THE HIGH COURT

JUDICIAL REVIEW

[2025] IEHC 753

[2023/350 JR]

BETWEEN

MUHAMMAD MUZAFFAR, HARMEEN KHALID, ALISHA MUZAFFAR (A MINOR SUING BY HER FATHER AND NEXT FRIEND, MUHAMMAD MUZAFFAR), ZAARA MUZAFFAR (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, MUHAMMAD MUZAFFAR), AIZA MUZAFFAR (A MINOR SUINING BY HIS FATHER AND NEXT FRIEND, MUHAMMAD MUZAFFAR) AND ZOYA MUZAFFAR (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, MUHAMMAD MUZAFFAR)

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

[2023/644JR]

ALI MUMTAZ PERVAIZ

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Cregan delivered on 20th December, 2024

Introduction

1. This is an application by the applicants in two sets of proceedings for the costs of the proceedings against the respondent in circumstances where the principal relief sought by the applicants i.e. orders of *Mandamus* have now become moot because the Minister has made decisions.

2. The respondent is resisting these applications and submits that, based on the authorities, there should be no order as to costs.

The *Muzaffar* case - background

3. The first applicant is a citizen of Pakistan and is the father and next friend of the four minor applicants. The second applicant is the wife of the first applicant and the mother of all four minor applicants. The four children were born in 2009, 2013, 2015 and 2020. The applicants have been residing in the State since November 2015 having initially entered the State from Belfast.

4. The applicants made an application for residency to the Minister on 4th February 2022 pursuant to the "Regularisation of Long Term Undocumented Migrant Scheme ("the scheme" or "UDMS").

5. Ms. Mary Kelly a higher executive officer with the respondent, stated in her affidavit that the scheme was an administrative scheme established under the Minister's executive powers to regularise the status of long term undocumented migrants residing in the State. To apply for the scheme, applicants were required to meet certain criteria, namely, to have been living undocumented in the State continuously for the previous four years, to be of good character and good conduct, and to have no adverse criminal record in the State, or in any other country. The scheme was open for applications from 31st January, 2022 to 31st July, 2022. Applications were submitted through an online portal.

6. The applicants made a family application pursuant to the scheme on or about 4th February, 2022 through the department's online portal accompanied by certain documentation.

7. On 29th May, 2023, the applicants were granted permission to remain in the State under the scheme.

8. Ms. Kelly set out in her affidavit the system for the consideration of each application. She stated that an individualised consideration is required for each application so that some applications will inevitably take longer than others. She stated that *"the Minister has in place an orderly and rational system for dealing with applications made pursuant to the scheme which operates on the basis of chronological processing"*. Ms. Kelly then set out how the scheme operated in practice. Once an application was received, it was automatically queued in "Alfresco" the department's electronic application management software. She stated that all applications were dealt with in chronological order. A case worker accepts the next application in the queue and performs the necessary searches to establish if the applicant already has a record with the Immigration Service Delivery (ISD) and then moves the application into AISIP, the system of record for ISD.

9. An e-vetting invitation is then issued to the applicant and once this e-vetting form is completed and returned, An Garda Siochána are required to carry out any checks needed to complete the background checks. She states that every application will differ in relation to how long this process takes, depending on the applicant's individual circumstances, the quality and completeness of the data provided, and also the time required by An Garda Siochana to complete the checks. Once these checks are completed, the application is then reviewed again by a caseworker to confirm whether any information remains outstanding.

10. She said that in the present case, the background checks in relation to the applicants took longer than some other cases and the results of checks were awaited for some time.

Chronology of events in the *Muzaffar* case.

11. The applicants in their proceedings pleaded that the respondent's delay in processing their applications was inordinate, unreasonable and inexcusable and sought orders of Mandamus requiring the respondent to issue a decision.

12. The chronology of events is set out below.

31st January, 2022 – Undocumented Migrant Scheme ("UDMS") opens for six months.

4th February, 2022 – Applicants apply for permission to remain under the UDMS.

11th February, 2022 – Background checks process starts.

19th October, 2022 – letter from Applicants' solicitor seeking a decision in respect of the applicants.

27th October, 2022 – Respondent's reply giving an indicative timeframe of seven weeks within which a decision would be made but possible extension might be required.

11th December, 2022 – email from Applicants' solicitors stating that seven week period had elapsed.

6th December, 2022 – Respondents reply stating that it was unable to finalise the application within the indicative timeframe.

6th December, 2022 – Applicants' letter to the respondent seeking an exact timeframe and reason why the decision was not being made.

16th December, 2022 – Respondents reply stating that it was not possible to give an exact timeframe in any individual case and confirmed the respondent was awaiting background checks in relation to the application.

12th April, 2023 – Mandamus proceedings filed in the Central Office of the High Court.

13th April, 2023 – letter from Applicant solicitors to CSSO sending the papers – with the leave date stated to be "assigned soon".

