Neutral Citation No. [2009] IEHC 142

THE HIGH COURT

2006 507 JR

BETWEEN/

O.F.

APPLICANT

AND

JUDGE HUGH O'DONNELL, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

AND

T.F.

NOTICEPARTY

2008 424 JR

BETWEEN/

M.I.

APPLICANT

AND

JUDGE HUGH O'DONNELL

RESPONDENT

AND

B.H., IRELAND, ATTORNEY GENERAL,
MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

NOTICE PARTIES

JUDGMENT of O'Neill J. delivered the 27th day of March 2009.

1. Relief sought in the first set of proceedings

1.1 On the 8th May, 2006, in the first set of proceedings, leave was granted by this Court (Peart J.) to pursue the following relief, *inter alia*, by way of judicial review:-

An order of *certiorari* quashing the decision of the first named respondent of the 7th April, 2006, granting a barring order to the notice party against the applicant.

1.2 Leave was granted to seek this relief on the grounds that the first named respondent had proceeded to make a determination against the applicant where the facts were in dispute without hearing any evidence and in so doing he acted *ultra vires* the Domestic Violence Act 1996 and in breach of the applicant's right to constitutional justice and fair procedures.

1.3 On the 22nd January, 2007, on foot of a contested motion, the applicant was granted liberty by this Court (Hanna J.) to amend his statement of grounds, pursuant to O. 84 r. 23(2) of the Rules of the Superior Courts, 1986, to include the following additional reliefs and grounds:-

> 1. A declaration that if the applicant is not entitled, in law, to an order for costs against the respondents, save where *male fides* is established, then such a rule of law gives rise to a breach of Article 13 of the European Convention on Human Rights and Fundamental Freedoms (the Convention) as it deprives the applicant of an effective remedy for a breach of Article 6 of the Convention.
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> 2. A declaration, pursuant to s.5 of the European Convention on Human Rights Act 2003 (the Act of 2003), that a rule of law prohibiting the applicant from being entitled, in law, to an order for costs against the respondents, save where *male fides* is established, is incompatible with the State's obligations under the Convention.
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> 3. The applicant is entitled to an order for costs as against the second and third named respondents by virtue of the fact that Article 13 of the Convention provides that everyone whose rights are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by a person acting in an official capacity.
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> > a. In the circumstances pleaded, the first named respondent has denied the applicant his right to a fair trial and fair procedures pursuant to the said Convention.
> >
> > b. If the applicant is not entitled, in law, to an order for costs against the respondents, save where *male fides* is established, then such a rule of law gives rise to a breach of Article 13 of the Convention, in that, it deprives the applicant of an effective remedy for a breach of Article 6 of the Convention.
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> 4. The second and third named respondents are appropriate bodies to act as *legitimus contradictor* in these proceedings, being potential indemnifiers of the first named respondent in relation to a costs order, in guaranteeing to the first named respondent an immunity from suit pursuant to Article 35 of the Constitution of Ireland.
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> 5. It is just and necessary in order to vindicate the right of the applicant to a fair hearing and fair procedures pursuant to the provisions of the Constitution of Ireland 1937 and the Act of 2003 that the second and third named respondents are parties to these proceedings and liable to be fixed with the applicant's costs should he be successful in these proceedings.

1.4 The applicant also introduced grounds relating to Article 41 of the Constitution in the amended statement of grounds but these were not pursued at hearing.

2. Relief sought in the second set of proceedings

2.1 In the second set of proceedings, on the 14th April, 2008, the applicant was granted leave by this Court (McGovern J.) to pursue the following reliefs by way of judicial review:-

1. An order of *certiorari* quashing the respondent's order of the 8th April, 2008, granting guardianship over the child of the applicant and the first named notice party.

2. An order of *certiorari* quashing the respondent's order of the 8th April, 2008, granting access over the said child of the applicant and the first named notice party.

3. A declaration that the respondent breached the applicant's right to a fair hearing on the 8th April, 2008, such that the second, third and fourth named notice parties or one or other of them are obliged to provide the applicant with an effective remedy by reason thereof pursuant to Article 13 of the Convention.

2.2 The applicant's grounds in seeking judicial review in these second proceedings are that the respondent failed to give her a fair hearing in refusing to hear her evidence or any evidence on her behalf, in violation of her right to constitutional justice and to fair procedures and in breach of the rule of *audi alterem partem*, and in breach of her rights under Article 6.1 of the Convention. She also contends that the respondent erred in law and acted *ultra vires* the Guardianship of Infants Act 1964 in the manner in which he determined the first named notice party's application for guardianship.

3. Facts in the first set of proceedings

3.1 The first judicial review application arises from family law proceedings in the District Court. The applicant husband and the notice party wife are a married couple and are joint owners of the family home. In or around September 2005, the applicant left the family home. On the 20th March, 2006, both the applicant and the notice party appeared before the District Court, each seeking a safety order against the other. No evidence was heard on this date and both parties agreed to give undertakings not to use or threaten to use violence against, molest or put in fear the other or any dependent persons and not to watch or beset the place where the other or dependents live, mirroring the terms of a safety order. Counsel for the notice party sought that the applicant would be required to give an undertaking to stay away from the family home but the Court refused to require such an undertaking on the basis that it would amount, in practical terms, to a barring order. The Court acknowledged that the applicant could attend at the family home for the purpose of collecting the children for access.

3.2 On the 21st March, 2006, the applicant attended at the family home for that very purpose. An altercation ensued between the applicant, the notice party and the notice party's partner. Following this altercation the applicant applied on the same day to the District Court for a barring order and a safety order against the notice party. He obtained a protection order and was given a hearing date of the 19th May, 2006, for the barring order. The notice party also sought a barring order along with an interim barring order on the 22nd March, 2006. The interim barring order was granted and given a return date of the 29th March, 2006. The matter was adjourned to the 7th April, 2006.

3.3 On the latter date, at a hearing before the first named respondent, a barring order was granted to the notice party against the applicant. Counsel for the notice party indicated to the Court that the applicant was in breach of his undertaking given to the Court by attending at the family home. Counsel for the applicant refuted this allegation and submitted to the Court that the applicant had attended at the family home to see his children and further submitted that there was nothing in the undertaking which prohibited the applicant from attending at the family home for this purpose. The first named respondent refused to hear evidence from the applicant's solicitor as to what had taken place in Court on the 20th March, 2006. He also refused to hear evidence from the applicant in respect of what had occurred on the day of the alleged breach of the undertaking. A clear factual dispute existed as between the applicant and notice party as to the terms of the undertaking given in Court on the 20th March, 2006, and as to what had taken place at the family home on the following day. Notwithstanding this, the first named respondent declined to hear any evidence in this regard and he proceeded to grant a full barring order to the notice party against the applicant, effective until the 19th May, 2006. It is this order that the applicant seeks to quash in these proceedings.

3.4 A full hearing took place before another District Court Judge on the 19th May, 2006. A safety order was granted to the applicant against the notice party with effect until the 21st September, 2006. The notice party did not renew her application for a barring order against the applicant and the barring order that had been granted by the first named respondent duly expired. However, the fact that this barring order was granted remains on the applicant's record. The applicant is a foreign national with temporary leave to remain in the State. It was submitted on his behalf that the existence of the barring order would have adverse consequences for him in an immigration context.

3.5 The first named respondent did not enter an appearance, oppose or participate in these proceedings. The second and third named respondents represented the State and the statement of opposition emanates from them. There was no appearance by or on behalf of the notice party. The applicant appealed the impugned order to the Circuit Court but subsequently withdrew his appeal for undisclosed reasons.

