APPROVED **[2024] IEHC 712**

THE HIGH COURT
JUDICIAL REVIEW

2021 1092 JR

BETWEEN

DENISE LYNCH

APPLICANT

AND

MINISTER FOR HEALTH
COMMISSIONER OF AN GARDA SÍOCHÁNA
GOVERNMENT OF IRELAND
ATTORNEY GENERAL
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 December 2024

INTRODUCTION

1. The principal judgment in these proceedings was delivered on 25 July 2024, *Lynch v. Minister for Health* [2024] IEHC 463. This supplemental judgment determines the incidence of the legal costs of the proceedings.

2. The Applicant, the unsuccessful party in the proceedings, contends that these proceedings represent a form of "*test case*" and further contends that costs should not follow the event.

PROCEDURAL HISTORY

3. The present proceedings are one of a small number of cases which seek to challenge the domestic legislation which prohibits the sale of certain "*cannabinol derivatives*" (as defined). A different one of these cases had been advanced as a lead case, and the balance of the cases had been adjourned generally to await the outcome of that first case. The High Court (Owens J.) delivered judgment in the first case on 26 October 2022, *Bogusas v. Minister for Health* [2022] IEHC 621. The application for judicial review was dismissed. Mr. Bogusas filed an appeal but same was subsequently withdrawn.

4. The Office of the Chief State Solicitor wrote to the Applicant's solicitors on 8 June 2023. In brief, the State Respondents called upon the Applicant to discontinue her proceedings and indicated that if the proceedings were withdrawn, the State Respondents would not pursue her for legal costs. The Applicant did not accept this offer.

5. Following a procedural skirmish on 27 February 2024, the present proceedings were listed for hearing on 20 June 2024. The principal judgment was delivered on 25 July 2024, *Lynch v. Minister for Health* [2024] IEHC 463. The application for judicial review was dismissed for the same reasons as the earlier *Bogusas* proceedings had been.

6. Following upon the delivery of the principal judgment, the parties filed written legal submissions on costs. A short oral hearing was convened on 14 October 2024. Counsel on behalf of the Applicant drew my attention to the fact that the Supreme Court had recently heard argument on the principles governing legal costs in public law proceedings in another case and that judgment was awaited (*Little v. Chief Appeals Officer*). The Supreme Court judgment was

subsequently scheduled for 19 November 2024. Having regard to the relevance of that anticipated judgment, I determined to defer the costs ruling in the present proceedings until the Supreme Court judgment had been delivered. Thereafter, the parties were afforded an opportunity to make further submissions following the delivery of the Supreme Court judgment. Written submissions were filed on 5 December and 12 December 2024, respectively. The parties were offered but declined an opportunity to make further oral submissions on 17 December 2024.

LEGAL PRINCIPLES GOVERNING COSTS

7. The legal principles governing the allocation of the costs of "*public interest proceedings*" against the State have been authoritatively restated by the Supreme Court in *Little v. Chief Appeals Officer* [2024] IESC 53. Insofar as relevant to proceedings pending before the High Court or the Court of Appeal, the factors guiding the exercise of the power to absolve an unsuccessful applicant from the cost consequences that usually follow the failure of their challenge are stated as follows (at paragraphs 68 to 71):

> "First, those Courts enjoy a discretion not to award costs against an unsuccessful plaintiff or applicant in a public interest proceeding. These are civil proceedings against the State, or an organ or agency of the State (including a statutory body) in which the plaintiff or applicant seeks relief in public law, whether in the form of a challenge to the validity, legality or compatibility having regard to the Constitution, European Law, the European Convention on Human Rights or the general principles of administrative law, in respect of an enactment, measure, act, omission or decision of a body of the defendant or respondent whether by way of plenary action, proceedings by way of judicial review, or statutory appeal, and which present the various other features I have outlined at paragraph [34] of this judgment.
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> Second, in determining whether to exercise that discretion in favour of such a litigant, the Court must have regard to all

