THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 495 J.R.]

BETWEEN

NDUBUISI UCHE

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 23rd day of April, 2018

1. The applicant is a Nigerian national who married a Czech citizen in 2011. She had no employment as of the date of her marriage certificate and the State is disputing the extent to which she was exercising EU Treaty rights thereafter. In December, 2011, the applicant was granted a five-year permission to be present in the State based on the marriage. In August, 2016 his wife left the State and thereafter no contact seems to have occurred. The applicant's permission expired on 6th December, 2016. The applicant then made a retention-of-rights application and a permanent residence application. In April, 2017, the retention-of-rights application was refused. A review was sought but was ultimately withdrawn. At that point consideration was given to the permanent residence application.

2. The applicant applied for leave to seek judicial review on 19th June, 2017. The reliefs sought in the proceedings as drafted were an order of *mandamus* compelling the respondent to determine the application for a permanent residence card, a declaration that the Minister was obliged to grant permission to reside and work pending the determination of that application and an injunction requiring such permission to be afforded. When the leave application was made, notice of the Minister's intention to refuse the application for permanent residence was brought to the court's attention. Thus, *mandamus* was not pursued and leave for that relief was not granted.

3. On 30th June, 2017, the application for permanent residence was refused. Administrative review of that decision was then sought. On 20th July, 2017, the respondent wrote an important letter in the context of the present proceedings. The CSSO wrote to the applicant's solicitors offering the applicant a right to work pending the determination of the application but stating that it was to be agreed (at para. 4 of the letter) that "*the applicant undertakes that a plea of mootness will not be raised by him in relation to the substantive proceedings on account of the grant of discretionary permission*". It also expressly stated that the grant was not to be construed as a concession that the Minister has a legal obligation to grant the temporary permission and agreement to these terms was sought. Those rather important conditions were unfortunately not alluded to on behalf of the applicant when the present application for costs was made.

4. On 18th December, 2017, the applicant's application for review of the refusal of permanent residence was also refused. That decision is the subject of separate judicial review proceedings [2018 No. 197 J.R.].

5. The applicant's solicitors had previously accepted the terms referred to but on 27th February, 2018 wrote to the CSSO asking whether the respondents regarded the case as moot, and they said that if the respondents did accept the case was moot then clause 4 of the previous letter was no longer effective. There was no reply to this so it is hard to see how it can be relied on. A party certainly cannot unilaterally get out of an undertaking. The applicant's lawyers have completely misstated and misunderstood the effect of clause 4. That is an undertaking that mootness will not be asserted by the applicant based on the grant of temporary permission. That undertaking is not affected by the case becoming moot on some other basis such as the one that applies at present, namely the basis that permission has been finally refused. That renders the case moot save potentially as to damages, but the applicant has expressly disclaimed that plea according to counsel's submission.

6. I have received submissions from Mr. Derek Shortall B.L. for the applicant and Ms. Eilis Brennan B.L. for the respondent.

7. The law in relation to mootness is now primarily to be found in the Supreme Court judgments 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* [2015] IESC 45 (Unreported, Supreme Court, 26th July, 2016) (MacMenamin J.).

8. Mr. Shortall submits that there is an event in this case, the grant of permission to remain in the State pending the outcome of the permanent residence application, and says that "*the application is moot because the respondent has essentially granted the applicant the relief sought*". That would be correct but for the undertaking to which he did not refer in his initial submission. The submission made is an attempt to improperly rely on the grant of temporary permission in order to assert mootness and therefore to assert an entitlement to costs, which is precisely what the applicant undertook not to do. The undertaking takes the grant of permission out of the equation for costs purposes. Taking that out, what makes the proceedings moot is that the applicant's application has been finally adversely decided. Unfortunately, I have to conclude that the applicant's presentation and prosecution of this costs application is in breach of his undertaking, which had previously in effect been communicated to the court by virtue of the parties having compromised the injunction application.

9. In his reply the applicant's counsel sought to adjust his ground by saying that what makes the case moot is that the State is not fighting it. That is not so. The proceedings were not adjourned to allow a statement of opposition. They were adjourned to await the outcome of the permission application. Mr. Shortall himself is telling me that the case is moot, as it clearly is. It is also suggested that the issue of whether the refusal of permanent residence was valid or not is a live issue. That may be so, but it is not a live issue in the present proceedings.

Order

10. Since the proceedings are moot I will strike them out and I will refuse the applicant's application for costs for the reasons set out above and in the light of the caselaw referred to. As Ms. Brennan was not pressing a right in relation to costs of the matter incurred by the respondent, I will make no order in relation to those costs.