

**THE HIGH COURT
JUDICIAL REVIEW**

[2018 No. 490 JR]

BETWEEN

M.S. (AFGHANISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

**THE HIGH COURT
JUDICIAL REVIEW**

[2018 No. 796 JR]

BETWEEN

M.W. (AFGHANISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

**THE HIGH COURT
JUDICIAL REVIEW**

[2018 No. 962 JR]

BETWEEN

G.S. (GEORGIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(NO.2)

Judgment of Humphreys J. delivered on Tuesday the 16th day of March, 2021

1. In *M.S. (Afghanistan) v. Minister for Justice and Equality (No. 1)* [2019] IEHC 477, [2019] 7 JIC 0209 (Unreported, High Court, 2nd July, 2019), I decided to refer three questions to the CJEU. The Advocate General delivered an opinion which suggested the determination of the proceedings in favour of the State (Case C-616/19, *M.S. v. Minister for Justice and Equality* (Court of Justice of the European Union, Opinion of Advocate General Saugmandsgaard Øe, 3rd September, 2020, ECLI:EU:C:2020:648)).
2. The CJEU then delivered a judgment answering the first and third questions with a composite answer which required the proceedings to be determined in favour of the State and deciding that it was not necessary to answer the second question: Case C-616/19, *M.S. v. Minister for Justice and Equality* (Court of Justice of the European Union, Judgment of the Court (First Chamber), 10th December, 2020, ECLI:EU:C:2020:1010). In essence the first question had it been answered independently would have been answered adversely to the State, but the finding is in the body of the judgment and not the curial part of it (see para. 36), and the second question wasn't answered at all as it wasn't necessary to do so (para. 55).

3. On foot of that judgment it has been agreed that the proceedings would be dismissed, but an issue has arisen regarding costs. All parties applied for their costs albeit that the applicants, being the losing parties, majored more on the possibility of a portion of their costs.

Section 169 of the 2015 Act is not retrospective

4. The first question is the relevance or otherwise of s. 169 of the Legal Services Regulation Act 2015. The section was commenced on 7th October, 2019 (after the institution of these proceedings) by the Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No. 2) Order 2019 (S.I. No. 502 of 2019), art. 2(n). In *Sweetman v. Shell E&P (Ireland) Ltd.* [2016] IESC 58, [2016] 1 I.R. 742 the Supreme Court decided that the law on costs is substantive rather than procedural, which has the logical consequence that a change in the law regarding the costs regime for proceedings is not retrospective. I appreciate that the Court of Appeal recently left this question open in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183 (Unreported, Court of Appeal, Murray J. (Whelan and Power JJ. concurring), 8th July, 2020), at paras. 7 and 8, but that was because there was no argument on the point (see also *Kellett v. RCL Cruises Ltd.* [2020] IECA 287 (Unreported, Court of Appeal, 21st October, 2020)). However, here there has been some argument on the issue, and, in particular (with the caveat that the court might not need to decide the point), counsel for the respondent accepted in written submissions that *Sweetman* decided that “as substantive rules rather than procedural rules, any changes in the costs rules apply only prospectively” and in oral submissions that “the logic of *Sweetman*” suggests a similar result here. I think it does. It seems to me to follow from the Supreme Court decision in *Sweetman* that the law in relation to the costs of any given proceedings must be the law as it stood when the proceedings were commenced, at least absent any express and constitutionally-compatible statutory provision to the contrary. Thus the law governing the costs of the present proceedings must be that pre-dating the 2015 Act.

The basic principle that costs follow the event remains relevant

5. Even if I am wrong about that, the context is that the basic principle of costs following the event is deeply established in the law (see particularly *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 I.R. 775). The Legal Services Regulation Act 2015 seems to involve a change of focus, or at least of language, in the sense that the “event” prior to the 2015 Act was primarily identified by reference to whether relief was granted or refused whereas post the 2015 Act, the court has focused more on the outcome of specific issues (see *per* Simons J. in *Náisiúnta Leictreach Conraitheoir Éireann v. Labour Court* [2020] IEHC 342 (Unreported, High Court, 31st July, 2020), at para. 42 and *Higgins v. Irish Aviation Authority* [2020] IECA 277 (Unreported, Court of Appeal, 9th October, 2020), at para. 16 *per* Murray J. (Noonan and Binchy JJ. concurring)).
6. It is by no means clear that any change in focus was actually intended by the Oireachtas. And there is a second independent problem: the position in relation to costs seems to have been also unintentionally complicated by the listing in s. 169(1)(a) to (g) of large numbers of factors which could apply in vast numbers of cases. Experience in the brief period since s. 169 was commenced might suggest that it seems to have had the effect of

encouraging applications that costs should not in fact follow the event. I don't think that such an outcome was the intention of the legislature.