> the facts and circumstances. I have identified some relevant considerations at paragraph [35] of this judgment: these are as pertinent to the exercise by the High Court and Court of Appeal of its jurisdiction, as they are in the exercise by this Court of its jurisdiction to award costs.
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> Third, because this is essentially a balancing exercise, there are case specific factors which may cause the Court to exercise its discretion to order costs, even in proceedings in which many of these criteria are met. These include that the case was an obviously weak one, that the point was ultimately found to be covered by well-established authority, that the nature of the private advantage at stake for the unsuccessful party in the action is such that it would be unjust not to award costs (for example if the proceedings were brought for a commercial purpose), that the conduct of the unsuccessful party is such that costs should be awarded against it, or that the point of law in issue is so discrete and particular to the case of the unsuccessful party that it is not appropriate to exempt the claimant from the order that usually follows complete defeat.
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> Fourth, while the courts retain a power to order costs in public interest litigation in favour of an unsuccessful party, the cases in which that power should be exercised are very rare. It would be only in the most exceptional of circumstances that they would not comprise cases where the constitutional issues litigated were '*fundamental*' and '*touched on sensitive aspects of the human condition*,' cases of '*conspicuous novelty*', cases in which the issue was one of '*far reaching importance in an area of the law with general application*', in which the courts have clarified an otherwise '*obscure or unexplored area*', or cases in which the claimant, although ultimately unsuccessful, prevailed on a discrete issue in the case which was itself significant. Even where a case falls within one or more of these categories, the Court must have regard to the factors I have identified in the preceding paragraph in determining whether to award costs in such circumstances."

8. These, then, are the principles to be applied by this court in deciding on the proper allocation of the legal costs of the proceedings.

DISCUSSION

9. The Applicant seeks to resist a costs order on the basis that her proceedings represent a "*test case*" or a "*lead case*". It should be explained that the concept of a "*test case*" or "*lead case*" is essentially a case management tool rather than a characterisation for costs purposes. The concept is employed where there are a large number of cases which present the same or similar issues. The court will seek to select one of these cases as a pathfinder case. The hearing of the selected lead case will then be expedited, with the balance of the cases adjourned generally to await the outcome of the same. This is done in the expectation that the final judgment delivered in respect of the lead case will have precedential value in respect of the balance of the cases. The remaining cases can then be disposed of shortly. If, for example, the applicant in the lead case has been unsuccessful, then it is likely that the other applicants will discontinue their cases.

10. The selection of a lead case is not an exact science. Depending on the legal points raised, it may even be necessary to select more than one case in order to ensure that an example of each of the various factual permutations arising in the pool of proceedings is represented. It may also be the position that the initial lead case will fall away and have to be replaced by another. This may be so where the applicant in the first case elects not to pursue an appeal.

11. Importantly, the selection of proceedings as a lead case does not necessarily imply that those proceedings come within the concept of "*public interest proceeding*s" in the sense that the term is employed by the Supreme Court in *Little v. Chief Appeals Officer*. The identification of a lead case indicates no more than that there are a number of cases raising the same or similar legal point.

It is a function of the quantity of cases not of the quality of the legal point. If the legal point fails to meet any of the criteria which might justify a nil costs order, then the cost outcome is not changed simply because a number of individual litigants pursued the same legal point.

12. Therefore, the question of whether the Applicant's proceedings assumed the mantle of the lead case once the appeal in the *Bogusas* proceedings was withdrawn is, in a sense, a distraction. The crucial question is whether the indicative criteria for a nil costs order have been satisfied. This will require consideration, *inter alia*, of the strength of the case and whether the legal position can be said to have lacked clarity. The existence of the *Bogusas* precedent is relevant in this regard.

13. I am prepared to assume, therefore, that the Applicant's case has become a lead case in circumstances where the appeal in *Bogusas* has been withdrawn. The outcome of the contested directions hearing before the High Court (Hyland J.) on 27 February 2024 had been that this case was to be heard in advance of the balance of the other cases raising the same point of law. There are five such cases. The court rejected a submission, on behalf of the State Respondents, that all the cases should be heard together.

