

APPROVED



**AN ARD-CHÚIRT
THE HIGH COURT**

[2025] IEHC 24

Record No. 2024/155JR

BETWEEN:

YAVOR POPTOSHEV

APPLICANT

-AND-

**THE DIRECTOR OF PUBLIC PROSECUTIONS, THE
COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE
ATTORNEY GENERAL**

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 22nd day of January 2025

INTRODUCTION

1. This is a costs ruling arising from the judgment delivered in *Poptoshev v DPP & Ors* [2024] IEHC 721, where I refused Mr. Poptoshev’s challenge to sections 48(5)(b)(i), 49(1)(c) and 49(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001.
2. Mr. Poptoshev had contended that these statutory provisions – which allow a member of An Garda Síochána acting under the authority of a warrant to operate any computer at a place which is being searched and to require any person at that place, who has lawful access to the information in any such computer, to furnish any password necessary to operate it and create an arrestable offence for failure to comply with such request – constituted a disproportionate interference with the privilege against self-incrimination and, therefore, infringed his constitutional rights.
3. Both parties agree that the position on costs in this type of public law challenge, where the applicant has not been successful, has been restated by the Supreme Court in the judgments of Hogan J. and Murray J. in *Little v Chief Appeals Officer* [2024] IESC 53.
4. It is accepted, on behalf of the Attorney General, that these proceedings come within the general definition of *public interest proceedings* defined by Murray J. in *Little v Chief Appeals Officer* [2024] IESC 53 at paragraphs 34, 35 and summarised at paragraph 68 of his judgment as including “*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”.*¹

5. In his judgment, Murray J. referred to the court’s *discretion* not to award costs, *i.e.*, essentially directing no order as to costs, (and, in exceptional circumstances, to award costs), in this type or category of public law litigation where an applicant has been unsuccessful.
6. The question arising before me concerns the exercise of that discretion in the context of Mr. Poptoshev’s challenge, which was determined in *Poptoshev v DPP & Ors* [2024] IEHC 721.

APPLICABLE PRINCIPLES

7. In *Little v Chief Appeals Officer* [2024] IESC 53, at paragraph 43, Murray J. observed that the reference in section 169(1) of the Legal Services Regulation Act 2015 (“the 2015 Act”) to ‘the particular nature and circumstances of the case’ reflected the gist of the case law before the enactment of the 2015 Act and preserved the power of a court “*to deprive a state defendant that has been entirely successful in their defence of an action of all or part of an order for costs to which they would otherwise have been*

¹ Murray J. also referred in paragraph 68 to the various other features outlined at paragraph 34 of his judgment in *Little v Chief Appeals Officer* [2024] IESC 53.

‘entitled’ having regard to the importance of the issues in the case” and that “the same logic dictates that it preserves the power to direct that those costs be awarded against the successful defendant in an appropriate case.”

8. A brief paraphrasing of the restated general (and non-exhaustive) principles,² adumbrated in the judgment of Murray J. in *Little v Chief Appeals Officer* [2024] IESC 53 which inform the *exercise* of that *discretion*, the weighting of which will vary from case to case, include the following matters:

- (i) the requirement that the proceedings involve a point of law of general public importance which is either novel, or unclear or should be changed;
- (ii) while it is not a requirement that the applicant obtains no personal advantage, it is a relevant consideration that the issues in the litigation are likely to have a significant effect on the category of persons affected by the legal issues;
- (iii) the strength of the case for an exemption from costs is in proportion to the strength of the underlying claim, *i.e.*, the point of law must be stateable and of real substance on the merits;
- (iv) the systemic importance to the State of having the law clarified;
- (v) a stateable – if weak – case which arises in the context of avoidably unclear legislation;
- (vi) in a ‘test case’ – *i.e.*, one or more pathfinder cases selected from a larger cohort of pending claims for the purposes of determining issues of law that

² In *Little v Chief Appeals Officer* [2024] IESC 53, at paragraph 67, Murray J., in restating the applicable principles (at paragraph 68), confirmed that the approach of the High Court and the Court of Appeal to costs orders in public interest challenges remained “*as before*”.

will govern all actions – a court may decide not to award costs against the claimant whose case is selected to go forward on this basis;

- (vii) whether the subject matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issue.

DISCUSSION & DECISION

9. In this case it is argued on Mr. Poptoshev's behalf that there should be no order as to costs.

10. In the exercise of my discretion, I am of the view, after weighing the following factors (and for the following reasons), that the Attorney General and the Director of Public Prosecutions, are entitled to their costs as against the Applicant, Mr. Poptoshev.

