Neutral Citation: [2013] IEHC 527

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 28 J.R.]

BETWEEN

YOUCEF MANSOURI

APPLICANT

AND

THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered the 29th day of January, 2013

1. This is an application for costs by the applicant in a case in which the issue between the parties became moot after the institution of judicial review proceedings in the following circumstances. The applicant, then an Algerian national was granted a declaration of refugee status by the respondent on 14th September, 2007 and has lived lawfully within the State since that date. He applied for naturalisation as an Irish citizen pursuant to the provisions of s. 15 of the Irish Nationality and Citizenship Act 1956 on 21st February, 2008. The applicant and his solicitors engaged in correspondence with the respondent over the following four years in relation to this application, the most relevant of which is:-

(i) On 8th May, 2008, the Irish Naturalisation and Immigration Service (INIS) wrote to the applicant informing him that his application had not been examined in detail and that confirmation that it was valid could not be given or that he met the statutory conditions for naturalisation until a detailed examination took place.

(ii) On 17th August, 2009, the applicant's solicitors wrote to INIS some fifteen months after the initial application, indicating his desire for a grant of naturalisation so that he could feel fully integrated into Irish society.

> It was emphasised that the applicant was effectively "stateless" in that he could never return to Algeria and could not hold the passport of any other country. It was requested that the application be expedited and finalised.

(iii) On 18th August, 2009, the INIS wrote that it was not possible to give a timescale within which a decision would be furnished and stated "there is a limit to the reduction in the processing time that can be achieved as applications for naturalisation must be processed in a way which preserves the necessary checks and balances to ensure that it is not undervalued and is only given to persons who genuinely satisfy the necessary qualifying criteria".

(iv) On 27th October, 2009, the applicant's solicitors wrote to the INIS complaining that the delay in processing their client's application was excessive and unreasonable. They requested a timeframe within which they could expect to have the matter determined.

(v) This correspondence was acknowledged by INIS on 29th October, 2009 and though a timescale could not be given, an assurance was given that "officials in this office will contact you as soon as a decision is reached…".

(vi) On 17th May, 2010, some seven months later, the applicant's solicitors again wrote to INIS expressing the applicant's appreciation of the significance of a certificate of naturalisation and "that many inquiries need to be made by the Minister during the course of his investigation of an application." INIS were asked to confirm the current stage of the processing of the application and whether any further documentary evidence was required.

(vii) By reply on the 18th May, 2010, INIS stated that applicants for naturalisation were generally dealt with in chronological order as this was deemed to be the fairest approach to all applicants. The solicitors were informed that the average processing time from application to decision was about 23 months. It was further stated:-

> "The more complicated cases can at times take more than the current average, while an element of straightforward cases can be dealt with in less than that timescale. There is a limit to the reduction in the processing time that can be achieved as applications for naturalisation must be processed in a way which preserves the necessary checks and balances to ensure that the status of citizenship is not undervalued and is only given to persons who genuinely satisfy the necessary qualifying criteria."

(viii) On 16th July, 2010, the applicant's solicitor again requested expedition and confirmation of the current stage of the processing of the application and referred to Article 34 of the Geneva Convention to the effect that "contracting states shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings…"

(ix) On 20th July, 2010, the INIS replied indicating that the length of time taken to process each application "should not be classified as a delay, as the length of time taken for any application to be decided is purely a function of the time taken to carry out necessary checks…."

(x) The applicant's solicitors wrote on the 9th June, 2011, to INIS informing them that he was frequently missing out on job opportunities as prospective employers would not consider him beyond the interview stage when he could not furnish them with a passport. The prospective employers would not accept his travel document in lieu of a passport.

(xi) A reply was furnished on the 10th June, 2011, stating:-

> "Your client's application for naturalisation is currently being processed in the normal way with a view to establishing whether the applicant meets the statutory conditions for the granting of naturalisation and will be submitted to the Minister for decision when processing is complete."

(xii) On 7th December, 2011, the applicant's solicitors again wrote to INIS. They informed INIS that they had obtained a copy of records held by the Department of Justice, Equality and Law Reform following a request made under the Freedom of Information Act 1997. A copy of these records relating to the applicant's application was received by the applicant's solicitors on 23rd February, 2009. Subsequently, a further application was made in respect of any further records held by the Department of Justice, Equality and Law Reform and copies of those documents were furnished to the applicant's solicitors on 14th December, 2011. The court notes that no reference was made in any of the disclosed materials to any application made to other agencies seeking information in respect of the character of the applicant.

(xiii) On 7th December, 2011, the applicant's solicitors wrote pointing out to INIS that the average processing time for naturalisation applications was now stated to be 25 months, and that a public announcement had been made by the Department of Justice and Law Reform that it was hoped to achieve a processing time for applications of six months by the spring of 2012. It was stated that no reason had been provided for the apparent delay in processing the application, despite representations made by his solicitors. It was submitted that nothing arose on the facts of the application that would have rendered it more complicated than any other and that the applicant had been prejudiced by the delay in that he had missed out on employment opportunities. In the final paragraph of the letter it was stated that:-

> "In light of the above and previous submissions, we would respectfully request that you now finalise Mr. Mansouri's application and communicate a decision to us within a strict period of 28 days of the date of this letter. Please note that if we do not hear satisfactorily from you within this timeframe, we will have no alternative but to take our client's instructions on the possibility of applying to the High Court for an order to compel this decision and this letter will be relied upon to fix you with the costs of same. Our client's desire is to have this matter finalised favourably and would be very reluctant to engage in litigation."

