THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 693

[Record No: 2021/740 JR]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED)

BETWEEN

A.Z., M.Z. AND C.Z. (A MINOR) SUING BY HIS MOTHER AND NEXT FRIEND M.Z.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENTS

RULING of Ms. Justice Phelan delivered on the 2nd day of December, 2022

INTRODUCTION

1. This is my ruling on the Applicant's application for costs and the Respondent's application for a certificate of leave to appeal in respect of questions of law arising from my judgment delivered on the 27th of July, 2022. The application for a certificate is made pursuant to s.5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000 (as amended) (hereinafter "the 2000 Act").

2. I have received and considered helpful written submissions from the parties in respect of this application and heard oral argument today. I will deal with the costs application first before turning to address the application for a certificate.

COSTS

3. In summary, the Applicants seek their costs on the basis that they have succeeded in these proceedings. The Respondent opposes the grant of costs on the basis that the Applicants did not succeed on all grounds and also having regard to the prelitigation conduct of the First Applicant.

4. In my judgment of the 27th of July, 2022, I held that the Respondent's decision of the 28th of June 2021, which refused to revoke the deportation order made against the First Applicant (AZ) on the 26th of June, 2019, should be quashed. Despite the fact that the Applicant has been successful in obtaining the primary relief sought in the proceedings, the Respondent argues that the Applicants should only recover an unspecified portion of their costs.

5. This position is advanced on the basis that the Applicants succeeded in respect of the approach taken to the assessment of the child's rights by the Respondent but not on other grounds advanced, specifically with regard to the consideration of marital rights in reliance on the Supreme Court's decision in *Gorry v. Minister for Justice* [2020] IESC 55 and the criminal convictions of the First Applicant did not succeed and therefore was only "*partially successful*" within the meaning of s. 168(2)(d) of the Legal Services Regulation Act, 2015 [hereinafter "the 2015 Act"] and also having regard to the conduct of the First Applicant which it is contended justifies an order departing from the normal rule in accordance with my discretion under s. 169(1)(a) of the 2015 Act or a discount in exercise of a discretion under s. 168

6. For their part, the Applicants contend that they were "*entirely successful*", within the meaning of s. 169 of the 2015 Act. They refer to the fact that the s.3(11) decision in respect of AZ has been quashed and there has been an injunction preventing deportation in place since the leave application. They maintain that they have obtained everything that they sought in the proceedings (these were the only reliefs sought). They therefore rely on what they refer to as "*the default position*", in general terms, that costs should follow '*the event'* and they identify the event here as the quashing of the s.3(11) decision.

7. It is accepted on behalf of the Applicants that s.169 of the 2015 Act does not refer to '*the event'* but rather to one party being "*entirely successful*" (although the phrase '*costs to follow the event*' appears in the marginal note to s.169) but they nonetheless submit that in most asylum and immigration cases, winning in terms of '*the event'* (obtaining the relief

sought) is treated, in effect, the same thing as being "*entirely successful*". In this regard they refer to the decision of Barrett J. in *E, F and Z (a minor) v. The Minister for Justice and Equality* (No. 2) [2021] IEHC 519 which is to the effect that, for a variety of reasons, 'success' can best be determined by reference to the outcome/relief granted in asylum and immigration judicial review cases.

8. In that case (*E, F and Z*), the applicants had challenged the respondent's refusal to grant permission to remain to Mr. E on four grounds, three of which were relied upon at hearing. They succeeded in respect of one of those grounds only and the respondent contested their application for costs on that basis. Barrett J. had regard to the decision in the Court of Appeal decision in *Chubb European Ground SE v. The Health Insurance Authority* [2020] IECA 183 and the general principles set out therein. He then held:

> *"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.*
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> *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."*

9. Barrett J. awarded the full costs of the proceedings to the applicants. He stated as follows:

> *"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*."

