

THE HIGH COURT

[2020 No. 337 JR]

BETWEEN

E, F, AND Z (A MINOR) SUING BY HER MOTHER AND NEXT FRIEND, F

APPLICANTS

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY (No. 2)

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 22nd July 2021.

SUMMARY

This is a successful application by the applicants for an order for costs in their favour following on the court's decision in its principal judgment.

I

Introduction

1. It is perhaps testament to the cost of High Court proceedings that the court's principal decision ([2021] IEHC 438) in this matter has been followed hard on by a relatively hotly contested costs application.

2. The essential findings of the court in its primary decision are encapsulated under the heading "*Conclusion*" where the court stated as follows:

“60. *Of the three complaints made, the applicants have succeeded with regard to the first complaint and failed as regards the second and third. How then should the court exercise its discretion as regards the granting of any (if any) reliefs in this application?*

61. *When it comes to the said exercise of discretion, the court's attention has been drawn to Mr E's numerous criminal convictions, mostly for road traffic offences, one for a public order offence, and one for an offence under the Civil Registration Act 2004 (arising out of a so-called 'marriage of convenience'. A separate conviction for possession of stolen property has been quashed by the High Court and hence is being disregarded by the court). The details of Mr E's criminal record, other than the quashed conviction, are set out in Appendix B hereto. Although the attention of the court was drawn to Mr E's convictions, no especial reliance was placed on them by the Minister in the proceedings, save to suggest that they were a factor that might be borne in mind if/when the court came to deciding how to exercise its discretion.*

62. *The court admits that Mr E's criminal record has given it considerable pause as to how it ought to proceed. Most people go through life without ever attracting a conviction. Mr E has several. Among Mr E's Road traffic offences are convictions for driving without insurance (a serious*

matter). Moreover, Mr E’s conviction for a public order offence for which he received a one month suspended sentence is unsettling. As against these convictions the court has to weigh the fact that (i) Mr E has been punished for his offences, (ii) all of the offences were of such a level that they were tried in the District Court, and (iii) the impugned decision is greatly flawed in failing to elaborate at all upon the possible implications for Miss Z, an Irish infant national, if Mr E is removed from the familial scene in circumstances where Ms F clearly suffers from very poor mental ill-health. (Again, in this regard the court would note the general point it made at para.5 above). Not without some hesitation in the face of Mr E’s unimpressive criminal history – and it is perhaps fortunate for Mr E that this Court occasionally sits in family law cases and is keenly aware of how very important a child’s home environment is for the lifelong psychological well-being of that child and so how important it is that matters be assessed thoroughly and correctly – the court has decided that in the very particular circumstances of this case it will quash the impugned decision for the various reasons stated herein and remit the matter to the Minister for fresh consideration” [Emphasis added].

II

Relevant Statute-Law/Rule

3. Section 168 of the Legal Services Regulation Act 2015 provides as follows:

- (1) *Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings—*

- (a) *order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or*
 - (b) *where proceedings before the court concern the estate of a deceased individual, or the property of a trust, order that the costs of or incidental to the proceedings of one or more parties to the proceedings be paid out of the property of the estate or trust.*
- (2) *Without prejudice to subsection (1), the order may include an order that a party shall pay—*
 - (a) *a portion of another party’s costs,*
 - (b) *costs from or until a specified date, including a date before the proceedings were commenced,*
 - (c) *costs relating to one or more particular steps in the proceedings,*
 - (d) *where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and*
 - (e) *interest on costs from or until a specified date, including a date before the judgment.*

4. Section 169(1) of the Act of 2015 provides as follows:

“A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings unless the court orders otherwise, having regard to the

particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including –

(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,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court of settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.”

5. Order 99, rule 3(1) RSC provides that:

“The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.”

