

**THE HIGH COURT**

[2022] IEHC 184

[Record No. 2020/618 JR]

**BETWEEN**

**CHARLOTTE MULHALL**

**APPLICANT**

**AND**

**IRISH PRISON SERVICE, GOVERNOR OF LIMERICK PRISON, MINISTER FOR JUSTICE  
AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**Judgment of Mr. Justice Barr delivered ex tempore on the 30th day of March, 2022.**

**Introduction.**

1. The background to this case can be briefly stated in the following way: following her conviction for murder, the applicant was committed to the Dóchas Centre in Mountjoy prison on 27th September, 2006. On 24th December, 2018, a decision was made by the Director of Operations of the first respondent to transfer the applicant to Limerick prison.
2. The applicant challenged that transfer by way of judicial review in an *ex parte* application moved on 14th September, 2020. In her application, the applicant challenged both the legality of the decision to transfer her to Limerick prison and she challenged the decision made by the governor of Limerick prison, the second respondent, whereby the practice of permitting a temporary transfer of her back to the Dóchas Centre for the purpose of access visits with her son, which was ceased as and from July 2019. Meenan J. directed that the applicant's leave application be heard on notice to the respondents.
3. The contested leave application was heard before this court. In a written judgment delivered on 20th April, 2021, reported at [2021] IEHC 267, this court refused the applicant leave to challenge the decision to transfer her to Limerick prison, as the application had not been made within the time prescribed by the Rules of the Superior Courts. The court allowed the applicant to proceed with her challenge to the decision not to permit her to have temporary transfer to Dublin for the purpose of having access visits with her son.
4. The situation in relation to the visitation rights with the applicant's son was not straightforward. Following the conviction of the applicant, her son had been taken into care. As things currently stand, he will remain in care until 2024. Prior to her transfer to Limerick prison in December 2018, the applicant had had visits from her son in the Dóchas Centre and had had one escorted visit at a neutral venue.
5. After her transfer to Limerick prison, the applicant had two periods of temporary transfer when she was brought back to the Dóchas Centre for the purpose of having access visits with her son. These were between 13th to 16th May, 2019 and 24th to 29th July, 2019. Thereafter, that practice stopped. In an affidavit sworn on 8th March, 2021 by Mr. Mark Kennedy, the Governor of Limerick prison, he stated that subsequent to each of the visits that had occurred in Dublin, the applicant was noted to be out of sorts and took a number of weeks to return to a structured regime within Limerick prison. He was of the view that the transfers were having a negative destabilising effect on the applicant. Accordingly, he

decided that it would be in the best interests of the applicant that such temporary transfers should cease and that she should have access visits with her son in Limerick prison.

6. There are high quality family visiting facilities in Limerick prison. Unfortunately, the boy's foster parents and the CFA were of the view that bringing him to Limerick was too upsetting for his normal routine. The CFA would not permit such visits as they were of the view that they were not in the best interests of the child. However, the applicant did have two visits with her son in Limerick prison in 2019, before that decision was reached.
7. Thus, the practical effect of the decision made by the second respondent to cease the temporary transfers to Dublin, was that the applicant could not have face-to-face visits with her son, because the prison authorities would not bring her to Dublin and the CFA would not bring the child to Limerick.
8. It was in these unusual circumstances that the applicant challenged the legality of the decision made by the second respondent to stop the temporary transfers of her to Dublin for the purpose of access visits with her son, as being in breach of her rights under article 8 of the European Convention on Human Rights. That was the main heading under which she was granted leave to seek relief by way of judicial review. In addition, she sought damages for breach of her rights under the ECHR.

**Subsequent Affidavits.**

9. Subsequent to the delivery of the judgment granting the applicant leave to proceed, each of the parties furnished further affidavits. The applicant swore her supplemental affidavit on 13th July, 2021. In that affidavit she complained that her transfer to Limerick prison had resulted in her being unable to have visits with her son. While she acknowledged that her experience in Limerick prison was better than it had been initially, she stated that she would prefer if access with her son took place in the Dóchas Centre. However, if it had to be in Limerick prison, she would accept that. She stated that she had seen her son twice in Limerick after she had seen him in Dublin in June [sic] 2019, but the CFA and the boy's foster parents were not happy with him travelling to Limerick for visits. She accepted that she had had a number of video calls with her son.
10. On 13th August, 2021, the second respondent swore his supplemental affidavit. In that affidavit he set out in considerable detail the efforts to which the prison authorities had gone to ensure that, as far as possible, the applicant had access and contact with her son. In total, in the period between 24th December, 2018 and July 2021, the applicant had had a total of 1,546 telephone calls to various people, including to her legal team, members of her family, her son's foster parents and her son.
11. Mr. Kennedy stated that prior to the introduction of the restrictions mandated by the COVID-19 pandemic in March 2020, the applicant, like all other prisoners in the prison, had had access to weekly family visits in the prison. The opportunity to have such visits, was only stopped following the government announcement in March 2020 preventing all non-essential travel. All physical visits to prisons were suspended under the level IV and

level V restrictions. All physical visits were suspended in March 2020 and only “screen visits” returned from early August 2020. All visits were suspended again on 24th December, 2020 and remained suspended at the time of the swearing that affidavit, due to the ongoing pandemic.

