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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GEORGE ESHOKAI FOR JUDICIAL REVIEW

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GILLEN J

Introduction

[1] This application addresses the approach of the court to costs orders in Judicial Review in circumstances where proceedings are rendered moot by a change in circumstances.

The Facts

[2] In this matter the applicant, a Nigerian national, challenged removal directions issued by the Secretary of State for the Home Department, the respondent, removing him from the United Kingdom. The applicant sought an order of certiorari quashing an earlier decision of 19 April 2007 to remove him to Nigeria and the removal directions of 13th June 2007. Additionally he applied for declarations that the decision was unlawful and that there had been a failure to comply with Article 3(2) of EU Directive 2004/38 and Operation Enforcement Manual Chapter 36. A further order was sought to quash the decision of the respondent to certify his human rights claim as clearly unfounded. A number of other ancillary orders were claimed.

[3] It was the applicant's case that he was a partner of an Irish National with whom he had been in a relationship for nearly two years. This woman was pregnant with the applicant's child and due to give birth in September 2007. In correspondence of 11 June 2007 the applicant's solicitor Richie McRitchie of P Drinan solicitor, had indicated, inter alia, that he would be submitting an application for an EEA residence document and that a copy of this would be forwarded to the respondent. Reliance was placed on the obligation under Article 3(2) of the EU Directive 2004/38 to "undertake an extensive examination of the personal circumstances" of such persons. In addition a claim was made on behalf of the applicant under Article 8 of the

European Convention on Human Rights and Fundamental Freedoms (the Convention).

[4] An essential matter therefore to be determined in the substantive hearing was whether the respondent had erred in settling removal directions and certifying the applicant's human rights claims as clearly unfounded in light of his relationship with his partner.

[5] Leave was granted at a hearing on 21 June 2007 and the matter fixed for substantive hearing on 8 October 2007. At the leave hearing the court directed that the applicant furnish a further affidavit by 12 July 2007. Counsel for the respondent informed me that the direction included an exhortation by the court for the applicant to deal in the affidavit with the relationship that he had with his partner. Following the grant of leave, the applicant did not file a further affidavit.

[6] Certain correspondence was opened to me which was relevant to the instant case. It was as follows.

[7] As early as the 29 March 2007, the then solicitor acting on behalf of the applicant Fidelma O'Hagan wrote to the Enforcement and Removal Branch of the Immigration Authorities on behalf of the applicant in relation to his immigration status in the United Kingdom. The penultimate paragraph of that letter was as follows:

> "Please note that I am presently obtaining evidence which I will lodge with your office in support of an application under the Immigration (European Economic Area) Regulations 2006 on the basis of my client's relationship with Ms Ciara Doyle, my client's partner who is presently pregnant with her child. I also intend to lodge evidence in support of an Article 8 application on similar grounds."

[8] This letter made it very clear that for some time the issue of the EEA status of the applicant was in contemplation by his advisers and could therefore have been brought to the fore long before the removal directions of June 2007 were made.

[9] Two letters dated 18 June 2007 were of importance. First, the present solicitor on behalf of the applicant wrote to the Immigration and Nationality Directorate in Croydon applying on his behalf for an EEA residence document in accordance with Directive 2004/38 and the Immigration (EEA) Regulations 2006 (the Croydon letter). It is curious that this step did not materially feature at all in the affidavit evidence to date.

[10] On the same date a letter was sent by the same solicitor to the Belfast Enforcement Office of the Immigration Authorities in which the submissions on behalf of the applicant are set out. This letter did not make clear that an application had been made in the Croydon letter on the same date to the Immigration and Nationality Directorate under the Directive 2004/38. The Border and Immigration Agency in Belfast replied to the applicant's solicitor on 20 June 2007.According to Mr McGleenan who appeared on behalf of the respondent, it was unaware of the Croydon letter .The Home Office replied on 26 June 2007 to the Croydon letter indicating receipt of the application with an accompanying explanatory letter. That letter indicated that the application had not been received until 20 June 2007.

The Issue before the Court

[11] Removal directions will generally not be enforced where an EEA application is outstanding .Pursuant to the Croydon letter and the response of 26 June 2007 there is now outstanding such an application which will serve to suspend the removal directions pending a determination of the EEA application. Accordingly both parties were agreed that the judicial review application was now academic.

