



THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 260

Appeal Number: 2019/237

**Whelan J.
Haughton J.
Murray J.**

BETWEEN/

**M.
(SUING BY HIS MOTHER AND NEXT FRIEND J.)**

APPELLANT

- AND -

**THE DIRECTOR OF OBERSTOWN CHILDREN DETENTION CENTRE
AND THE MINISTER FOR CHILDREN AND YOUTH AFFAIRS AND IRELAND**

RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 15th day of October 2021

Introduction

1. Judgment was delivered electronically by this court on 18 September 2020; the net effect of same being to refuse the appeal. It follows that the form of the final order to be made is one dismissing the appellant's appeal on all grounds.
2. The outstanding issue for determination between the parties is that of costs. The appellant was granted liberty to file written submissions on the issue of costs but none were filed. The appellant now seeks a recommendation from the court for costs pursuant to the provisions of the Legal Aid – Custody Issues Scheme ("the Scheme").
3. Insofar as relevant, in light of the outcome of the appeal, the respondents have been "entirely successful" within the meaning of s. 169(1) of the Legal Services Regulation Act 2015.

Position of the appellant

4. The appellant seeks a recommendation for his costs in respect of solicitor, senior and junior counsel under the Scheme. It is asserted by his solicitor that he has a note that he

requested “for the custody issues/AG scheme for payment during the appeal” and, further, that a recommendation was made pursuant to same in respect of costs incurred in the High Court.

5. As noted above, no formal written submission was made on behalf of the appellant regarding costs “save for in the appeal notice which we marked as seeking costs rather than the scheme which was an error.” It is contended on behalf of the appellant that “the issues raised on appeal are worthy of a recommendation for payment under the scheme.”

Position of the respondents

6. The respondents acknowledge that the appellant is seeking admittance to the Scheme post the hearing. The State brings to the court’s attention a ruling on costs made by Barr J. delivered on 21 April 2021 in *H. v. Director of Public Prosecutions* [2021] IEHC 308, which considered the issue of costs in the context of Part 11 of the Legal Services Regulation Act 2015 and the decisions in *Corcoran v. Commissioner of An Garda Síochána* [2021] IEHC 11 and *O’Shea v. The Legal Aid Board* [2020] IESC 51.

7. Following from a review of the said authorities, Barr J. concluded at para. 5:-

“...the court is of the view that the issue of costs in this case cannot be disposed of as if it were simply *inter partes* litigation in the ordinary sense. At all material times, the applicant was incarcerated...Having consulted with his lawyers, an *ex parte* application was made seeking relief by way of judicial review. Liberty to bring such proceedings was granted on an *ex parte* basis by the High Court.”

8. Barr J. considered that it could not be said that the substantive application was not stateable, having regard to the fact that the application had been brought on the advice of both senior and junior counsel and a solicitor who were representing the applicant and, further, that the applicant had been successful at the *ex parte* stage in obtaining an order granting him liberty to proceed by way of judicial review. The court further attached weight to the fact that the applicant was in custody.

9. The court was satisfied that it was appropriate in the circumstances of that case to make a recommendation that the fees incurred by the applicant be discharged under the Scheme.

10. The stance of the respondent is that there is no point of distinction *vis á viz* costs between the circumstances of this case and the decision of Barr J. in *H. v. Director of Public Prosecutions*:-

“...therefore if the court were minded to make the recommendation being sought by the applicant’s solicitor, then given what is stated in [*H. v. Director of Public Prosecutions*], the State would not have any grounds to object.”

The Scheme

11. The details of the non-statutory administrative scheme are to be found in the Legal Aid – Custody Issues Scheme Provisions and Guidance Document which expressly provides:-

“The Legal Aid – Custody Issues Scheme (formerly known as the Attorney General’s Legal Aid Scheme) provides payment for legal representation in the High Court and the Supreme Court for certain types of cases not covered by civil legal aid or the Criminal Legal Aid Scheme. The cases covered include Habeas Corpus (Article 40.4.2) Applications, High/Supreme Court Bail Motions, certain types of Judicial Review, Extradition and European Arrest Warrant Applications (see Section 4 below). It is an *ex gratia* scheme set up with funds made available by the Oireachtas.”

It is noted that from 1 June 2012 the remit of the administration of the Scheme was transferred to the Legal Aid Board.

12. Clause 3 of the *ex gratia* Scheme outlines its purpose:-

“The purpose of the Scheme is to provide, in certain circumstances, legal representation for persons who need it but who cannot afford it. It is not an alternative to costs. For this reason it is necessary for the application for access to the Scheme to be made at the outset of the proceedings.

Such access is not automatic and the applicant must satisfy the Court that he or she is not in a position to retain a solicitor (or, where appropriate, counsel) unless he or she receives the benefit of the Scheme. The applicant must receive from the Court a recommendation to the Legal Aid Board that the provisions of the Scheme be applied to their specific case.”

It further provides:-

“...legal practitioners who elect to provide representation to the Scheme’s applicants will only be reimbursed in accordance with the Scheme’s provisions as set out in this document.”

13. With regard to the scope of the scheme, clause 4 provides that it is:-

“...an administrative, non-statutory arrangement whereby payments are made from the Vote of the Department of Justice and Equality in respect of certain legal costs in the types of litigation set out below in which, for the most part, the State is a party (although the State need not be a party to proceedings which are eligible for the Scheme).”

