THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 528 J.R.]

BETWEEN

KAMLESH GOOLGAR, KATARZYNA JADWIGA STALICA AND EMMA GOOLGAR (AN INFANT SUING BY AND THROUGH HER MOTHER AND NEXT FRIEND KATARZYNA JADWIGA STALICA)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of January, 2018

1. The first-named applicant is a Mauritian national, the second-named applicant is a Polish citizen and the third-named applicant is their child. The first-named applicant arrived in the State on 3rd October, 2007 on a student permission. That was due to expire on 25th November, 2008 but was cancelled because the first-named applicant was not attending his course. He undertook to leave the State by 27th December, 2008 but did not do so, and remained in the State unlawfully thereafter. He was issued with a deportation order in July, 2011 and evaded his reporting obligations until his arrest at a later stage.

2. The second-named applicant arrived in the State in May, 2012. The parties met in August, 2013 and the third-named applicant was born on 7th January, 2015.

3. The first-named applicant was arrested on 14th June, 2018 and was detained in Cork Prison. His solicitors then sought to regularise his position and made a number of applications – a request to revoke the deportation order under s. 3(11) of the Immigration Act 1999, an application for an EU residence card and an application for permission pursuant to the CJEU decision in C-34/09 *Ruiz Zambrano*. Those applications appear to have been dated 18th June, 2018 and received on or about 25th June, 2018, although the dates on the papers are not entirely consistent.

4. The present proceedings were then issued and an application for leave and for an injunction was made to Keane J. on 2nd July, 2018. In an *ex tempore* judgment on that date, Keane J. granted partial leave for the declaratory relief at E2 of the statement of grounds, on the grounds set out at para. F1 of the statement. An injunction was refused. The first-named applicant was nonetheless released on 6th July, 2018 and the respondent gave an undertaking not to deport him until the s. 3(11) application had been dealt with.

5. The proceedings were then adjourned from time to time. On 17th September, 2018 the applicants submitted DNA evidence confirming that the first-named applicant was the father of the third-named applicant. On 25th September, 2018, the Department of Justice and Equality prepared a recommendation that the first-named applicant should be given permission as a permitted family member, subject to the revocation of the deportation order. On 9th October, 2018 that deportation order was revoked. An EU residence card was then granted to the first-named applicant on 6th December, 2018.

6. As it is agreed that the proceedings are now moot, the only remaining issue is costs, and in that regard I have heard helpful submissions from Mr. Ian Whelan B.L. for the applicants and from Mr. Daniel Donnelly B.L. for the respondent.

7. The applicable principles are those set out by the Supreme Court *inter alia* in *Cunningham v. President of the Circuit Court* [2012] IESC 39 [2012] 3 I.R. 222, *Godsil v. Ireland* [2015] IESC 103 [2015] 4 I.R. 535 and *Matta v. Minister for Justice and Equality* [2016] IESC 45 (Unreported, Supreme Court, 26th July, 2016). I have discussed these principles in *M.K.I.A. (Palestine) v. International Protection Appeals Tribunal* [2018] IEHC 134 [2018] 2 JIC 2708 (Unreported, High Court, 27th February, 2018).

8. Depending on the situation, a possible distinction may exist between the costs of moot proceedings overall and costs of any particular element of them. Dealing with the proceedings overall first, one must pose the question as to what rendered the proceedings moot. Given the nature of the grounds asserted in para. F1 of the statement of grounds, the proceedings were not rendered entirely moot by the release of the first-named applicant from custody or by the undertaking or by the revocation of the deportation order, but were only finally rendered moot by the grant of the permission under the EU free movement directive 2004/38/EC.

9. The next question is whether that involves an "event" for the purposes of the law on costs. To some extent, insofar as the applicant sought to assert rights by way of EU free movement, those rights have ultimately been acknowledged in the decision, so to that limited extent there is an event in the sense of an acknowledgement of the applicants' rights. The problem for the applicant is the question of whether that event is related to the proceedings and in a basic sense it's not. The primary causative factor as to why the application was granted was because it was made. Once an applicant makes an application it will be decided in due course at some time. The fact that an applicant seeks injunctive or declaratory relief does not fundamentally change the dynamic that the whole case is based on having made an application which would be decided in due course. An applicant does not get an entitlement to costs simply because they issue proceedings seeking declarations about an application that is going to be decided anyway.

10. The grant of declaratory relief is equitable and discretionary in the sense that merely because something is legally or factually the case does not mean that any and all persons potentially affected are entitled to a form of declaration from the High Court that that is so.

11. Another element in the present case is that the applicants have had since 7th January, 2015 to make an application based on their family situation. That was only made when the first-named applicant was in custody, thus depriving the Minister of a reasonable time to make the necessary enquiries. That certainly does not help their position in relation to costs.

12. While the application of the Supreme Court jurisprudence on the costs of moot proceedings to an individual case can be a matter of degree, here, applying that caselaw, the ultimate resolution of the matter in favour of the applicants was because the application

was made, not because of the proceedings as such, so the court should lean in favour of no order as to costs.

13. As regards the injunctive element of the case, that was rendered moot by the respondent's undertaking. However, the question of injunctive relief wasn't a live issue at that point because an injunction had been refused by Keane J. and nothing was happening at that stage by way of an appeal or an interlocutory application, even if theoretically that could have been done. Under those circumstances, while in other possible cases an undertaking might amount to a concession by the State as regards the injunctive aspect of the case, that is not so here because the applicants had been unsuccessful in relation to the injunction and weren't taking any steps to challenge that. Whether one thinks an injunction should have been granted by Keane J. or not, that is water under the bridge and I cannot engage in some form of parallel review of a decision of a court of co-ordinate jurisdiction, so I have to take it as a fact that that injunction was refused and that refusal was not appealed or otherwise challenged. So while acknowledging the very helpful and thorough submissions of Mr. Whelan, I must, albeit without any great enthusiasm (given that I do have some sympathy for the applicants), come to the conclusion that the only tenable way to act consistently with the Supreme Court caselaw in relation to mootness in the present circumstances is to make no order as to costs. If the present case could have been credibly distinguished from other cases where a person is in a queue awaiting a decision then it might have been possible to give more favourable consideration to an order of some kind in favour of the applicants, but obtaining leave to institute proceedings seeking declaratory relief (or indeed any other features of the present case) do not withstand serious analysis as a credible basis for such a distinction because such an approach would rapidly erode the Supreme Court's jurisprudence on this issue.

14. Accordingly there will be no order as to costs.