7. It is not clear from anything I can see in the legislative history that it was ever suggested that it would change the principle that costs follow the event. Rather the Act seems to have been designed to reinforce that principle. The background includes the following.
8. The report of the Legal Costs Working Group in 2005 (at para. 2.1 of the executive summary), refers to "the absence of a convincing case for change" and says "given the paucity of research on this topic, the Group does not recommend abandoning the principles underpinning our system of costs recovery."
9. The Competition Authority report, *Competition in Professional Services, Solicitors and Barristers*, December 2006, did not suggest any change to the rule that costs follow the event either.
10. What is now s. 169 of the 2015 Act began as s. 108 of the Legal Services Regulation Bill 2011. The explanatory memorandum dated 9th October, 2011 says that, "*Section 108 sets out the general principle that costs are to follow the event. In other words, a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties. Nothing in this Part is to be construed as affecting section 50B of the Planning and Development Act 2000 or Part 2 of the Environment (Miscellaneous Provisions) Act 2011.*"
11. While the explanatory memorandum is (typically for such documents) more a paraphrase than an explanation, the term "[i]n other words" implies that the Minister in introducing the Bill appeared to be under the impression that the section was simply setting out the principle that costs were to follow the event and proceeded on an assumption that the pre-existing principle was an equivalent concept to that provided for in the section. However, the explanatory memorandum gave no explanation as to why the Minister was setting out such a principle in primary legislation. One could argue that the State missed a trick by largely providing a paraphrase of the legislation without a legible explanation of its background history and rationale. The explanatory memorandum certainly did not explain who asked for this change or what the mischief was that was intended to be addressed. That paraphrase-as-explanation is fairly typical of the genre unfortunately, and it is certainly not the first time that one has seen situations where the State is missing out by such an approach by passing up the opportunity to put its intentions and analysis on the formal record in a way that would have been helpful in later judicial consideration.
12. The rule that costs follow the event is very much in the space of lawyers' law. While parliaments can of course legislate on whatever they want, this type of rule is not the sort of thing that legislatures either here or elsewhere tend to dabble in without some clear

purpose, or without some clear stimulus emanating from a particular legal development, for example a report on law reform.

13. In this instance, when one asks what the Oireachtas was trying to achieve, what the mischief was, where this provision came from and what change was sought to be enacted, answer comes there none; or at least none suggestive of an intention to change anything. The rule that costs should follow the event was working as well as one might expect, and much better than many rules.
14. At committee stage in Dáil Éireann on 12th February, 2014 (and again at committee stage in the Seanad), the section was agreed to without debate. At second stage in the Seanad on 13th May, 2015, Minister Fitzgerald said that "Part 11 of the Bill contains two additional provisions on legal costs including the upholding of the principle that costs follow the event." This certainly provides little succour for the idea that the provisions of s. 169 were intended to change the principle that costs follow the event. There is a passing reference in the debates to transparency, which suggests that the purpose of the provision is to enact the existing law in express terms.
15. While I appreciate that Murray J. in *Chubb* at para. 20 raised the question that "winning the 'event' and being 'entirely successful' may well not mean the same thing", one doesn't have to question that proposition in any way in order to consider that the two are not mutually exclusive. In other words, an "entitlement" to costs if one is entirely successful can still coexist with a presumption of costs following the event in any case where there is an event, but the winning party is still not "entirely" successful. It seems to me the principle of costs following the event is too deeply embedded in the law to be impliedly removed simply by the enactment of the 2015 Act without any express provision disapplying the pre-principle if the section doesn't apply. I would favour the view that the principle of costs following the event remains in place, and that s. 169 is to be superimposed on it, but if the section doesn't apply, the general principle remains.

