

APPROVED



**AN ARD-CHÚIRT
THE HIGH COURT**

[2025] IEHC 87

Record No.2023/260MCA

BETWEEN/

OISIN QUINN MCDONAGH

APPELLANT

-AND-

THE INFORMATION COMMISSIONER

RESPONDENT

-AND-

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

NOTICE PARTY

(No. 2)

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 6th day of February 2025

INTRODUCTION

1. In *McDonagh v Information Commissioner* [2024] IEHC 576 (“the principal judgment”), I refused Mr. McDonagh’s statutory appeal in which he sought to set aside the decision of the Information Commissioner of 19th July 2023 refusing a request made by his solicitors (Mulholland Law) seeking access to records in relation to (i) a breakdown of all An Garda Síochána stops and searches from 1st January 2022 until 1st January 2023 in the Dundalk/Louth district (ii) the legal provisions (if any) that were utilised to ground the stops and searches and (iii) a breakdown of the stops and searches concerned by age, gender, and ethnicity.
2. This is the costs application arising from that judgment.
3. Donnchadh Morgan BL appeared for Mr. McDonagh. Louise Beirne BL appeared for the Information Commissioner and Gerard Downey BL appeared for the Garda Commissioner.

SUMMARY OF THE PARTIES’ POSITIONS

4. On behalf of Mr. McDonagh (the unsuccessful party), costs were sought against the Garda Commissioner who is the notice party in this appeal.
5. It was submitted on his behalf that section 169 of the Legal Services Regulation Act 2015 (“the 2015 Act”) facilitated the making of a modified costs order in certain circumstances, including where the issues litigated were of exceptional public

importance or in the public interest and taken together with section 24(7) of the Freedom of Information Act 2014 (“the 2014 Act”) this allowed for a more flexible (and therefore, more ‘generous’) regime in relation to the exercise of the court’s discretion regarding the costs of an unsuccessful party.

6. Two matters were emphasised in this regard: first, it was contended that the appeal related to a novel question of statutory interpretation of Part 1 of Schedule 1, paragraph (n) of the 2014 Act and that the appeal was brought on a legitimate basis and that seeking statistical data in relation to stops and searches by the Gardaí within a defined period was in the public interest ensuring the accountability and transparency of An Garda Síochána. It was submitted that such data was crucial for allowing oversight and scrutiny of police practises and potential systemic issues, including, for example, racial profiling. It was further submitted that gauging the parameters of how the Gardaí, as a public body, approached the task of disclosing data of certain documents was now clearer as a result of the principal judgment; second, it was submitted that if, for example, an order for costs was made against Mr. McDonagh, as an unsuccessful party, it would have a unintended chilling effect in the bringing of such appeals where there was a public interest, in terms of accountability and transparency, in seeking such data from An Garda Síochána under the 2014 Act.
7. These arguments were opposed on behalf of the Information Commissioner and the Garda Commissioner who additionally sought their costs as against the appellant.
8. In summary, the Information Commissioner and the Garda Commissioner respectively submitted that the default position as per section 169(1) of the 2015 Act applied,

namely that costs follow the event, as each had been entirely successful and the point of law argued on behalf of Mr. McDonagh did not meet the threshold of being a point of law of exceptional public importance such that I should consider ordering otherwise than granting the Information Commissioner and the Garda Commissioner their costs. Whilst it was acknowledged that the participation of the Garda Commissioner was more limited than that of the Information Commissioner and was confined to referring to certain discrete evidential matters (and did not, for example, include the furnishing of written legal submissions), it was submitted that the Garda Commissioner was nonetheless a necessary notice party to the appeal and engaged in the hearing of the appeal in a proportionate manner.

9. On behalf of the Garda Commissioner, it was submitted that Mr. McDonagh's appeal arose from a decision of the Information Commissioner affirming the decision of the Gardaí that the records which were sought were not disclosable. It was argued that the appeal did not, for example, involve a challenge to the constitutionality of an exemption in the 2014 Act and that it was not appropriate to suggest that racial profiling, or any concern in relation to it, was raised in the appeal or determined in the principal judgment. It was submitted on behalf of the Garda Commissioner that were that to be the case, the Garda Commissioner would have addressed such an allegation. In summary, it was argued that the submissions made on Mr. McDonagh's behalf should stay within the parameters of what was heard and determined. Further, it was submitted that arising from the findings in the principal judgment, the Garda Commissioner was not an "*FOI body*" as his decision was not an administrative decision and was therefore not captured by section 24(7)(a) of the 2014 Act.

