# THE COURT OF APPEAL
## Civil

**Neutral Citation Number [2022] IECA 168**
**Record Number: 2019/372**
**High Court Record Number: 2016/803JR**

**APPROVED**

**NO REDACTION NEEDED**

**Ní Raifeartaigh J.**

**Power J.**

**O'Connor J.**

**BETWEEN:**

**JB**

**Applicant**

**-AND-**

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

**Respondents**

**Ruling on costs delivered on 26 July 2022 by Mr. Justice Tony O'Connor**

**1.** This appeal was heard on 25 February 2021 and continued then on 11 May 2021 as outlined already in the chronology set out in the judgment delivered on 7 April 2022. In that judgment, the Court indicated that it would grant an Order of *Certiorari* of the 2016 Review

Decision made by the first respondent ("**the Minister**") dated 5 October 2016. The Court indicated in its judgment that it would not make final Orders until it had heard from the parties in relation to (i) the question of remittal for reconsideration; and (ii) whether the parties wished to make detailed submissions about the issue of compliance by the Respondent with Articles 30 and 31 of Directive 2004/38 EC on the question of whether the review mechanisms available to the appellant constituted an effective remedy.

**2.** Written submissions were exchanged and the Chief State Solicitor confirmed by letter dated 11 May 2022 that there was no objection to remitting the review decision dated 5 October 2016 to the respondent Minister. Having received that confirmation, the solicitors for the appellant confirmed that any question relating to the adequacy of the review mechanisms would not be pursued.

**3.** Thus, the order of *certiorari* will be granted and the decision remitted for reconsideration and there will be no further argument on the "effective remedy" aspect of the case. The remaining issue is that of costs only.

## *Costs*

**4.** There is little disagreement between the parties about the regime introduced by the Legal Services Regulation Act 2015 ("**the 2015 Act**") and the recast O. 99 of the Rules of the Superior Courts. In fact, both parties cite the summary of the effect of those provisions in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 more particularly paras. 19 and 20 thereof.

**5.** Counsel for the appellant submits that the appellant is entitled to full costs having succeeded on several issues that were determined in favour of the appellant. It is further submitted that the issue of the adequacy of the review mechanisms did not prolong the proceedings in any way. The appellant submits that the nature of the proceedings which are the subject of this appeal "is far simpler" than those arising in *Chubb European Group SE*.

It is submitted that the appellant was "entirely successful in all the issues determined in the case . . ." [emphasis added by the appellant]. The appellant claims success in the "event" in that the decision of the Department which was challenged has been quashed.

**6.** The appellant's submissions also refer to the following as matters which this Court should take into account:

(i) The fact that the appellant made an open offer to withdraw the appeal subject an order about costs, which was rejected by the respondents on 30 January 2020 as described in the chronology;

(ii) The coming into force of the 2015 Act on 7 October 2018 with the new O. 99 coming into effect on 3 December 2019 (this regime was not in force when the High Court judgement was delivered on 28 January 2019);

(iii) The failure to disclose information about notices issuing from the GNIB when advancing the mootness point by way of filing additional affidavits for this Court.

**7.** The respondents disagree that the appellant should be entitled to full costs. They submit that the appellant "has chosen not to proceed with a significant issue" and "the appellant should be entitled only to a partial order for costs above and below". They submit that the Minister had to prepare to address a significant legal point and point to the fact that a significant portion of their legal submissions were dedicated to so doing. Moreover, they say that, at least on the level of principle, Court acknowledged that the point which the appellant is no longer pursuing was relatively well settled in a way that did not favour the appellant's position. Thus, whilst the Minister accepts that the appellant has succeeded in relation to the first matter, the Minister submits that in circumstances where the appellant is not no longer pursing the second matter, there should be a reduction in the costs to which the Appellant may be entitled.

## *Decision*

**8.** The appellant has been ultimately successful in obtaining *certiorari* in respect of the impugned decision, and the only question is whether an award of costs in favour of the appellant should be reduced by reason of the "effective remedy" issue which was addressed in written submissions but not pursued to any detailed extent in oral argument in either Court.