Chubb

6. In a helpful appellate court judgment that does not just decide the appeal at hand but succinctly identifies relevant principle in a manner capable of ready application, Murray J., in *Chubb European Ground SE v. The Health Insurance Authority* [2020] IECA 183, in what, at this time, is the leading judgment on how a court should approach a costs application under the Act of 2015 and O.99 when treating (as here) with the costs of proceedings as a whole, identifies the following general principles, at para.19:

- “(a) *The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and 0.99, r.2(1)).*

- (b) *In considering the awarding of costs of any action, the Court should ‘have regard to’ the provisions of s. 169 (1) (0.99, r.3(1)).*

- (c) *In a case where the party seeking costs has been ‘entirely successful in those proceedings’, the party so succeeding ‘is entitled’ to an award of costs against the unsuccessful party unless the court orders otherwise (s. 169(1)).*

- (d) *In determining whether to ‘order otherwise’ the court should have regard to the ‘nature and circumstances of the case’ and ‘the conduct of the proceedings by the parties’ (s. 169 (1)).*

- (e) *Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).*

- (f) *The Court, in the exercise of its discretion may also make an order that where a party is ‘partially successful’ in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).*
- (g) *Even where a party has not been ‘entirely successful’ the court should still have regard to the matters referred to in s. 169(1)(a)-(g) when deciding whether to award costs (O. 99, r.3(1)).*
- (h) *In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a))”*

7. Murray J.’s points (c)-(e) are, with respect, superfluous. This is because (as, for example, will be seen below) the application of s.169(1) pursuant to Murray J.’s point (b) has the result that one necessarily treats with his points (c)-(e) in the context of his point (b).

8. ***“(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O. 99, r.2(1)).”***

9. Court Note: Noted.

10. ***“(b) In considering the awarding of costs of any action, the Court should ‘have regard to’ the provisions of s. 169 (1) (O. 9, r.3(1)).”***

11. Section 169(1) of the Act of 2015, it will be recalled, provides as follows:

“A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including –

[Court Note: It seems to the court that when one has regard to the result in this case: a quashing of the impugned decision and a remittal, the applicants must be seen to have been wholly successful in securing their desired outcome in these proceedings.

The court is mindful that only having regard to outcome may not always be the most exact measure of ‘success’, especially in, for example, complex commercial proceedings. However, in judicial review proceedings in the asylum/immigration context where (a) hearings are usually relatively brief, (b) the issues tend to be quite net, and (c) the ultimate focus tends to be ‘should an impugned decision stand or fall?’, the decision of the court on point (c) seems likely in most asylum/immigration cases to indicate with complete clarity which party has been “*successful*” and hence where costs ought properly to lie.

Neither ss.168 nor 169 of the Act of 2015 or O.99 RSC require the undue complication of the essentially simple – and determining where costs should lie in the typical asylum/immigration matter is an essentially simple matter. Here, as stated, the applicants must be seen to have been wholly successful in securing their desired outcome in these proceedings. As a consequence they are entitled to the costs of their proceedings “*unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties*”].

(a) *conduct before and during the proceedings.*

[Court Note: In this regard, the Minister has made the following points in her written submissions:

“14. *The Minister submits that the first named Applicant has shown contempt for the immigration laws of the State and the State’s obligations as a Member State of*

the EU. His previous application for a residence card was based on a marriage of convenience and was refused at first instance and on review. Moreover, he was subsequently convicted of an offence under s. 69 of the Civil Registration Act arising out of that marriage of convenience (giving a registrar particulars or information which he knew to be false or misleading in relation to the other party to that marriage – a conviction which was upheld on appeal).

15. *Even in these proceedings, notwithstanding that the first named Applicant never challenged the Minister's decisions refusing him a residence card, he purported to aver at paragraph 4 of his affidavit that his 'spouse' only returned to Estonia in or about November, 2015 and at paragraph 6 baldly stated that he did not accept that the marriage was one of convenience. Such averments were simply not tenable, particularly bearing in mind his conviction pursuant to s. 69(3) of the Civil Registration Act 2004 arising from that marriage.*

16. *In addition, as is clear from the papers before the Court, the first named Applicant did not comply with his reporting requirements arising from the deportation order which had previously been made in respect of him, leading to his being classified as evading deportation.*
17. *Lastly, in his affidavit in these proceedings, the first named Applicant was not candid with the Court in relation to his previous criminal offences, having referred to pleading guilty to (i) a charge under s. 69(3) of the Civil Registration Act 2004, as amended; (ii) a charge under s. 6 of the Criminal Justice (Public Order) Act 1994, as amended; and (iii) a charge in respect of driving without insurance. That was an incomplete account of his infractions of the criminal law of the State. A complete record in that regard, outlining 14 convictions in all, was exhibited by Ms O'Reilly to her affidavit on behalf of the Minister and also set out by the Court as Appendix B to its judgment.”*

All of this is correct. Two points, however, might be made.

