



AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2021:000053
Court of Appeal Record No. 2020/155
Circuit Court Record No. 2019/5526

O'Donnell C.J.
Charleton J.
Baker J.
Woulfe J.
Hogan J.

IN THE MATTER OF SECTION 16 OF THE COURTS OF JUSTICE ACT 1947
(AS AMENDED) – A CASE STATED FROM THE CIRCUIT COURT TO THE
COURT OF APPEAL

Between/

ELG

(a minor suing by her mother and next friend SG)

Appellants/Applicants

- AND -

Health Service Executive

(No. 2)

Respondent/Respondent

COSTS RULING of the Court delivered on 2 day of June 2022

1. The appellants seek the costs of the appeal to this Court, including those in respect of the hearing of the preliminary issue regarding the jurisdiction to hear a case stated when the judge stating the case had retired. The appellants also seek the costs of the hearing before

the Court of Appeal, and an issue arises whether the Determination granting leave to appeal to this Court permitted an appeal on that ground.

2. Briefly, the appeal concerned the question of whether the minor appellant, who was assessed with needs falling short of a disability, could be entitled to a service statement for the purposes of the Disability Act 2005 (“the Act of 2005) which provides an enforcement mechanism to access to certain services.

3. The issue arose for determination in the application to the Circuit Court commenced by originating motion pursuant to the enforcement and complaints procedure provided by the Act of 2005. The Circuit Court judge agreed to state a case to the Court of Appeal, by way of consultative case stated, as to the proper interpretation of the statutory provisions. The initial request to state the case was made by the respondent, and the appellants agreed. The Court of Appeal in its judgment observed that the issue raised was one which could potentially impact on a large number of persons, and had agreed with the submission of the respondent that the issue raised was of “systemic” importance. The Determination of this Court granting leave noted the potentially “wide-ranging implication” of the issue.

4. The case was stated by the Circuit Court judge who had retired from office before the judgment of the Court of Appeal was delivered. In those circumstances a separate and new issue arose for consideration by this Court as to whether jurisdiction existed to hear an appeal from the decision of the Court of Appeal, and although neither party asserted that this Court did not have jurisdiction, the issue was one of some novelty and resulted in the Court reserving its judgment and the delivery of two judgments: Baker J. and Hogan J. ([2021] IESC 82). The Court, for the reasons stated, accepted it had jurisdiction to hear the appeal.

5. The hearing of that preliminary issue may fairly be said to be separate from the substantive appeal, and arose from circumstances outside the control of both parties to the case stated and to the appeal. It could be said that there was no “winner” of this aspect of the appeal as both parties had urged the Court to assume jurisdiction because, as noted in the

judgment of Baker J., the question of law arising was capable of finally resolving the issue between the parties but “also the cases of those other children potentially affected by the statutory provisions”.

The costs of the appeal

6. In the substantive judgment Baker J., with whom the other members of the Court agreed, rejected the proposition advanced by the appellants concerning the interpretation of the legislation ([2022] IESC 14). The practical consequence of the decision of this Court on the case stated was therefore that the appellants could not succeed in obtaining the relief sought in the motion before the Circuit Court.

7. The appellants assert, however, that they are entitled to the costs of the appeal because in the words of s. 161(1)(A) of the Legal Services Regulation Act 2015 the “nature and circumstances of the case” so require, and that costs should be awarded to them in the Court’s general discretion, whether the issue of costs is assessed under the Act of 2015 or under O. 99, r. 2(1) of the Rules of the Superior Courts. Again, by reference to the statutory language, it is asserted that it was “reasonable” for the appellants to support the request by the respondent that the Circuit Court would state a case to the Court of Appeal, and also reasonable for them to appeal the decision of the Court of Appeal. It is argued that the affidavit evidence of the respondent in the Circuit Court was that the issue was one of “systemic” importance, which “potentially touches thousands of applicants across the country who have been assessed not to have a disability”.

8. As the Court of Appeal noted in its judgment at para. 39, and as was noted also in the judgment of this Court on the substantive issue, no authority had directly dealt with the question posed in the case stated regarding the entitlement to a service statement of a person with identified health needs falling short of a disability, such statement being the statutory gateway to the enforcement mechanisms in the Act.

9. In correspondence on 4 November 2020, before the case was stated, to the solicitor for the applicants the respondent's solicitor had proposed that the Circuit Court would make a consultative case stated to the Court of Appeal, as, because the interpretative question raised arose in other cases, there would be a "significant benefit" in clarifying the point. It was said that, should the Circuit Court judge accede to the application to state the case, that no order for costs would be sought against the applicants irrespective of the outcome.

10. The respondent says that it is presumptively entitled to its costs but proposes that no order for costs be made in respect of either aspect of the appeal before this Court, and that the order in the Court of Appeal be retained.