12. Mr. Kennedy went on to outline in some detail the facilities that had been put in place to ensure that there were video calls between the applicant and her son. He stated that contact between the applicant and her son was a priority for her. He stated as follows at paragraph 16:

*"I say that in certain of my interactions with the applicant, contact with her son has been a priority. I say that the applicant is recorded as having requested visits with her son on governor's parole namely on 2 April 2019 and 13 May 2019. I say that access to her son has formed part of the applicant's Sentence Management Plan and through my discussions with the Parole Board and the Irish Prison Service it has been agreed as a priority to resume neutral visits, in secure circumstances, with her son as soon as practicable post level V COVID lock down."*

13. Mr. Kennedy went on in the affidavit to outline how the applicant had been doing well in Limerick prison. He outlined how she had completed a significant number of courses in education and personal development.

#### **Further Developments.**

14. When the substantive application was opened before the court on 29th March, 2022, Mr. Power SC on behalf of the applicant, brought the court's attention to matters that had developed on the ground since the swearing of the supplemental affidavits by the parties. In October and November 2021 and in March 2022, the applicant had had face-to-face access visits with her son at neutral venues. That was a significant development.
15. Counsel for the respondents, Ms. Lawlor SC, informed the court that there was another such visit scheduled for an undisclosed venue in April 2022. While she could not say that that regime would continue in the future, as the decision in that regard is within the discretion of the second respondent and would be based on his assessment of the operational and security considerations relevant at the time of the proposed visit, she was authorised to say that as things stood at present, there was no reason to believe that there would not be further such visits after April 2022.
16. In light of these representations, Mr. Power SC conceded a number of matters. He conceded that the decision to grant a person an escorted visit at a neutral venue, lay within the discretion of the prison governor. He accepted that that decision would have to be made by the governor based on relevant factors and circumstances, which would apply at the time that the proposed visit was to take place. He accepted that the court would not micromanage how the prison should be run and in particular, would be slow to direct that a prison governor had to take a particular decision in a particular way at some time in the future.

17. In these circumstances, Mr. Power SC accepted that where it transpired that there was no necessity for an order of mandamus, it was unlikely that the court would accede to a request for such an order. Accordingly, in light of the developments that had occurred to date and on the basis of the representation made in open court by counsel on behalf of the respondents, he did not press for injunctive relief.
18. In terms of the claim for damages, he accepted that having regard to the onset of the COVID-19 pandemic, he was not challenging the withdrawal of face-to-face visits for his client during 2020 and down to the resumption of visits in October 2021. Accordingly, he withdrew the claim to damages.
19. However, counsel submitted that the applicant was entitled to her costs because the second respondent had maintained that he had been entitled to withdraw the practice that had existed of having temporary transfers for access visits in 2019, because that was believed by the second respondent to be necessary on the basis of the applicant's welfare, notwithstanding that she had not been consulted about that and when it effectively meant that she was denied any face-to-face visits with her son.
20. The applicant had challenged that state of affairs. It was only subsequent to the leave application and subsequent to the swearing of the supplemental affidavit on behalf of the respondents, that the situation had reverted to something akin to the 2019 practice, save that the visits were at a neutral venue, rather than in Dublin; which was acceptable to the applicant. Furthermore, it was submitted that it was only at the hearing of the substantive action before the court on 29th March, 2022, that counsel for the respondent had given the comfort of the representation on behalf of the respondent, to the effect that, all things being equal, there was no reason to believe that there would not be further face-to-face access visits after April 2022. Counsel submitted that that was a very significant representation from the applicant's point of view.
21. It was submitted that in these circumstances, the applicant had been successful in obtaining what she had sought by means of the injunction; she had acted reasonably in not pursuing that remedy in light of what had transpired; but she should be entitled to an order for payment of her costs, as she had been successful in obtaining the same thing as she would have obtained, had she got an injunction requiring the respondent to provide her with temporary transfers to the Dóchas Centre for the purpose of having access visits with her son.
22. In response, Ms. Lawlor SC, stated that there was no basis on which the court should make an order for costs against the second respondent as governor of Limerick prison, or as against any of the respondents. Mr. Lawlor applied for an order for costs in favour of the respondents. She pointed out that, at all times, the second respondent had told the applicant that she could have face-to-face access visits in the award-winning visiting suite in Limerick prison. They had opened their doors to visits by the applicant's son in the prison. They had made that known to the CFA. It was the CFA which had put the obstacle in the way of such visits taking place. That was out of the control of the respondents.