First, although s.169(1)(a) refers to “*conduct before and during the proceedings*”, the court is treating fundamentally in this regard with where the costs of the proceedings should lie. So it seems to the court that although the phrase “*conduct before and during the proceedings*” would appear ostensibly to capture all conduct of any nature and at any time before and during the proceedings in fact what must be at play in this regard is conduct that is somehow connected to the proceedings and the issues at play in those proceedings. While the behaviour referred to at para.14 in the above-quoted text is highly reprehensible, it seems to the court that only the behaviour at para.15, *possibly* para.16, and para.17 involve conduct that is relevant for the purposes of s.169(1)(a).

Second, there are three applicants in these proceedings and it is Miss Z, an infant Irish child, who stood to be particularly affected by the deficiency that led to the quashing of the impugned decision, and of whose rights and interests, given her infant status, the Minister ought to have been especially watchful. In truth, it is not clear to the court that the Minister appreciates the seriousness of the error that led to the court’s order to quash the impugned decision (an order not lightly given). In this regard, the court recalls its observations at para.14 of the principal judgment where it stated, *inter alia*, as follows:

“[W]hat specific circumstance ought to have been considered in the reasoning in the impugned decision and was not? The answer is Ms F’s mental ill-health and any implications that flowed therefrom as regards Miss Z’s best interests were Mr E to be removed from the family scene. That, with respect, is a gaping omission compounded by the fact that in the list within the impugned decision of documentation considered (Pleadings, pp.195-96) there is no mention of the consultant psychiatrist’s letter of 19th July 2016 which one must therefore

presume was not considered, notwithstanding the claim in the impugned decision that all has been considered.”

The Minister’s “*gaping omission*” could very quickly have led to a situation in which, with Dad sent back to his country of origin, and Mum possibly hospitalised from time to time, Miss Z, an Irish/European Union national might well have required to be taken into care when, if Dad remained in Ireland, she might well be entrusted to his care (and, all else being equal, the care of a loving father would seem generally preferable to entrusting a child to non-parental care). It may be that on considering matters anew, following on the quashing of her original impugned decision, the Minister may yet make like decision to the decision previously made. However, the failure to consider “*Ms F’s mental ill-health and any implications that flowed therefrom as regards Miss Z’s best interests were Mr E to be removed from the family scene*” is a profoundly serious issue to have been omitted from consideration to begin with].

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings.

[Court Note: It seems to the court that once an issue is stateable and arguable (matters on which counsel regularly opine) it may reasonably be raised/pursued/contested. All of the points made by the applicants here were stateable and arguable (and vetted at a leave application). That a party loses on a stateable and arguable point does not, to the court’s mind, unfailingly transform that stateable and arguable point into an unreasonable point. Here, the court does not see that there is any issue that it was not reasonable for the applicants to raise, pursue or contest. Specifically, as regards the second complaint made, while the court concluded that the criticism was unfair, it was not other than reasonable (whether in the sense of ‘just’ or ‘capable of being reasoned’) for the applicants, in essence, to contend that on the very

particular facts presenting the Minister ought to have seen for herself that Mr E was a primary carer or joint primary carer. They lost on the issue; that does not mean that it was other than reasonable to raise, pursue or contest it].

(c) the manner in which the parties conducted all or any part of their cases.

[Court Note: The court struggles to see that category (c) is not caught by category (a) unless one reads category (a) as referring to general conduct and category (c) as referring to the conduct of the parties in court, *i.e.* how the proceedings were despatched at hearing. Here the proceedings were professionally conducted by professional lawyers and no issue presents. To the extent that this category overlaps with category (a), see also the court's comments in respect of category (a)].