General comments regarding costs

11. The factors which fall to be considered when a court is asked to depart from the normal rule that costs follow the "event" include the general importance of the legal issues raised, whether they are novel or well-established, whether a party's case is strong or weak, and whether the subject matter of the litigation is likely to have a significant effect on the category of persons affected by the legal issues. The jurisdiction is exceptional. Where the losing party had brought a claim to, even in part, obtain a personal advantage that factor will undoubtedly weigh against granting costs to that party, but may justify making no order against them: see the discussion in this Court's judgment in *An Taisce v. An Bord Pleanála* [2022] IESC 18 and in that of Murray J. in the Court of Appeal in *Lee v. Revenue Commissioners* [2021] IECA 114.

12. Essentially the appellants argue that the appeal to this Court raised a matter of general public importance which justifies the award of costs in their favour. Reliance is placed on the decision of Simons J. in *Corcoran v. Commissioner of An Garda Síochána* [2021] IEHC 11 at para. 19 where he noted that one of the objectives of the Court in exercising its discretion to award costs in proceedings which raise matters of general public importance includes "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”, noting too that that objective must be reconciled with another objective, that of insuring that unmeritorious litigation is not “inadvertently encouraged by an overly indulgent costs regime”.

13. As will be apparent from the judgment of the Court, in particular from para. 50 to the end of the judgment, the issues raised were answered by a literal reading of the Act, by a reading of the relevant statutory provisions in the context of the Act as a whole and also in the light of the definition section in Part 2 of the Act. The conclusion of the Court was that the ordinary canons of statutory interpretation did not require to be departed from in the exercise of ascertaining the intention of the Oireachtas. The appeal did not therefore raise an issue of any great complexity or novelty.

14. Nonetheless, and while the judgment did not require the Court to depart from well-established principles of statutory interpretation, the matter can still be said to have been one of general public importance, the answer to which is likely to be undoubtedly of assistance in many cases where the legislation falls to be interpreted.

15. The principles to which this Court must have regard in considering the proper approach to costs in a case where issues of general public importance arise must have regard in the first place to the changes in the constitutional architecture affected by the operation of the 33rd Amendment of the Constitution Act 2013 which has resulted in a new and constitutionally different jurisdiction in this Court and that leave to appeal is granted only in those cases which raise legal issues of general public importance, or where the interests of justice require. It could be said therefore that all cases that come before this Court have the potential to determine a legal question which can have general legal effect and importance, and is capable of affecting a large or small number of other persons in similar circumstances.

16. Therefore, as this Court has already noted in its ruling on costs in *Minister for Communications Energy and Natural Resources v. Wymes* [2021] IESC 63, the fact that a

question considered in an appeal is a matter of general public importance cannot of itself 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 to grant of leave to appeal. More recently in *Sobhy v. Chief Appeals Officer* [2022] IESC 16, which concerned what was undoubtedly a matter of systemic importance regarding the welfare entitlement of an undocumented person who whilst employed in the State was making the appropriate social welfare contributions, the Court considered that the justice of the case was properly met by making no order as to the costs of the appeal or of the High Court, and noted that whilst the result had a direct consequence for the appellants it was equally likely to impact on a large number of persons. The Court there departed from the normal rule that costs follow the event, as that appellants had lost the appeal.

17. In the light of those general observations the following is the conclusion of the Court

The costs of the Court of Appeal

18. The applicants raised the issue of the costs of the Court of Appeal in their application for leave to appeal under the rubric of “interests of justice” and make a specific plea in Ground 5 of the notice of appeal that the Court of Appeal erred in the manner in which it exercised its discretion to not award costs to them. The respondent opposed the application and pleaded that the Court of Appeal had correctly exercised its discretion in particular by reference to the principle set out by that Court in *Lee v. Revenue Commissioners*.

19. It is argued by the respondent that the Determination did not give leave to appeal the Court of Appeal order for costs. It was not mentioned in the Statement of Case to the parties on 29 October 2021. The appellants made no suggestion following circulation of the Statement of Case that the issue of costs did arise for consideration in the appeal and that it ought to have been referred to in the Statement of Case. It was not raised at either of the two case management hearings and the Court notes that on 5 November 2021, when the case management judge asked the parties to identify any issues which remained to be clarified,

the appellants again did not raise the costs. As was noted in the judgment of the Court, the parties prepared a joint issue paper as directed at case management. The issue paper prepared by the parties identified those matters which were agreed and those remaining in contention. The costs of the Court of Appeal were not mentioned as an issue. The document ran to four pages with 17 numbered paragraphs.