[12] Given the new turn of events, by consent the application for judicial review was dismissed subject to the question of costs being resolved. The applicant sought an order for costs against the respondent

The submissions of the parties

[13] It was the applicant's case that an application was made for an EEA residence card on 18 June 2007, three days prior to the granting of leave on 21 June 2007. Counsel on his behalf submitted that the respondent had indicated on 20 June 2007 that removal directions were to remain in force and therefore the applicant had no choice but to commence proceedings.

[14] Accordingly it was the applicant's case that had the respondent considered and applied the relevant legal principles to the facts, in particular to the EEA status point, he would have realised that any defence of his position was untenable and would have avoided the need for proceedings to be issued.

[15] The respondent's case is that the applicant has been dilatory in dealing with this issue of the EEA residence card. The matter had been raised as early as 29 March 2007 and yet there had been delay in making application until 18 June 2007, which application was not received in Croydon until 20 June 2007. Accordingly the Belfast office of the relevant immigration department was unaware of this on 21 June 2007 at the leave hearing. There was some dispute between the parties as to whether or not this matter had been expressly raised

at the leave hearing, but certainly the Order 53 application did not expressly refer to the issue of the EEA residence card.

[16] Moreover it is the respondent's case that the applicant had failed to file an affidavit outlining the details of the relationship between the applicant and the Ms Doyle as suggested by the court at the leave hearing and this in turn had prevented the respondent properly assessing the matter and preparing a replying affidavit in advance of the substantive hearing on 8 October 2007.

[17] It was the respondent's case that the basis for the challenge to the removal directions was in essence the applicant's relationship with Ms Doyle and the attendant engagement of Article 8 rights. That same relationship could have grounded an EEA application long before the judicial review challenge crystallised rather than at best leaving the EEA application to be lodged on 18 June 2007 three days before the leave hearing. It is the respondent's case that had the applicant taken that step at an appropriate stage, the judicial review would have been unnecessary.

[18] Accordingly the respondent submitted that the judicial review application had now become academic as a result of two supervening considerations namely the birth of the applicant's child to Ms Doyle and the submission of the EEA application on 18 June 2007 which had a suspensive effect on the removal directions.

The legal principles governing costs

[19] The fundamental principle governing the award of costs is that the court has a broad and unfettered discretion upon settlement and discontinuance. The flexible nature of the court's jurisdiction enables the court to make costs orders at various stages of judicial review proceedings. There have been instances where the court has exercised its power as to costs where there had been a settlement before permission had been granted (see R v Royal Borough of Kensington and Chelsea RLBC Ex p. Ghebregiogis (1994) 27 HLR 602). In Bolton Metropolitan District Council v Secretary of State for the Environment (Practice Note) (1995) 1 WLR 1176, Lord Lloyd said at 1178F:

> "In all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule."

[20] However it is the conventional approach that the losing party will be ordered to pay the costs of the winning party. Costs normally follow the event where the merits are obvious. The starting point therefore is the same

in judicial review proceedings as in other types of cases (see R (Smeaton) v Secretary of State for Health (2002) 2 FLR 146 at 406).

[21] The issue that arises in this case is as to costs where the substantive proceedings have been resolved or have become academic prior to the hearing but after leave has been granted. I consider that the courts in Northern Ireland should adopt the so called Boxall guidance set out in R v(Boxall) v The Mayor and Burgesses of Waltham Forest London Borough Council (2001) 4 CCLR 258 (Boxall) notwithstanding that this case was set in the context of the Civil Proceedings Rule 44.3 that governs proceedings in England and Wales. That case dealt expressly with those cases where leave had been granted but the substantive hearing had not occurred because the issues had now become academic. Scott Baker J, having considered the authorities, distilled the principles to be applied as follows:

> "The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.
>
> It would ordinarily be irrelevant that the claimant is legally aided.
>
> The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs.
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> At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs and the conduct of the parties.
>
> In the absence of a good reason to make any other order the fall back position is to make no order as to costs.
>
> The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage."

[22] I pause to observe that these principles chime with Order 1A of the Rules of the Supreme Court (NI) 1980 with its emphasis on the requirement to do justice between the parties saving expense and ensuring cases are dealt with expeditiously and fairly.