14. The original iteration of the Scheme is recorded in the decision of Walsh J. in *Application of Woods* [1970] I.R. 154 which noted at p. 166 the undertaking advanced to the court on behalf of the Minister for Finance and of the Attorney General:-

“...in respect of this application and of every application for habeas corpus made henceforward, to defray the cost of solicitor and counsel for applicants who are not in a financial position to engage such professional representation whenever the High Court or this Court, as the case may be, considers it proper that solicitor and counsel

should be assigned by the court concerned to make submissions in support of the application.”

Walsh J. characterised the undertaking at p. 166 as “a notable contribution to the cause of personal liberty”.

15. O’Donnell J. (as he then was) in his judgment in *Minister for Justice & Equality v. O’Connor* [2017] IESC 21 – a decision particularly directed towards the operation of the Scheme in the context of European Arrest Warrants – noted that:-

“The development of the law on legal aid in Ireland cannot be understood solely by reference to the terms of the legislation, or the scheme. The predecessor of the 2013 scheme was the Attorney General’s Scheme. That can in turn be traced to the matters recorded in the *Application of Woods* [1970] 1 I.R. 154.” (para. 15)

In reviewing the operation of the Scheme, O’Donnell J. also observed at that it was “difficult to avoid the conclusion that the scheme was understood, at least in part, to be required to meet the State’s constitutional obligations.”

16. At para. 4, O’Donnell J. noted that evidence had been given that the Legal Aid Board would consider itself bound in any European Arrest Warrant case to honour a recommendation made by a court under the Scheme.
17. More recently, the Supreme Court (Baker J.) in *O’Shea v. Legal Aid Board* [2020] IESC 51 observed of a recommendation:-

“...The decision not having been made *inter partes*, it cannot be said in a strict legal sense to bind the Board, but the system by which a recommendation is made by a court on an essentially *ex parte* basis leaves the Board in the difficult position that it must on the one hand undoubtedly respect the solemnity and importance of the fact that a judge has made a recommendation, but equally it must be satisfied before paying out from State funds that an applicant meets the various eligibility requirements in the Scheme.” (para. 88)

Baker J. had earlier noted:-

“It cannot...be said that the recommendation made by the court has the force of an order, but that does not mean that it is without effect, or indeed that it is not to be afforded a degree of deference or respect. I would not go so far as the trial judge in saying that to ignore the order could amount to an affront to the dignity of the Court.” (para. 78)

At paras. 94 to 96 the court further opined:-

“The Scheme as established permits and requires the Board to consider whether the proceedings are properly within the Scheme and whether an applicant satisfies the financial eligibility requirements. The Board is not in a true sense bound by the

recommendation of the court, but it is hard to envisage circumstances in which the recommendation of the court would not bear very significant weight in the decision, and may be in most cases dispositive...

In short, the recommendation of the court is a condition precedent to the making of payment by the Board under this Scheme, but the Board retains a role, albeit a role it must respect the fact that a recommendation was made by a competent court.

While I am satisfied that the recommendation made by the court is not in a true sense an order of the court, and it does strain language to treat it as such, both on account of the terms of the order itself, and the terms of the Scheme, a number of factors suggest that the recommendation is a weighty and valuable matter, one not to be likely disregarded, and one which carries with it a right on the part of the person holding the recommendation to have his or her application duly considered in a rational and lawful manner."

Determination

18. The submissions on behalf of both parties arising from the correspondence and communications with the Office of the Court of Appeal demonstrate that both approached the question of costs by reference exclusively to the terms of the Legal Aid – Custody Issues Scheme. This pragmatic approach makes it unnecessary for the court to enter into a formal evaluation as to the applicability of the provisions of the Legal Services Regulation Act 2015 to the issue of the costs in light of the particular facts of this case and particularly in light of the fact that the appeal was unsuccessful in all respects.
19. Having due regard to the terms of the Scheme and the relevant jurisprudence, together with the respective positions of the parties, I consider that salient facts predisposing the court to make the recommendation as sought include that at the time of institution of the proceedings the appellant was a minor, that the proceedings were brought by his mother and next friend, and that the appellant had been in custody when the judicial review proceedings were initiated. It does appear, in light of the tenor of the Scheme, that it is intended to encompass issues connected with custody and is not strictly confined *per se* to the lawfulness of custody in all instances.
20. Further, I am prepared to accept the statement of the appellant's solicitor that at the hearing before us there was an intention to seek a recommendation for the Legal Aid – Custody Issues Scheme, that same was mentioned to the court and that the omission in the written notice of appeal of a specific reference to the Scheme was inadvertent and in error. 21. In all the circumstances and having due regard to the spirit and intendment of the provisions of the Legal Aid – Custody Issues Scheme, I am satisfied that this is an appropriate matter for the court to recommend to the Legal Aid Board that the fees incurred by the appellant be discharged pursuant to the Legal Aid – Custody Issues Scheme and in particular the recommendation extends to the fees incurred in respect of retaining a solicitor, junior counsel and senior counsel pursuant to the terms of the said scheme.
21. Haughton and Murray JJ. agree with this decision.