an extant claim and avoid the costs consequences that would usually flow from such a concession. The court should therefore look at the circumstances giving rise to the new decision and see whether the new decision was prompted by a change in circumstances (*Hughes*, at paras 31-33)

36. Murray J was careful to emphasise that each of these propositions presents 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. They are thus properly viewed as presenting a framework for the application of the Court's discretion in the allocation of costs in a particular context and should not be applied inflexibly or in an excessively prescriptive manner."* (at para 34)

37. This is a key point and one that was also made by Clarke J in *Cunningham* itself where he observed that courts should not be "*overly prescriptive*" in the application of any "*rule*" in this context and also recognised that any such rule might be displaced by "*significant countervailing factors*" (*Cunningham*, at para 24). Similarly, in *Godsil,* McKechnie J observed that the court should not be "*over prescriptive in setting out rules of general application which thereafter, as a matter of routine, would feed into individual cases*" noting that "*there will be many situations displaying multiple and*

variable factors all calling for separate evaluation." (*Godsil*, at para 46). The *Cunningham* "*rules*" are not - and ought not to be applied as if they were - statutory rules, less still absolute or unqualified statutory commandments. As Murray J observed in *Hughes*, they are intended simply to guide the exercise of the court's over-riding discretion in the area of costs, not to eliminate that discretion or exclude consideration of the "*multiple and variable factors"* that potentially fall for assessment in this context.

38. Where a public body facing legal proceedings makes a decision, or takes some other action, the effect of which is to render the proceedings moot, the proper characterisation of that action may not be straightforward. At one end of the spectrum, the action may amount to a concession that the proceedings were well-founded. Such was the position in *Godsil*: in McKechnie J's view, the enactment of the Electoral (Amendment) Act 2014 could only be understood as being in "*direct response to the proceedings as issued*" and as "*an explicit acknowledgement and admission of the legal validity of the challenge as mounted*." (*Godsil*, at para 63). In such circumstances, it is unsurprising that the Supreme Court took the view that there was an "*event*" that the costs should follow in the ordinary way, at least in the absence of particular factors warranting a departure from the ordinary rule.

39. At the other end of the spectrum, the action rendering the proceedings moot may have no causal connection with the proceedings and may instead be due solely to external factors and/or a change in circumstances. In such a scenario, it may not be appropriate to characterise the action of the public body as a "*unilateral act*" within the *Cunningham* taxonomy and, in that event, the court should ordinarily lean in favour of

making no order for costs: *Cunningham*, at paras 24-28. *Matta v Minister for Justice, Equality and Law Reform* [2016] IESC 45 provides an example of such a case.

40. Between these two poles many different situations may present themselves. The *Cunningham* jurisprudence appears to suggest that, if there is any "*causal nexus*" between the proceedings and the action of a public body causing the proceedings to be rendered moot, the public body should ordinarily bear the costs. Such an approach arguably paints with too broad a brush. One can readily see the force of that approach where a public body simply changes its mind and effectively concedes a disputed claim. But applying such an approach too rigidly runs the risk that public bodies may be deterred from responding pragmatically to legal challenges – such as by accelerating the making of a decision that the body is obliged to make in any event - for fear of adverse costs consequences. This issue may warrant further debate in an appropriate case.

Discussion and Conclusions

41. Insofar as the Appellants suggest that they were "*entirely successful"* in their case against the Minister, that is plainly not so in my view. In fact, each of the issues addressed in the High Court's Judgment of 8 December 2020 was decided against the Appellants and the Court refused the declaratory relief sought at (d)(3) of the Amended Statement of Grounds (which was directed to the lawfulness of any transfer of the Appellants in light of imminent expiry of the Brexit transition period). In those circumstances, the Judge was clearly entitled to take the view that the Appellants had

not been "*entirely successful"*. It followed that there the Appellants had no presumptive entitlement to their costs under section 169(1) LSRA.

