



THE SUPREME COURT

[Supreme Court Record No. 118/2020]

[Court of Appeal Record No. 207/2019]

[High Court Record No. 1675P/2015]

**Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Baker J.**

BETWEEN:

MICHAEL O'CALLAGHAN

PLAINTIFF/APPELLANT

V.

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

Ruling of the Court delivered by Mr. Justice John MacMenamin dated the 8th day of October, 2021

1. This is a ruling in relation to matters arising consequent upon the judgment, delivered on the 30th September, 2021, in the above appeal. In that judgment, it was held that the appellant was entitled to a declaration that his constitutional right under Article 38 to a trial with due expedition had been infringed, and that this infringement should be marked by an award of €5,000 arising from the constitutional violation.

Damages

2. In addressing the issue of damages, the judgment observed that this question could only be measured on the basis of a period during which the appellant had actually sustained a denial of his right to a trial with due expedition. (para. 116 et. seq.). The judgment made clear that the appellant's detention had been lawful. There was no breach of his constitutional right to liberty, or anything said to flow from such alleged miscarriage or wrongful imprisonment. What was in issue was simply the measurement of a remedy for a specific constitutional tort, that tort being the denial of a right to a trial and appeal with due expedition, which contravened Article 38 of the Constitution.

3. The judgment observed that this was an instance where ECtHR jurisprudence, on the right to a trial within a reasonable time, set out considerations and criteria which were of assistance in assessing the nature and essence of the constitutional right to a trial and appeal with due expedition, derived from Article 38. Thus, it followed, that the level of an award for the violation would bear comparison with the similar level of awards made by the ECtHR by way of just satisfaction for similar breaches of the Article 6 right to a trial within a reasonable time. Thus, it logically also followed that the nature of damages in question could be limited only to what flowed from the actual constitutional infringement itself, that is, the delay over and above that which would have been reasonable in having the appeal heard.
4. It must be remembered that the appellant originally made a claim for damages from a miscarriage of justice. That claim was rejected in the High Court. Thus, any claim for damages or consequences that might have flowed from a finding of miscarriage of justice was necessarily eliminated from the case at that stage. The issue of any such damages simply did not arise. Neither could a claim for an award under the European Convention on Human Rights ("ECHR") Act, 2003. The only issue to be determined was the claim under Article 38 of the Constitution, and the level of damages which could reasonably flow from the violation as identified in the judgment; not simply from the fact that the appellant had been sentenced to a term of imprisonment.
5. In the course of written submissions on the question of costs, the appellant now submits that it had been expected that the assessment of damages would be remitted to a lower court, should his argument for liability be established. It is claimed that this expectation arose from an agreement reached between the parties at the start of the proceedings in the High Court, which had been conveyed to the High Court judge at the start of the hearing in that court on the 18th July, 2018. The existence of that agreement was never disclosed to this Court. It was not mentioned in the notice of application for leave. It was not mentioned in the written submissions. Despite the fact that the question of remittal was mentioned, the fact of such an agreement, which would have been known to the appellant, was not mentioned in submissions. This was both remiss and unfortunate.
6. Moreover, the wording of the application for leave was misleading, in that, in terms, it sought an order for a *remittal* of the case to the High Court, in the event of liability being established. None of that terminology, deployed in the application for leave, suggested that there had been some prior agreement that the case would be dealt with in a modular way. There was nothing before this Court to suggest the possibility of any putative limitation on the role of this Court in dealing with the constitutional infringement, and what logically followed from that finding. The fault for any miscommunication did not lie with this Court. But the fact that the submission was made also indicated a level of misconception regarding the nature of the findings on the infringement, which, in fact, created the framework for any award of damages.
7. In fact, the issues which the appellant wished to have "*remitted*" concerned the conditions of his detention, and the effect of that detention upon his livelihood, health, private and

family life, and relationships with others. He wished to advance claims in relation to suffering distress, anxiety, loss, damage, inconvenience, and expense.

8. A number of observations are apposite here. It was not suggested in the submission that it was the actual *delay* in the appeal, rather than the fact of the sentence imposed in due course of law, had given rise to any such alleged consequences. Second the claim which the appellant wished to make was, on its face, in the nature of one for personal injuries. Even had the Court decided to make an order to “*remit*” a damages question to the High Court, the appellant would, as a matter of high likelihood, have faced significant difficulties in relation to time-limitations which, if not already pleaded by way of defence, might have been the subject of an application to amend the defence. Further, the nature of the submission indicated a misunderstanding of the nature and limitations of the award of damages which could flow from the findings of the Court made in this case.
9. The effect of the submission was, in fact, to have been to seek to re-open issues of alleged damage sustained by the appellant, which had already been closed off by the dismissal of the claim for a miscarriage of justice, and under the ECHR.
10. But this is not the only consideration. The very fact that an issue might be remitted, and thereafter appealed, to the Court of Appeal, and then perhaps to this Court, would raise fundamental considerations regarding further delay in these proceedings, which commenced as long ago as the 27th February, 2015. There is a strong public interest in the finalisation of cases at the earliest opportunity. In the present case, remittal would involve unnecessary allocation of court time on what, in the circumstances, would have been, in any case, a redundant and unnecessary “*remittal*”, because of the nature of the limitation in damages. The application is, therefore, rejected.

Costs

11. In the Court of Appeal, Ní Raifeartaigh J. held that the costs attributable to each of the three issues which had been litigated by the appellant had been (a) delay and right to a fair trial – 45%; (b) miscarriage of justice – 45%; (c) the ECHR cross-appeal – 10%. The appellant now submits that he would be entitled to full costs of the High Court and costs of appeal. He suggests that in this Court he succeeded on the fundamental issue, that is, the establishing of systemic delay, giving rise to the constitutional violation. He submits that the evidence was not unduly prolonged in the High Court. It is also submitted, perhaps with some bravery, that the appellant’s conduct before, and during, the proceedings had been “without fault”.
12. While a court will evince a degree of latitude regarding cases where more than one issue is ventilated, such latitude must be tempered by the findings which were made in the courts below. The question of allocation of time was carefully and extensively dealt with in the Court of Appeal ruling by Ní Raifeartaigh J. In the event, she decided that the appellant should be entitled to 45% of his costs in the High Court, and the Court of Appeal.

13. The appellant submits that there are unusual factors in this case which would warrant a departure from the principles established in ss. 168 and 169 of the Legal Services Regulation Act, 2015; *Veolia Water UK Plc. & Anor. v. Fingal County Council (No. 1)* [2017] 2 I.R. 8186; *Fox v. Minister for Justice & Others* [2021] IESC 67; *UCC v. ESB* [2021] IESC 47; and *Chubb European Group S.E. v. Health Insurance Authority* [2020] IECA 183. There are no factors in the case which would dislodge the general rule that a partially successful litigant should be awarded only those costs relating to the successful elements of the proceedings. It requires repetition that the claim under common law for miscarriage of justice was rejected both in the Court of Appeal, as, earlier, judges held in the High Court. The claim under the ECHR was held to be time barred. The question of costs was carefully analysed by Ní Raifeartaigh J. The allocation of costs which was held appropriate in the Court of Appeal should be applied. The allocation of time was used in order to calculate what reduction there should be in the respondents' costs, as, in the Court of Appeal, the appellant was unsuccessful. It has not been suggested that this allocation of time was incorrect. I would not interfere with the allocation of time in the Court of Appeal order, and would apply that formula to the costs now to be awarded to the appellant. The appellant will be entitled to the full costs of the appeal to this Court, and 45% of the High Court and Court of Appeal hearings.