14. For the reasons which follow, I have concluded that a nil costs order would not be appropriate in the present case. Rather, costs should follow the event.

15. First, the point of law raised in the proceedings is not one of general public importance, and certainly not one which can be characterised as of "*systemic*" or "*foundational*" importance. The claim actually advanced is narrow. The Applicant does not seek to challenge the long established principle that narcotic drugs cannot avail of the free movement of goods under EU law. Rather, the

Applicant relies on a highly technical argument that a cannabinol derivative with a specific chemical composition should not be characterised as a narcotic drug. The proceedings do not disclose any broader legal issue. It is not suggested, for example, that the use of cannabis in general should be decriminalised.

16. The proceedings did not necessitate the determination of any issues touching upon sensitive personal rights under either the Constitution of Ireland or the European Convention on Human Rights. Although the statement of grounds alleged a breach of certain constitutional rights, this aspect of the case was not pressed at the hearing. It is not sufficient that proceedings merely raise an issue of EU law. The Applicant's case, at its height, turned on a technical argument as to whether a particular preparation comprised a "*drug*" for the purpose of the free movement of goods.

17. Secondly, there is no uncertainty in the law. The legal position governing the import and sale of the relevant cannabinol derivative had, as of the date of the execution of the search warrant the subject-matter of the judicial review proceedings, been clear-cut. More specifically, it was obvious from the date of the rejection of the proposed legislative amendment to the Single Convention on Narcotic Drugs in December 2020 that the substance came within the definition of a "*drug*" and did not benefit from the free movement of goods. See paragraphs 30 to 35 of the principal judgment.

18. The fatal flaw in the Applicant's argument was that it largely ignored the inexorable consequences of the proposed legislative amendment having been rejected. Instead, the Applicant sought, somewhat opportunistically, to argue that there was a divergence or discrepancy between the approach of the Court of Justice in *Kanavape,* Case C-663/18, EU:C:2020:938 and the Council of the

European Union as evidenced in Council Decision (EU) 2021/3. With respect, this argument overlooks the logic that a legislative amendment has priority over earlier case law and may render that case law inapplicable. Thus, if and insofar as there might be a divergency between the two institutions—and for the reasons explained in the principal judgment, there is not—this would not create any legal uncertainty: the legal regime is that in force following the rejection of the amendment.

19. The position is put as follows in the principal judgment:

> "The Vienna Convention of 23 May 1969 on the Law of Treaties (*United Nations Treaty Series*, vol. 1155, p. 331) provides that any subsequent agreement or subsequent practice in the application of a treaty, which establishes the agreement of the parties regarding its interpretation, may be taken into account in interpreting the relevant treaty.
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> The contracting parties to the Single Convention on Narcotic Drugs expressly rejected an amendment which would have excluded preparations containing not more than 0.2 percent of delta-9-tetrahydrocannabinol from measures of control. Having regard to this legislative history, the Single Convention on Narcotic Drugs cannot sensibly be interpreted as *excluding* from its ambit preparations which fall below this threshold. To apply such an interpretation would be to disregard the express intentions of the contracting parties as expressed in December 2020 and would bring about the precise interpretation which they chose to reject. It follows, therefore, that a substance or preparation which contains even a low level of THC comes within the concept of a narcotic drug under the Single Convention on Narcotic Drugs, and, by logical extension, is not a good which is entitled to benefit from the principle of the free movement of goods under Article 34 TFEU."

20. The present proceedings do not, therefore, fulfil one of the essential criteria for public interest proceedings, namely, clarification of the law in an area of systemic importance.