(xiv) By letter dated the 9th December, 2011, INIS replied that the law in respect of naturalisation and citizenship was well settled following a series of High Court decisions, which are then listed. The applicant's solicitors were invited not to issue judicial review proceedings on consideration of these authorities. It was indicated that the letter would be relied upon in defence of any claim and to fix the applicant with costs of any proceedings and concluded:-

> "You should also advise your client that the Minister will vigorously pursue any order for costs as against your client and will ensure the state is not put to unreasonable expense in defending inappropriate and misconceived proceedings."

2. By order of the 23rd January, 2012, (Cooke J.) the applicant was granted leave to apply for judicial review for:-

(1) An order of mandamus requiring the respondent to determine the applicant's application for naturalisation; and

(2) A declaration that the respondent had failed to determine within a reasonable period of time the said application contrary to fair procedures and natural and constitutional justice.

(3) An order for costs.

3. Leave was granted upon a number of grounds all relating to the delay in processing the application for naturalisation. It was claimed that the respondent's delay in determining the application was so excessive as to constitute a refusal to discharge his statutory duty under s. 15 of the Irish Nationality and Citizenship Act 1956. It was asserted that:-

> "It is almost four years/forty eight months since the application was made with the relevant documentation. There has been no communication from the respondent to indicate why there has been such a long delay in dealing with the applicant's application. The applicant appears to meet all of the conditions for naturalisation referred to in s. 15 of the Irish Nationality and Citizenship Act 1956, as amended, and all of the necessary checks are long completed."

It was also claimed that the delay was disproportionate and unreasonable particularly having regard to the applicant's status as a refugee and that the delay constituted a breach of Article 40 of the Constitution in failing to deal expeditiously with the applicant's case and a failure to fulfil the state's obligations to facilitate the assimilation and naturalisation of recognised refugees under Article 34 of the United Nations Geneva Convention relating to the status of refugees, 1951.

4. A notice of motion issued returnable to the 20th February, 2012, and service of the relevant documents was effected on the 27th January, 2012.

5. A statement of opposition was delivered on the 7th June, 2012, in para. 1 of which it was pleaded that the proceedings had become moot because a decision had been taken by the respondent in respect of the applicant's application for a certificate of naturalisation on the 4th May, 2012, which was positive. The applicant's solicitors were notified of this decision by letter dated the 10th May, 2012, and consequently the only issue remaining between the parties was one relating to the costs of the proceedings. Each party now claims to be entitled to the costs of the proceedings.

6. The respondent filed an affidavit of Mr. John Ryan, a principal officer in INIS, with the statement of opposition in which he explained the nature of the system which the respondent had constructed to process applications for certificates of naturalisation. It outlined in detail how such applications were managed and, in particular, described how the issue of "good character" was dealt with under ss. 15 and 16 of the Irish Nationality and Citizenship Act 1956, as amended. He stated that as part of the investigation of the character of the applicant, An Garda Síochána is requested to conduct an investigation into the applicant's background, the detail and extent of which is a matter for An Garda Síochána. He stated that there were a number of applications in which the assessment of character takes considerably longer to complete for a number of reasons "including where potential security issues arise". He noted that this necessitates the carrying out of rigorous and wide ranging investigations, the period for the completion of which was outside the control of the respondent. The country of origin of the applicant in question is also a variable which can affect the time within which the checks can be completed. He stated that until such time as those checks are completed it is not possible for the respondent to be satisfied that the applicant to whose application they pertain is of "good character", and this precludes the respondent from making a decision on such an application. Mr. Ryan stated that once an investigation is completed and the applicant in question is deemed to satisfy the conditions of naturalisation, including whether or not he is of "good character", a written

recommendation on the application for a certificate of naturalisation is then prepared and furnished to the respondent together with the file.

7. Some explanation for the delay in dealing with the applicant's application is set out at paras. 37 – 39 of the affidavit. It was acknowledged that the determination of the applicant's application took longer than the average period referred to in the Department's correspondence with him in May, 2010 because his application was one of those in which particular potential security issues had to be addressed in the context of assessing whether or not he was of "good character". It was asserted that it was not possible for the respondent to set a deadline for the completion of those "rigorous checks". Further, Mr. Ryan stated that the information sought was only received by the investigating unit within the Department in March, 2012 which then enabled a view to be formed as to whether or not the applicant satisfied the "good character" condition of naturalisation. Following the receipt of this information a written recommendation was prepared on the applicant's application for a certificate of naturalisation and submitted to the respondent on the 30th March, 2012, together with his file. This led to the grant of a certificate of naturalisation on the 4th May, 2012.

