



THE SUPREME COURT

S:AP:IE:2021:000025
High Court Record No. 2020/353 JR

O'Donnell C.J.
MacMenamin J.
Dunne J.
O'Malley J.
Baker J.

Shardha Sobhy

Respondent/Applicant

- AND -

The Chief Appeals Officer,
Minister for Employment Affairs and Social Protection,
Ireland and the Attorney General

Appellants/Respondents

-AND-

Irish Human Rights and Equality Commission

Notice Party

COSTS RULING of the Court delivered on the 4th of March, 2022

1. By its judgment delivered on 16 December 2021 [2021] IESC 81, the Court allowed the appeal against the judgment and order of the High Court [2021] IEHC 93, and concluded that an employment contract entered into by a person who did not have a work permit or permission to be in the State could not be regarded as a “contract of service” for the purposes of the contribution requirements in the Social Welfare Code.

2. This ruling concerns the costs of that appeal, and a consideration of whether the award of costs made to the respondent by the order of the High Court dated 10 March 2021 ought to be reversed.

3. Section 169(1) of the of the Legal Services Act 2015 (“the 2015 Act”), provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against the unsuccessful party “*unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties...*”

4. The parties are agreed that no material difference exists between s. 169(1) of the 2015 Act, and the provisions of Order 99, Rule 2(1) of the Rules of the Superior Courts which provides that costs are in the discretion of the Court, although the Court must have regard in particular to the matters set out in s. 169(1) of the 2015 Act, where applicable.

5. As the appellants have been entirely successful in their appeal, they have a presumptive entitlement, pursuant to the provisions of s. 169(1) of the 2015 Act, to be awarded their costs against the respondent. It is submitted on behalf of the appellants that no circumstances exist to displace that presumption or for this Court to exercise its discretion to depart from the normal rule as to costs, either to make no order as to costs or to award the respondent a contribution towards her costs.

6. Without prejudice to that general proposition, the appellants are in the circumstances not seeking to be awarded the costs of the appeal to this Court, nor do they seek the costs of the High Court against the respondent, but seek to vary the order of the High Court accordingly.

7. They submit that the following orders in respect of costs would meet the justice of the case:

- (i) No order in respect of the costs of the appeal
- (ii) An order setting aside the order of the High Court dated 10 March 2021 granting costs to the respondent and ordering that there be no order in respect of the costs of the High Court.

8. It is submitted by the respondent that a contribution to her costs is an appropriate means by which the Court would exercise its discretion and draws attention to the following factors:

9. First, the respondent submits that in the course of its substantive judgment, the Court observed that “whether the legislature intended the consequence of her having worked without a work permit to render her contributions not reckonable was not obvious” and extrapolates that the appeal has “contributed to the clarification of an area of law with general application. It is argued that this is of particular significance in the context of the recent decision by Government for the regularisation of thousands of undocumented persons, many of who can be expected to be in the position of the respondent. It is also argued in that context that the appeal raised matters of systemic legal importance and that this is recognised in the determination granting leave to appeal.

10. Second, whilst it is accepted that the litigation did not concern a constitutional issue, it is argued that it did raise an issue touching on “sensitive aspects of the human condition”, and in particular the State’s material support for pregnant women and new mothers. Accordingly, it is said that whilst this is not a public interest test case in the sense meant in the authorities, the benefit was sought by the respondent to benefit her baby and not herself.

11. Third, that the Court did in the course of its judgment note certain problematic aspects of State policy with respect to the entitlements of undocumented persons and that it could make employment of irregular migrants more rather than less attractive for unscrupulous employers. In reply, it is submitted on behalf of the appellants that the question of whether a person working unlawfully in the State is entitled to rely on that employment for the purpose of claiming a contributory social welfare benefit from the State does not raise fundamental issues which touch on sensitive aspects of the human condition of the type identified in *Collins v. Minister for Finance* [2014] IEHC 79, such as sexuality or assisted suicide, and that the litigation did have the purpose of seeking a personal benefit for the respondent. It is also submitted on behalf of the appellants that the proceedings concerned the payment of a social welfare benefit to the respondent and were entirely for her personal advantage. The fact that her child might indirectly benefit from a payment to the respondent does not elevate the case to one of a public rather than private nature.

Decision

12. This Court recently held in its costs ruling in *Minister for Communications, Energy and Natural Resources & anor. v. Wymes* [2021] IESC 63 at para. 7 that:

“It is undoubtedly the case that the question considered in the appeal was a matter of general public importance, but that factor alone cannot be a basis on which a determination on liability for costs could be made, as most, if not all, appeals to this Court could be said to fall into that category by reason of the constitutional threshold for the grant of leave to appeal.”

13. This Court held in this regard in *Wymes*:

“Furthermore, the applicant by the appeal sought to overturn his own adjudication, and therefore he cannot argue that he was not seeking a private personal advantage. Accordingly, the appeal does not meet the test identified in cases such

as Dunne v. the Minister for the Environment (No. 2) [2008] 2 IR 775, and is not therefore one which meets the test of the public interest litigation.”

14. The present appeal undoubtedly had as its ultimate aim the overturning of the decision that the respondent did not have an entitlement to maternity benefits, and any benefit sought in respect of her child would inevitably enure for her benefit directly and indirectly. The appeal and the litigation does not in any sense fall within the categories recognised in *Collins*.

15. While it was noted in the course of the substantive judgment that the employment of undocumented migrants may be advantageous to unscrupulous employers, the employer and employee in this case made all social welfare contributions. No exploitative consequence is apparent in those circumstances. The reference by the Court was to the general problem concerning undocumented persons working in the State entirely outside its contribution structure.

16. The appeal clarified a matter of systemic importance and, notwithstanding that the respondent lost the appeal, and that the litigation was not public interest litigation as explained in the authorities, this is a reason to justify not awarding the costs of the appeal against the respondent. The justice of the case is in those circumstances adequately met by an order that there be no order as to the costs of the appeal or of the High Court. This result has the effect that the respondent does gain some benefit albeit she unsuccessfully pursued litigation which, while the result was likely to have a direct consequence for her, was of systemic importance in regard to legislation which has, or is likely to have, an impact on large number of persons.

17. In the circumstances the appropriate order is:

- (i) no order as to the costs of the appeal
- (ii) set aside the order of the High Court regarding costs
- (iii) no order as to the costs of the High Court