DISCUSSION & DECISION

10. The position on costs is generally set out in section 169(1) of the 2015 Act and (a recasted) Order 99, rules 2 & 3 of the Rules of the Superior Courts 1986 (as amended and substituted) (“the RSC 1986”).¹
11. The default position is that *costs follow the event* where a party has been entirely 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 the matters set out at sections 169(1)(a) to (g) of the 2015 Act).²
12. Further, section 24(7) of the 2014 Act provides as follows:

¹ S.I. 584 of 2019. The operative provisions of the 2015 Act came into force on 7th October 2019 and the new provisions of O. 99 RSC 1986 took effect from 3rd December 2019.

² Section 169(1) of the 2015 Act *inter alia* provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, 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 the 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 (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

“(a)Where an appeal under subsection (1), (2) or (3) by a person (other than a head) is dismissed by the High Court, that Court may, if it considers that the point of law concerned was of exceptional public importance, order that some or all of the costs of the person in relation to the appeal be paid by the FOI body concerned.

(b)Where a reference under subsection (6) is heard by the High Court, that Court may order that some or all of the costs of a person (other than a head) in relation to such reference be paid by the FOI body concerned.”

13. Section 24(8) of the 2014 Act states the following:

“Where an appeal to the Supreme Court [now to the Court of Appeal] is taken from a decision of the High Court under this section, that Court may order that some or all of the costs of a person (other than a head) in relation to an appeal to that Court be paid by the FOI body concerned, if it considers that a point of law of exceptional public importance was involved in the appeal and, but for this subsection, that Court would not so order.”

14. The 2015 Act continues the position, set out in the established case law, which allows the exercise of the court’s discretion to make no order as to costs, or in exceptional circumstances, to award an unsuccessful party some or all of their costs.

15. In the costs ruling in *Jackson Way Properties Ltd & Anor v The Information Commissioner & Anor* [2022] IECA 280, for example, the Court of Appeal (Donnelly, Noonan and Binchy JJ.), in the judgment of Binchy J., at paragraph 7, referred to the relationship between the provisions of section 169 of the 2015 Act and other provisions dealing with costs, as follows:

“The appellant further relies upon the decision of Murray J., then sitting in this Court, in Lee v. The Revenue Commissioners [2021] IECA 114 in which he stated that the court “retains an exceptional jurisdiction to exempt a litigant from the consequences of this principle [that the entirely successful party should recover its costs] as provided for in s.169(1) of the Act of 2015] where proceedings were of general public importance”.”

16. Similarly, at paragraph 43 of his judgment in *Little v Chief Appeals Officer* [2024] IESC 53, Murray J. observed that the reference in section 169(1) of 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 ‘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.*”

17. In the costs ruling in *Jackson Way Properties Ltd & Anor v The Information Commissioner & Anor* [2022] IECA 280 Binchy J., at paragraphs 15 to 19 of his judgment addressed similar issues (that case concerned section 24(8) whereas this case concerns section 27(7) of the 2014 Act), as follows:

“(15) The appellants place reliance upon the decision of Murray J. in this Court in Lee v. The Revenue Commissioners [2021] IECA 114. That case concerned the jurisdiction of the Appeal Commissioners to decide whether liabilities the subject of assessments to tax issued by the Revenue Commissioners had been compromised. Mr. Lee had been successful on this issue before the Appeal Commissioners themselves, was then unsuccessful on an appeal brought by the Revenue Commissioners to the Circuit Court, was again successful in his appeal to the High Court, and finally was unsuccessful on appeal to this Court. At paras. 5 and 6 of his judgment on costs, Murray J. stated:

“(5). The application falls to be viewed by reference to four features of the factual and legal context. First, the issue arising in this case was of systemic importance to the definition of the jurisdiction of the Appeal Commissioners. Second, it was not a straightforward issue – as evidenced by the fact that while both the Appeal Commissioner and the High Court judge adopted the view that the Commissioners did have jurisdiction to rule on whether there had been a settlement of the taxpayer’s liability,

both the Circuit Court judge and this Court reached a different conclusion. There were, on any version of the case, good arguments either way. Third, while it follows that the taxpayer may have acted entirely reasonably in adopting the position that he did and litigating the issue of whether the Appeal Commissioners enjoyed that jurisdiction, it is clear that this is not enough of itself to displace the principle that a party that has failed in proceedings will normally bear the costs incurred by its opponent in defeating the claim (see most recently The Lady Magda [2021] IECA 51, para. 6).