10. I note that in *Bebhe v. Minister for Justice* (ruling in relation to costs on the 3rd of May, 2022) a recent deportation order case, Ferriter J. adopted a similar approach in awarding the two applicants in that case full costs although the respondent claimed that they had only succeeded on one ground.

11. Both parties refer to the decision of the Court of Appeal in *Chubb*. In that case Murray J. (for the Court) referred back to the decision of Clarke J. in *Veolia Water UK PLC v Fingal County Council* [2006] IEHC 137, and stated as follows*:*

> *"9.The judgment of Clarke J. (as he then was) in Veolia envisages three different scenarios relevant to the allocation of the costs of the full trial of an action.*
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> *10. As analysed by Clarke J. the first is a case where an 'event' can be identified and in which all costs of the case follow that event. This is the default position even where the party who succeeds on the 'event' has not prevailed on every issue in the case or succeeded in every argument it has advanced (see Veolia at para. 2.5 and 2.8 and MD at para. 9). For these purposes, Clarke J. related success on the event to the securing of a 'substantive or procedural entitlement which could not be obtained without the hearing concerned' (Veolia at para. 2.8). A party who has thus succeeded on the 'event' so understood should normally obtain their costs, even if not successful 'on every point' for two principal reasons. As a matter of both fairness and of principle, where a party has had to institute legal proceedings in order to obtain relief, the starting point should be that he recovers all of the legal costs in securing that benefit (Godsil v. Ireland [2015] IESC 103, [2015] 4 IR 535 at para. 20). Moreover, in many cases the splitting of costs as between different issues and arguments in a case is likely to create satellite applications around costs which will not usually represent an economical use of the time and cost of either the parties or the Court.*
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> *11. The second situation arising from Veolia is where an 'event' is identified, but where the party who has prevailed on that event has not been successful on an identifiable issue or issues which have materially increased the costs of the case. In that circumstance the successful party may obtain his costs but may suffer two deductions – one in respect of his own costs in presenting that issue, and the other*

requiring him to set off against such costs as are ordered in his favour, the costs of his opponent in meeting it (see Veolia at para. 2.10 and O'Mahony v. O'Connor [2005] IEHC 248, [2005] 3 IR 167). Both Veolia and MD make it clear that an order splitting costs in this way is very much the exception where the winner of an event has been identified and, in particular, should only be made where (a) the proceedings involve multiple issues and therefore are (as variously suggested in the judgment) 'complex' (at paras. 1.4, 2.2, and 2.14) and/or not 'straightforward' (para. 2.14), (b) where the raising of the issues on which the otherwise successful party failed to prevail could have effected the overall costs of the litigation 'in a material extent' (Veolia para. 2.14) and (c) where the Court can readily separate and identify the costs so arising…

The third scenario arises where the Court cannot identify with confidence which party has succeeded on the 'event'. This will arise where 'there are two equally valid ways of looking at which party might be said to have been successful' (Veolia at para. 3.9). Where this happens, the appropriate course of action is for the Court to base its award of costs on an assessment of how much of the hearing might be attributable to the issues on which each party succeeded with the costs attributable to the presentation of the general background to the case being allocated proportionately across the range of issues to which that background applies (Veolia at para. 3.9).''

12. It does seem to me that this case comes within the first category of case referred to in *Veolia*, as relied upon in *Chubb*. I do not consider it correct to approach this case and the application for costs on the basis that the Applicants succeeded on one of three grounds contended for in advancing their case. It is recalled that they also succeeded in their response to preliminary issues advanced on behalf of the Respondent which took a considerable amount of the time allocated to the hearing of the case. Despite the time dealing with preliminary issues unsuccessfully raised by the Respondent, the hearing nonetheless concluded well within two days. The fact that the Applicants did not succeed on all grounds of challenge argued did not in my view materially prolong the proceedings in a manner which ought to be reflected in a partial costs order or a discounted order. It does not seem to me that by running unsuccessful points, the Applicants added excessively to what was in any event a two-day case and I respectfully agree with the position adopted by Barrett J. in *E, F and Z (a minor) v. The Minister*

for Justice and Equality (No. 2) [2021] IEHC 519 and Ferriter J. in *Behhe v. Minister for Justice i*n this regard.

