[2021] IEHC 264

THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 116 JR]

BETWEEN
M.A. (BANGLADESH), S.A. AND A.Z. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M.A.)

APPLICANTS

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

RESPONDENTS

(NO. 2)

JUDGMENT of Humphreys J. delivered on Monday the 26th day of April, 2021

1. In *M.A. (Bangladesh) v. International Protection Appeals Tribunal (No. 1)* [2017] IEHC 677, [2017] 11 JIC 0801 (Unreported High Court 8th November, 2017), I referred certain questions concerning the Dublin III regulation (Regulation (EU) No. 604/2013) to the CJEU under art. 267 TFEU.

2. On foot of that reference, in Case C-661/17 *M.A. v. The International Protection Appeals Tribunal* (Court of Justice of the European Union, 23rd January, 2019, ECLI:EU:C:2019:53), the CJEU answered the reference in a sense that was, in essence, favourable to the interpretation advanced by the respondents.

3. In separate proceedings, *U. v. Minister for Justice, Equality and Law Reform* [2017] IEHC 490 (Unreported, High Court, 26th June, 2017); *U. v. Minister for Justice, Equality and Law Reform* [2017] IEHC 613 (Unreported, High Court, 24th October, 2017), O'Regan J. had found for the State on the question at issue, namely who was to exercise the fall-back discretion under art. 17 of the Dublin III regulation.

4. The Court of Appeal reversed that position and found for the applicants *(N.V.U. v. The Refugee Appeals Tribunal* [2019] IECA 183 (Unreported, Court of Appeal, Baker J., (Irvine and McGovern JJ. concurring), 26th June, 2019)), and the Supreme Court was to go on to reverse *that* judgment and reinstate the High Court's finding for the State (*N.V.U. v. Minister for Justice and Equality* [2020] IESC 46 (Unreported, Supreme Court, Charleton J. (Clarke C.J., O'Donnell, MacMenamin and O'Malley JJ. concurring), 24th July, 2020)).

5. Crucially for present purposes, the Supreme Court granted 50% of the costs in that court to the losing applicants, made no order as to costs in the Court of Appeal and upheld the order giving the applicants 50% of the High Court costs which was granted by the learned trial judge, despite the applicants having lost there as well. So two different courts gave 50% of the costs to the losing applicants.

6. Also of crucial importance for present purposes is the fact that the judgment of the CJEU was of significant relevance in resolving the European law aspects of the problem and contributed substantially to the clarification of the questions at issue. That judgment, as noted above, arose in the present proceedings, not in *N.V.U.*

7. Despite having a relatively free hand following the Supreme Court judgment, the Minister for Justice decided on a discretionary basis to admit the applicants to the protection process, so as a result it has been agreed that the present proceedings are moot and should be dismissed. The issue is what to do about costs.

8. The parties engaged in open correspondence on this issue as well as some without prejudice negotiations, although I do not place any major reliance adverse to the State on the open exchanges in the particular circumstances. Admittedly, the State did make an offer of a contribution to the applicants' costs, but that is in no way binding given that the offer was not accepted. The respondents now seek full costs whereas the applicants seek a contribution to their costs albeit that counsel did not particularise that by reference to a percentage or a specific amount, but rather left that to the court.

9. The starting point is that costs follow the event. Also in favour of the Minister is that this case was ultimately about the applicants' private interests. Most cases are. However, I am not sure that that fact or the general default position is particularly determinative because the point at issue here was in a really exceptional category of extraordinary public importance. Several hundred other cases got held up waiting for final determination of the point that arose in this case and in *N.V.U*. That is the outstanding difference between this case and *M.S. (Afghanistan) v. Minister for Justice and Equality* [2021] IEHC 164 (Unreported, High Court, 16th March, 2021) – see para. 22(vi) and (vii).