3.6 This applicant does not allege *male fides* or impropriety on the part of the first named respondent.

4. Facts in the second set of proceedings

4.1 The second set of judicial review proceedings also arise from family law proceedings in the District Court. These proceedings, involved a guardianship and access application on the part of the first named notice party, who is the father of a four year old child. The applicant is the mother of the child. The respondent granted guardianship and access rights to the first named notice party on the 8th April, 2008. He refused to hear evidence from the applicant or submissions from the applicant's solicitor, in circumstances where the applicant vigorously opposed the first named notice party's application. Ms. McCartan, solicitor for the applicant, stated in her affidavit that she indicated to the District Court that her client wished to give evidence to the effect that her child had been abducted and taken from the jurisdiction by the first named notice party previously, but that she was not given of an opportunity to do so. The first named notice party takes issue with this and states in his affidavit that Ms. McCartan was not prevented from fully expressing her reservations to the Court on the 8th April, 2008, regarding the guardianship and access application.

4.2 Although the first named notice party swore an affidavit in reply to these proceedings, no statement of opposition was filed on his behalf. A statement of opposition was filed on behalf of the second, third and fourth named notice parties on the 28th May, 2008, by the Chief State Solicitor's Office. The respondent did not file a statement of opposition nor did he participate in the proceedings.

4.3 *Male fides* or impropriety is not alleged against the respondent in respect of these proceedings also.

4.4 In the second set of proceedings the first named notice party merely filed an affidavit but has not opposed the relief sought and did not participate in the hearing. In the first set of proceedings, the notice party did not participate at all. The District Court order

was appealed in the first set of proceedings but the appeal was not persued to a hearing. No appeal was taken in the second set of proceedings.

5. *Certiorari*

5.1 At the hearing before this Court of the first case on the 7th October, 2008, the affidavit evidence of the applicant as to the conduct of the hearing in the District Court was uncontroverted and there was no opposition to the granting of the relief sought. I was satisfied that a breach of natural justice had occurred and I, accordingly, granted an order of *certiorari.*

5.2 In the second set of proceedings the evidence of the applicant with respect to the conduct of proceedings in the District Court was disputed on affidavit by the first named notice party. Ms. McCartan described what took place at the hearing at paras. 16 – 18 of her affidavit sworn on the 14th April, 2008, in the following terms:-

> *"16. When the first named Notice Party's guardianship and access application came on for hearing before the Respondent on the 8th day of April, 2008, the Respondent immediately stated that he was going to make an Order for Guardianship, having perused the Guardianship Summons. The only question he asked was how long the parties had co-habited. I indicated that the Applicant strenuously opposed the guardianship application because the child had been abducted by the first named Notice Party and I further indicated that I wished to call evidence in connection therewith.*
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> *17. Notwithstanding same, no opportunity whatsoever was afforded to me to do so as the Respondent immediately reiterated that he was making an Order for Guardianship. He then added that he was going to give supervised access to the first named Notice Party. When I objected to that, he replied: 'I am making an order for supervised access.' Following some brief discussion with the parties, the Respondent then directed the terms of access. The entire hearing took between five and ten minutes.*
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> *18. I say that I sought a stay on the Respondent's Orders and he replied as follows: 'I will not give you a stay but I cannot stop you appealing.' I say the Applicant was shocked and taken aback by the Respondent's attitude to the matter…."*

The first named notice party's affidavit, sworn on the 21st May, 2008, avers as follows at para. 18:-

> *"18. With regard to what is set out in paragraphs 16, 17 and 18 of the aforementioned Affidavit of Felicity McCartan, I say that I do not accept that the said Ms. McCartan was prevented from fully expressing to the Court on the occasion of the 8th April, 2008 her reservations in respect of the making of the orders in respect of Guardianship and Access."*

5.3 The first named notice party does not address or dispute Ms. McCartan's averment that she asked that evidence be heard on the issue of whether the child was abducted previously and the response of the respondent to this. In these circumstances there does not appear to be a conflict of evidence. I accept the evidence of Ms. McCartan that she was not permitted to call evidence prior to the making of the order for guardianship. This led me to conclude that there was a failure to afford the applicant a fair hearing, in that, there was a breach of the applicant's constitutional right to natural justice and fair procedures. I, therefore, granted an order of *certiorari* quashing the respondent's orders of the 8th April, 2008, granting guardianship and access to the first named notice party.

5.4 Following on the making of the foregoing orders of *certiorari*, counsel for the applicant in each case, Ms. Butler S.C., applied for orders for the costs of these judicial review proceedings against Ireland and the Attorney General only. No orders for costs were sought against the first named respondent, the learned District Judge, because he had not intervened in these proceedings and no *male fides* or impropriety was alleged against him. Costs orders were not sought against the notice parties as, in the first proceedings the notice party did not participate at all and in the second proceedings the first named notice party merely filed an affidavit but did not file a statement of opposition and did not oppose the granting of the relief sought. Also, neither notice party had in the District Court led that Court into error or in any way contributed to the breaches of natural justice and fair procedures that occurred.

6. The Issues

6.1 These costs applications raise the following issues for determination:-

(i) Is there a prohibition on making an order for costs against a judge, where a judge has not intervened in the proceedings and there is no allegation of *male fides* or impropriety on his or her part?

(ii) Where no allegation of *male fides* or impropriety is made against him or her, is a judge a proper party to judicial review proceedings in which his or her orders are impugned?

(iii) Is the non-joining of the judge in these circumstances and/or the prohibition on a costs order against the judge a potential denial of access to a court or a tribunal in breach of Article 6 of the Convention or a denial of an effective remedy in breach of Article 13 of the Convention? Is the ability to obtain an order for costs an essential aspect of access to a court or an effective remedy?

(iv) Is the existence of alternative remedies such as the right of appeal relevant? Is the possibility of obtaining an order for costs against another party relevant?

(v) If it is concluded that a judge is a proper party but costs should not be awarded against him or her and the notice parties should not have a costs order made against them, then should the State be responsible for costs on the basis that the judge, as a member of the judiciary, the judicial arm of the government of the State, is an office holder of the State, with the necessary consequence that the State is liable in respect of acts done by a judge in the discharge of judicial office?

7. The European Convention on Human Rights Act 2003

7.1 The relevant statutory provisions are ss. 2 and 5 of the European Convention on Human Rights Act 2003 (the Act of 2003). Section 2 states as follows:-

> *"2. – (1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.*

(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

7.2 Section 5 of the Act of 2003 states as follows:-

"5. – (1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions."

8. The European Convention on Human Rights and Fundamental Freedoms 1951 (the Convention)

8.1 The articles of the Convention at issue in these proceedings are Articles 6 and 13.

Article 6 of the Convention states:-

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …"

8.2 Article 13 of the Convention states:-

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

9. Rules of the Superior Courts 1986

9.1 Order 99 r. 3 of the Rules of the Superior Courts 1986 states:-

"(3) The costs of every action, question, or issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct."

10. Is there a prohibition on making an order for costs against a judge, where a judge has not intervened in the proceedings and there is no allegation of *male fides* or impropriety on his or her part?