8. By letter dated 15th June, 2012, the applicant's solicitors indicated to the respondent that they were "currently considering our response to…opposition papers" and sought "full and fair disclosure" relating to the reasons for the delay in dealing with their client's application for naturalisation. This letter in effect sets out a number of interrogatories relating to the nature and extent of the inquiries made by the respondent between the 5th June, 2008, and the 23rd January, 2012, in respect of the character of the applicant. The writer also indicated that a number of further applications were being considered including an application for discovery and an application to cross examine Mr. John Ryan on the contents of his affidavit. By letter of the 22nd June, 2012, the respondent noted that the matter in respect of costs had been before the High Court on 11th June, 2012, and indicated that the respondent relied upon the position set out in the affidavit of Mr. Ryan sworn on the 5th June, 2012, which it regarded as a satisfactory explanation for the time taken to determine the application and to enable the High Court to determine costs. It denied the applicant's entitlement to have his twenty questions answered. The letter added:-

> "…in respect of the questions specifically referable to the time taken to determine the applicant's application and the nature of the examination carried out on foot of it, we would point out that, as averred to in Mr. Ryan's affidavit, there are some cases where checks are made with external agencies which can lengthen the time taken to determine applications, and the consequent elongation of the determination period is frequently outside the control of the respondent. For reasons of national security, the respondent is not prepared to disclose to you the nature of such checks or the identity of the agencies with which they are made or in which cases such checks are made. We trust you will appreciate his position in this regard."

9. A motion issued on 4th July, 2012, returnable to the 9th July, 2012, seeking an order compelling the respondent to reply to "the particulars" sought in the letter of the 15th June, 2012, and an order directing the cross examination of Mr. John Ryan at the hearing of the matter. This motion was ultimately adjourned to the hearing of the costs matter.

10. At the outset of the hearing, it was submitted on behalf of the applicant that full and fair disclosure had not been made in relation to delay such as to enable the court to determine the issue of costs. In reply the respondent was hesitant to supply details of the inquiries made in respect of the applicant. In particular, the respondent was reluctant to disclose the content of communications with various third parties outside the state. If the matter were pressed an issue of privilege was said to arise which would have to be litigated. The court then invited the respondent to submit such further information, as was possible, concerning the chronology of events relevant to inquiries with third parties regarding the applicant's good character. The court gave the respondent the opportunity to furnish it with evidence of any efforts made by the respondent to seek information concerning the applicant's good character, whether such information was received, and when and how long it took to consider the information.

11. In a supplemental affidavit of the 2nd November, 2012, Mr. Ryan stated that:-

> "I say that on the 9th June, 2008, the application for a certificate of naturalisation made by the applicant was assigned to a batch of applications requiring particular security checks. From that date the application was, in effect, entered into a queue for security checking which in all cases involved making requests of external security agencies for assistance. These requests are made by a particular section of An Garda Síochána to which the applications are referred, which on the completion of the process provides the Department with a security report on the application. As averred to in my previous affidavit, the Department received the relevant response on 2nd March, 2012, following which the application was processed without further delay."

12. The respondent was unable to expedite the process of security checks through external agencies. However, Mr. Ryan stated in his affidavit that there was continuing contact with An Garda Síochána in an attempt to expedite the matter as far as possible. In addition, he stated, that numerous telephone calls and electronic communications between the Department and An Garda Síochána occurred and there were also formal meetings regarding the provision of security reports on the 23rd March, 2010, 28th May, 2010, 24th June, 2010, 11th April, 2011, and 10th February, 2012. It was not made clear to the court whether these meetings concerned general delay in the furnishing of reports or delay specific to this case.

13. While accepting that it often took a considerable amount of time to obtain assistance from external agencies, Mr. Ryan stated that the authorities in this jurisdiction were dependent on the goodwill of those agencies in accommodating them and were indebted to them for the invaluable assistance provided by them in that regard. This assistance helped to ensure the maintenance of national security, the integrity of the process for determining applications for certificates of naturalisation and, ultimately, the integrity of an Irish passport, with all the desirable consequences that flowed from that to the state and its citizens. He was unwilling to disclose the type of information obtained from such external agencies for reasons of security but also because of the basis upon which such information is provided by the external agencies to the State.

14. Counsel for the respondent emphasised that notwithstanding the inquiries made in respect of the applicant, this should not be regarded as and was not a reflection on the applicant's character in any respect. The making of these inquiries does not imply anything that reflected negatively on the applicant.

15. The supplemental affidavit of John Ryan was of considerable assistance in providing a much more complete understanding of the chronology of events that gave rise to the delay in this case. It provided a useful insight into how the applicant's case was investigated and confirmed that the respondent was dependent upon parties outside his control to provide relevant information to his investigation. The chronology indicated continuing efforts of a general nature by the respondent to obtain information and that, in this case, once received, the information was assessed and the decision made within a relatively short time.

16. It is regrettable that the bare chronology outlined by Mr. Ryan was not supplied to the applicant. It is now clear that within four months of this application for a certificate of naturalisation, it was "assigned to a batch of applications requiring particular security checks": it was removed from the general queue and joined a more limited one where it remained until March, 2012. The Minister is, of course, entitled to carry out appropriate investigations as to the character of an applicant and to direct the extent of the inquiries to be made. Inquiries with external agencies manifestly took a very long time. The court notes that the delay in this case is not one that is peculiar to the applicant alone. It is similar to many cases now pending before the court in which the same issue as to costs arising out of mootness following the grant of certificates of naturalisation delayed by investigations of character through external agencies falls to be considered. Mr. Ryan has explained that the Official Secrets Act 1963, and national security preclude the Minister or his officials from informing the applicant with even the bare details of the fact that character is under investigation, the likely duration of such investigations, or even the general fact that such investigations are likely to delay the processing of the case for in excess of four years. However, the court notes that the information is now contained in the affidavits of Mr. Ryan sworn subsequent to the grant of the certificate of naturalisation and well after the initiation of proceedings in the case. It is difficult to understand why this information could not have been given to the applicant at a much earlier stage. The checking of his character, the delay arising in the course of the investigation and the fact that following completion of the investigation his case would then be the subject of decision, were all matters which could have been conveyed without any difficulty to the applicant.