(6). Fourth it is clear that the Court retains an exceptional jurisdiction to exempt a litigant from the consequence of this principle where proceedings were of general public importance. That jurisdiction continues following the enactment of the Legal Services Regulation Act 2015..."

(16) Later in his judgment, Murray J. observed that there will be cases involving a State party which arise because and only because of an avoidable lack of clarity in the drafting of legislation. In some cases, that lack of clarity gives rise to litigation which is of systemic importance. He concluded that Lee was such a case, because the proceedings presented an issue of law which was not straightforward, it was an issue that went to the core of the powers and functions of an important quasi-judicial tribunal and it involved the construction of an ambiguous statutory provision. This ambiguity could have been

avoided in the drafting of the legislation – for which the State itself was responsible – and at the same time the greatest beneficiary of the litigation would be the State itself.

(17) No issues of this kind were present in this appeal. As is apparent from the Judgment, I did not consider there to be any ambiguity in the provisions of the Act of 2014 under consideration. The proceedings involved the straightforward interpretation of ss. 15(1)(c) of the Act. As such, it is difficult to see how any benefit accrues either to the respondent or to other FOI bodies arising out of the Judgment. There was no issue of “exceptional public importance” for the purposes of s.24(8) of the Act of 2014.

(18) While the matters raised by the appellants have been clarified by the Judgment, it does not follow that those matters were in need of clarification, or that the smooth operation of the Act of 2014 required such clarification, simply because the appellants raised those issues”.

18. Additionally, whilst the decision in *Little v Chief Appeals Officer* [2024] IESC 53 *inter alia* addressed the exercise of the Supreme Court’s discretion in relation to costs, before and after the Thirty-Third Amendment to the Constitution, at paragraph 67, Murray J. confirmed that the approach of the High Court and the Court of Appeal to costs orders in public interest challenges remained “*as before*” (prior to restating the applicable principles at paragraph 68 of his judgment).

19. Accepting that any weighing of discretionary factors will vary from case to case, the general principles applicable to the exercise of the court's discretion not to award costs, *i.e.*, essentially directing no order as to costs, (and, in exceptional circumstances, to award costs) as re-stated in *Little v Chief Appeals Officer* [2024] IESC 53, can be briefly paraphrased as follows:

- (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 matter subject of the litigation is 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 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.

20. Whilst accepting, for the purposes of determining the costs application, that this statutory appeal comes within the general definition of ‘*public interest proceedings*’ as interpreted by Murray J. in *Little v Chief Appeals Officer* [2024] IESC 53,³ for the following reasons, I consider in the exercise of my discretion, that the Information Commissioner and the Garda Commissioner are entitled to be awarded the costs of this appeal as against the unsuccessful party, Mr. McDonagh.

21. First, while observing that the decision of the Court of Appeal on the costs ruling in *Jackson Way Properties Ltd & Anor v The Information Commissioner & Anor* [2022] IECA 280 concerned arguments in relation to the jurisdiction of that court pursuant to section 24(8) of the FOI Act 2014 (when construed together with section 75 of the Court of Appeal Act 2014) and noting the submissions made by the Information Commissioner in that case, referred to *inter alia* at paragraph 13 of the judgment of Binchy J. that “*the respondent argues that s.24(8) of the Act of 2014 is not engaged. No application was made in the High Court to hold the “FOI body concerned” , in this case Dun Laoghaire/Rathdown County Council, responsible for any of the costs of the other parties to the proceedings. Furthermore, no effort has been made by the appellants to identify any point of exceptional public importance as required by*

³ In *Little v Chief Appeals Officer* [2024] IESC 53 Murray J. at paragraphs 34, 35 and summarised at paragraph 68 of his judgment defined ‘public interest proceedings’ 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*”.

section 24(8)”, I consider - adopting and adapting the observations of Binchy J. at paragraphs 17 and 18 to the facts of this case – there was no ambiguity in the provisions of Part 1 of Schedule 1, paragraph (n) of the 2014 Act,⁴ in this case and the proceedings did not involve a point of law of general public importance which was either novel, or unclear or should be changed.