10.1 On this question there was no dispute between the parties. Ms Butler S.C., for the applicants, acknowledged that the judgments of the Supreme Court in the cases of *McIlwraith v. Fawsitt* [1990] 1 I.R. 343 and *O'Connor v. Caroll* [1999] 2 I.R. 160 and the judgments of Kelly J. in *Curtis v. Kenny* [2001] 2 I.R. 96 and McKechnie J. in *Stephens v. Connellan* [2002] 4 I.R. 321 and of Macken J. in *McCoppin v. Kennedy* [2005] 4 I.R. 66, all make it clear that where there is no allegation of *male fides* or impropriety and where the judge does not defend the impugned order, there cannot be an order for costs against him or her. Without such a rule, judges could be sued and orders for costs made against them where they had merely fallen into error without any impropriety or *male fides* on their part. Bearing in mind the range of error that may be the subject matter of judicial review, in my opinion, without a full indemnity from the State, which for the reasons discussed below cannot exist, it would not be possible because of the risk to personal fortune, to retain judges let alone independent judges in the District or Circuit Courts.

11. Where no allegation of *male fides* or impropriety is made against him or her, is a judge a proper party to judicial review proceedings in which his or her orders are impugned?

Counsels' submissions

11.1 Ms. Butler S.C., for the applicants, submitted that the principle of judicial immunity from suit in civil cases does not extend to conferring an immunity from suit on a judge of a lower court in judicial review proceedings, in which there is a challenge to the conduct of proceedings by that judge in the lower court. She described the submission on the part of the respondents that a District Court Judge is not a proper party to proceedings as extraordinary and argued that the District Court Judge is indeed a necessary and proper party to proceedings in cases such as the two instant ones, as the remedy of judicial review concerns the decision-making process and it is the District Judge who is the decision-maker responsible for the conduct of that process. She submitted that the *dicta* of the Supreme Court concerning the inappropriateness of judges participating in proceedings, as appear in the judgments in *O'Connor v. Carroll* [1999] 2 I.R. 160, would apply with equal force to the participation of other administrative tribunals and that the special treatment afforded to District Court Judges in terms of costs was not justifiable. She contended that the existing law and jurisprudence does not confer an immunity from suit on judges whose decisions are judicially reviewed but, rather, a rule of law did exist, which she sought to challenge in these proceedings, conferring an immunity from costs on them.

11.2 Ms. Butler submitted that the general rule that costs follow the event, as stated above in O.99 r.3 of the Rules of the Superior Courts 1986 should apply to a judge of the District Court in the context of judicial review proceedings. She pointed out that there was no statutory basis for the practice of immunity from costs in judicial review actions against judges and she contended that such a practice represented a misguided application of the principle of immunity from suit. She noted these cases did not involve claims for damages. She submitted that she could not identify a justification for the practice of providing immunity from costs, particularly where the State provides an indemnity in respect of costs, or even where it does not. In this regard she pointed to three cases where the State has provided legal representation to judges in the past, but where no orders for costs were actually made against the judges in question. Those cases are *McIlwraith v. Fawsitt* [1990] 1 I.R. 343, *Curtis v. Kenny* [2001] 2 I.R. 96 and *O'Connor v. Carroll* [1999] 2 I.R. 160. She further noted the absence of any affidavit evidence from the State explaining the policy of providing an immunity from costs.

11.3 Mr. Barniville S.C., for the second and third named respondents in the first proceedings and the second, third and fourth named notice parties in the second proceedings, submitted that unless there was a claim of *male fides* or impropriety on his or her part, a District Judge is not correctly joined as a respondent to proceedings in which his or her order is in issue. In this regard he relied on the principle of judicial immunity from suit, as enunciated in *Sirros v. Moore* [1975] Q.B. 118; [1974] 3 All E.R. 776, which, he submitted, was approved of in the Irish cases of *Desmond v. Riordan* [2000] 1 I.R. 505 and *Beatty v. The Rent Tribunal* [2006] 2 I.R. 191. He argued that there would be a breach of the Constitutional principle of judicial independence, enshrined in Article 35.2 of the Constitution of Ireland 1937, and a breach of the principle of the separation of powers if a judge was compelled to come to court to defend his or her order or to engage or act as a "*client*" of the executive.

11.4 He acknowledged that a practice of naming a District Court Judge as respondent to proceedings in judicial review cases had developed. However, he submitted that judicial review cases could proceed as a *lis* between the original parties to the proceedings in the lower court and that it was unnecessary and inappropriate to join a judge where no allegation of *male fides* or personal impropriety was made. In this regard he relied heavily on the Supreme Court judgments in *McIlwraith v. Fawsitt* [1990] 1 I.R. 343 and *O'Connor v. Caroll* [1999] 2 I.R. 160. He also referred to the judgments of Kelly J. in *Curtis v. Kenny* [2001] 2 I.R. 96 and McKechnie J. in *Stephens v. Connellan* [2002] 4 I.R. 321 and Macken J. in *McCoppin v. Kennedy* [2005] 4 I.R. 66 in which, in his submission, the principles enunciated by the Supreme Court in the two aforementioned cases were applied.

11.5 With regard to the submission that judges were represented in past proceedings by the State, Mr. Barniville noted that in *McIlwraith v. Fawsitt* [1990] 1 I.R. 343 the Circuit Court Judge was only represented after the application for costs was made and the matter was appealed to the Supreme Court. He was not represented before the High Court at the time the order for costs was made. Likewise in *Curtis v. Kenny* [2001] 2 I.R. 96 and in *O'Connor v. Carroll* [1999] 2 I.R. 160 the respondent judge appeared only when it was clear that an order for costs would be sought against him.

Decision

11.6 In *McIlwraith v. Fawsitt* [1990] 1 I.R. 343 the respondent Circuit Court Judge was found to have made an order which was in excess of jurisdiction in circumstances where there was no *male fides* or impropriety on the part of the Judge. As to the issue of whether he should be fixed with costs, Finlay C.J. at p.346 cited with approval the *dictum* of Maguire C.J., of the former Supreme Court, in *The State (Prendergast) v. District Justice Rochford and Judge Durcan* (Unreported, Supreme Court, 1st July, 1952) in which he approved the following statement of principle by Palles C.B. in *Rex (John Conn King) v. Justices of Londonderry* (1912) 46 I.L.T.R. 105:-

"According to the principles that the Courts have been acting upon for years, as a rule magistrates ought not to be obliged to pay costs unless they were acting in some way that was not bona fide, or unless they took it upon themselves to put forward and support a case that was wrong in point of law."

11.7 Finlay C.J. followed the above principle and expressed the view at p. 346 that the practice of adding the other contesting party to judicial review proceedings so as to ensure a *legitimus contradictor* in the event that the judge did not participate should continue:-

"*I am quite satisfied that the principle shortly enunciated by the former Chief Justice in this case is the appropriate principle and that under no circumstances should the High Court upon application for judicial review with regard to either a decision of a District Justice or of a Circuit Court judge award costs to a successful applicant in a case where there is no question of impropriety or male fides on the part of the judge concerned and where he has not sought to defend an order which apparently is invalid. For that reason, I am satisfied that the practice which I understood to have been usual in the High Court of adding as a further respondent in judicial review proceedings the other contesting party, so as to create a legitimus contradictor for any issue that may arise in the event that the Circuit Court judge or District Justice concerned does not seek to defend the order, should be universally followed. I have, therefore, no doubt that the appeal of the first respondent against the order made on the 6th July, 1987, should succeed and that that order in so far as it makes an order for costs against him should be set aside*."

11.8 The Court considered, therefore, that judicial review cases were capable of proceeding as between the parties to the original proceedings without any need to join the judge. It was noted by Finlay C.J., at pp.345-346, that the impugned order was "*an error occasioned by the application made on behalf of the second respondent Gilroy Automation Limited and, one must presume, upon the submissions made on its behalf that he had power to make such an order*". The role of that party, the notice party in the judicial review proceedings, in leading the Court into the excess of jurisdiction which brought about the need for judicial review proceedings was apparent.