Costs Principles

17. The normal rule is that costs should follow the event in accordance with O. 99, r. 4 of the Rules of the Superior Courts. In this case there is no determination of the substantive case made by the applicant and in respect of which he was granted leave to apply for judicial review because the granting of the certificate of naturalisation by the respondent rendered that issue moot. Both parties in this case now seek costs against the other, but neither can claim to have won the substantive action or "event". There will never be a decision on the merits of this case so that the normal rule does not apply.

18. The principles applicable in relation to the costs of a moot issue were considered by the Supreme Court in *Cunningham v. President of the Circuit Court & Anor* [2012] IESC 39. In delivering the judgment of the court Clarke J. summarised the general principles applicable as follows:-

> "A court…should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot."

19. In the course of his judgment Clarke J. discussed how this general principle should be applied. He said:-

> "4.8 It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In particular there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors. To take a simple example, one might envisage a criminal prosecution which was, on any view, wholly dependent on the evidence of an individual who unfortunately had died before the case could commence. If there had been a challenge, on judicial review grounds, to that prosecution which was not finalised, and if, as here, the DPP were to enter a *nolle prosequi* because of the death of the only real witness, then it might superficially be said that the judicial review challenge became moot by reason of the unilateral action of the DPP but in truth the real reason why the judicial review challenge had become moot would have been because of the death of the witness which made it necessary for the DPP to bring the criminal process to an end.
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> 4.9 In that context it is, of course, important to note that statutory officers and bodies have an obligation to exercise their powers in a proper manner. If circumstances change then it is, of course, not only reasonable but necessary for such officers or bodies to reflect the new circumstances by adopting a position (even if different) which takes into account the circumstances as they have come to be. The mere fact, therefore, that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one party.
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> 4.10 If there were no change in underlying circumstances and if the statutory officer or body had simply changed his or its mind or adopted a new and different view, then such a characterisation might be appropriate. Where, however, there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings had become moot by reason of the unilateral act of one party, on the one hand or, in reality have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand. The result of any such analysis should play an important role in the court's consideration of the justice of where the costs of proceedings rendered moot should lie.
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> 4.11 It does however, seem to me that, where the immediate or approximate cause of proceedings becoming moot is the action of such a statutory officer or body but where it is sought to argue that the true underlying reason is an external factor outside the control of that officer or body, it is incumbent on the officer or body concerned to place before the court sufficient evidence to allow the court to assess whether, and if so to what extent, it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances…"

20. Clarke J. then examined why the proceedings in *Cunningham* had become moot. It was emphasised that the onus was on the statutory officer or body who wishes to assert external factors as the reason for mootness to "at least put some sufficient information before the court to allow a judgment to be made on such questions". In *Cunningham* there was a virtual absence of evidence as to the true reasons why the DPP came to the view that criminal proceedings against the applicant were no longer sustainable. It was noted that the DPP could not be obliged to give reasons for decisions as to whether or not to prosecute. Further, it was entirely appropriate for the DPP to keep pending proceedings under review and to discontinue a case in the event that circumstances change in a way which leads the DPP to the view that the proceedings should no longer go to trial. The reason why changed circumstances might not have been discovered might also be an important factor. In the absence of sufficient information enabling the court to formulate a general assessment of the circumstances in which the case became moot and consequently, whether they post-dated the incurrence of the costs at issue or were not reasonably capable of being discovered prior to the incurrence of these costs, the court determined that the case had become moot by the unilateral action of the Director of Public

Prosecutions and awarded costs against the respondent.

21. In this case, the respondent set out in some detail in the first affidavit of Mr. Ryan verifying the statement of opposition, how circumstances changed thereby enabling the processing of the application following the receipt from external agencies of information as to "good character". Therefore, this case is distinguishable from the situation in the *Cunningham* case in which little or no information was supplied as to why a *nolle prosequi* was entered by the Director of Public Prosecutions thereby rendering the Cunningham case moot.

22. Prior to the *Cunningham* decision a number of High Court judgments dealt with the issue of costs in cases rendered moot after the initiation of judicial review proceedings in immigration and related cases.