22. Second, whether arising from the principles in established case law, or the provisions of section 24(7) of the 2014 Act, I do not consider that the point of law concerned in this appeal was of exceptional public importance; in summary, at paragraphs 60 and 61 of the principal judgment, I determined that by characterising the request for records as that in relation to *“An Garda Síochána stops and searches from 1st January 2022 to 1st January 2023 in the Dundalk/Louth district, any legal provisions which were relied upon to ground the stops and searches and a breakdown of the stops and searches concerned by age, gender, and ethnicity with the cloak of anonymity”*, Mr. McDonagh sought, in effect, to bring that initial request made on 21st March 2023 within the meaning of *“administrative records”* relating to *“human resources”* in order for An Garda Síochána to be deemed a public body for the purposes of the FOI Act 2014 and I held, for the reasons set out in the principal judgment, that the provisions of section 6 and Schedule 1, Part 1 paragraph (n) of the 2014 Act could not be interpreted that way.

⁴ Part 1 of Schedule 1, paragraph (n) of the 2014 Act *inter alia* provides: *“Section 6 does not include a reference to ... (n) the Garda Síochána, other than insofar as it relates to administrative records relating to human resources, or finance or procurement matters”*.

23. Third, the principal judgment considered and applied the leading authorities such as *A, B and C (a minor) v Minister for Foreign Affairs* [2023] IESC 10; [2023] 1 I.L.R.M 335 at paragraph 73, per Murray J., [2023] 1 I.L.R.M. 335; *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313 and determined that the request for records relation to An Garda Síochána stops and searches from 1st January 2022 to 1st January 2023 in the Dundalk/Louth district could not come within the meaning of “*administrative records*” relating to “*human resources*” in order for An Garda Síochána to be deemed a public body for the purposes of the 2014 Act. Accordingly, on this basis also, I do not consider that the point of law concerned in this appeal was of exceptional public importance. Further as Binchy J. found at paragraph 18 of his judgment in *Jackson Way Properties Ltd & Anor v The Information Commissioner & Anor* [2022] IECA 280 – “[w]hile the matters raised by the appellants have been clarified by the Judgment, it does not follow that those matters were in need of clarification, or that the smooth operation of the Act of 2014 required such clarification, simply because the appellants raised those issues..”. Similarly, there was no systemic importance to the State or requirement to have the provisions of section 6 and Schedule 1, Part 1 paragraph (n) of the 2014 Act ‘clarified’ and nor could it be retrospectively argued that the proceedings constituted a test case as defined in *Little v Chief Appeals Officer* [2024] IESC 53.

24. Having regard to my consideration and determination that the point of law in this appeal, as dismissed, was not of exceptional public importance and that Mr. McDonagh is not entitled to some or all of his costs, but rather is liable for the costs of the Information Commissioner and Garda Commissioner, the question of whether I should order that some or all of the costs of the person in relation to the appeal (*i.e.*,

Mr. McDonagh, the appellant) be paid by the FOI body concerned, does not arise in the circumstances of this case.

25. Fourth, when assessing the strength of Mr. McDonagh's application for either (i) an exemption from costs, or (ii) an award of (some or all) costs, in proportion to the strength of the underlying appeal, the principal judgment held that the central question to addressed related to the scope of the 2014 Act and determined, for the reasons set out in that judgment, that the Information Commissioner had correctly decided that the records which were requested on Mr. McDonagh's behalf (referred to above) did not consist of administrative records relating to human resources, finance or procurement matters and were accordingly "*excluded from the provisions of the FOI Act and no right of access to these records exists*". The principal judgment further determined that such an approach was consistent with settled case law as set out in paragraphs 58 and 59 of the principal judgment.

26. Therefore, the Information Commissioner and the Garda Commissioner are entitled to their costs as against Mr. McDonagh.

PROPOSED ORDER

27. In the circumstances, subject to hearing from the parties, I propose to make the following order:

- (i) The Information Commissioner is entitled to its costs as against the appellant, including reserved costs, if any, to be adjudicated upon by the Office of the Legal Costs Adjudicators in default of agreement;
- (ii) The Garda Commissioner is entitled to his costs as against the appellant, 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.

28. In the event that the parties wish to address the proposed order, the matter can be mentioned on Tuesday 18th February 2025, at 10:30.