15th May, 2023 – Applicants made an application for leave on 15th May which was adjourned to 23rd June, 2023 with directions that the papers be served on the CSSO.

29th May, 2023 – decision by the Respondent under the UDMS granting stamp 4 permission for two years to the applicants.

13. It is clear from the above, that the application for leave to issue judicial review proceedings was made by the applicants on 15th May, 2023 and adjourned to 23rd June, 2023 with directions that the papers be served on the Chief State Solicitors office. It is also clear that the decision was made on 29th May, 2023 by the respondent – which rendered the proceedings moot.

14. Importantly, Ms. Mary Kelly states, at paragraph 16 of her affidavit:

> *"I say that the service of the ex parte leave documents in advance of the leave application listed and the moving of the leave application 15th May, 2023 had no impact on the timing of the decision made on the applicant's application, which was made in line with the system outlined above. I say that as outlined above the background check process was completed in relation to this application on or about 6th May, 2023 after which the decision issued".*

15. Likewise, at paragraph 18, she states as follows:

> *"The decision in relation to the applicant's application pursuant to the scheme issued because it was the next application in the queue which had completed all checks and was ready for final processing. I say therefore and am advised that this does not constitute a unilateral action on behalf of the Minister such as would entitle the applicant to costs of the proceedings. I say that the within proceedings did not in any way prompt or influence the making of the decision"*(emphasis added).

16. No notice to cross-examine this deponent was made by the applicants and therefore this evidence is uncontroverted evidence before the Court.

The second case – *Pervaiz* – Background

17. The applicant in the second case is a 38 year old citizen of Pakistan. He came to Ireland on foot of a visitor's visa. He was married to an EU citizen in the State. He submitted an application as a qualified family of an EU citizen who was residing and exercising her EU Treaty rights in the State. His application was approved in or around September 2013. He separated from his EU citizen spouse. He applied for retention of his residence. He said in his verifying statement that his application for retention of a resident card was refused and his resident card which was granted in September 2013 were revoked retrospectively. He said he submitted a review against the refusal of his application but then withdrew this application in order to submit his application under the undocumented scheme.

18. He submitted his application on 8th April, 2022 to the respondent under the UDMS. Having waited seven months for an answer, his solicitor wrote to the respondent on 9th November, 2022 seeking a decision, and indicating that Mr. Pervaiz was prejudiced by the delay and that if a decision were not made within fourteen days, he would instruct his solicitors to initiate proceedings.

19. Ms. Mary Kelly, a higher executive officer with the respondent, filed a replying affidavit in these proceedings also. She stated that, by letter dated 19th June, 2023, the applicant's application pursuant to the scheme was refused as he did not satisfy the relevant criteria; in particular he had a period of documented residency within the previous four years.

20. Again, she averred that an individualised consideration is required for each application so that some applications would inevitably take longer than others. She also stated that the Minister has in place an orderly and rational scheme for dealing with applications made pursuant to the scheme which operates on the basis of chronological processing.

21. She also states, at paragraph 9, that following completion of the background check process, the applicant's application was reviewed and it became apparent that the applicant

previously had permission as a result of his marriage to an EU citizen – a marriage which was subsequently found to be one of convenience. His application was therefore referred to a more senior member of staff for further consideration and to obtain certain legal advice. Once that consideration was complete, the application was finalised. A negative decision was issued to this applicant as a result of the permission he held to reside within the State within the previous four years.

22. Importantly, at paragraph 13 of her affidavit, she states:

> *"I say that the service of the ex parte leave documents in this manner had no impact on the timing of the decision made on the applicant's application, which was made in line with the system outlined above. I say that the refusal decision letter had already been drafted in respect of this application prior to the service of the ex parte leave documents but was on hold pending the receipt of certain legal advice which impacted this and other applications. Following receipt of the said legal advice, the decision was cleared to issue".* (emphasis added)

23. She states at paragraph 15:

> *"The decision in relation to the applicant's application pursuant to the scheme issued because it was the next application in the queue, which had completed all checks and was ready for final processing. I say therefore and am advised that this does not constitute a unilateral action on behalf of the Minister such as would entitle the applicant the costs of the proceedings. I say that the within proceedings did not in any way prompt or influence the making of the decision."*(emphasis added)

24. Again, as in the first case, this affidavit evidence is clear and uncontroverted. No application was made to cross examine Ms. Kelly.

Chronology in second case

25. Again Mr. Pervaiz's proceedings were to seek an order of Mandamus on the ground of delay. The chronology in the *Pervaiz* case is obviously slightly different. The chronology of events is as follows.

31st January, 2022 – Undocumented migrants scheme (UDMS) open for six months.

8th April, 2022 – Applicant makes application for permission to remain under the UDMS.

26th September, 2022 – letter from the Applicant making enquiries in respect of his application.