(d) whether a successful party exaggerated his or her claim.

[Court Note: Judicial review proceedings concern an application by an applicant; they are not concerned with a claim between plaintiff and defendant. Additionally, it does not seem right to speak of an applicant in judicial review proceedings as having a “*claim*”. So a question-mark arises over the applicability of category (d) to judicial review proceedings at all. To the extent that category (d) is applicable, if at all, there has been no exaggeration in these proceedings.]

(e) whether a party made a payment into court and the date of that payment.

[Court Note: Not relevant here.]

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer.

[Court Note: If one treats the verb “*to settle*” as embracing efforts between the parties privately to resolve matters between them before the costs application came on to be decided (and it may be that Oireachtas had in mind a “*claim*”, as referred to in (d), not judicial review proceedings, the court is not aware of any efforts between the parties to these proceedings to resolve matters privately before the matter came on for hearing.]

and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.”

[Court Note: Not relevant here.]

12. ***“(c) In a case where the party seeking costs has been ‘entirely successful in those proceedings’, the party so succeeding ‘is entitled’ to an award of costs against the unsuccessful party unless the court orders otherwise (s. 169(1)).”***

13. Court Note: This point already falls to be treated with pursuant to s.169(1) of the Act of 2015 which itself falls to be treated with under Murray J.’s point (b), as considered above.

14. ***“(d) In determining whether to ‘order otherwise’ the court should have regard to the ‘nature and circumstances of the case’ and ‘the conduct of the proceedings by the parties’ (s. 169 (1)).”***

15. Court Note: This point already falls to be treated with pursuant to s.169(1) of the Act of 2015 which itself falls to be treated with under Murray J.’s point (b), as considered above.

16. ***“(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and***

whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).”

17. Court Note: This point already falls to be treated with pursuant to s.169(1) of the Act of 2015 which itself falls to be treated with under Murray J.’s point (b), as considered above.

18. *“(f) The Court, in the exercise of its discretion may also make an order that where a party is ‘partially successful’ in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).”*

19. Court Note: As discussed above, it seems to the court that when one has regard to the result in this case: a quashing of the impugned decision and a remittal, the applicants must be seen to have been wholly successful in securing their desired outcome in these proceedings.

20. *“(g) Even where a party has not been ‘entirely successful’ the court should still have regard to the matters referred to in s. 169(1)(a)-(g) when deciding whether to award costs (O. 99, r.3(1))”.*

21. Court Note: As discussed above, it seems to the court that when one has regard to the result in this case: a quashing of the impugned decision and a remittal, the applicants must be seen to have been wholly successful in securing their desired outcome in these proceedings.

22. *“(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a))”.*

23. Court Note: Noted.

IV

Conclusion

24. The thrust of the applicants’ case in these proceedings was that the Minister failed to consider the mental health of the mother and to consider whether the third country national father was in fact the primary carer for the child. The applicants (in effect) succeeded on the

grounds relating to mental health and best interests of the child, but not on the ground relating to error of fact. (The applicants were in fact correct that there were errors on the face of the impugned decision, but these were not considered fatal to the conclusion). The court has however decided that in the particular circumstances of this case, it will quash the impugned decision on the basis that the flaws in assessment (as opposed to factual errors) are particularly significant or serious in a case involving European Union law and the welfare of an Irish/European Union citizen child. This logic, it seems to the court, should also apply to the question of costs.

25. In passing, the court notes that the applicants in these proceedings, as in so many asylum/immigration proceedings, are not at all well off financially, and that these proceedings, as with so many asylum/immigration proceedings, were taken by their lawyers on a ‘no foal, no fee’ basis. It seems to the court that if every asylum/immigration case were to yield a hotly contested dispute as to costs, that could quickly yield systemic difficulties in terms of the ability of people who are less well off financially to access the justice system – and people who are less well off financially are every bit as entitled to their legal rights as their richer neighbours. Neither ss.168 nor 169 of the Act of 2015 or O.99 RSC require the undue complication of the essentially simple – and determining where costs should lie in the typical asylum/immigration matter is an essentially simple matter.

26. The court will order costs in favour of the applicants.