23. It was submitted that insofar as the applicant had sought a mandatory injunction requiring the second respondent to provide temporary transfer for such visits, that was not something which the court was likely to do for a number of reasons. Firstly, the court would not micromanage the running of a prison. Secondly, such decisions are decisions that are always within the discretion of the prison governor, who must take whatever operational decisions may be necessary to ensure good order and safety within the prison at any given time. Accordingly, it was submitted that there was no basis on which the court would grant a mandatory injunction requiring the prison governor to act in a particular way in the future in relation to his management of the prison.
24. It was submitted that the applicant was seeking her costs on the basis that she had obtained something of practical value, as a result of bringing her application. It was submitted that that was not correct. It was submitted that in his affidavit sworn on 13th August, 2021, the second respondent had made it clear that once the COVID restrictions allowed, it was the intention of the prison service to reintroduce access visits between the applicant and her son at neutral venues. That was something that had been recommended by the Parole Board as far back as 2017. In this regard, counsel referred to paragraph 16 of that affidavit, which has been quoted above.
25. It was submitted that the access visits held in October and November 2021 were simply the activation of that intention, which was introduced following the lifting of the COVID restrictions in September 2021. The access visits had to be suspended between December 2021 and February 2022, due to the reintroduction of restrictions. The visits were reintroduced in March 2022. Therefore, it was submitted that it was not correct to assert that the respondent objected to such visits. The applicant had known from August 2021, that such visits would be reinstated, as soon as COVID restrictions for prisons allowed.
26. It was submitted that in these circumstances, the applicant had not obtained anything in the proceedings, which she was not otherwise going to get. It was submitted that the respondent had always permitted face-to-face visits at Limerick prison. He had agreed to reintroduce access visits at neutral venues, as soon as the COVID restrictions allowed. He had acted entirely reasonably and lawfully. There was no basis on which the court should award costs against the respondents. In fact, an application was made that the respondents' costs should be paid by the applicant.

**Conclusions.**

27. In awarding costs, the court has to look at a whole range of matters to ensure that its ruling on costs is fair to both parties. This is made clear in ss. 168 and 169 of the Legal Services Regulation Act 2015. It is also provided for in the new rules on costs in SI 584/2019. The relevant principles have been set out by the Court of Appeal in *Chubb Europe Group SE v. Health and Safety Authority* [2020] IECA 183 and *Higgins v. Irish Aviation Authority* [2020] IECA 277.
28. In these proceedings the applicant was not entirely successful, because she did not get leave to pursue the challenge to her transfer to Limerick prison in December 2018. The question arises as to whether she was partially successful in obtaining any benefit in

relation to her access visits to her son. To answer that question, one has to look at the litigation in the round and also in the temporal sequence in which it arose.