26th September, 2022 – letter from the respondent seeking the Applicant's passport.

29th September, 2022 – Applicant provides his passport.

9th November, 2022 – letter from Applicant's solicitor seeking a decision.

10th November, 2022 – Respondent's reply giving the applicant an indicative timeframe of seven weeks.

20th December, 2022 – Respondent's email stating further time would be required.

2nd June, 2023 – Applicant applied for residency in the State based on his parentage of an Irish citizen child.

8th June, 2023 – Mandamus proceedings filed in the Central Office.

9th June, 2023 – Proceedings sent to the Respondent.

12th June, 2023 – email from the registrar stating that the leave application was listed for hearing on 24th June, 2022.

19th June, 2023 – applicant's UDMS application was refused.

31st August, 2023 – Applicant's ICC application was granted.

19th August, 2023 – Applicant lodged an appeal in respect of the decision refusing his application under the UDMS.

19th August, 2024 – his appeal in respect of UDMS was refused.

The legal principles applicable to mootness applications for costs.

26. It is clear that the general rule is that costs follow the event and that a successful party will be awarded its costs.

27. However as Clarke J. (as he then was) stated in *Cunningham v. The President of the Circuit Court* [2012] 3 IR 222 at paragraph 22:

> *"The problem in dealing with the costs of proceedings which have become moot is that there will, in reality, be no event which those costs have to follow."*

28. In the present case I am satisfied that there was no event in this case to which the general rule that costs follow the event could be applied.

29. The default order, in relation to proceedings which have become moot, is to make no order as to costs (see *Cunningham v. President of the Circuit Court* [2012] 3 IR 222 and *Godsil v. Ireland* [2015] 4 IR 535) – but the court retains a discretion to depart from this rule in certain circumstances.

30. The test where proceedings have become moot is to examine whether this was (i) due to some factor or occurrence outside the control of the parties or (ii) due to the unilateral action by one of the parties to the proceedings, (see para. 24 of Clarke J. in *Cunningham v. the President of the Circuit Court*) – whilst also acknowledging that some cases might not always fit into one or the other category.

31. In *Cunningham v. President of the Circuit Court* [2012] IESC 39, Clarke J. (as he then was) considered a situation where a case became moot as a result of a factor or occurrence outside the control of the parties. As he stated at page 213:

> *"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." (emphasis added)

32. In *MATA v. Minister for Justice* [2016] IESC 45, McMenamin J. stated as follows:

"Applying the dicta from these two authorities, [*Cunningham* and *Godsil*] *therefore, it seems to me that the critical issue which arises in this appeal is, whether it can be established that the appellant's case became moot as a result of a factor outside the control of the parties, as in Cunningham's case, or whether there had been some very proximate unilateral action by the respondents, that is, an 'event' in the Godsil sense, caused by the appellant's proceedings."*

33. At paragraph 20 of his decision McMenamin J. stated:

"There was, therefore, material before the judge which would allow her to conclude that, in fact, there has been <u>no causal nexus</u> between the bringing of the proceedings, and the grant of long-term residency. The judge was entitled to draw that inference." (emphasis added)

34. In *MKIA (Palestine) and C.Z. v. The International Protection Appeals Tribunal, the Minister for Justice and Equality Ireland and the Attorney General* [2018] IEHC 134 Humphreys J. set out the principles in relation to costs of moot proceedings. As he stated at paragraph 6 of his decision:

"So it seems then the law applicable in relation to costs of a moot action can be summarised as follows:

(i). The first inquiry that a court is required to make is to decide whether or not there existed an ' event' to which the general rule that costs follow the event can be applied (see Godsil).

(ii). An act that could only be regarded as an explicit acknowledgment and admission of the legal validity of the plaintiff's challenge is such an event, as in Godsil.

(iii). Thus the event must normally in some way be caused by the applicant's proceedings; per MacMenamin J. in Matta.

(iv). If the proceedings are moot due to a factor outside the control of either party, the view should be taken that there is no event in the Godsil sense and therefore the default order is no order as to costs, as discussed in Cunningham.

(v). If the proceedings are moot due to a factor which is within the control of one party but that has no causal nexus with the proceedings or which relates, as it is put in Cunningham, to an underlying change in circumstances, then again there seems to be no event in the Godsil sense, so the court should lean in favour of no order (see per MacMenamin J. in Matta at para. 20).

(vi). Finally, if the proceedings are moot due to a factor within the control of one party that does have a causal nexus with the proceedings then there is an event in the Godsil sense and the default order should be costs in favour of the other party (see Cunningham and Godsil in particular)."

35. In *Hughes v. the Revenue Commissioners and the Minister for Public Expenditure and Reform* [2021] IECA 5 Murray J., giving the judgment of the Court of Appeal stated at para. 39 of his decision:

"39. In seeking first to resolve these issues on the basis of Cunningham, the approach suggested by that case requires the Court to answer four questions:

(i) What was the specific event that resulted in the action becoming moot?