13. I have separately reflected on the potential significance of the fact that the rights of the child under Article 42A were considered important by me in this case but no reference to Article 42A was made in the pleadings nor advanced in argument until the question was raised by me, albeit the case that there had been a failure to properly consider the rights of the child was clearly made. As apparent from my judgment (see particularly, para. 80) I was satisfied that it was necessary for me to consider whether the approach taken in the decision under review to the weighing of the rights and interests of the child reflects a proper application of Article 42A1 and/or 42A4, on the basis of the case as pleaded where clear focus was placed on the failure to properly consider the rights of the Third Applicant in the decision-making process.

14. In the circumstances, I would not disallow a portion of costs based on the fact that the Applicants did not succeed on all issues pursued at hearing or having regard to the fact that some of the legal argument in respect of the rights of the child was only developed during the hearing.

15. The other specific issue raised by the Respondent is the First Applicant's behaviour in respect of the officials in the Department he was dealing with in the course of the s.3(11) application. I agree that the First Applicant's conduct was outrageous and concerning. Although no authority directly on point has been identified, it is my view that conduct of this nature is a matter which might properly be relied upon as a basis for departing from the normal position with regard to costs of the winning side in reliance on s. 169(1)(a) of the 2015 Act, although access to justice considerations where one has been successful in proceedings suggest that the discretion would be most sparingly and carefully exercised. Such was the seriousness of the First Applicant's behaviour which I consider was proximately related to the proceedings given the litigation history and the circumstances in which the correspondence was sent, that I would have been prepared to discount the First Applicant's costs were he a sole litigant or separately represented. I have indicated to the parties a concern, however, as to how this could be properly done in circumstances where the First Applicant is only one of three applicants who share legal representation. I have not been referred to any authority which might guide the exercise of my discretion in such circumstances.

16. On balance, I do not think it would be an appropriate exercise of my discretion under s. 169(1)(a) to visit the Second and Third Applicants with the consequences of the behaviour the First Applicant where, as in this case, he shares legal representation with them. I consider that such a step would result in a disproportionate interference with their rights of access to the Court. I do not know of any effective way of disallowing costs or a portion of them which does not also impact on the Second and Third Named Applicants who are innocent of wrongdoing. It seems to me more than likely that an order limiting the costs to be recovered to the costs of the Second and Third Named Applicant may not result in any difference to costs properly recoverable in this case in reality on the basis that the costs were jointly incurred and I understand that the parties share my view that this is the case.

17. Having regard to the outcome of the proceedings before me being the making of an order for *certiorari* by reason of the failure to properly consider the child's rights and having regard to the Applicants' constitutional rights of access to the Court which right was only effectively vindicated in this case with the benefit of legal assistance, I am satisfied that the Second and Third Applicants are entitled to recover their full costs, to include reserved costs, as against the Respondent, such costs to be adjudicated in default of agreement. In view of his conduct which has been more fully outlined in my judgment of the 27th of July, 2022, I will not make an order in favour of the First Applicant but I do so in the understanding is that this will not result in any or much difference in the costs recovered where costs were jointly incurred. Nonetheless, I expressly make no order in respect of the First Applicant's costs as I consider it appropriate to signal the depth of my disapproval for the treatment which officials within the Respondent's department were subjected to during the course of the process, even if this does not have any real impact on the costs properly recoverable as having been incurred in bringing and pursuing these proceedings on behalf of the Second and Third Applicants. Where there are no financial consequences in the particular circumstances of this case, it nonetheless reflects my strong disapproval of the First Applicant's behaviour. No decision maker engaging in discharging their duties should be subjected to such abusive correspondence.