10. Nor do I think it is a huge issue in favour of the respondents that they resisted the hearing of the present matter originally. That seems to me to be water under the bridge. The original High Court decision in *N.V.U*. did not seek assistance from Luxembourg and didn't expressly address the precise formulation of the argument canvassed in these proceedings, so it seems to me that there was an objective reason for the present case to proceed, in the sense that it provided the vehicle by which that clarification was obtained.

11. Indeed this case would have been heard in this court in full and the inevitable appeal would either have travelled with *N.V.U*. in the Court or Appeal or might even have gone on to the Supreme Court first by leapfrog as the lead case, had not the Court of Appeal vacated the original date and granted a much earlier hearing date to *N.V.U*. than had been originally envisaged. In fact I was contemplating an early hearing in this court until that development meant there was no point doing so because the proximity of the new appeal hearing date didn't leave enough time for this case to be substantively decided and appealed so as to catch up with *N.V.U*.

12. I also take note of the point in favour of the Minister that while the State did change its position as to how the art. 17 discretion was to be exercised, that change had occurred prior to the initiation of the present proceedings. While I fully acknowledge that point, nonetheless it cannot be said that the position was totally clear thereafter. One could contend that the lack of clarity is demonstrated by the expression of some doubts as to the correctness of, or disagreement with, the Minister's position by Baker J. (Irvine and McGovern JJ. concurring) in the Court of Appeal in *N.V.U*. and previously by Hogan J. (Peart and Irvine JJ. concurring) in *H.N. v. International Protection Appeals Tribunal*

[2018] IECA 102 (Unreported, Court of Appeal, 19th April, 2018) (at para. 18, he said that the applicants' conclusion "would seem to follow"). Together with my own views favourable to the applicants, that was an indicative score of 6 judges to 1 leaning towards the applicants, prior to the deciding fixture at the Supreme Court. While obviously that position proved to be legally erroneous, it can hardly be said that the legislation made that outcome entirely clear and predictable. While we are in the irreverent and not-to-be-taken-too-seriously business of noting scores, maybe I should reiterate that another 6 judges (the Supreme Court plus O'Regan J.) gave the applicant in *N.V.U.* some measure of costs despite losing, making it 12-0 in terms of the overall total of judges prepared to do *something* for the various applicants raising this point in the headline cases prior to and including their final determination. That is not at first sight indicative of the State having an impregnable, cast-iron and self-evidently correct position which rendered clarifying litigation unnecessary and inappropriate.

13. Even bearing in mind all of the points made on behalf of the respondents, by far the most significant factor in relation to costs in the present case is the fact that the Supreme Court granted the applicants 50% of costs in *N.V.U*. For good measure, as noted above, that related to the costs not just in that court, but also in the High Court. Even if the *N.V.U*. case hadn't happened, the fact that this case raised a point that affected vast numbers of other cases, not just in some technical sense, but in terms of the concrete reality of a huge flotilla of actually issued judicial reviews that were live before the court at the time, puts it in a very special and truly exceptional category for the purposes of costs.

14. While *N.V.U*. was formally the "lead case", the present case was also as or nearly as significant to the ultimate determination of the issue as was the *N.V.U*. case itself. The precise basis of the Supreme Court's disposition of this issue is not the point. The point is that the present case provided the mechanism for the reference and the judgment of the CJEU which furnished an EU law interpretation without which it would have been difficult to envisage complete finalisation of the point.

15. In these very special and unusual circumstances, therefore, and taking fully into account the default position of costs following the event as well as all of the other factors, whether reinforcing that default position or otherwise, it is appropriate to follow the lead of the Supreme Court and to award the applicants 50% of the total costs of the proceedings (which total will include the costs of and related to the proceedings before the CJEU and all reserved costs).

Order

16. Accordingly, the order will be:

(i). that the proceedings be dismissed; and

(ii). that the applicants be awarded as against the respondents 50% of the total costs of the proceedings (which total will include the costs of and related to the proceedings before the CJEU and all reserved costs).