11.9 At p.347 of his judgment, Finlay C.J. anticipates an issue, which now has arisen in this case, as follows:-

"*Considerations of the obligation owed by the executive under the Constitution to support the judiciary in the carrying out of its separate duties under the Constitution may well lead in appropriate cases to an obligation which the courts could enforce against the executive to indemnify members of the judiciary in regard to costs which are properly awarded against them, but no question of that description has been debated before this Court on this appeal and it is not necessary for me to express any opinion upon it*."

11.10 In the subsequent case of *O'Connor v. Carroll* [1999] 2 I.R. 160, where the respondent Circuit Court Judge had refused to hear evidence from the applicant and an order of *certiorari* was made by this Court (Kelly J.), the Supreme Court upheld the decision of Kelly J. not to make any order for costs against the respondent Judge, in circumstances where there was no *male fides* or impropriety on the part of the respondent Judge. In that case the notice party to the proceedings, who had been the respondent in the case before the Circuit Court did not oppose the relief of *certiorari* sought and in the Circuit Court, had attempted to persuade the respondent Judge to hear the evidence which the applicant sought to adduce. Therefore, in that case the notice party could not be said to be in any way responsible for the breach of fair procedures that arose. Murphy J., *per curiam*, addressed the question of whether a judge should be joined in judicial review proceedings brought to challenge his or her order at p.165:-

"*A claim for costs against a trial judge is anomalous but then so too are proceedings in which a judge is joined for the purpose of condemning the order made by him. It was understandable that the actions of lay or temporary magistrates might be subject to review in that way. It is questionable whether such a procedure is an appropriate method of reviewing the decisions of any of the courts created by or established pursuant to the Constitution of 1937. That the decision of every court – other than this, the final court of appeal – should be subject to some appellate procedure is clearly desirable in the public interest. It would seem unnecessary for that purpose to have recourse to procedures in which the judge must be joined as a party. Indeed such a procedure has little merit in practice as the judge whose decision is being impugned has no interest or function in supporting it. Furthermore, as has been pointed out by this Court, it would be inappropriate for any judge to swear an affidavit in any such proceedings as that would leave him open to cross-examination in relation to the judicial process. That would be contrary to the public interest. These problems might be the subject of law reform or, alternatively, review by the full court in an appropriate case*."

11.11 At p. 170 Barron J. agreed with the findings of Murphy J. in the following terms:-

"*I would however support Murphy J. where he questions the propriety of joining a judge as a party to judicial review proceedings. While it should be open to him or her to ensure through the court clerk or registrar as the case may be that the basic facts are not distorted, there is no need for him or her to be a party, particularly where it is inappropriate that he or she should enter the arena*

by swearing an affidavit.

In my view, judicial review proceedings of this nature should name as parties those upon whom under present procedure the originating documents are directed to be served. This would enable costs to be awarded against such persons if the court thought fit."

11.12 In the ten years or so that have elapsed since the decision of the Supreme Court in the *O' Connor* case, the invariable practice in this Court, where the decisions of a Circuit Court Judge or a District Court Judge are challenged by way of judicial review, is to join the judge as a respondent and the other contesting party either as a co-respondent or more frequently as a notice party. This practice follows the *dictum, per curiam*, of Finlay C.J. quoted above in the *McIlwraith* case. The *dictum*, also *per curiam*, of Murphy J. in the *O'Connor* case with which Hamilton C.J. and Barron J. agreed, to the effect that unless *male fides* or impropriety is alleged the judge should not be joined, has not in practice been followed. If the *dictum* of Murphy J. is a correct statement of the law, then it should be rigorously applied and this Court should, on the granting of leave for judicial review, refuse to direct service on the judge and indeed should strike the judge from the proceedings.

11.13 The reason for such a rule is succinctly explained in the judgment of Murphy J. in the passage quoted above. In addition, it should be mentioned, if not stressed, that where a judge intervenes in a judicial review application to defend his or her order, necessarily the judge must engage in dispute on issues of law and/or fact with one or more of the parties to the litigation heard by the judge. The immediate and unavoidable consequence of this is that the judge abandons his or her stance as an independent impartial adjudicator to become a combatant in the dispute. In my opinion, such an outcome damages the paramount public interest in the independence of the judiciary expressed with clear constitutional force in Article 35.2 of the Constitution as follows:-

"*All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law*."

11.14 The primary protectors of the independence and impartiality of judges are the judges themselves, who by their conduct both in the discharge of judicial office and in their private lives must avoid actions or omissions which damage judicial independence or impair public confidence in it. When confronted with a judicial review challenge to a decision made, a judge of the District Court or the Circuit Court should not enter the proceedings to defend their order, as to do so will invariably be inconsistent with the independent role of the judge. It is to be noted that this forbearance is almost universally observed by judges of the Circuit Court and District Court. In this respect it can be said that there is a material difference between the Constitutional position of judges and the position of the wide variety of statutory tribunals who, of course, are obliged to act judicially.

11.15 If it is the case that there cannot be an order for costs against a judge who is not guilty of any impropriety or *male fides*, and if it is wrong for a judge of the Circuit Court or District Court to engage as a combatant in the proceedings, the question which necessarily arises is, what is the point in joining the judge in the proceedings at all.? Where it is open to the other party to the litigation to be a *legitimus contradictor*, in my opinion, there is no point in joining the judge. No useful purpose is served by so doing and indeed as said above, in practice, the judge invariably does not participate in the proceedings and is invariably a superfluous or unnecessary party to the proceeding. On this basis alone, judges should not be joined. It is right that this is so. Were it otherwise, i.e. that judges were expected to defend their orders in judicial review proceedings, inevitably a great deal of the time of judges of the Circuit Court and District Court would be taken up dealing with judicial review litigation brought by litigants who were disappointed by rulings made in, or the final outcome of, the litigation before the judge. It might be said that for the purpose of the enforcement of any order made it is necessary to join the judge. In my view this is not the case. In the extraordinary circumstance that a judge refused compliance with the order made by the High Court, the judge could be joined to the proceedings at that stage. This could only arise where the order was an order of *mandamus*. The enforcement of orders of *certiorari* do not require any compliance from the affected judge and the effect of orders of prohibition can be achieved by an order restraining the prosecuting party to the proceedings.

11.16 Can it be said that the exclusion of judges from judicial review proceedings where there is no allegation of *male fides* or impropriety goes so far as to entitle judges in these circumstances to the benefit of the ancient common law principle of immunity from suit? Where it is wrong or inappropriate for a judge to participate in judicial review proceedings to defend his or her order, it necessarily follows, in my view, that it is wrong for an applicant for judicial review to seek to join the judge in the proceedings, when there is another potential *legitimus contradictor* available, thus enabling the impugned order to be judicially reviewed. This, however, is a very different situation to that addressed by the immunity from suit. The immunity from suit is there to protect judges from actions for damages in respect of the acts done or things said in the discharge of judicial duties. If a claim for damages were to be persued in judicial review proceedings, which is possible under O.84 of the Rules of the Superior Court 1986, then the immunity would arise. Apart from this, the normal range of relief available in judicial review, namely orders of *certiorari*, prohibition or *mandamus* and associated declarations would not expose the judge to the risk or potential loss covered by the immunity and hence, in my view, the immunity does not apply in those circumstances.

11.17 It would seem to me that the exclusion of judges from judicial review proceedings in which their orders are challenged is, in essence, mandated by a correct compliance with the principle of judicial independence, which, in the first instance, requires that judges forbear from participating in these proceedings to defend their orders and as a necessary consequence of this and where there is another potential *legitimus contradictor* available, the party seeking judicial review cannot join the judge.

