THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 740 J.R.]

BETWEEN

M.K.I.A. (PALESTINE) AND C.Z.

APPLICANTS

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of February, 2018

1. At the risk of over-simplification, the facts in this case can be summarised as follows. The first named applicant applied for asylum in the State on 25th September, 2016. It was decided to transfer the application to another EU State. That decision was affirmed on appeal by the tribunal on 9th August, 2017. In the meantime on 28th July, 2017 the first named applicant applied for residency based on his marriage to the second named applicant, an EU national. On 2nd October, 2017 the proceedings were instituted, at a time when the EU residence card application was pending, so the applicants knew at all times that the proceedings could be overtaken by that development. On 15th January, 2018 the Minister accepted the application for residency, rendering the proceedings moot.

2. The issue now is costs and I have heard helpful submissions from Mr. David Leonard B.L. for the applicants and Mr. Anthony McBride B.L. for the respondents.

Principles in relation to costs of moot proceedings

3. It seems to me that the principles set out by the Supreme Court 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) (MacMenamin J.) are the operative ones. Particular pains were taken in both *Godsil* and *Matta* to attempt to ensure that those principles were seen as having priority over previous approaches to costs. McKechnie J. made the point in *Godsil* that "*In some of the cases mentioned in argument, the issue of costs seems to have been determined in a number of ways or, on occasion, even within the same case, by a variety of means",* referring to *Garibov v. Minister for Justice, Equality and Law Reform* [2006] IEHC 371 (Unreported, Herbert J., 16th November, 2006) where the emphasis was on the reasonableness or otherwise of taking the proceedings and *Mansouri v. Minister for Justice, Equality and Law Reform* [2013] IEHC 527 (Unreported, McDermott J., 29th January, 2013) and *Nearing v. Minister for Justice, Equality and Law Reform* [2009] IEHC 489 [2010] 4 I.R. 211, where Cooke J. stressed the issue of whether the applicant had demonstrated an entitlement to the relief claimed. McKechnie J. then proposed a clearer approach to resolving these issues. It must now be considered that the previous High Court case law must be taken to be decided on its special facts as stated by MacMenamin J. in *Matta*, in relation to *Garibov*. Thus, primary recourse must be had to the three Supreme Court decisions I have referred to and the factors referred to in those cases, rather than to the factors referred to in previous High Court cases such as the reasonableness of taking the action or whether the applicant would have won in any event, a somewhat inconvenient test from any standpoint because it would require the court to determine the case to adjudicate on the issue of costs.

5. To an extent, as with any costs situation, a discretion exists under O.99 of the Rules of the Superior Courts to be exercised within certain limits; but having regard to the matters I have set out, the primary factors to be considered are those outlined by the Supreme Court in the trio of cases I have referred to, even if other factors could potentially have a secondary role.

6. 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).
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> (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).

Application of those principles to the present case

7. Applying these principles to the facts at issue here, it is clear that the proceedings are moot because a residence card was issued. That was due to an application by the first named applicant that was not related to the proceedings. Thus there is no event, so the default order is no order as to costs. While a number of possible secondary reasons to depart from that default position, in the exercise of the O. 99 discretion, were canvassed by Mr. Leonard it seems to me that these are insufficiently substantial grounds to

depart from that default order.

Order
8. So the order will be that there be no order as to costs.