20. Whilst it could be said that in many cases when the result of an appeal to this Court is a finding that the judgment of the lower Court was wrong, then the usual order would include an order setting aside the judgment of that lower Court and setting aside the costs order made against the party who was ultimately successful on appeal. It would, in those circumstances, follow as a matter of logic and fairness that if the result of the appeal was that the lower court's decision was wrong in its substance, that the costs order it made was incorrect. However, the present case presents a somewhat different question, in that the appellants seek to appeal the refusal of the Court of Appeal to exercise its discretion to award the costs of the Court of Appeal to the losing party on an exceptional basis having regard to the public interest element of the litigation, and because the result of the case stated was likely to impact on a large number of other persons. The costs question therefore was not one which was capable of being dealt with in this usual way because the result of the appeal was to uphold the decision of the Court of Appeal, which had, like this Court, rejected the argument of the appellants on the meaning and application of the statutory scheme.

21. In those circumstances, it was imperative that the appellants should identify the costs question as a separate and standalone question for consideration by this Court on the appeal. The appellants had ample opportunity to do so, including at case management hearings, in the preparation of the agreed issue paper, and in response to the Statement of Case issued by the Court. Whilst it is not normally necessary for this Court in its Determination on a question of leave to appeal to separately identify the issue of costs, and because the Court expressly left open the precise parameters of the appeal, the appellants ought to have

identified the costs issue with clarity. Because they did not do so, it follows that the issue of reversing the costs order of the Court of Appeal on exceptional grounds did not become part of the appeal as it evolved through case management.

22. The Court notes too that an *ex tempore* judgment was delivered by the Court of Appeal (Ní Raifeartaigh J.) following an oral hearing by that Court on the costs question and the transcript of that ruling was not submitted with the appeal papers.

23. It appears from the summary of the reasoning of Ní Raifeartaigh J., now set out by the respondent in its written submissions on costs, that she noted the various factors which came for consideration in the exercise of the court's exceptional discretionary power to award costs against a successful litigant.

24. In this Court's view, having regard to the fact that the appellants did not specifically raise and identify the issue of costs as a live issue in the appeal, and also having regard to the fact that what is sought is an appeal of a discretionary order where no error can be identified in the reasoning of the Court of Appeal, this Court considers that it should not allow an appeal from the order of the Court of Appeal, and should not interfere with that order: see the discussion in *MD v. ND* [2015] IESC 66, [2016] 2 I.R. 438 and *Nash v. DPP* [2016] IESC 60, [2016] 3 I.R. 320. The decision of the Court of Appeal was "within the range of costs orders which were open to the trial judge within the margin of appreciation which must be afforded" to it: *per* Clarke J. (as he then was) in *Nash v. DPP* at para. 73.

The costs of the appeal

25. In the present case a conclusion similar to that in *Sobhy* and *Wymes* (discussed above at 16) would have been warranted but for a number of special factors, none of which, taken alone would warrant a departure from the usual rule that costs follow the event, or from the general approach adopted in *Sobhy*, that costs should not in general be awarded against a successful party.

26. This appeal arose by reason of a case stated from the Circuit Court, one promoted or initiated by the respondent. That factor is one which distinguishes the circumstances from those arising in either *Wymes* or *Sobhy*, and as noted above, the respondent did urge the Circuit Court to make a consultative case stated by reason of the systemic importance of the question. The respondent provided comfort to the appellants by agreeing that it would not seek its costs even should its interpretation of the legislation be found to be correct, but nonetheless the appellants were in those circumstances facilitating and agreeing to the making of a case stated.

27. The respondent is, moreover, a State agency, which has broader interests and obligations than a private party to litigation. In addition, the imbalance in interests in the litigation and in resources is a factor to which some regard it to be had, especially in the light of the limitations in the availability of civil legal aid in cases such as this and the personal sensitive interests sought to be protected by the appellants. The respondent had a real systemic interest in securing a definitive ruling on the scope of the Act. While the appellants commenced the Circuit Court application to seek a personal benefit for the first applicant, and she has lost that application, it must be recognised that the minor child undoubtedly has needs and requires some State support over that available to a child without those needs, and these circumstances meant that some engagement with the respondent and the legislation was both appropriate and indeed inevitable.

28. These are factors which, taken together, are relevant. While noting too that the legal point was not of any great complexity nor was the legislation so opaque as to require the Court to depart from standard rules of statutory interpretation, the Court is of the view that the appellants should be awarded some costs, albeit not the full measure of costs. Any costs order must as a starting point reflect and give considerable weight to the fact that the appellants lost the appeal, and as a consequence, they will not succeed in the Circuit Court application commenced on behalf of the minor child.

29. Accordingly, the Court considers that the justice of the case would be met by awarding the appellants 40% of the costs of the appeal, on the basis of one day's hearing, although the case did run on two separate days and in two separate parts.

30. Accordingly, the Court will make the following orders:

(a) Dismiss the appeal from the order of the Court of Appeal; and

(b) Award the appellants 40% of the costs of the appeal on the basis of one day's hearing.