CERTIFICATE APPLICATION

18. In their submissions in support of an application for a certificate the Respondent focuses on two issues namely:

(i) whether an application to the Minister to revoke a deportation order under s. 3(11) of the Immigration Act, 1999 (as amended) falls within the meaning of "proceedings" in Article 42A.4.1 such that the Minister must consider the best interests of an Irish citizen child as a *paramount* consideration; and

(ii) whether Article 42A of the Constitution has any application to a deportation (under s.3(11) of the Immigration Act 1999) decision;

19. It is common case that the criteria for consideration in this application for a certificate for appeal are: that the point of law raised is one of exceptional importance, that the area of law must be uncertain and that it would be in the common good to resolve the uncertainty, the point of law must arise out of the court's decision and the requirements of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements. There is no agreement, however, in relation to the application of these principles in this case.

20. First and foremost, the parties are not in agreement that there is uncertainty in the law. The fact that the Applicants did not expressly plead reliance on Article 42A nor develop an argument in reliance on Article 42A in their written submissions, however, suggests otherwise insofar as the applicability of Article 42A is concerned.

21. Dealing first with the best interests principle. It is not a novel point that the best interests of the child should be a primary or paramount consideration in public law decisions including in respect of deportation orders and decisions to revoke or affirm deportation decisions. I expressly did not decide the case on an application of Article 42A4. This much is clear from the terms of my judgment but particularly para. 115 where I stated that it was not necessary to decide whether the best interests test applied as a constitutional imperative either under Article 42A4 or 40.3, as it applied by virtue of s. 3 of the European Convention on Human Rights Act, 2003 in any event.

22. Accordingly, the first point of law identified by the Respondent at paragraph 29 of their written submissions does not arise out of my decision because I did not decide that an

application to the Minister to revoke a deportation order under s. 3(11) of the Immigration Act, 1999 (as amended) fell within the meaning of "*proceedings*" in Article 42A.4.1 of the Irish Constitution, such that the Minister must consider the best interests of an Irish citizen child of a deportee as a paramount consideration.

23. While I did decide that the Minister was required as a matter of Irish law to consider the best interests of the Irish citizen child as a paramount consideration in the context of a s.3(11) review, this is neither a new nor uncertain proposition and is well-established law be it as a matter of Irish constitutional law (*Ogueke* and/or *In Re JJ*) or pursuant to s. 3 of the European Convention on Human Rights Act, 2003. It was for this reason that I did not consider it necessary to decide whether Article 42A4 had application or not and clearly stated as much. As I was satisfied that the Respondent were required to apply a best interests test as a paramount or primary consideration test (and I do not understand this to be disputed either during the hearing or today) and I was satisfied that this had not occurred, I concluded the decision-making process to be flawed, particularly when combined with the failure to consider the rights of the child under Article 42A.

24. I recognize, however, that the Respondent application is not confined to the treatment of Article 42A4 in the judgment but also raises the question of the extent to which Article 42A plays a role in deportation decisions which concern a non-national who has an Irish born child residing in the State. In this regard, the Respondent clearly and openly states in their written submissions in support of this application that until now the Respondent understood that the correct legal position as regards Article 42A was that it did not have application in deportation cases.

25. Notably, most of the cases cited by the Respondent as confirming her in her view that Article 42A has no application are cases which are addressed to Article 42A4 and not Article 42A1 and have been addressed in my judgment. However, it is clear from the recent decision of Hyland J. in *A v. Minister for Justice and Equality* [2022] IEHC 576, in a case which is quite similar to this one, that she applied the earlier decision of the Court of Appeal in *Dos Santos v.* MJE [2015] 3 IR 411 as representing the settled law in respect of the non-application of Article 42A to deportation decisions (she further refers in this regard to. *O.O.A.*, and *J.W. v. Minister for Justice* [2020] IEHC 500). Accordingly, she arrives at a different conclusion to me in

deciding that Article 42A does not require to be independently considered (see para. 37 of her judgment).