23. In *S.G. & N.G. v. The Minister for Justice, Equality and Law Reform* [2006] IEHC 371, the applicants withdrew an application for leave to apply for judicial review but sought the costs of the proceedings to date. In their initial proceedings they sought leave to apply for an order of *certiorari* quashing deportation notices issued by the Garda National Immigration Bureau against both applicants. The proceedings were initiated on 24th October, 2003, and were returnable for 5th November, 2003. On 14th March, 2006, the Minister for Justice, Equality and Law Reform revoked the deportation orders made in respect of the applicants and granted them temporary leave to remain in the State. Medical reports had been supplied to the Minister on 13th January, 2004 and 12th January, 2006. Herbert J. in the course of his judgment determined that there was nothing in the second medical report which was not also and more comprehensibly dealt with in the first medical report of 13th January, 2004. He found that the decision to revoke the deportation orders and to grant the applicants temporary leave to remain on 14th March, 2007, could have been made in January or February, 2004 rather than 14th March, 2007, and that no explanation had been advanced as to why this was not done. He continued:-

> "What is before the court is an application to seek judicial review. Without dealing with the application fully on its merits it would be impossible and, indeed improper, for the court to endeavour to predict the outcome of the application. It appears to me that the question which the court must ask in considering this application for costs is, whether in the circumstances it was reasonable for the applicants to have commenced their application for leave to seek judicial review.
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> In considering whether it was reasonable for the applicants to have instituted these proceedings on 24th October, 2003, the court cannot reasonably have regard to events which developed after that date and could not have been reasonably predicted prior to that date. Subsequent events might be relevant to the question of whether it was reasonable of the applicants to have persisted in their application in certain circumstances. In my judgment so far as the present application for costs is concerned, the court has to consider whether:-
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> > The decision to commence these judicial review proceedings was a proportionate reaction in the applicants to the situation arising from the decisions and actions of the respondents, their servants or agents;
> >
> > The decision to commence these judicial review proceedings was clearly based upon identified, existing and relevant constitutional, statutory and additionally or alternatively legal rules and principles;
> >
> > The decision to commence these judicial review proceedings was on its face manifestly, (as distinct from arguably) frivolous or obviously unstateable and for the purpose of delay;
> >
> > Any alternative course of action was reasonably available to the applicants which would not have exposed the respondents to the risk of incurring legal costs;
> >
> > The applicants had afforded the respondents a reasonable opportunity, in so far as the particular circumstances of the case would permit of addressing and responding to their claims before commencing these proceedings.
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> Applying these tests, I find on the affidavit evidence to which I have referred, and from a careful consideration of the originating documents, that it was reasonable for the applicants, in the particular circumstances of the instant case, to have sought leave from this Court to apply for judicial review on 24th October, 2003, and, thereafter at all times to have persisted in that application. In particular, in the light of the events which have occurred, I find that the respondents could have rendered the application redundant in January or February, 2004 rather than in March, 2006.
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> In the special circumstances, I find that the applicants though seeking to withdraw their motion seeking leave to apply for judicial review are entitled, as against the respondents to the costs of the proceedings to date on a party and party basis. I find nothing in the conduct of the applicants or in the manner in which this application has been prosecuted by them which would permit this Court as a matter of reason and justice to deprive the applicants of those costs or to award costs to the respondents."

The court is satisfied that the considerations outlined in the judgment of Herbert J., remain relevant to the exercise of judicial discretion and the awarding of costs in cases of this kind together with and within the other considerations outlined in the *Cunningham* case.

24. The applicant placed considerable reliance on the decision of Kearns P. in *Salman v. Minister for Justice & Equality* [2011] 1 EHCC 481, in which an application was made for a certificate of naturalisation but no decision had issued for a period of three years and nine months as a result of which application was made for judicial review by way of *mandamus* to compel the respondent to issue a decision in respect of the application and for a declaration that the applicant was entitled to a decision within a reasonable period of time following receipt of all relevant information. There was a history of correspondence similar to this case. On the eve of the judicial review hearing, the respondent issued a decision granting the applicant a certificate of naturalisation, thereby rendering the proceedings moot. The only matter that remained to be determined was that of costs. Kearns P. at p. 11 of the judgment stated:-

> "In the case at hand there is no evidence before the court of any purported system which is in place for dealing with applications for certificates of naturalisation. The letter sent by the respondent in the context of the application for the certificate cannot constitute evidence as to the truth of the matters alleged therein, *i.e.* that the respondent had a fair system in place whereby applications were dealt with in chronological order. The respondent was in possession of all documentation necessary to make a decision since June 2008, and never indicated to the applicant that there was anything outstanding. The respondent did not at any time indicate what was causing the delay in processing the

> application and refused to explain why the period of delay extended far past the average time period put forward by the department. There is no affidavit evidence at the time of bringing this application aside form the respondent's bare assertion that the respondent had in place a fair and rational system for the processing of applications."

Against that background the learned President determined that had the application for judicial review in that particular case proceeded, the applicant would have been entitled to relief on the basis of the respondent's unexplained delay. The costs of the proceedings were therefore awarded to the applicant. In this case, however, an affidavit as to the system pursuant to which the application for the certificate of naturalisation was submitted was filed with the statement of opposition. Thus, the respondent had gone further than the respondent in the *Salman* case by at least submitting some evidence as to the operation of a system and the reasons for delay in reaching a decision. However, no indication had been given up to that point to the applicant as to why the delay had occurred or was continuing.