[23] In dealing with costs, courts will be sensitive to the parties resolving their differences for reasons unconnected to the merits of the case. In R v Liverpool City Council ex p. Newman (1992) 5 Admin. LR 669(Newman) the court dealt with an application to discontinue proceedings after leave had been granted. Newman involved a challenge by individual members of NALGO designed to guard against redundancy in the wake of the Council's budget settling process. The challenge became academic when the Council rescinded a number of outstanding redundancy notices. Simon Brown J, having set out the general rule that costs follow the event on discontinuance where this is equated with defeat, added:

> "That, of course, was dealing with the position in an ordinary civil action. But I have no doubt that if judicial review proceedings are discontinued there is equally a general rule that that will be at the applicant's cost. In other words the respondents will recover their costs, provided again that such discontinuance can be shown to be consequent upon the applicant's recognition of the likely failure of his challenge.
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> The position, is, however, entirely different where, as here, the discontinuance follows some step which has rendered the challenge no longer necessary, which in other words renders the proceedings academic. That may have been brought about for a number of reasons. If, for instance, it has been brought about because the respondent, recognising the high likelihood of the challenge against him succeeding, has pre-empted his failure in the proceedings by doing that which the challenge is designed to achieve – even if perhaps no more than agreeing to take a fresh decision – it may well be just that he should not merely fail to recover his own costs but indeed pay the applicant's.
>
> On the other hand, it may be that the challenge has become academic merely through the respondent sensibly deciding to short-circuit the proceedings, to avoid their expense or inconvenience or uncertainty without in any way accepting the likelihood of their

> succeeding against him. He should not be deterred from such a cause by the thought that he would then be liable for the applicant's costs. Rather in those circumstances, it would seem to me appropriate that the costs should lie where they fall and there should accordingly be no order. That might equally be the case if some action wholly independent of the parties had rendered the outcome of the challenge academic. It would seldom be the case that on discontinuance this court would think it necessary or appropriate to investigate in depth the substantive merits of what had by then become an academic challenge. That ordinarily would be a gross misuse of this court's time and further burden its already over-full list.
>
> In my judgment, this case is clearly one where this court cannot hope, in a short time, to discern what the likely outcome of the challenge would have been had it been litigated to a conclusion.
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> All that it is possible to say with certainty is that, without accepting the validity of the challenge the respondents, following the grant of leave, acted so as to render academic any continuing interest in the proceedings on the part of those who NALGO represent. In short, the case seems to me to fall clearly into the category of those in which it is appropriate to allow discontinuance without penalty to the applicants."

[24] Accordingly in a costs issue the court is unlikely to expend the same time considering the issue in the substantive claim as it would be in a fully contested hearing. Rather it will broadly consider the allegations and responses.

[25] A good example of the approach to be adopted is found in Miah v London Borough of Tower Hamlets (2002) EWHC 1141 (Admin). This case concerned a judicial review of family care assessments made by a local authority. After the grant of leave, the applicants succeeded in being rehoused, which was the outcome sought as a result of the community care assessment. Sullivan J held that it was not appropriate to examine in detail the extent to which the local authority was complying with its precise statutory duty or to individually assess care needs prior to permission being granted. He stated:

> 'In terms of doing justice as between the parties, the family have effectively succeeded in obtaining that which they wished. I do not think it a sensible use of the court's time to probe through the entrails to see whether or not they were legally entitled to that, for these reasons I make no order as to costs'."

Conclusions

[25] Applying these principles to this case, I have concluded that there should be no order as to costs for the following reasons:

[26] First, I am not satisfied that the resolution in this case has been driven by the merits of the case as presented in the Order 53 statement and on the basis of which leave was granted. Belatedly the applicant has introduced the application for EEA status, a step which I consider could have been taken several months prior to the leave hearing rather than merely 3 days. Without this step having been taken it is not clear what the outcome of this case might have been. All that it is possible to say with certainty is that the effect of the application for EEA status is to render the proceedings moot.

[27] Secondly, once the application for EEA status was established, the respondent should not be discouraged from swiftly recognizing its suspensive effect by the potential burden of costs.

[28] Thirdly, with the late arrival of the EEA status issue, it is unnecessary to delve deeply into an investigation of the substantive issues/merits outstanding in the rest of the case if the principle of conserving court time and reducing costs embodied in Order 1A of the RSC is to be observed.

[29] In all the circumstances although I have dismissed the application I make no order as to costs.