26. I observe in relation to the decision of Hyland J. that it was delivered on the 12th of October, 2022, after my judgment in this case but without reference to it. I note also from what is recorded in the judgment that the Article 42A issue appears to have been raised by Hyland J. rather than the parties and she invited the parties to make supplemental written submissions on the question of the application of Article 42A after the hearing had concluded. It is not clear from the judgment when this took place – whether before or after my decision but I am assured by counsel for the Applicants that it occurred before my decision. It appears from the judgment, however, that the issue was addressed only through written submissions. It is unclear to me how full or developed these submissions were. Suffice to say that if Hyland J. was referred to the decisions of the Supreme Court in *J.B. v. KB* [2019] 1 I.R. 270 and *In Re JJ* [2021] IESC 1, she does not address them in coming to her conclusion that the existence of Article 42A does not extend the obligations of the respondent in this case and therefore does not require to be independently considered in her analysis.

27. As apparent from my judgment in this case delivered on the 27th of July, 2022, I understand these decisions of the Supreme Court to establish that Article 42A1 extends the obligations on decision makers to consider the rights of the child as recalibrated in that new constitutional provision. I accept, however, that there are now two seemingly contradictory decisions of the High Court. It is undeniable that in consequence there is a lack of certainty as to the application of Article 42A in a deportation context. I am satisfied that this is a question of law of exceptional public importance. I accept also the Respondent submissions that it stands to affect many other deportation cases involving children, albeit that on the facts of this case I was concerned with a decision-making process in relation to an Irish citizen child with significant special needs for whom his father, the proposed deportee, was a primary carer for many years. I agree that it is desirable in the public interest that an appeal be pursued in this matter so that the question of the application of Article 42A1 is clarified.

28. While I accept as well made the Applicants' point that ultimately this case was decided on the failure of the Respondent to lawfully consider the issue of the primacy of the child's rights and the consequences for the proportionality assessment that flowed from that failure and these considerations arise whether Article 42A1 applies or not, nonetheless an issue arises from the terms of my judgment as to whether I was correct in my conclusion that it was

necessary to have regard to the child's rights under Article 42A1 in this context. I regret that this means that the Applicants' litigation will be further delayed with all the uncertainty, upset and restrictions on them that this brings, particularly in circumstances where these proceedings are the third set of proceedings which have been pursued in relation to the proposed removal of the First Applicant from the State.

CONCLUSION

29. As I see it the issue which arises from the conclusions reached in my judgment is the general applicability of Article 42A1 rather than the application of a best interests test under Article 42A4. Accordingly, I will certify the following question (which is a slight reformulation of the draft question presented on behalf of the Respondent), namely:

I. Has the High Court erred in law in finding that Article 42A.1 applies in deportation decisions which concern a non-national who has an Irish born citizen child residing in the State?

30. While I am certifying one question and refusing to certify the second proposed question having regard to my conclusions on an application of the terms of s. 5(3)(a) of the 2000 Act, I appreciate that in other cases in the immigration context this has not been found to mean that the appellant is confined to arguing the certified point.

31. Finally, it is obviously a matter for the Respondent but it seems to me that in view of the delay already experienced by reason of the necessity for repeat litigation, the accepted importance of the issue of constitutional law identified and having regard to my reliance on two recent decisions of the Supreme Court in coming to my decision, consideration should be given to seeking a leap frog appeal to the Supreme Court in this case.

32. In view of my decision on the certificate application, I will place a stay on both the order of *certiorari* which flows from my judgment delivered on 27th July, 2022 and on the order for costs made today. I note the Respondent's undertaking to take no further steps to remove the First Applicant from the State pending a first listing of this matter before whichever appellate Court has seisin of the appeal. I make no order as to costs in respect of the certificate

application heard today in circumstances where it was resisted with result that the question certified was narrowed and reformulated with the benefit of submissions from both sides.