Whether the State carried the event or was "entirely" successful

16. If I am wrong about the non-application of the 2015 Act, one must also look at the question of whether the respondent was entirely successful. Murray J. made the point in *Higgins* at para. 14 that if a party obtains relief, but fails on one or more arguments, "while such a party can certainly be accurately described as having been 'successful' it seems to me that in those cases where a party obtains the relief it claimed but has failed to prevail on a distinct issue in the action on which it has chosen to base its claim, it is very difficult to see how it could be said that they have been 'entirely successful'." Again I would in no way try to take from that compelling observation but in retrospect it's strange nobody pointed that out in the near-decade between the publication of the Bill and the commencement of the enacted provision. I've dealt above with my view of what the situation is if a party falls outside s. 169 if it is successful but not "entirely" successful.
17. In the present case, however, the "issues" on which the applicants could possibly be said on any interpretation to have been "successful" were relatively minor in the overall. It is

also to be borne in mind that these were not issues on which the respondent has “chosen to base its claim”, to use Murray J.’s phrase; rather the idea of a reference came primarily from the court. The questions were formulated by the court with the parties only then having had an opportunity to comment on the court’s draft questions. They were an attempt to capture my analysis of the key issues in the case and do not necessarily reflect the parties own conception of how they chose to “base their claims”. The State’s written legal submissions in this court dated 28th June, 2019 regarding the draft questions to the CJEU merely state that the respondent has “no difficulty” with the first and second question, but go on to say as regards the third question that they, “consider it to be the central question at issue in the present proceedings.”

18. In the *M.S.* case, the applicant’s written legal submissions dated 20th June, 2019 regarding the proposed CJEU reference begin the discussion with reference to the third question because it “appears to be capable of fully disposing of all relevant matters required to be considered by the Irish Court.” Whether or not this position was shared by all applicants does not particularly matter because even these submissions demonstrate quite a degree of consensus that the third question was the central one.
19. In the CJEU submissions themselves, the State devoted a modest three paragraphs out of an 84-paragraph submission to the first question (the only one on which the CJEU actually expressed a view adverse to its position). Also it should be noted that there was no oral hearing and the matter was determined on the papers by the CJEU, so there can be no real argument but that the relatively peripheral issues in the first and second questions did not have much of a material effect on the overall costs.
20. In circumstances where there the respondent is entirely successful on the central issue and only unsuccessful on a less central issue which was formulated by the court in the interests of seeking assistance from Luxembourg, one would have to conclude that the event favours the respondent. If, which I do not accept, the 2015 Act applies, I would consider that the respondent has been entirely successful in the sense that the minor or peripheral issues which were not determined in the respondent’s favour were not sufficiently significant to detract from an overall characterisation of a complete success. Alternatively, if such minor or peripheral issues could be viewed as detracting from entire success or as constituting an independent event, it seems to me that they are not sufficiently significant to counterbalance the respondent’s case for costs in its favour overall having won on the central issue.

Reinforcing considerations

21. While it is not, in the circumstances, necessary to consider any reinforcing considerations, it is worth noting the fact that the applicants in *M.S.* and *M.W.* (although not in *G.S.*), failed in their legal duty to make accurate disclosure of their immigration history. Falsifying or at least concealing that history with a view to avoiding the legal pitfall into which their applications have now fallen doesn’t particularly assist those applicants, and has the consequence that to depart from the normal rule in their cases would reward illegality, fraud or nondisclosure. Admittedly, making a second application was not held to be a disqualifying abuse of rights, but their overall conduct and its direct relevance to

the proceedings (a challenge to a decision based on the emergence of facts they fraudulently tried to conceal during the international protection process itself) is still relevant to costs. This isn't a case where an applicant's wrongs can be disregarded as independent of the procedural matrix in which the challenge arises. However in the circumstances I don't have to base the decision on this aspect.

Alleged countervailing considerations

22. The applicants have advanced a number possible countervailing considerations although none of those are sufficient to displace the default order. I can summarise these as follows:

- (i). It's correct to say that the tribunal got it slightly wrong in the sense that the reasoning of the tribunal differed from the ultimately established legal position. I acknowledged this possible distinction in paras. 18 and 20 of the (*No. 1*) judgment and described that as a purely technical issue because fundamentally the tribunal relied on s. 21 of the International Protection Act 2015, which has now been established to be a valid provision. In short this was a legalistic point, and the tribunal got the matter right in substance. Consequently, the purely technical error involved is not a weighty basis to depart from an order of costs in favour of the respondent.
- (ii). The argument is made that the applicants were correct on the issue of abuse of rights. However, that cannot be said definitely because the CJEU did not decide that point.
- (iii). It is argued that the CJEU did not rely on any precedent for the conclusion that the impugned legislation was compatible with EU law and thus that the decision has broad precedential value as it is based on policy considerations in a manner that could not have been foreseen by the applicants. However, the fact that the CJEU decision did not rely on a specific precedent is a matter for that court. It is not the position, even in a common law context, that nothing can happen unless there is a precedent for it. That would give rise to an absurd conclusion that many things can be done but nothing can be done for the first time. The fact that the applicants didn't foresee the outcome is unfortunate for them but it doesn't give them an entitlement to resist a costs order.
- (iv). It is argued that the situation arose from policy decisions by the State both in introducing the legislation and in opting out of the recast procedures directive. However, these were positions that the State was fully entitled to take and could not possibly be a basis for penalisation of the State in costs.
- (v). Reliance is placed on the decision in *Singh v. Minister for Justice and Equality* [2016] IEHC 202 (Unreported, High Court, Mac Eochaidh J., 8th April, 2016), where costs of a reference were awarded to the applicant. However, unlike here, that was a case where the reference was applied for by the State. Here it happened at the court's initiative. That case was clearly decided on its own peculiar facts including