**9.** I note that at paragraphs 21 – 24 of the High Court judgment delivered on 28 January 2019, the Court referred to the acknowledgment by counsel for the appellant that the argument relating to the adequacy of "the judicial and administrative redress procedures" had been rejected by Eagar J. in *Balc & Ors. v Minister for* Justice [2016] IEHC 47. The trial judge referred to the "sensible course of action" adopted by counsel which effectively preserved the position of the appellant pending the determination by the Court of Appeal in *Balc*, which judgment was delivered on 7 March 2018 [2018] IECA 76. In short, the parties were agreed at an early stage of the High Court proceedings that the ground in the order granting leave relying on the adequacy of the review mechanisms was not going to trouble the High Court notwithstanding that the matter was addressed in the written submissions of the parties to the Court below.

**10.** On 11 May 2021, counsel for the appellant was equally candid before this Court when he clarified that he was not going to spend too much time on the issue of the adequacy of "the judicial and administrative redress procedures". Again, he was seeking to reserve the right to challenge the alleged non-implementation by the State of the safeguards in Article 30 of the 2004 Directive. It is also clear that a further day or part of a day would have to have been assigned by this Court if the appellant was going to pursue that line of argument.

**11.** It is also true, however, that the written submissions of the parties addressed the "effective remedy" issue in some detail, and that this included discussion of the Supreme Court judgment in *Pervaiz v. Minister for Justice and Equality* [2020] IESC 27, [where]

Baker J. (Nem Diss) found that judicial review was "a robust remedy", and *Orfanopoulus* C-482/01, 29 April 2004 EU:C:2004:262 , a decision of the CJEU.

**12.** Notwithstanding the fact that the respondents were obliged to and did prepare written submissions on the adequacy of review issue, I consider that the appellant is entitled to recover the full costs of the High Court proceedings. The trial judge's commendation of the approach taken by counsel for the appellant in the High Court as described, coupled with the absence of any evidence that the adequacy point took time in oral submissions before the High Court, leads me to conclude that the proper course for the trial judge to have taken if he had found in favour of the applicant in the way that this Court has now determined, would have been to award costs to the appellant, following delivery of the judgment on 28 June 2019. At that point in time, the general rule that 'costs follow the event' was in force. Specifically, O.99 (1) (4) of the RSC provided that "the costs of every issue of fact or law … follow the event" and O. 99 1 (1) provided that "The cost of and incidental to every proceeding … shall be in the discretion of [the Court]" An example of that globalised approach to success in the general 'event' may be seen in the trial judge's direction that, notwithstanding the applicant's success on the issue of anonymising the identity of the appellant, the appellant was, nevertheless, ordered to pay the costs of the respondents in the High Court.

**13.** By the time this Court delivered its judgment in the matter, the updated legal framework in respect of costs was operative. Although largely consistent with the principles of earlier legislation, it no longer contains the earlier language that 'costs follow the event' but requires, rather, that a party be 'entirely successful' in order to be 'entitled' to costs, unless the Court orders otherwise (*Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183). For that reason, I take a slightly different approach with regard to the costs of the Court of Appeal proceedings.

**14.** The appellant included the "effective remedy" point in the appeal and relied on further case law, thus necessitating that the Minister respond in detail by way of written submissions. The preparation of written submissions is of particular importance in this Court, where the oral hearing time is more limited. The appellant did not finally indicate that this aspect of the appeal would not be pursued until after the Court delivered its decision in April 2022 and the issue remained technically live until that late stage. Therefore, whilst no considerable time was spent in *oral* hearing on the issue, it did form a part of the appeal until very recently. In all of the circumstances and having regard to the various matters referred to in s.169 of the 2015 Act, I conclude that there should be a reduction of 10% in the costs to be recovered by the appellant in the appeal.

**15.** I should perhaps add that the appellant's offer to compromise the appeal (see s.169 (1) f) of the 2015 Act) is not particularly relevant to my assessment because the offer did not refer to the abandoned line of argument which gives rise to this reduction.

## ***Summary***

**16.** I therefore direct the following:

(i) The respondents pay to the appellant the costs including all reserved costs and the cost of written submissions incident to the High Court proceedings;

(ii) The respondents pay 90% of the costs including any reserved costs and costs of written submissions incident to the appeal.

**17.** As this judgment on costs is being delivered remotely Ní Raifeartaigh J. and Power J. have indicated their agreement in respect of this ruling.