25. In this case a system was outlined in the first affidavit of Mr. Ryan. However, very little detail was furnished in this affidavit as to how investigations in relation to the applicant's "good character" had delayed the processing of his application. It was only when the case had been rendered moot and during the course of the hearing of the issue of costs that a fuller explanation and exposition of the chronology of events in respect of the investigation in this case and its effect on the decision making process was elaborated upon in the supplemental affidavit of Mr. Ryan. It was this deficit in information supplied to the applicant that resulted in frustration leading to the initiation of proceedings in order to procure a decision on his application. Understandably, it was difficult for the applicant to fathom why a decision of this kind should take almost four years. Any inquiries made on behalf of the applicant were met with somewhat formulaic replies. The absence of a reason for the delay in reaching a decision understandably prompted apprehension on the applicant's part that his application was being unreasonably and unjustifiably delayed, perhaps by administrative inertia or inefficiency. This apprehension can only have been fuelled by information emanating from the respondent suggesting much shorter periods for the processing of some applications for certificates of naturalisation than that experienced by the applicant. The applicant had no appreciation that his case had been placed in a separate queue which of its nature gave rise to lengthy delays, a fact that was well known to the Minister. There was no indication to the applicant at the time of the initiation of his application for judicial review as to when it was proposed to deal with his application. This is in contrast with other cases cited in argument.

26. In *Nawaz v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clark J., 29th July, 2009), an application for costs was made in respect of an application for *mandamus* to compel the Minister to make a decision in respect of an application for a certificate of naturalisation. Following the grant of leave to apply for judicial review, the applicant was granted a certificate of naturalisation. In that case the application for the certificate was made in September, 2007 and the applicant was informed that a decision would be made within 29 months - by November, 2009. Following the initiation of proceedings he was granted a certificate of naturalisation in February, 2009. Clark J. rejected the application for costs. She noted that the proceedings had been initiated notwithstanding the fact that a timeframe had been identified within which the application would be processed and that no particular circumstances of urgency or prejudice had been advanced on behalf of the applicant. The court held that it was not reasonable to institute proceedings in those circumstances. Though making no order as to costs in favour of the respondent, Clark J. indicated that it might be appropriate in the future to make such an order if a similar case arose. The court is satisfied that the facts in *Nawaz* are distinguishable from this case in that Mr. Nawaz had been given a clear timeframe within which his application would be determined: this applicant had not. On the contrary, he had no indication when a decision might be made even after a period of 44 months.

27. In *Nearing v. Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 211 the applicant applied for long term residence under an administrative scheme on 12th August, 2007. The applicant's solicitors were kept fully informed as to the extent of the backlog in processing such applications within the department in March, 2008 and August, 2008. In addition, further information was sought and furnished in respect of the applicant's absence of criminal convictions. After eighteen months the applicant's solicitors threatened legal proceedings if his application was not processed within fourteen days from the 4th April, 2009. Judicial review proceedings were initiated on 27th April, 2009. On the 14th May, 2009, the department informed the applicant that the Minister had decided to grant permission to remain for five years from that date thereby permitting him to work and engage in business without the need for a work permit. Cooke J. was satisfied that the replies from the Immigration Division to the applicant's solicitors gave:-

> "a coherent and transparent account of the way in which it operated and the progress that was made. Applications were processed on a strict and therefore fair order of receipt and the applicant was kept informed from time to time as to how close the applications of August, 2007 were being processed".

The average time taken to process an application for long term residency came down to eighteen months. Eventually the applicant's file was reached in May, 2009 and in an affidavit submitted to the court the entire chronology was set out and the decision taken was said to be unconnected with and uninfluenced by the commencement of the proceedings. Cooke J., having regard to all the circumstances and in particular the transparent manner in which the management of the scheme and the progress in reaching the application was explained from time to time to the applicant's solicitor, found that the time taken could not be regarded as unreasonable. Cooke J. noted that it was not to be assumed in such cases that because following the grant of leave the relief claimed became moot, a court will always regard an outstanding issue of costs as a discrete ancillary issue to be decided by asking the question whether it was reasonable for the proceeding to have been commenced. He stated that if an applicant in such circumstances is to avoid having costs awarded against him where an action does not proceed to judgment, the entitlement to the relief claimed must be proved. He also stated:-

> "*Mandamus* does not issue against an administrative decision maker simply because there is a duty to make a decision. *Mandamus* lies to make good an illegal default in the discharge of a public duty. There must have been, either expressly or by implication, a wrongful refusal to make a decision or such an egregious and unjustified delay in dealing with the application as to be tantamount to a refusal in its effect."

This may be viewed in the context of what was clearly regarded by Cooke J. as a wholly unreasonable initiation of proceedings by the claimant. It is clear that the court in that case regarded the proceedings as unjustified having regard to the transparent way in which the time sequence had been outlined to the applicant's solicitors. In that context, the court is satisfied that there are circumstances in which proceedings may be regarded as unreasonably brought for reasons separate from the issue of mootness and be a factor in the exercise of the discretion in determining costs. Similarly, the fact that a case is initiated with a high likelihood of success but becomes moot is also a significant factor in the exercise of a discretion to award costs.

28. It is clear that the principles formulated in *Cunningham* were not dependent on the applicant succeeding on the merits of her case. In that regard Clarke J. stated in *Cunningham*:-

> "6.2 Next it was said, correctly so far as it goes, that this Court cannot and should not form a view as to whether the appeal was likely to succeed or not. However, it seems to me that that very fact leads into a consideration of the proper

approach to be taken in cases which have become moot precisely because there never will be a decision on the merits."