42. The Judge clearly took the view that the Appellants had been "*partially successful*". As she put it, the Appellants had had a "*win*", albeit a limited one. That "*win*" clearly involved the securing of a commitment from the Minister to make a decision on the Article 17 applications by 15 December 2020, which had rendered moot the claim for *mandamus*, as well as the first declaration sought by the Appellants. In characterising this as a "*win*" for the Appellants, the Judge's approach was entirely consistent with the *Cunningham* jurisprudence (whether or not that jurisprudence was in fact cited to her).

43. In light of the Judgment of 8 December 2020, it is clear that the Minister was also *"partially successful"* in the proceedings.

44. Overall, the Judge took the view that an order for costs should be made in favour of the Appellants. As a matter of principle, such an order was clearly within her discretion, bearing in mind the terms of Section 168(1) LSRA and Order 99, Rule 2(1) RSC. In addition, section 168(2) LSRA expressly provides that, where a party is partially successful in the proceedings, the other party *may* (not, it should be noted, *shall*) be ordered to pay the *"costs relating to the successful element or elements of the proceedings".*

45. The Judge was also obliged to have regard to the factors set out in section 169(1) LSRA in exercising her discretion. These included (a) *"conduct before and during the*

proceedings", (b) "*whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings"* and (c) *"the manner in which the parties conducted all or any part of the cases."* As is evident from both her Judgment and her Costs ruling, the Judge was very critical of the manner in which the proceedings had been initiated and how it had been progressed and presented. While the Appellants take issue with these criticisms, they have not demonstrated any basis on which this Court could properly conclude that the Judge was not entitled to take the view that she did. The Judge dealt with all aspects of the proceedings from their commencement and was therefore in a much better position than this Court is to make an assessment of how the proceedings were presented and the extent to which the time and resources of the Court (and of the Minister) may have been wasted. That is particularly so in circumstances where this Court has not been furnished with transcripts or other records of the various hearings before the Judge.

46. As regards the specific criticisms made by the Appellants, it was said in argument that the Judge was wrong to conclude that the Article 17 application was only made to the Minister in September 2020. That finding is not challenged in the Appellant's Notice of Appeal. In any event, it appears to me that it was open to the Judge to take that view: indeed, it is difficult to see how any other conclusion could have been open to her. The Appellants had previously made Article 17 submissions to the IPO and to IPAT in 2017/2018. The Appellants could have made such an application to the Minister at that stage but appear to have deliberately elected not to do so, based on their asserted position that the Minister was not the competent authority. The submissions made to the IPO and IPAT could not retrospectively be recast as constituting an application to

the Minister. The fact that the application to the Minister was only made on 15 September 2020 was something that the Judge was entitled to have regard to, in circumstances where the proceedings were commenced less than five weeks later, at a time when the Appellants appeal was still pending before IPAT. In these circumstances, it was open to the Judge to take the view that the proceedings had been brought prematurely and before the Minister had had a reasonable opportunity to reach a decision on the Article 17 applications.

47. As regards the further specific criticism made by the Appellants to the effect that it was unfair of the Judge to rely on the terms of the original Statement of Grounds in circumstances where an Amended Statement of Grounds had subsequently been served, that criticism is, in my view, misplaced. It is clear that Court time (and, presumably, time of the Minister also) was taken up – wasted - dealing with the original Statement of Grounds. It is entirely reasonable that that should have had costs consequences for the Appellants. That is particularly so in the context of a very busy list with many urgent demands on the resources of the Court. In any event, it is evident from the Judgment and Costs ruling that the Judge considered that issues arising from the way that the Appellants' case was pleaded remained even after the amendment of the Statement of Grounds and that issues were advanced in that amended Statement of Claim that ought not to have been pursued.

48. The Judge was, in my view, clearly entitled to take the view that these matters should impact on the costs to be awarded to the Appellant. While the Judge herself characterised such a reduction as a "*a form of penalty*", I do not consider such language

apt. Rather than involving any form of penalty, such a reduction is properly understood as the consequence of the application of the statutory factors in section 169(1)(a)-(c) in the context of the exercise of the High Court's over-riding discretion in respect of costs. They are, to use the language of Clarke J in *Cunningham*, "*countervailing factors*" which, where applicable, can operate to reduce the costs that might otherwise be recoverable by a party who has been successful in litigation. Such a reduction is clearly contemplated by section 169(1).