11.18 Where an allegation of *male fides* or impropriety is made against the judge, it is necessary to join the judge as a respondent but only to afford the judge the opportunity to appear to defend his or her Constitutional rights. In this regard I would respectfully agree with the following passage from the judgment of McKechnie J. in *Stephens v. Connellan* [2002] 4 I.R. 321 in which the learned Judge, having considered the above two Supreme Court cases, went on to say at p.341:-

"*32. The rationale for these views, if I might respectfully say, is of course securely based and well founded, and is in furtherance of public confidence in the general administration of justice. In the vast majority of cases it should be no part of one's judicial activity to engage, as would a litigant, on an appeal or a review, when that person's decision is directly in challenge. In such cases it will be for the parties to advance the arguments and make the submissions for and against the points at issue. If for some reason there is a shortfall in the material available then an affidavit from the court clerk or registrar will usually fill the void. However, this practice may not be sufficient where, in a case like the present an allegation of personal impropriety is made against the respondent judge. If this allegation was substantiated it could not but be a source of significant concern for him in the performance of his judicial role. In such circumstances I do not believe that the general views expressed by the Supreme Court, in the judgments which I have mentioned, are to be taken as governing this wholly exceptional situation, where the personal involvement of the judge may be essential … I would therefore be of the view that in like or similar circumstances, the vindication of a judge's good name and professional integrity supersede and outweigh the disadvantages which undoubtedly are inherent in the direct and personal intervention of the holder of judicial office in an appeal or review of a decision made by him. Whilst such situations would be very*

rare indeed, nevertheless where these would arise and where it would not be possible for others to satisfactorily respond on his or her behalf, I would preserve a judge's right to appear and participate in the case if that was necessary and was the only way to protect or vindicate his constitutional rights."

11.19 I am satisfied that the foregoing dictum of Murphy J. in the *O'Connor* case is a correct statement of our domestic law, unless it is incompatible with the Convention, in which case, pursuant to s.2 of the Act of 2003, this Court would have to consider a Convention compatible interpretation or application if that was possible.

12. Is the possibility of obtaining an order for costs against another party relevant?

Counsels' Submissions

12.1 Ms. Butler refuted any contention that the notice parties were the *legitimus contradictors* and that costs should be obtained from them. She argued that it would be unreasonable and inappropriate to fix the notice parties in these sets of proceedings with orders for costs as they were not to blame for what occurred in the District Court hearings. She sought to distinguish the cases of *State (Prendergast) v. Rochford* (Unreported, Supreme Court, 1st July, 1952) and *Curtis v. Kenny* [2001] 2 I.R. 96, where it was held that the conduct of the respective notice parties to proceedings in each of those cases led the judge into error and resulted in an order for costs against the notice parties in question.

12.2 Ms. Butler submitted that the notice parties in these proceedings were in no better financial positions than the applicants and in such circumstances an order for costs would be meaningless and would certainly impact negatively on the applicants. She outlined, in practical terms, the financial burden to the applicant if an order for costs was not made.

12.3 Mr. Barniville submitted that the notice parties were the appropriate contradictors in both sets of proceedings and that, contrary to the case that had been made at hearing by the applicant in the first case, the notice party was not blameless for what occurred in the District Court. He stated that the notice party did not offer to give evidence to resolve the issues in dispute at the hearing and surmised from this that she was happy to go along with the decision of the District Court Judge. He referred to the second affidavit sworn by the applicant in the first proceedings on the 7th September, 2006, in which he accused the notice party of having "*misled the Honourable Judge*".

Decision

12.4 I am satisfied that the right of the applicants to fair procedures in these cases were not breached by the notice party in the first set of proceedings nor by the first named notice party in the second set of proceedings and that these parties were not in any way to blame for what occurred in each case in the District Court.. Neither notice party opposed the relief sought in these judicial review applications. In such circumstances it would be inappropriate to fix them with costs.

12.5 If judicial review proceedings were to proceed *inter parties*, in such circumstances, without joining a judge against whom no allegation of *male fides* or impropriety is made, there would be no *legitimus contradictor* to the proceedings and thus an order for costs could not be made in favour of the applicant. Thus, in these cases the possibility of an order for costs against another party is not a relevant consideration, except in the context of appeals to the Circuit Court as discussed at para. 13.24 below.

13. Is the non-joining of the judge in these circumstances and/or the prohibition on a costs order against the judge a potential denial of access to a court or a tribunal in breach of Article 6 of the Convention or a denial of an effective remedy in breach of Article 13 of the Convention? Is the ability to obtain an order for costs an essential aspect of an effective remedy?

13.1 The next question, therefore, is whether the fact that it is wrong to join a Circuit or District Court Judge to judicial review proceedings in which there is no allegation of *male fides* or personal impropriety made against him or her, thereby making it impossible to make an order for costs against him or her, or if joined (current practice), there cannot be an order for costs against him or her, is consistent with the State's obligations under the Convention? The meaning and extent of an effective remedy as guaranteed under Article 13 of the Convention and the right to access to the courts under Article 6.1 must be examined.

13.2 In effect, the rule that a judge should not be joined supersedes the rule that costs cannot be awarded against the judge. *Per se*, a rule which excludes suing a judge in respect of an order made by him or her but which permits the issue of the invalidity of the order to be litigated between the original contesting parties in the litigation is manifestly not in conflict with Art 6.1, which requires access to *independent* tribunals. The problem which arises, insofar as access to a court or tribunal (Article 6), or effectiveness of remedy (Article 13) is concerned, is the denial of access to an order for costs against anyone. Thus, as the two rules have that net effect, they can be considered together for the purpose of assessing compliance with the Convention.

Counsels' Submissions

13.3 Ms. Butler acknowledged that the remedy of judicial review, through which the impugned orders may be quashed is capable, in principle, of constituting an effective remedy for the purposes of Article 13 but that a serious issue arose as to its effectiveness in circumstances where the courts granting that relief will automatically apply a rule of law which precludes a successful applicant from recovering any costs from the judge. She submitted that in these two cases what occurred, resulting in orders of *certiorari*, was a breach of the rights of the applicants under Article 6 of the Convention and that the rule of law that prohibited costs being awarded against a District Judge in the absence of *male fides* or impropriety deprived them of an effective remedy for such a breach, in violation of Article 13 of the Convention. She pointed out that the earlier cases of *McIlwraith v. Fawsitt* [1990] 1 I.R. 343, *O'Connor v. Carroll* [1999] 2 I.R. 160 and *Curtis v. Kenny* [2001] 2 I.R. 96 were decided prior to the incorporation of the Convention and that the legal landscape had now altered by virtue of the Act of 2003. She argued that these rules of law were not proportionate to the legitimate aim that it sought to achieve and that no consideration was given to the individual circumstances of the applicants in the universal application of the rule.

13.4 She further submitted that, the law as it stands, in terms of a potential award of costs against a District Court Judge, is dependent on a high level of personal culpability and that this is inconsistent with Article 13 of the Convention, which guarantees the right to an effective remedy for breach of a Convention right, in these cases, Article 6 rights. The situation that pertains to the issue of costs in judicial review proceedings taken against District Court judges, in her submission, would not apply to any other public decision-maker. She submitted that the correct approach was not to ask whether a judge who has acted in error should be held culpable, but whether the person whose rights have been breached due to that error should have to bear the costs of rectifying it. She criticised the imposition of a requirement to establish either *male fides* or a high level of judicial impropriety in cases of a clear

breach of a Convention right as tantamount to a denial of an effective remedy. The culpable nature of the conduct of a judge should not feature, in her submission, in assessing whether costs should be awarded against a judge in judicial review proceedings. The primary focus was, and indeed the only issue should be, whether there was a breach of a Convention right for which the judge was responsible, and the degree of culpability of the judge should be irrelevant. If an error was made, then, it was argued, that an applicant should be entitled to relief and should not have to pay the cost of rectifying the error.