Ms. Cunningham was not required to establish that she would succeed on judicial review in order to establish her entitlement to costs when the proceedings were rendered moot. Indeed, the Supreme Court formulated the principles precisely because the merits of the case could not be decided and the ordinary rule that costs follow the event did not apply.

29. In *Matta v. Minister for Justice and Law Reform* (Unreported, High Court, Clark J., 21st July, 2010) the applicant, a Lebanese national applied for a long term residency permit. He sought priority for the consideration of his application on the basis that his wife was seriously ill. Priority was refused and the applicant was informed that his case would be considered in chronological order of application. The Minister was requested repeatedly to prioritise the applicant's case. On 14th July, 2009, the applicant's solicitors wrote to the Minister complaining that 12 months had elapsed since the application had been made. The Minister by letter dated 24th July and received by the solicitors on 27th, repeated that the case would be dealt with in chronological order and informed the applicant that applications received in October, 2007 were then under consideration. An application for leave to apply for judicial review by way of *mandamus* was lodged in the Central Office of the High Court on 23rd July, 2009. The long term residency permit sought by the applicant was issued on 14th August, 2009, some 15 months after the application was made, thereby rendering the *mandamus* proceedings moot. Clark J. noted that this case was indistinguishable from that of *Nearing*. Following a careful examination of the facts, the court determined that by reason of changed circumstances there was no basis for the claim of priority at the time of the making of the application and no prejudice had been established on the evidence. There had been no capricious or unfair behaviour on the part of the Minister in processing the case and no unjustifiable delay: the Minister had explained that there would be delay but dealt openly and fairly with the applicant in this regard. No order for costs was made, but the court concluded that this might not be the case in "other such applications".

Conclusion

30. The court is satisfied that the applicant in this case acted reasonably in initiating and persisting in these proceedings. His application for a certificate of naturalisation was made on 21st February, 2008. He made many reasonable inquiries of the respondent in the following years. He requested that his application be expedited. He requested a time for the making of a decision and/or information or confirmation of the current stage of the processing of his application. He explained that he was suffering loss of job opportunities. His solicitor applied twice for the records held in respect of the application by the Department of Justice and Law Reform: nothing appeared in these records to indicate that any progress had been made in his application. The respondent replied on numerous occasions to his correspondence in a formulaic manner informing him that it was impossible to give a timescale within which a decision would be furnished. He was assured that he would be contacted as soon as a decision was reached. The average time for determining applications initially furnished to him was completely inaccurate and well exceeded. He was repeatedly told that his application was "currently being processed in the normal way…". In fact, no active step appears to have been taken in respect of his file from 9th June, 2008, the date upon which inquiries as to his "good character" were initiated as part of a batch of other inquiries. From that time it appears this application remained in a moribund state.

31. On 7th December, 2011, some 44 to 45 months after the initial application, the applicant's solicitors requested the respondent to finalise the application within 28 days. The applicant refrained from threatening proceedings at that stage but instead referred to "the possibility" of considering an application to the High Court for relief. The solicitors explained that their client's preference was to have a decision rather than to engage in litigation. The respondent's reply on 9th December, 2011, gave no information about the applicant's claim or when it might be finalised or the stage to which it had progressed. Unsurprisingly, application was then made on 23rd January, 2012, for leave to apply for an order of *mandamus* requiring the respondent to determine the application and a declaration that the respondent had failed to determine the application within a reasonable time. The application was based on legal principles pertaining to delay in decision making in respect of which there is a substantial body of case law referable to Article 40.3 of the Constitution and Article 6 of the European Convention on Human Rights and Fundamental Freedoms. Leave to apply for judicial review on the basis that the grounds advanced constituted a stateable case was granted by Cooke J..

32. The respondent answered this claim by filing a statement of opposition and the verifying affidavit of Mr. John Ryan which gave an account of the system operated by the respondent in processing applications for certificates of naturalisation. It explained how cases were dealt with in the order in which they were received. There is a backlog. Unlike the decisions cited earlier in this judgment, no timeframe was furnished to the applicant indicating to him the period within which he might reasonably expect to have a decision. He was left for 44 to 45 months without any identifiable progress. As far as he knew, his application was complete. No further documentation or information was required by the decision maker and nothing was asked of him. He was not made aware that any inquiry had been made as to his character. Against that background, it is submitted that it was unreasonable for the applicant to issue these proceedings.

33. The applicant's case is based on what he contended to be egregious and unreasonable delay in the processing of his application. The court is satisfied that there was delay from the applicant's perspective in January 2012 that could not be explained or justified by the respondent. The applicant gave the respondent every opportunity to do so and up to that point had behaved in a very reasonable and patient manner, as is evident from the correspondence exhibited. The respondent initially maintained that the applicant could not have been informed of the fact that an investigation was being conducted with external agencies or the details of communications with external agencies for reasons of national security, the obligations of officials under the Official Secrets Act 1963, and public policy. The rigidity of the respondent's position in this regard was tempered in the supplemental affidavit of Mr. Ryan furnished in respect of the issue of costs. The court fully appreciates the issues of public policy set out in both affidavits. However, it is difficult to understand why the basic information set out at paras. 3 and 7 of the affidavit could not have been conveyed to the applicant or his solicitors in the course of the correspondence. If it could be made public in this Court, it is difficult to understand why it could not have been given to the applicant. The court is satisfied that the respondent's failure to furnish this information was in all the circumstances unreasonable. It would have provided the applicant with an understanding of the fact that a delay was envisaged from as early as June 2008 and a limited understanding as to its cause. It would have provided some assurance that the case was not moribund and that a decision would be made once the outstanding information was obtained. If there were cases of a similar type in which character information had been sought and obtained only after a lengthy delay following which a decision was made, the respondents should have been able to offer a timeframe within which a decision might reasonably be anticipated. The launching of proceedings by way of judicial review had such information been furnished might well have been regarded as unreasonable having regard to the decisions of this Court in *Nawaz, Nearing, Matta* and *Salman*.

