THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 126 J.R.]

BETWEEN

MAHELET GETYE HABTE

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

[2017 No. 569 J.R.]

BETWEEN

MAHELET GETYE HABTE

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 11th day of February, 2019

1. In *Habte v. Minister for Justice and Equality* (*No. 1)*[2019] IEHC 47 (Unreported, High Court, 4th February, 2019) I dealt substantively with these two related judicial reviews by granting an order requiring the respondent Minister to consider, if appropriate in the light of any report of the committee of inquiry under s. 19 of the Irish Nationality and Citizenship Act 1956, whether the applicant's certificate of naturalisation should be amended.

2. I now deal with the question of costs and I have received helpful submissions from Mr. Mark Harty S.C. (with Ms. Julie Maher B.L.) for the applicant, and from Ms. Siobhán Stack S.C. (with Mr. Alexander Caffrey B.L.) for the respondents.

Why were there two judicial reviews rather than one?

3. Affidavits were sworn by solicitors on both sides, Mr. Niall Colgan and Mr. Gareth Wells of the CSSO, and they have helpfully illuminated why the No. 1 proceedings were not amended and why a second set of proceedings were initiated. The sequence of events was as follows.

4. On 15th February, 2017, leave was granted for the first judicial review. On 29th May, 2017 the applicant sought the delivery of a statement of opposition. The respondent stated that correspondence would issue in that regard and O'Regan J. directed that the respondent either file a statement of opposition or write to the applicant within four weeks. On 22nd June, 2017 the Minister wrote indicating an intention to revoke the certificate of naturalisation. On 28th June, 2017 the matter came back before O'Regan J., when the respondent stated that the proposed revocation rendered the proceedings moot. O'Regan J. said that was a matter for the applicant. The applicant then repeated the request for a statement of opposition. O'Regan J. said it appeared that the statement of grounds needed to be amended, and ordered that a draft amended statement of grounds be provided by 3rd July, 2017 and if there was no consent to such amendment, gave liberty to bring a motion for 10th July, 2017. On 3rd July, 2017, the applicant's solicitor sent a draft amended statement of grounds to the CSSO asking for a reply by 5th July, 2017. On 7th July, 2017 the CSSO replied, refusing to agree to the amendment and stating that if the applicant wished to judicially review the notice of 22nd June, 2017 she should do so "*in the ordinary way*". On 10th July, 2017 an affidavit supporting a proposed amendment was filed in the Central Office but the amendment application could not be moved on that date because it had not been filed in advance. O'Regan J. adjourned the proposed amendment application for one week. The respondents submitted that the applicant should bring a separate leave application. O'Regan J. then indicated that her view was that the applicant should bring a separate leave application since if the State thought that the applicant should issue separate proceedings there could hardly be a complaint regarding the applicant's entitlement to costs if the applicant succeeded. But she indicated she was not directing any particular course of action.

5. On 13th July, 2017 the applicant's solicitor wrote to the CSSO, noting the stance in their letter and their position at the hearing on 10th July, 2017 and stating "*in the light of your position we are not going to proceed with the amendment of the existing proceedings but instead we will seek to apply for leave to bring judicial review proceedings challenging your decision set out in your letter to our client dated 22nd June, 2017".* On this point, it is deposed to on behalf of the respondents that "*it was at all times open to the applicant to proceed with a formal motion to amend*" (para. 7 of affidavit of Gareth Wells). Thus it is stated that not proceeding with that application was "*entirely the applicant's decision*". The applicant's letter also disputed the respondent's contention that the first proceedings were moot.

6. On 17th July, 2017 leave was granted in the second set of judicial review proceedings. The CSSO indicated they would not be filing a statement of opposition in the first set of proceedings and that they intended to renew their application for an adjournment. They continued to maintain the stance that the first set of proceedings were effectively moot or alternatively should be adjourned, until the matter came before me on 9th October, 2017 when I directed that the statements of opposition in both cases be filed by 20th October, 2017.