13.5 She relied on *Kudla v. Poland* (Judgment of the European Court of Human Rights dated the 26th October, 2000), where a violation of Article 13 was found and the cases of *Podbielski v. Poland* (Judgment of the European Court of Human Rights dated the 26th July, 2005), *Stakiewicz v. Poland* (Judgment of the European Rights dated the 6th April, 2006), *Tomasic v. Croatia* (Judgment of the European Court of Human Rights dated the 19th October, 2006), *Tabor v. Poland* (Judgment of the European Court of Human Rights, dated the 27th June, 2006) and *Bertuzzi v. France* (Judgment of the European Court of Human Rights dated the 13th February, 2003) which deal with the right of access to the courts under Article 6. She submitted that there is a large degree of overlap between the jurisprudence under Article 6 and under Article 13.

13.6 Ms. Butler submitted there were two avenues open to this Court. The first was to interpret and apply the rule of law at issue "*in a manner compatible with the State's obligations under the Convention provisions*", in line with s.2 of the Act of 2003. This could be achieved, in her submission, by this Court exercising its discretion not to apply the rule of law in relation to costs or by reformulating that rule. In the alternative, she sought a declaration of incompatibility in respect of the rule of law at issue pursuant to s.5 of the Act of 2003. She acknowledged, however, that this Court could not annul an existing rule of law on the ground of incompatibility with the Convention and that only practical relief for her client, in the event of this Court granting a declaration of incompatibility under s.5 of the Act of 2003, would be an *ex-gratia* payment pursuant of s.5 (4) (c) of the Act of 2003. Ultimately, she stated that if her clients were not satisfied with that, as a remedy, the only course open would be an application to the European Court of Human Rights.

13.7 Ms. Butler contended that the applicants in these cases complained of a breach of their right to fair procedures and that this was not suitable to be remedied *via* an appeal hearing since such a hearing would not deal with the manner in which the District Court Judge conducted a hearing in the first instance. The only appropriate remedy for the applicants, she submitted, was judicial review.

13.8 Mr. Barniville submitted that there were a number of remedies available to the applicants under Irish law that were effective for the purposes of Article 13 of the Convention. He highlighted that the applicants had a right of appeal from the District Court to the Circuit Court and that it was also open to the applicants to bring judicial review proceedings against the notice parties, who, in his submission, were the appropriate parties against whom to institute such proceedings. He submitted that the Convention does not require perfection in a national legal system, merely the existence of an effective remedy for a breach of Convention rights and that this did not equate to a right to a cheap or publicly funded system for vindicating their rights. Mr. Barniville submitted that there was no Convention right to be reimbursed for the costs of proceedings as per *X and Y v. The Netherlands* (Decision of the European Commission of Human Rights dated the 16th March, 1975) and *Dello Preite v. Italy* (Decision of the European Commission of Human Rights dated the 27th February, 1995). He pointed out that the potential cost to the applicant would be limited to the cost of his own lawyers and not the costs of any other party. He observed that the right to an effective remedy is not an absolute right. He identified the legitimate aim of the rule prohibiting the making of an award of costs against a judge in judicial review cases as protecting judicial independence, in that, it is not the proper function of a judge to stand over or defend his order in another court. He submitted that this rule of law was proportionate in the sense that an aggrieved person can institute judicial review proceedings and can pursue an order for costs against the notice party and may appeal the order.

Decision

13.9 Article 13 of the Convention requires that an individual who has an arguable claim that one or more of his or her Convention rights have been violated should have a remedy before a national authority which has the power to decide his or her claim and, if appropriate, to give redress. The substance of the alleged violation must, firstly, be addressed and secondly, adequate redress must be provided. I am satisfied that violations of the applicants' rights under Article 6 of the Convention occurred in both cases. The remedy pursued in both cases was judicial review. An appeal was pursued in one case.

13.10 The European Court of Human Rights in *Kudla v. Poland* (Judgment dated the 26th October, 2000) provides a useful summary of the key requirements of Article 13 at para. 157:-

"*157. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief...*

The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be 'effective' in practice as well as in law (see, for example, Ýlhan v. Turkey [GC], no. 22277/93, § 97, ECHR 2000-VII).

The 'effectiveness' of a 'remedy' within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the 'authority' referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, among many other authorities, the Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 42, § 113, and the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V, pp. 1869-70, § 145)."

13.11 Therefore, a "*remedy*" within the meaning of Article 13 of the Convention, does not mean that an applicant will succeed but requires the existence of an accessible remedy before an authority competent to deal with the merits of the complaint. "*Effective*" means that the remedy must be effective in practice as well as in law and must not be hindered by acts or omissions of the authorities, as held in *Kaya v. Turkey* (Judgment of the European Court of Human Rights dated the 19th February,1988, at para. 106); *Ilhan v. Turkey* (Judgment of the European Court of Human Rights dated the 27th June, 2000, at para. 97); *Aksoy v. Turkey* (Judgment of the European Court of Human Rights dated the 18th December, 1996, at para. 95 and *Hasan and Chaush v. Bulgaria* (Judgment of the European Court of Human Rights dated the 26th October, 2000, at para). 101. The "*effectiveness*" of a remedy is dependent upon the nature of the right in question, meaning that alleged violations of Article 2 (the right to life) and Article 3 (the right to be free from torture, inhuman or degrading treatment) will necessitate a higher standard of remedy to be provided before the threshold of "*effectiveness*" can be satisfied. In *Doran v. Ireland* (Judgment of the European Court of Human Rights dated the 31st July, 2003) an "*effective remedy*" was described by the Court as a remedy that was "*adequate and accessible*".

13.12 In these proceedings the applicants claim that their rights under Article 6 to a fair hearing in the determination of a barring order and guardianship and access proceedings, respectively, were breached. Both of the applicants instituted judicial review proceedings. It was accepted by both sides in these proceedings that judicial review is, in principle, an effective remedy for the purposes of Article 13 of the Convention. Judicial review is an accessible remedy in this Court, a competent authority, which can deal with the substance of the applicants' complaints of a breach of fair procedures in the District Court.

13.13 In *Robins v. United Kingdom* (Judgment of the European Court of Human Rights dated the 23rd September, 1997) the European Court of Human Rights accepted that cost procedures following substantive proceedings which involved the determination of the civil rights of an individual will fall within the scope of Article 6.1 of the Convention. Cases involving complaints as to costs orders have not been determined by the European Court of Human Rights by reference to Article 13. It appears that where the more specific guarantees of Article 6 apply, Article 13 does not apply since it is a more general provision. Its requirements are less stringent and are absorbed by Article 6. Therefore, in the context of proceedings which fall within the ambit of Article 6, in general, issues will not arise under Article 13. This was the approach adopted by that Court as recently as 2006 where, in *Tomasic v. Croatia* (Judgment of the European Court of Human Rights dated 19th October, 2006), having found a violation of the applicant's right of access to a court, did not proceed to examine the applicant's complaint under Article 13 "*since its requirements are less strict than, and are here absorbed by, those of Article 6.1*"

13.14 There has been only one case decided by the Court which is an exception to this. In the case of *Kudla v. Poland* (Judgment of the European Court of Human Rights dated the 26th October, 2000) the Court dismissed the respondent State's argument that Article 13 was never applicable where the alleged violation of rights had taken place in judicial proceedings. It found that the application of Article 13 to complaints of excessive delay in court proceedings would satisfy the purpose of ensuring that individuals could obtain redress at national level, thereby reinforcing the safeguards of Article 6.1, rather than being absorbed by it.