29. When the plaintiff started her application in respect of the removal of the visiting arrangements by way of temporary transfer in 2019, that was before the onset of the COVID pandemic. She had had two temporary transfers to the Dóchas Centre to visit her son in May and July 2019. The second respondent had made a decision following the second of these visits in July 2019 to cease that practice. That was done as a result of what was perceived by him as being the adverse effect that such visits were having on the applicant when she returned to Limerick prison. Thereafter, there were two visits by the applicant's son to Limerick prison. After these, the CFA refused to bring him down to Limerick. The respondents maintained their stance, that they would not bring the applicant to the Dóchas Centre, but would only allow visits in Limerick prison. The upshot of all this was, that the applicant could not have face-to-face visits with her son as and from the latter part of 2019.
30. Then, COVID intervened and face-to-face visits could not be entertained on health grounds. That was a reasonable decision on the part of the prison authorities. In fairness, the applicant does not challenge that decision.
31. When granted leave, it was only in respect of the visiting regime that had been in existence in 2019 and the decision that had been made to withdraw it. While the respondent has relied on the averments made by Mr. Kennedy at paragraph 16 of his affidavit sworn on 13th August, 2021, that paragraph has been very carefully drafted. In it, Mr. Kennedy makes reference to the requests for access visits that had been made to him on the governor's parade on 2nd April, 2019 and 13th May, 2019. He goes on to state that access for the applicant to her son has formed part of her Sentence Management Plan. He stated that through his discussions with the Parole Board and the Irish Prison Service it was agreed as a priority to resume neutral visits in secure circumstances with her son, as soon as the COVID restrictions would allow.
32. What is not stated in that paragraph is that following the representations that had been made to him by the applicant at the governor's parade in April and May 2019, access visits by means of temporary transfer to the Dóchas Centre were put in place in May and July 2019. Subsequent to those visits, the second respondent had made the decision to withdraw the practice of having temporary transfers of the applicant to the Dóchas Centre, due to what he perceived as being the adverse effect of such visits on the applicant's welfare when she returned to Limerick prison. It was that decision that is at the heart of the case. In the paragraph quoted in his affidavit of 13th August, 2021, he skips directly from May 2019 to his intention as of August 2021, to resume neutral venue visits as soon the COVID restrictions would allow. As a statement of past fact and as a statement of future intention, both were undoubtedly correct; but they did not deal with the critical decision that had been taken between those two dates.
33. After the lifting of the COVID restrictions on the reinstatement of access visits in October 2021 and thereafter, the respondent did not write to the applicant's solicitor and say that

her action had become moot or unnecessary, as a new visiting regime had been put in place. It was only at the hearing that counsel for the respondents was authorised to make the representation on behalf of the second respondent that, as things stood at present, there was no reason to believe that the April 2022 visit at a neutral venue would be the last such visit.

34. If a party wishes to avoid the costs of a hearing, they should make clear offers to the other side in advance of the hearing. The making of such offers can be done “without prejudice save as to costs”. The significance from a costs perspective of such offers, was emphasised by the Court of Appeal in the *Higgins* case: see in particular paragraphs 19, 28 and 29 of the judgment. While those observations related to the making of an offer between the hearing at first instance and the hearing of an appeal, they apply equally to the making of an offer between the grant of leave and the hearing of the substantive judicial review proceedings.
35. I am of the view that in obtaining what was in effect a change in practice in October 2021, from the position that had existed following the taking of the decision by the second respondent after the second visit in July 2019 to cease such visits, and in obtaining a representation in open court that the second respondent did not view the April 2022 access visit as being the last one, the applicant had gained in effect a result that was of considerable benefit to her.
36. If the respondents had written to the applicant’s solicitor after the lifting of the COVID restrictions in September 2021, or thereafter, and had stated that it was the intention of the second respondent to reintroduce, or maintain, access visits at neutral venues, and if they had invited the applicant to withdraw her application on the basis that it was no longer necessary for her to obtain a mandatory injunction to that effect, that would have been something to which the court could have had regard under s.169 of the 2015 Act, in particular under s. 169(1)(f). However, no such offer was made.
37. The court is satisfied that having regard to all the circumstances in the case from December 2018 to the present, it is just and reasonable that the applicant is entitled to some order for the payment of her costs. The applicant was only partially successful at the leave stage. I award the applicant 50% of her costs for the contested leave application, to include the costs of submissions on that application.
38. In looking at the question of the costs of the substantive hearing, I have had regard to the evidence contained in the affidavit sworn by the second respondent on 13th August, 2021. I am satisfied that the second respondent has made a bona fide effort to treat the applicant fairly and to have regard to her visitation rights with her son. That these were partially frustrated by the attitude adopted by the CFA, was beyond the control of the respondents. Nevertheless, the applicant has been successful, insofar as her proceedings have secured for her a change from the visitation regime that pertained at the end of 2019 and she has secured a valuable entitlement, being the opportunity to have face-to-face visits with her son at a neutral venue; together with the comfort of a representation in open court by the second respondent, that all things remaining as they are, such visits

will continue in the future. Taking all of these matters into consideration, the court is satisfied that an award of 66% of her costs on the substantive hearing, to include the costs of submissions, is fair and reasonable in the circumstances.

39. Accordingly, the applicant is entitled to an order for the payment of 50% of her costs on the leave application, to include the costs of submissions; together with 66% of her costs on the substantive hearing, to include the costs of submissions; such costs to be adjudicated upon by the office of the Legal Costs Adjudicator in default of agreement.
40. As there is no necessity for any substantive order, the court will strike out the proceedings with an order for the payment of the applicant's costs by the respondents in the manner outlined above.
41. There will be a stay on the order for costs for 28 days and if, within that period, a notice of appeal is lodged by either party, the stay on the order for costs will continue until the final determination of the matter before the Court of Appeal.