in a situation where there was conflicting jurisprudence and where the judgment was given by the Grand Chamber which indicated that the point was of particular importance. Most of those special circumstances are absent here. More fundamentally, the fact that one case involved an order for the costs of a reference does not mean that all cases should do so. That was clearly exceptional.

- (vi). A similar submission is made in relation to the costs decision following the judgment in Case C-604/12, *H.N. v. Minister for Justice and Equality* (Court of Justice of the European Union, Judgment of the Court (Fourth Chamber), 8th May, 2014). That related to an overall architectural challenge that affected every applicant for international protection in terms of whether there could be a two-stage system. It also involved a partial victory for the applicants in that para. 45 of the judgment provided that an applicant should be allowed to submit an application for subsidiary protection at the same time as one for refugee status; a procedure which was not provided for in Irish law. It also required determination of the subsidiary protection application within a reasonable time. Thus the judgment could not be held to be a complete win for the State. Following the substantive judgment in *Nawaz v. Minister for Justice, Equality and Law Reform* [2015] IESC 30 (Unreported, Supreme Court, O'Donnell J., (McKechnie and Clarke JJ. concurring), 27th March, 2015), the Supreme Court allowed the costs of the reference in the ultimate order made by the court on 18th June, 2015. Again it seems to me that that decision turns on its own particular facts and, in any event, an order without reasons is of limited precedential value. But more fundamentally, the fact that costs were allowed in one case does not mean that costs for a reference must be allowed in every case or indeed in any other case.
- (vii). It is suggested that the questions of law here were ones of exceptional public importance. I do not particularly accept that. They only relate to cases where applicants have obtained subsidiary protection in another EU member state which is a relatively limited category.
- (viii). It is suggested that the question arose in circumstances that were outside the control of the applicants, that a valuable public service was being performed by the applicants, that there were other cases where such a point could arise, that there was practical importance to the points, that they were complex and weighty, and that clarity and certainty has now been provided. However, one could make similar points about a vast number of cases. Any validity challenge raising questions of EU law could be sufficient on that sort of logic to ground an argument for an award of costs. It seems to me that the departure from the general principle of costs following the event (whether or not this involves entire or near entire success in proceedings) must be still relatively exceptional.
23. In all the circumstances the appropriate order is one for costs to the respondent, either because they follow the event, or because such points as do not follow the event or constitute separate events (which I don't accept) are so peripheral as to make an order

other than one in favour of the respondent inappropriate. If, which I don't accept, the 2015 Act applies, I would characterise the respondent as entirely successful and thus entitled to her costs. But if I am wrong about that, I would make an order for the respondent's costs anyway given that the point on which the respondent wasn't successful wasn't sufficiently central as to detract from the case for the respondent being awarded costs.

Order

24. Before concluding I hope I will be forgiven if I raise the question of whether s. 169(1) of the 2015 Act as it stands might not be capable of improvement. It seems to have managed the triple-whammy of disturbing settled law of immense practical importance, creating significant legal uncertainty, and counterproductively encouraging a significant number of try-on applications by losing parties stimulated by the large list of enumerated factors that could be relied on to support something other than the normal costs order. I would respectfully suggest that perhaps consideration might be given to whether it would be better if this provision was replaced with a wording that corresponds more clearly to the pre-existing principle of costs following the event, and without invitingly listing out all imaginable reasons why losers might argue against such an outcome.
25. The order in each case will be:
 - (i). that the proceedings be dismissed; and
 - (ii). that costs be awarded to the respondent including reserved costs, the costs of the proceedings before the CJEU and the costs of the present costs application.