13.15 In *X and Y v. The Netherlands*, (Decision of the European Commission of Human Rights dated the 26th March, 1975), it was held that although there is no right to free proceedings under the Convention, that the high cost of proceedings could raise an issue under Article 6.1 with respect to the right of access to court. It appears that if it can be shown that the high cost of proceedings had the effect of depriving an applicant of the essence of that right, then Article 6.1 would be infringed. In addition, a limitation on the right of access to the courts will not be compatible with Article 6 if it does not pursue a legitimate aim and there is not reasonable proportionality between the means employed and the aim sought to be achieved.

13.16 In *Dello Pretie v. Italy* (Decision of the European Commission of Human Rights dated the 27th February, 1995) the Commission held that the right of access to a tribunal under Article 6 does not require that the successful party in the proceedings must be reimbursed his costs. It stated as follows at p.23:-

> "*…the right of access to a tribunal does not prescribe that the successful party in the domestic proceedings must be reimbursed his costs. Moreover, the applicant has not shown that these costs were so high as to constitute such an impediment…"*

The applicant did not demonstrate in those proceedings that the costs were so high as to constitute an impediment to his right of access to Court. In *Stankiewicz v. Poland* (Judgment of the European Court of Human Rights dated the 6th April, 2006) the Court stated at para. 60 that where litigation costs were not recoverable, that this may impact on a person's rights under Article 6.1 of the Convention:-

> "*… there may … be situations in which the issues linked to the determination of litigation costs can be of relevance for the assessment as to whether the proceedings in a civil case seen as a whole have complied with the requirements of Article 6.1 of the Convention (see, mutatis mutandis, Robins v. the United Kingdom, judgment of 23 September 1997, Reports of Judgments and Decisions 1997-V, p. 1809, § 29)."*

13.17 From the above it is clear that the Convention does not require in all cases that there be provision in law for the recovery of costs by a successful party from the defeated party. Recovery of costs *per se* is not an essential feature of the right of access to Courts or tribunals (Article 6) or of an effective remedy (Article 13). The costs issue only engages the Convention and invariably Article 6, rather than Article 13, at the point where the lack of a provision in law for the recovery of costs acts as an impediment to access to the courts. Thus the jurisprudence of the European Court of Human Rights requires that, firstly, there be a consideration of whether the particular litigation costs, having regard to the particular circumstances of the case, constitute an obstacle to the applicant's right of access to the courts resulting potentially in a breach of Art 6.1, and if the answer to this question is in the affirmative, secondly, does the prohibition on making a costs order satisfy the proportionality test?

13.18 In this case the cost to each applicant of pursuing judicial review proceedings is in the region of €25,000. In the first set of proceedings the affidavit evidence shows the earnings of that applicant, as approximately €31, 680 *per annum* and his outgoings amount to approximately €16,000 *per annum*. The costs involved in these proceedings, according to the letter from Peter Fitzpatrick & Co., Legal Costs Accountants dated 27th November, 2006, would be in the region of €25,000. This applicant does not qualify for legal aid. It is clear that funding the costs of these proceedings out of his own resources would impose a heavy long term financial burden on this applicant and would, in my opinion, be a serious impediment to his availing of access to the court unless there was the prospect of recovering those costs or a substantial part of them from some other party.

13.19 The applicant in the second case is a part-time teacher of Russian and is described as person of modest means. The costs in her case are similar to the costs in the other case. I am satisfied that for her also there would be a serious impediment to availing of access to the court unless it was envisaged that there could be recovery of costs against another party.

13.20 Next this Court must consider the reason for or the legitimate aim for the rule excluding the judge from the proceedings and/or the prohibition on making a costs order in these cases. The reason for these rules is to protect and preserve the independence of the judiciary. It must be borne in mind that these rules do not apply where there is an allegation of *male fides* or impropriety. If a judge, who had not acted with *male fides* or impropriety could be sued and a costs order made against him or her, in my opinion that would be gross attack on the independence of the judiciary. In effect, a judge would be exposed to being sued and a costs order merely for error, albeit error as to jurisdiction, or error in the conduct of the proceedings. I see little or no difference between error of this kind and error which otherwise would be the subject matter of appeal. In both instances the judge falls into error but without *male fides* or impropriety.

13.21 It need hardly be said that a judiciary could not function if exposed to that kind of risk. Hence, I have no doubt that not only are these rules proportionate to the aim of protecting the independence of the judiciary, they, or to be more specific, the rule prohibiting costs is essential to maintain a functioning independent judiciary.

13.22 The rule excluding a judge from being sued in these circumstances, prevents the judge being drawn into dispute with one or more of the parties whose case he or she has heard and may have judged, and hence it preserves, protects and enhances the independence of the judiciary and, in particular, the public perception of that independence and impartiality. As no advantage whatsoever accrues to an applicant who seeks judicial review of a judge's order if the judge is joined in the judicial review, in the sense that the impugned order may be judicially reviewed but no order for costs may be made against the judge, conversely there is no disadvantage to that applicant if the judge is excluded from the proceedings because the order can still be judicially reviewed and there cannot be an order for costs against the judge.

13.23 Accordingly, in my opinion, these rules, in the limited circumstances in which they operate, amply satisfy the proportionality test and hence do not breach Article 6.1 or Article 13 of the Convention. This conclusion alone would be sufficient to dispose of the issue as to whether there has been a breach of Article 6.1 or Article 13.

13.24 The fact that the avenue of an appeal to the Circuit Court was available to the applicants in these cases is relevant and should also be considered. In *Doran v. Ireland* (Judgment of the European Court of Human Rights dated the 31st July, 2003) the Court held at para.58 that:-

"*… even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may, in principle do so…*"

It was open to the applicants to appeal to the Circuit Court, which would have ensured a full re-hearing on all the issues of law and fact. The central complaint of the applicants in both cases, that they suffered a breach of fair procedures in the District Court, would not have been addressed in the context of an appeal. However, an appeal to the Circuit Court would have dealt with all issues between the parties arising from their original disputes, and, as it would have been a complete rehearing, the applicants' grievances in these judicial review proceedings, that they did not get a fair hearing, would have been remedied, even though the specific issue that arises in these judicial review proceedings would not have been considered by the Circuit Court in the appeals. Also, in the appeals the Circuit Court could have awarded costs to the applicants. I am satisfied, therefore, that an appeal to the Circuit Court satisfies the requirement of Article 6.1, that there be access to a court or tribunal and Article 13 that there be an effective remedy in the domestic legal system.

14. If it is concluded that a judge is a proper party but costs should not be awarded against him or her and the notice parties should not have a costs order made against them, then should the State be responsible for costs on the basis that the judge, as a member of the judiciary, the judicial arm of the government of the State, is an office holder of the State, with the necessary consequence that the State is liable in respect of acts done by a judge in the discharge of judicial office?

14.1 In light of the above conclusion, namely that a judge should not be joined in judicial review proceedings unless there is an allegation of *male fides* or impropriety and that this is compliant with the Convention, it may be unnecessary to consider this issue. For the sake of completeness, I feel I should offer an opinion on the topic.