11. First, in balancing these matters, whilst the constitutional challenge to sections 48(5)(b)(i), 49(1)(c) and 49(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001 could be described as discrete, I do not believe that it involved a point of law of general public importance which was either novel or unclear or related to provisions of the 2001 Act which required change.

12. Second, the complexity in the proceedings was contextual and related to the investigation by the Serious Economic Crime Investigation Unit of the Garda National Economic Crime Bureau of allegedly serious criminal offences and did not arise in the context of the legal issues raised. The principal judgment (at paragraph

45), for example, rejected the argument made on behalf of Mr. Poptoshev that the law was in a state of confusion consequent upon the judgment of the ECtHR in *Saunders v UK* (1996) 23 EHRR 313.

13. Third, whilst the ultimate objective of Mr. Poptoshev's challenge in this judicial review application is to restrain his prosecution for failing to furnish passwords when requested to do so under the 2001 Act (and is not 'test case' as defined by Murray J. in *Little v Chief Appeals Officer* [2024] IESC 53), the seeking of an order of prohibition is not dispositive of the costs issues as it is *not* a requirement that *no* personal advantage is obtained and it *is* a relevant consideration that a decision on the issue may clarify the question which could arise with persons in similar situations (subject, of course to Mr. Poptoshev's right of appeal to the Court of Appeal).

14. However, any systemic importance from the finding in the judgment that a Google Pixel 4 mobile smartphone, a Google Pixel 6 mobile smartphone and an Asus laptop constituted '*computers*' as provided for in section 48 of the 2001 Act can be balanced by the fact that the Search Warrant which was issued by the District Court was not the subject of any legal challenge.

15. Further in this regard, the Search Warrant was grounded upon a detailed Sworn Information which notified the District Judge concerned (who signed the Search Warrant) of the detailed particulars of the alleged offences and that the search of the address in question may include *inter alia* digital and electronic devices, such as computers (including mobile phones).

16. Further, the devices in question, *i.e.*, the Google Pixel 4 mobile smartphone, Google Pixel 6 mobile smartphone and the Asus laptop were in Mr. Poptoshev's ownership and were lawfully seized by the Gardaí under a Search Warrant issued by the District Court on foot of the Sworn Information.
17. Fourth, the principal judgment found that the privilege against self-incrimination was not engaged in this case: in brief, section 48(5)(b)(i) of the 2001 Act conferred power on the Gardaí to require Mr. Poptoshev to provide passwords for computers comprising a Google Pixel 4 mobile smartphone, a Google Pixel 6 mobile smartphone and an Asus laptop and the existence of the passwords in relation to each of these three devices existed independent of the will of Mr. Poptoshev.
18. Further, the principal judgment determined that the provisions of the 2001 Act – namely, section 48(5)(b)(i) which conferred the power to require the applicant to provide passwords for the three devices, section 49(1)(c) which created an offence when failing to comply with this requirement, and section 49(2) of the 2001 which provided for the power of arrest – were: (i) rationally connected to the objective of a member of An Garda Síochána acting under the authority of a warrant issued under section 48 to operate any computer at the place which is being searched (or cause any such computer to be operated by a person accompanying the member for that purpose) and were objective, not arbitrary, unfair or based on irrational considerations; (ii) impacted the right to freedom of expression or the provisions of Article 38.1 as little as possible; and (iii) their effects on such rights were proportional to the objective sought.

19. Accordingly, subject to Mr. Poptoshev's right of appeal (which is addressed in the Order which I propose below), having regard to the strength of the case for an exemption from costs in proportion to the strength of the underlying claim, I consider that the Attorney General and the Director of Public Prosecutions, are entitled to their costs as against the Applicant, Mr. Poptoshev.

20. Fifth, given the general availability of the Legal Aid – Custody Issues Scheme, which Mr. Poptoshev did not ultimately pursue in this case, the decision on this application for judicial review is not likely to have a significant deterrent effect on the category of persons affected by the judgment.

21. The Attorney General and the Director of Public Prosecutions are, therefore, entitled to their costs as against Mr. Poptoshev.

PROPOSED ORDER

22. In the circumstances, therefore, I shall make the following order:

- (i) The Attorney General is entitled to his costs as against the Applicant, including reserved costs, if any, to be adjudicated upon by the Office of the Legal Costs Adjudicators in default of agreement;
- (ii) The Director of Public Prosecutions is entitled to her costs as against the Applicant, including reserved costs, if any, to be adjudicated upon by the Office of the Legal Costs Adjudicators in default of agreement;

- (iii) In the event of an appeal, there will be a stay on the execution of the above orders for costs until the determination of the appeal or until such further or earlier order as the Court of Appeal may direct.

CONLETH BRADLEY