

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 325

[Record No. 2020/398 JR]

**IN THE MATTER OF THE CONSTITUTION OF IRELAND  
AND IN THE MATTER OF THE EUROPEAN CONVENTION ON  
HUMAN RIGHTS ACT 2003**

**BETWEEN**

**PATRICK MCGOVERN**

**APPLICANT**

**AND**

**THE CHIEF APPEALS OFFICER, MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL  
PROTECTION, IRELAND,  
AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 12th day of May, 2021.**

**Issue**

1. This Court delivered judgment on 19 March 2021 dismissing the applicant's claim for judicial review in respect of a decision of the Appeals Officer to refuse him the payment of the Widower's (Contributory) Pension and the Widowed or Surviving Civil Partner Grant under the provisions of the Social Welfare Consolidation Act 2005 as amended (the 2005 Act).
2. Subsequently, the parties delivered submissions on the issue of costs, the respondents seeking their costs and the applicant seeking no order as to costs. This judgment is addressing the issue of costs in those circumstances.
3. The applicant's position might be summarised as follows:
  - (a) The applicant suggests that the proceedings raised issues of significant general importance so that it would be appropriate that the matter be litigated in the public interest relative to the interpretation of the 2005 Act and the Constitution as well as the application of both EU and ECHR law.
  - (b) It is suggested that the within was a test case. Reliance is placed on *P.C. v. Minister for Social Protection* [2016] IEHC 343 wherein Binchy J. held against the plaintiff in that constitutional and ECHR challenge, however awarded the plaintiff two-thirds of his costs. Binchy J. identified a test case as including cases with a constitutional challenge to a statutory provision, which, if successful, would inevitably result in a large number of claims being made against the State. Reliance is also placed on the judgment of Clarke J. in *Cork County Council v. Shackelton* [2007] IEHC 334 when it was held that where there is doubt about the proper interpretation of the common law, the Constitution, or statute law, and where the circumstances giving rise to those doubts apply in very many cases, then it is almost inevitable that one or a small number of cases which happened to be first tried would clarify the legal issues arising.

- (c) It is said that the matters raised in these proceedings were fundamental and touched on sensitive aspects of the human condition.
- (d) The applicant highlights that a finding of personal advantage is not fatal to the applicant's claim seeking no order as to costs as was the position in *R.A. v. Refugee Appeals Tribunal (No.2)* [2015] IEHC 830, but rather this is a factor to be taken into consideration as part of the overall circumstances.
- (e) The applicant relies on the jurisprudence identified in *C.A. & T.A. v. Minister for Justice and Equality & Ors.* [2015] IEHC 432, a judgment of Mac Eochaidh J. which dealt with the challenge on multiple grounds of the direct provision system as a whole. The Court was not prepared to find any special feature which would warrant granting the applicant's costs in that matter, however, the applicants were afforded one-fifth of their costs in respect of the arguments that were successful, which was reduced by a quarter due to inefficiencies in the manner in which the proceedings were litigated. The basis for such an order was effectively that a costs order should not have a chilling effect on public interest litigation thereby denying vulnerable and marginalised people their constitutional right to access the courts.

4. I would make the following comments in respect of the above grounds:

- (1) Although a constitutional challenge was incorporated in the grounds of the statement of grounds, nevertheless, there was no serious engagement with this constitutional challenge before the Court. Certainly there was no argument of a nature which could be said that the applicant presented a real engagement in a suggestion that the provisions of the 2005 Act were unconstitutional.
- (2) There was no evidence before the Court that the within matter was any form of a test case or that the outcome would apply to a significant number of litigants so that judgment would have any form of widespread application.
- (3) Although it was suggested that the issues raised were fundamental and touched on sensitive aspects of human condition, the issues raised herein in my view are not at all comparable with the examples of the sensitive aspects of human condition cases highlighted in *Collins v. Minister for Finance* [2014] IEHC 79.
- (4) Insofar as there was a determination in the principal judgment of the word "spouse" in or about identifying the qualifying criteria for eligibility for relevant grants under the 2005 Act, this was arrived at by an application of existing accepted jurisprudence which in my view was straightforward (see the comments of Ni Raifeartaigh J. at para. 14 of *O'Brien v. Clerk of Dáil Éireann* [2017] IEHC 377.) The applicable principles could not have been described as novel.
- (5) In *C.A. & T.A.* aforesaid where there was a particular costs order made by MacEochaidh J. to avoid a chilling effect on litigation of the nature that was before him, that litigation is not in my view comparable to the instant circumstances.

MacEochaidh J. was dealing with the direct provision system as a whole and clearly therefore potentially affected a significant number of parties. In the instant matter the personal circumstances of the applicant formed the basis of the challenge and indeed the basis of the judgment delivered. The matters raised therefore are in my view not at all comparable with the issues before the Court in *C.A. & T.A.*

5. Under s.169 of the Legal Services Regulation Act 2015 it is provided that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful 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 including:
  - (a) conduct before and during the proceedings;
  - (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings;
  - (c) the manner in which the parties conducted all or any part of their cases;
  - (d) whether a successful party exaggerated his or her claim;
  - (e) whether a party made a payment into court, and the date of that payment;
  - (f) whether a party made an offer to settle the matter the subject of proceedings, and if so the date, terms and circumstances of that offer; and,
  - (g) where the parties were invited by the court to settle the claim and the court considers that one or more than one of the parties was or unreasonable in refusing to engage in the settlement discussions or in mediation.
6. In *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183 it was confirmed that even where a party has not been entirely successful the court should still have regard to the matter set out in sub. 169(1) when deciding whether to award costs.
7. In *Higgins v. Irish Aviation Authority* [2020] IECA 277, the Court of Appeal explained that in determining whether a party has been "entirely successful" for the purposes of s.169(1) the correct approach is to look beyond the overall results of the case and to consider whether the proceedings involve separate and distinct issues.
8. The court's discretion as discussed by Murray C.J. in *Dunne v. Minister for the Environment* [2007] IESC 60 remains. There it was held that the rule of law that costs follow the event has an obvious equitable basis and therefore the court has a discretionary jurisdiction to vary or depart from the rule if special circumstances of the case or the interests of justice require that it should do so. The court is not completely at large in the exercise of a discretion to depart from the normal rule but rather must do so on a reasoned basis indicating the factors. Invariably the assessment will involve a combination of factors on a case by case basis.

9. In the principal judgment no relief was secured by the applicant. Although in the principal judgment the failure to exhaust alternate remedies was taken into account in the exercise of the court's jurisdiction (as opposed to dismissing the judicial review application outright), it does not in my view amount to a partial success on the part of the applicant, but rather accorded with the jurisprudence on the topic of applying for judicial review in circumstances where an alternate remedy has not been exhausted.
10. None of the matters set out in s. 169(1) impact on costs incurred. In the circumstances therefore, it appears me that the respondents have been entirely successful in these proceedings and I have no basis to depart from the general rule of law as to costs, or to afford the applicant costs or a portion of his costs, or indeed to provide for no order as to costs under the provisions of s.169(1) of the 2015 Act.
11. In the event an order will be made for the respondent's costs against the applicant to be adjudicated upon in default of agreement.
12. The applicant is seeking a stay on the order for costs pending an appeal and in the circumstances therefore I will afford a stay until the end of the period within which an appeal should be maintained, and in the event that such an appeal is maintained such stay will continue until the first directions date before the Court of Appeal.