34. The court is satisfied that the decision to commence these judicial review proceedings was an entirely proportionate reaction by the applicant to the situation in which he had been placed. He had waited 44 to 45 months for a decision without any reason or explanation for this delay. The court is also satisfied that the furnishing of additional information would have provided an explanation to the applicant as to why the decision was delayed and given him some understanding that his case was being processed even if at a painfully slow pace. It is also clear that the decision to commence these proceedings was based upon identifiable and existing constitutional and other legal rules and principles and could not be regarded as manifestly frivolous or obviously unstateable. Indeed,

the grant of leave indicates otherwise.

35. There is no doubt that the applicant afforded the respondent every opportunity in the particular circumstances of this case to address and respond to this claim before commencing proceedings and was left with no other option in the light of the attitude taken by the respondent that he should not be informed about why his case had been delayed. These factors are matters which the court is entitled to take into account in the exercise of its discretion on this application for costs.

36. In this case the processing of applications for certificates of naturalisation is the construct of the respondent. The merits of the applicant's claim in this judicial review have not been and will not be determined. However, the court is entitled to take into account the position in which the applicant was placed by the respondent as already set out in this judgment. While the *Cunningham* decision states that in the absence of significant countervailing factors a court should ordinarily lean in favour of making no order as to costs in cases which have been rendered moot for reasons outside the control of the parties, I am satisfied that the factors already outlined constitute countervailing factors of sufficient significance to enable the court to depart from that ordinary principle. However, I am not satisfied that this case may be regarded narrowly as one in which mootness arose solely for reasons outside the control of the parties.

37. In this case there was an external element which the respondent regarded as a prerequisite to the making of his decision. On the evidence the respondent sought, as is proper, to investigate the applicant's good character by making inquiries with external agencies. The stasis that ensued in the processing of the application is entirely due to this inquiry. The respondent made the making of his decision dependent upon the conclusion of that investigation. That was a factor over which he had no control. Following the initiation of proceedings, the information became available from the external agencies and was then furnished to the respondent by An Garda Síochána. This enabled the respondent to take a decision thereby rendering the proceedings moot. The court is satisfied that though this was a factor external to the proceedings, nevertheless this is not a case in which it can be said that the proceedings had become moot due solely to external events.

38. In this case it was also submitted that the act of the respondent in granting a certificate of naturalisation to the applicant was a unilateral act, taken after the initiation of proceedings, and in the absence of any external factor. In reality, the respondent is in an intermediate position. On receipt of the relevant information from the external agency, the relevant officials were able to provide a written recommendation for the respondent. The respondent was thereby enabled to process the application due to the fact that the information had been supplied and the inhibiting factor in making a decision had been removed. The circumstances had changed. The respondent could now reasonably and in accordance with his statutory powers determine the application, but that does not mean that these proceedings became moot by reason of the respondent's unilateral action.

39. The court is satisfied that this case does not fall within the category of cases in which mootness was caused by the unilateral act of the respondent; neither can it be said that mootness was due to entirely external events. It is something of a hybrid. It is the case that the respondent adopted a changed position by making his decision due in large measure to the furnishing of information from external sources at a late date. An unusual feature of this case is that the respondent created a process that was reliant for its conclusion upon this external investigation. The court is satisfied that it is entitled to take account of the nature of the external inquiry in the decision making process and its known or anticipated effect in delaying the determination of this application. Further, and importantly, the respondent from the earliest stage deprived the applicant of information about the existence of this inquiry and its effect on the handling of his case, its progress, and any potential delay occasioned thereby.

40. The court is, therefore, in all the circumstances satisfied that it was reasonable for the applicant to initiate these proceedings. At all times prior to the initiation of these proceedings he acted with reasonableness, patience and forbearance. It is not a case that falls to be determined on a strict assessment of whether this was caused by an independent factor outside the control of the parties or by a unilateral act of the respondent, but by the exercise of the court's discretion on the basis of the principles already outlined in this judgment. In this case the applicant was placed in a very difficult position because the investigative and decision making process constructed by the respondent for applicants for certificates of naturalisation gave rise to delay by reason of investigations conducted with external agencies. These remained entirely unexplained to the applicant and his advisors when reasonable inquiry was made. Nevertheless, the applicant waited some 44 to 45 months before initiating proceedings. I am, therefore, satisfied that the applicant should be awarded one half of the costs of the proceedings including one half of the costs of the motion dated the 4th July, 2012. I make this order for all the reasons set out in this judgment on the basis of the affidavits and correspondence exhibited therein and having due regard to all of the submissions made by the parties and because it is fair and reasonable in the exercise of the court's discretion to do so.