21. Thirdly, the case was an obviously weak one. This reason is closely related to the second reason above. The Applicant's case was predicated on a tendentious

reading of the judgment in *Kanavape* and largely ignored the inexorable consequences of the rejection of the proposed legislative amendment. Perhaps more importantly, these self-same arguments had already been rejected by the High Court in *Bogusas*. Whereas the Applicant, as is any litigant, is entitled to contend that an earlier judgment of the High Court had been wrongly decided, the existence of the precedent is significant in the allocation of costs. It does not advance any of the objectives underlying the court's discretion to make nil costs orders to allow parties a free run to relitigate precisely the same points as have previously been dismissed as unfounded. In exercising its discretion in respect of costs, a court must seek to reconcile (i) the objective of ensuring that individuals are not deterred by the risk of exposure to legal costs from pursuing litigation of a type which—although ultimately unsuccessful—nevertheless serves a public interest, with (ii) the objective of ensuring that unmeritorious litigation is not inadvertently encouraged by an overly indulgent costs regime.

22. Fourthly, although in no sense determinative, it is appropriate to attach some weight to the fact that the sole objective of the proceedings was to protect the Applicant's own commercial interests.

23. Fifthly, whereas the existence of a number of other proceedings raising the same legal point is a factor to be considered in determining the incidence of legal costs, proceedings which fail to meet *any* of the criteria which might justify a nil costs order cannot overcome this shortcoming by sheer force of numbers.

24. Finally, it is appropriate to have regard to the conduct of the litigation insofar as it affected the Director of Public Prosecutions. As explained in the principal judgment, the Director had applied to be joined to the proceedings in circumstances where a criminal prosecution had been initiated against the

Applicant subsequent to the grant of leave to apply for judicial review. In the event, the Applicant abandoned those aspects of her case which had the potential to impact on the prosecution. This was only done on the day of the hearing. This will have resulted in the Director having had to incur significant legal costs unnecessarily. This occurrence could readily have been avoided had the Applicant notified the Director at an earlier date that no relief was being sought against her. It follows that, whatever might have been the position of the State Respondents, the Director of Public Prosecutions would be entitled to her costs even if the public interest litigation costs criteria had been met.

25. For completeness, it should be recorded that there is mention made of financial hardship in the Applicant's first set of written legal submissions, and to the proceedings having been taken on a "*no foal, no fee*" basis in the second set of submissions. None of this has been substantiated on affidavit. It cannot be inferred from the subject-matter of the proceedings that legal costs would have a significant deterrent effect on the bringing of litigation by the type of person likely to be affected by the legal issues arising. The legal issues here did not arise, for example, in the context of legislation intended to protect low paid employees nor in the context of social welfare legislation. Rather, the proceedings were taken by the owner of a retail business seeking to protect her commercial interests. In the absence of any admissible evidence, any supposed financial hardship cannot be taken into consideration. Even if it could, it would merely be one factor to be considered and would be outweighed by the obvious weakness of the legal point being pursued.

CONCLUSION AND FORM OF ORDER

26. The State Respondents and the Director of Public Prosecutions have been entirely successful in resisting the application for judicial review. The default position under section 169 of the Legal Services Regulation Act 2015 is that those parties are entitled to recover their legal costs as against the unsuccessful party, i.e. the Applicant. For the reasons explained herein, none of the criteria identified by the Supreme Court in *Little v. Chief Appeals Officer* [2024] IESC 53 arise.

27. Accordingly, an order will be made directing that the Applicant is to pay the legal costs of the State Respondents and the Director of Public Prosecutions, respectively. The costs include all reserved costs and the costs of the various sets of written legal submissions. The costs are to be adjudicated under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties.

28. The costs order will be stayed for a period of 28 days from the date of the perfection of the order. In the event of an appeal or an application for leave to appeal, the stay will continue until the determination of same.

Appearances

Derek Shortall SC and Stephen T. Faulkner for the applicant instructed by Mulholland Law
William Abrahamson SC and Frank Kennedy for the first to fourth named respondents instructed by the Chief State Solicitor
James Dwyer SC and Conor McKenna for the fifth named respondent instructed by the Chief Prosecution Solicitor