(ii) Was that event the result of an occurrence outside the control of either party?

(iii) Was that event caused by the unilateral actions of one of the parties?

(iv) If the answer to (iii) is in the affirmative, has the person responsible for the mootness established that their actions were not undertaken in response to the proceedings?"(emphasis added)

Submissions

36. Most of the applicants' submissions were relevant to the merits of the underlying proceedings of Mandamus but they are not relevant for applications for costs where proceedings have become moot.

37. Thus, for example, the applicants submit that the affidavits sworn by the respondent failed to address the substantive issue of the legality and/or reasonableness of the respondent's delay in processing the applications in circumstances where she breached her own timeline in which she indicated she would make the decision.

38. However I do not propose to enter into a consideration of the substantive issue of the legality and/or reasonableness of the respondent's delay in processing the applicants' application. That would be to engage in the merits of the underlying proceedings which would be impermissible.

39. As Hyland J. stated in *Kiani v. Minister for Justice* (Unreported High Court, 24 April 2024)*:*

"One thing that is absolutely clear from the case law on mootness is that the court should not try a hypothetical case; see paragraph 21 of the Cunningham decision. Therefore in ruling upon these applications for costs what I will not do is make a decision on costs effectively based on what the outcome of the case would have been. The cases are not being tried because they are moot. The costs application cannot be used as a proxy trial of the issues."

40. In my view, the applicants' submission that the respondent should be penalised in costs because the respondent failed to comply with its own anticipated timeline is without substance. Ms. Kelly for the respondent has indicated in affidavit that the background checks took longer than expected. There is no suggestion in the affidavits that the respondent dragged its feet in respect of the applicants' application. Indeed the evidence is all to the effect that the applicants' applications were processed in the normal way.

41. The applicants also submit that they were prejudiced as a result of this delay. Again however, in my view, this submission is without substance. First, both parties accept that questions of prejudice do not form part of the test; secondly, any alleged prejudice suffered by the applicants is very minor.

42. It is clear in the first and second cases that there was no supervening external event. The proceedings became moot due to the unilateral action of the respondent in making decisions in respect of the applicants.

43. However the respondent submitted that the decisions which were made in these cases were not made as a result of the applicants' proceedings and, as such, there was no "causal nexus" between the proceedings and the decisions made by the respondent . The respondent submitted that there was clear and uncontested evidence before the Court that the proceedings did not influence the timing of the decision. I agree with these submissions by the respondent.

44. Applying the principles set out in *MKIA (Palestine)* I would therefore answer the six points as follows:

1. **Is there an event for costs to follow?**

   – The answer to that question is no;

2. **Is there an explicit acknowledgment and admission of the legal validity of the plaintiff's case? If so that is an event.**

In the present case there is no such acknowledgment or admission. In the circumstances there is no event;

3. **Was the "event" caused by the applicant's proceedings?**

   As there was no event, this question is not applicable.

4. **If the proceedings are moot due to a factor outside of the control of either party there is no event and therefore no order.**

   This does not arise in the present application.

5. **If the proceedings are moot due to a factor within the control of one party but there is no" causal nexus" to the proceedings again, there is no event.**

   This is the relevant principle in this matter. There was no causal nexus between the decision made by the respondent and the proceedings. In those circumstances there is no "event" and the usual order (i.e. that there be no order as to costs) should apply.

6. **If the proceedings are moot due to a factor within the control of one party that does have a causal nexus with the proceedings then there is an event and the default order should be costs in favour of the other party.**

   That does not apply in the current situation.

45. In answer to the four questions posed in *Hughes v. the Revenue Commissioners and the Minister for Public Expenditure and Reform* [2021] IECA 5, I would answer as follows:

(i) What was the specific event that resulted in the action becoming moot?

The "event" which resulted in the action becoming moot was the decision of the respondent in each case.

(ii) Was that event the result of an occurrence outside the control of either party?

No.

(iii) Was that event caused by the unilateral actions of one of the parties?

Yes.

(iv) If the answer to (iii) is in the affirmative, has the person responsible for the mootness established that their actions were not undertaken in response to the proceedings?

Yes.

Conclusion

46. I would therefore conclude that there is no event in this case and therefore there is no situation in which the costs should follow the event.

47. I would also conclude that, although the proceedings are moot because of an action of the respondent, there is clear and uncontroverted evidence before the Court that there was no causal nexus between the institution of these proceedings and the decisions made by the respondent.

48. I am satisfied that there is nothing in the conduct of the respondent which would justify awarding the applicants their costs. Likewise there is nothing in the conduct of the applicants which would justify giving the respondents their costs.

49. In the circumstances I am satisfied that appropriate order to make in this case is no order as to costs.
