



THE SUPREME COURT

[Record No. 2019/000200]

**Clarke CJ.
O'Donnell J.
Dunne J.
Charleton J.
Baker J.**

BETWEEN

A

Applicant/Respondent

AND

**THE MINISTER FOR JUSTICE AND EQUALITY
THE ATTORNEY GENERAL
IRELAND**

Respondents/Appellants

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Notice Party

[Record No. 2019/000201]

BETWEEN

S AND S

Applicants/Respondents

AND

**THE MINISTER FOR JUSTICE AND EQUALITY
THE ATTORNEY GENERAL
IRELAND**

Respondents/Appellants

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Notice Party

[Record No. 2019/000209]

BETWEEN

I. I. (NIGERIA)

Applicant/Respondent

AND

**THE MINISTER FOR JUSTICE AND EQUALITY
THE ATTORNEY GENERAL AND
IRELAND**

Respondents

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Notice Party

RULING OF THE COURT ON COSTS DATED THE 15th MARCH, 2021

The Applicants/Respondents in the first two cases referred to in the title of these proceedings, namely, Mr. A and Mr. S. and S. (hereinafter referred to as the Applicants) were amongst a number of parties

who sought to challenge the provisions of section 56(9)(a) of the International Protection Act, 2015 (hereinafter referred to as the Act) on the basis that it was repugnant to the Constitution or incompatible with the European Convention on Human Rights. The Applicants succeeded in their challenge to the provisions of the Act in the High Court notwithstanding that the same issue had been determined in an earlier judgment of the High Court in the case of *RC (Afghanistan) v. Minister for Justice* [2019] IEHC 65, in which the learned High Court judge (Humphreys J.) had found the relevant provision of the Act to be constitutional and not incompatible with the European Convention on Human Rights. The Respondents/Appellants were granted leave to appeal to this Court and in a judgment of the 8th December 2020, ([2020] IESC 70), this Court found that the provisions of the Act were not unconstitutional and were not incompatible with the European Convention on Human Rights. Thus, the Appellants were successful in their appeal.

Despite the fact that the Applicants have ultimately been unsuccessful in these proceedings, the Applicants have sought the costs of the appeal against the Appellants. Not surprisingly, the Appellants have also sought the costs of the appeal and of the proceedings before the High Court. Both parties have furnished the Court with written submissions in relation to the issue of costs.

In their submissions, the Applicants made a number of points. They stated that the position in law concerning the treatment of pre-application and post-application marriages under the Act and in particular, s. 56(9)(a) of the Act has been clarified. They noted that following the judgment of the High Court in these proceedings, there were two conflicting High Court judgments regarding the constitutionality of the section, this decision and that in the case of *RC*, referred to above. They also pointed out that the Appellants in the application for leave accepted that the appeals raised points of serious public importance which justified a leapfrog appeal. It was also contended that these were test cases and that there were a number of similar cases in the High Court which were awaiting the outcome of these appeals. They added that the effect of the judgments of the High Court in this case and in *RC* together with this judgment have clarified the law in this area. Finally, they pointed out that not all of the arguments put forward by the Appellants as to the justification for a difference in treatment as between pre-application marriages and post-application marriages were successful.

They included in their submissions a summary of the legal principles on the award of costs. Thus, they sought an order for their costs or a portion thereof.

The Appellants in their submissions took issue with the points raised by the Applicants. They pointed out that following the decision in *RC*, some of those who had brought cases making similar arguments withdrew their cases but it is accepted that some additional cases sought to raise the issue. It was not accepted that these were test cases. It was stated that when the Applicants' cases came before the High Court, the matter had been determined in *RC* and they urged that that case should not be followed. Thus, the point was not a novel one but had already been decided. This led to the necessity for this Court to consider the jurisprudence in cases such as *Worldport* as to when a judge of the High Court may depart from a decision of a colleague. They went on to make a number of submissions as to principles to be applied in considering the question of costs and referred in particular to Order 99 of the Rules of the Superior Courts and section 169 of the Legal Services Regulation Act, 2015. They sought an order for their costs. However, they added that if the Court saw fit to depart from the normal rule as to costs, that the appropriate order to make would be no order as to costs as opposed to awarding costs to the applicants.

Decision and Conclusion

The normal rule is that a successful party is entitled to their costs. In this case, the Appellants have been successful and therefore it would appear that they should be entitled to their costs in this Court together with an order for the costs of the proceedings in the High Court. This was not a test case as the question at issue had been decided in a similar case, *RC*, just a few months earlier and, indeed, the fact that the judgement of the High Court came to a different conclusion resulted in a lengthy consideration of the circumstances in which one judge of the High Court could depart from the decision of another judge of the High Court in this appeal.

The fact that the appeal was a leapfrog appeal and thus met the constitutional threshold for such an appeal is not a decisive factor in deciding an application for costs. (See *Simpson v Governor of Mountjoy Prison* [2020] IESC 52). It was obviously necessary to determine the issue of the

constitutionality and compatibility of the impugned section and resolve the conflict that had arisen by virtue of the existence of two separate judgments coming to different conclusions but that is not a reason for a departure from the normal rule that costs follow the event.

Finally, the fact that the Court did not accept all of the reasons put forward by the Appellants to justify the difference in treatment between pre-application and post-application marriages is likewise not a factor in this case which would alter the normal position. It should be borne in mind that the Applicants' claim failed in its entirety.

In the circumstances, there is no reason to depart from the normal rule as to costs and accordingly the Appellants are entitled to their costs on the basis that costs follow the event.