Counsel's submissions

14.2 Ms. Butler submitted that there is an obligation on the State to indemnify judges acting in their official capacity. She relied on the passage from the judgment of Finlay C.J. in *McIlwraith v. Fawsitt* [1990] 1 I.R. 343 at p.347 quoted above at para. 11.9. Ms. Butler went on to list the occasions where the State has provided judges with legal representation: in *Curtis v. Kenny* [2001] 2 I.R. 96 the Chief State Solicitor appeared for and instructed counsel on behalf of the respondent Judge in judicial review proceedings but no order for costs was made against the Judge; in *O'Connor v. Carroll* [1999] 2 I.R. 160 the respondent Judge was represented by counsel instructed by the Chief State Solicitor, though no order for costs was made against the respondent Judge in that case either. She highlighted the judgment of Barron J. in the *O'Connor* case, because he noted that the State had indicated during the hearing that it would have indemnified the respondent Judge if an order for costs was made against him (at p.170) and because, in her submission, the learned Judge questioned the appropriateness of a rule which made the award of costs against a judge dependent on establishing that a judge had acted improperly. Barron J. stated as follows at p.170:-

"*In my view, it is totally inappropriate to consider whether a judge appointed under the provisions of the Constitution of 1937 has acted improperly solely for the purpose of determining such an issue. In my view his or her conduct should not be questioned save in accordance with the sanction procedure provided for by the Constitution itself. The determination of any such issue cannot have any bearing on the exercise of the Court's supervisory jurisdiction*."

Ms. Butler submitted that Barron J. was clearly suggesting that the refusal of costs should be automatic such that no inquiry should be required into the judge's conduct. She further submitted that it was significant, for the purpose of the present cases, that Barron J. accepted that the judge's conduct is largely irrelevant to the grant or refusal of relief by way of judicial review.

14.3 Ms. Butler contended that it was difficult to understand why the provision of an indemnity would, in these cases, represent an unjustifiable interference with the judiciary when it was not thought to constitute such an interference in the *O'Connor* case. She further contended that she could not see how the provision of an indemnity, for example through the Courts Service, would imperil the independence of the judiciary any more than the provision of an equivalent indemnity imperils the statutorily enshrined independence of any number of other quasi-judicial decision makers such as the Refugee Appeals Tribunal. She noted that in *The King v. The Justices of Salford Hundred Division* [1912] 2 K.B. 567 that costs were awarded against licensing judges who were indemnified by the treasury under statute.

14.4 Mr. Barniville submitted that in the *McIlwraith* case, the respondent Judge was not represented before the High Court at the time the order for costs was made and representation arose only after the application for costs was made on appeal to the Supreme Court. He submitted that the *dictum* of Finlay C.J. in that case at p.347 was clearly *obiter*, as the Court had already found that there are only limited circumstances where costs can be awarded against a judge and thus it is difficult to discern the circumstances in which the executive should indemnify a judge. He also noted that in *O'Connor* the respondent Judge was not represented in the High Court proceedings but only in the Supreme Court when the refusal of the order for costs was appealed. He further noted that the respondent Circuit Court Judge was not represented at all in *McCoppin v. Kennedy and Ors* [2005] 4 I.R. 66. He stated that the attitude of the State has changed since *O'Connor* and that it was not now offering any indemnity to judges. Mr. Barniville sought to link the indemnity issue to their principal argument that a District Court Judge is not a proper party to proceedings.

14.5 He submitted that there could be no liability on the part of the State and he relied on the judgments of the Supreme Court in *Deighan v. Ireland* [1995] 2 I.R. 56, where it was held that an error on the part of a High Court Judge which had led to the applicant's

imprisonment did not make the judge personally liable or "*Ireland*" vicariously liable. He cited the guarantee of judicial independence in Article 35.2 of the Constitution and submitted that this required not only that judges should not be forced into the adversarial arena but also that judges should not be forced into engagement with the executive in relation to their judicial duties or that the executive should not be forced to intervene in a particular case to support the judge's order or otherwise. He submitted that the guarantee of judicial independence and the principle of the separation of powers would be violated if the State was to be made liable for a judge's costs in a judicial review. He stated that if the State were to be held liable for judicial acts, it would be necessary for it to engage in the dispute before the Superior Courts as to the facts or law or both. This situation would, in his submission, negative the disinterest which is essential to the independence of the judiciary. Also, he envisaged that if the State were to answer a claim, the executive would be required to enquire into and assess the manner in which matters had been dealt with by the judge and engage with him or her as to the facts and would have to decide whether it agreed with the judge or not and whether to support the conduct under review. The inferior courts would as a result, in his submission, become the clients of the executive. He contended that there is no distinction between vicarious liability and any other basis on which the State might be liable, the result being a gross violation of the independence of the judiciary.

Decision

14.6 I am not satisfied that the apprehensions of the State as to the practical working out of an indemnity from the State in favour of judges, are well founded. The assumption made is that if there is an indemnity there must be a client-type relationship between the executive and the judge concerned, in which the State would or could decide on what approach was to be taken in respect of the defence of a particular impugned order. Needless to say if that type of relationship or function was an integral part of an indemnity, there would, as Mr. Barniville submits, be a clear breach of the separation of powers principle and the independence of the judiciary would be impermissibly cut down.

14.7 In my view, the giving of an indemnity by the State to judges would not necessarily involve the kind of engagement apprehended by Mr. Barniville. I see no good reason why the indemnity cannot be provided, leaving the conduct and control of the judicial review proceedings entirely in the hands of the judge concerned. There is no need, even, to involve the Courts Service. If the judge's case ultimately failed, it would be a simple matter for the State to indemnify in respect of the taxed costs of the successful party and, in an appropriate case, the judge's own taxed costs. In essence, there would or should be no difference, in principle, between the provision of such indemnities by the State and the provision by the State of the funds necessary to run the courts and specifically the salaries of judges. It has never been suggested that the provision of funds to the courts and the payment of judges' salaries gives to the executive any role in the administration of justice by the courts. I am satisfied, therefore, that, in principle, the State can indemnify judges in respect of acts done in the discharge of judicial office, as indeed was presaged by Finlay C.J. in the passage from his judgment in the *McIlwraith* case quoted above.

14.8 It is indeed difficult to envisage the circumstances in which such an indemnity would arise, given the fact that the judiciary enjoy immunity from action for damages in respect to the discharge of the duties of the judicial function. Preserving judicial independence from attack by disappointed litigants, even where it has been demonstrated that the judge has erred can only be achieved by the immunity in question and, in the case of judicial review, by prohibiting orders for costs against judges and/or excluding the judge from the proceedings. Attempting to remedy the consequences of judicial error for the disappointed litigant by the provision by the State of an indemnity for judges would merely expose the judiciary to continuous litigation in respect of the discharge of judicial office and, apart from the onerous burden which defending this litigation would place on the judiciary with the consequent dilution of the endeavours of judges in the administration of justice, it is inevitable that such a constant process of litigious attack on the judiciary would erode public confidence in the judiciary and, in all probability, weaken judicial independence itself, as few human beings could sustain such a process without suffering a serious loss of confidence. There would be a real risk that judges would not be, in the words of Lord Tenterden C.J. in *Garnett v. Ferrand* (1827) 6 B & C 611 at 625 and cited by Denning M.R. in *Sirros v. Moore* [1974] 3 All E.R. 776 at 782, "*free in thought and independent in judgment*".

14.9 However, for the reasons discussed above, such an indemnity does not arise in these two cases, because the judge should not have been a party to either proceeding in the first place and even if the judge could have been joined, because there was no allegation of *male fides* or impropriety, there could not be an order for costs against him. Thus, there is no liability to costs for the State to indemnify.

14.10 For all of the reasons set above, I must refuse the costs orders sought in these proceedings.