49. The Appellants say that the order made by the Judge fails to reflect the fact that they were "*substantially successful"* in the proceedings. They say that *mandamus* was the *"primary relief*" sought by them and that it was effectively conceded by the Minister. However, the suggestion that the principal object of the proceedings was simply to compel the Minister to make a decision on the Article 17 application – whether positive or negative – is difficult to accept. The original Statement of Grounds went far beyond that. The Amended Statement of Grounds also included many grounds directed to preventing the transfer of the Appellants to the UK. As already noted, the declaration sought at (d)(3), if granted, would have had that effect. Obtaining a decision from the Minister was hardly an object in itself: rather the Appellants were looking for a decision – whether from the Minister or from the High Court – that would result in the effective reversal of the Transfer Decision. The Minister's commitment to make a decision on the Article 17 application by 15 December 2020 effectively amounted to no more than a commitment to accelerate a decision that the Minister was in any event bound to make (albeit not within any specific time-frame). The Minister made no commitment to make a favourable decision on the application and, in the event, she did not do so.

Furthermore, it is clear that, as far as the Appellants were concerned, the commitment given by the Minister did not render the proceedings moot. There were further issues raised by the proceedings which the High Court was asked to determine and which it proceeded to determine against the Appellants. As already noted, if the Appellants had succeeded in obtaining the relief sought at (d)(3), their transfer to the UK would have been prevented, regardless of what view the Minister might take on the Article 17 application. It is clear therefore that was a significant aspect of the proceedings and was one in respect of which the Appellants were unsuccessful. In these circumstances, the Judge was entitled to take the view that the "*win"* achieved by the Appellants was limited in its nature and extent.

50. There is no doubt but that a very limited costs order was ultimately made by the Judge. However, in light of the fact that they had only been "*partially successful"* in the proceedings, the Appellants could not have had a realistic expectation of getting their full costs. The realistic starting point was significantly less than 100%. The assessment of the appropriate level of costs to award in light of the additional factors referred to above, including the question of weight to be given those factors individually and cumulatively, was then a matter for the judgment of the Judge. She was not, of course, entirely at large and she was obliged to explain the judgment that she reached. While her reasoning was brief, it was adequate in all the circumstances.

51. The Appellants have not demonstrated any error of law or principle on the part of the Judge. That does not, of course, exhaust this Court's inquiry. The Court is entitled to intervene even in the absence of such an error (*Godsil)*. But it should do so only where

the Judge's assessment "*has gone outside of the parameters of that margin of appreciation which the trial judge enjoys*" (*Nash)*. The fact that it was open to the trial judge to have made a different costs order is not, in itself, a sufficient basis for intervention. Neither is it sufficient that this Court might have made a different order if it had been in the position of the trial judge: this Court *"should not simply substitute its own assessment of what the appropriate order ought to have been"*(*Nash*).

52. Affording an appropriate deference to the view of the Judge – who was *"much closer to the nuts and bolts of 'the event' itself*" (*Nash*) – I do not consider it can properly be said that her assessment was outside the reasonable range of assessment or that the order made by her fell outside the range of orders which it was reasonably open to her to make. That being so, for this Court to interfere with the Judge's order would involve the illegitimate substitution of its assessment for that of the Judge.

53. Accordingly, the appeal must be dismissed. As the appeal of the Appellants has been entirely unsuccessful, it would appear to follow that they should be required to pay the costs of the appeal. If the Appellants wish to contend for any different order, they will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, the Appellants may be liable for the additional costs of such hearing: In default of receipt of such application, an order in the terms proposed will be made.

Noonan and Ni Raifeartaigh JJ have authorised me to record their agreement with this

judgment and with the orders proposed.