7. The upshot of the foregoing is that the first set of proceedings were not amended because the applicant decided not to proceed with the proposed amendment, but in doing so she was undoubtedly influenced by both the respondent declining to consent to the amendment and also by O'Regan J.'s view, which was in turn directly contributed to by the respondent's stance. So what it comes down to is that, while formally the applicant decided not to proceed with the amendment, that was a reasonable decision given the respondent's lack of facilitation of the proposed amendment. In fairness to the respondent, Mr. Wells makes the point that they were concerned that the proposed amendment was lacking in substance and also contained what were regarded as sweeping and

unfounded allegations. While sympathising with that concern and without in any way being critical of the respondent, the respondent's stance to some extent involved a confusion of the question of merits of the amendment with that of procedural convenience and the saving of costs. Not facilitating the amendment did not have the effect that the respondent did not have to meet the case, but rather had the effect that we ended up with two judicial reviews rather than one.

8. Ms. Stack submits that in retrospect the adjournment application in respect of the first set of proceedings seemed appropriate. However, I do not agree that because there is a benefit to the Minister in the first set of proceedings having been decided, in the sense that it gives the Minister a wider suite of options when he receives the report of the committee of inquiry. The order in the first set of proceedings was to the effect that the Minister has wider powers than originally thought, so that is hardly bad news for either party.

Costs of the first set of proceedings
9. The starting point is that costs follow the event and the applicant did obtain substantive relief, albeit not as extensive as that originally sought. However, the first set of proceedings were not so complex and diffuse as to warrant a *Veolia Water* approach (see *Veolia Water UK Plc v. Fingal County Council (No. 2)* [2006] IEHC 240 [2007] 2 I.R. 81). I might even have given more sympathetic consideration to further relief in favour of the applicant by way of a declaration as to the applicant's date of birth had that matter not been overtaken by events, namely the revocation process. Those events were within the sole control of the respondent, albeit that that occurred between the initiation of the proceedings and the hearing, and albeit that I might have required further evidence had we gone down that road.

10. Taking all these factors into account, the applicant is entitled to the costs of the first set of proceedings.

Costs of the second set of proceedings
11. The starting point is that costs follow the event, which would favour the respondents. Also in favour of the respondents is that certain sweeping allegations were made against the Department but not brought home. I might have given greater weight to that but must give Mr. Harty some credit for drawing back from the more inflammatory allegations when it came to cross-examination of the respondent's witnesses. In not necessarily regarding this issue as automatically trumping all other issues in the case, I do not of course give any succour to the criticisms of the Department which have been firmly rejected in the No. 1 judgment.

12. As against those matters there are a number of matters favouring the applicant. The respondent was not particularly facilitative of the proposed amendment to the first judicial review, which would have obviated the necessity for a second set of proceedings at all. Obviously, I also take into account as discussed above, the point that the applicant could have forced the issue but did not.

13. A related point in that regard is one might ask what order for costs would hypothetically have been made if this had all been one set of proceedings and the applicant had therefore obtained partial relief. I do not think there is much reality to the suggestion that the court would have granted no order as to costs. Most courts in such a situation would have given an applicant at least some costs. That militates against making an order in the second set of proceedings in favour of the respondents that cancels out the order in the first set of proceedings in favour of the applicant.

14. A further factor is that, while the applicant did not obtain formal relief, she did obtain a benefit in the second set of proceedings by identifying a series of relevant matters that she can reasonably expect to be taken into account in the decision-making process and that may ultimately assist in resolving the merits of the matter.

15. A final point that may be of relevance is that the evidence in the second set of proceedings as to the process of cancellation and reissue of certificates of naturalisation turned out to be relevant to the mechanics of the process considered in the first set of proceedings regarding the power of amendment, so the second set of proceedings did have a read-across into the point on which the applicant did obtain relief.

16. Balancing each set of factors against the other, the appropriate order is that there be no order as to costs.

Order
17. To summarise, therefore, the order will be:

> (i). in the first judicial review, an order that the respondent pay the applicant's costs including reserved costs to be taxed in default of agreement; and
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> (ii). in the second judicial review, that there be no order as to costs.

18. Finally, Mr. Harty requested that the first set of proceedings not be made the subject of a final perfected order but be adjourned generally in case further relief be required after the Minister's decision. That seems to me to be both procedurally inconvenient (not least because the proceedings would probably need to be entirely reconfigured) as well as hypothetical. So the orders will be perfected but instead, noting that the respondents do not object, I will retain seisin of the matter in the sense that the applicant can apply to me if she has any further application arising out of the same subject-matter. Given the fraught procedural history of the matter, that approach will probably assist in a quicker resolution of any further issues, if hypothetically there are any such issues.