THE HIGH COURT

[2023] IEHC 80

[Record No. 2021/596 JR]

BETWEEN

J.S. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, E.S.)

APPLICANTS

AND

MINISTER FOR EDUCATION

RESPONDENT

[Record No. 2021/598 JR]

BETWEEN

S.M. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M.M.)

APPLICANTS

AND

MINISTER FOR EDUCATION

RESPONDENT

JUDGMENT of Ms. Justice Bolger delivered on the 16th day of February, 2023

1. This judgment deals with two applications for a protective costs order providing that, regardless of the outcome of the substantive proceedings and any and all reliefs sought therein, the Minister shall bear all her own costs.

2. The substantive proceedings concern the Minister's decision to refuse to enrol the applicants for a further year in school and for various declaratory reliefs that the Minister's procedures and rules for determining whether a young person such as the applicants be granted a further year of education are unlawful and/or unconstitutional.

Background

3. Mr. M is a 19-year-old man with autism spectrum disorder, global developmental delay and epilepsy. Mr. S is a 19-year-old man with autism spectrum disorder, an intellectual disability, and a congenital birth anomaly, cystic hygroma. Both applicants had applied for a further year in special school in order to make up for what they say is a significant amount of school time which they missed out on due to covid restrictions during the school year 2020/21, leaving them without the essential skills required to transition to an adult day service.

4. Rule 64(1) of the Rules for National Schools prohibits the retention of a pupil on the roll of a national school after their eighteenth birthday. The Minister issued the 'Extension of Enrolment of Students over the age of 18 Guidelines' on 21 April 2021 which provide for the retention of a person on the rolls of a school after their eighteenth birthday including where the student is pursuing certain courses. The applicants' disabilities were such that

they could not pursue such a course and they claimed that they were denied a fourteenth year in school because of their additional needs without adequate consideration of their situations.

5. Mr. S turned 18 on 19 March 2021 and Mr. M. turned 18 on 4 March 2021. The Guidelines were issued on 21 April 2021. On 28 June 2021 they sought leave for judicial review and interlocutory injunctive relief which were given a hearing date of 27 June 2021. On 26 July 2021 they were served opposition papers which confirmed that other children had been given places in the school for the coming school year, and that there was no place for the applicants. This rendered the proceedings moot but the applicants wish to continue the proceedings in order to address what they say are undetermined important issues of general public importance for other children with additional needs. They seek an order from this Court that, regardless of the outcome of their substantive proceedings, they will not be made liable for the Minister's costs, commonly known as a protective costs order. Their solicitors and Counsel are not charging them fees but acknowledge their intention to seek their costs from the Minister if they succeed in their substantive claims.

Applicant's submissions

6. The applicants rely on case law (including *Village Residents Association Ltd v An Bord Pleanála* [2000] 4 IR 321, *R v Lord Chancellor ex p. CPAG* [1998] 2 All E.R. 755, and *Rosborough v Cork County Council* [2008] 4 IR 572), Order 99 of the Rules of the Superior Courts and s.168 and s.169 of the Legal Services Regulation Act 2015 in submitting that the court enjoys a discretion in any application for costs and that a costs order may be made at any time.

7. The applicants assert that the proceedings are of general public importance and that they no longer have any private interest in them. The applicants have no means and their parents have only modest means whereas the Minister has superior financial capacity to bear costs. The applicants will discontinue proceedings if the order is not made.

8. The applicants identify three issues of law within these proceedings which they say are of general public importance:

i. Application of the 1998 Act to persons with special needs

9. The applicants say this issue remains to be determined following the Supreme Court decision in *Sinnott v Minister for Education* [2001] IESC 63 and rely on *Mc D v Minister for Education & Science & Ors* [2008] IEHC 265 and *O'Carolan v Minister for Education*. They say the issue is of general public importance effecting a large cohort of people and that the applicants have, at least, an arguable case.

ii. The validity of the Rules and the Guidelines

10. The constitutional obligations on the State to provide for ongoing/further education for the applicant is also of general public importance and affects a large cohort of people. The Minister regularly utilises circulars and other guidelines that effect the rights of children which should be dealt with by way of legislation in accordance with Article 15 of the Constitution and s.5 of the 1998 Act, which requires regulations and orders made under

that Act to be laid before the Houses of the Oireachtas. Neither the Rules nor the Guidelines have been laid before the Oireachtas.

11. Administrative procedures should not be exercised arbitrarily, capriciously, in bad faith or, as a subsidiary proposition, to be so inflexible as to cause an injustice.

iii. The guidelines discriminate against persons with special needs/preclude a consideration of their needs

12. The Guidelines expressly exclude any consideration of any disability or special educational needs. Any discretion to allow for an exemption from the Rules via the Guidelines must be exercised "within any relevant statutory limitations" (*Dunne v Donohoe* [2002] IESC 35) and must be exercised properly in each individual case (*McCarron v Kearney*; *Magee v Murray*; *McVeigh v Minister for Justice Equality and Law Reform* [2010] IESC 35) and not applied as a rule without exceptions.

Minister's submissions

13. The Minister relies on Frie*nds of the Curragh Environment Ltd v Trustees of the Turf Club* [2009] 4 IR 451 in submitting that an application of this nature should only fall to be made in the most exceptional circumstances and where the interests of justice require it, which they say does not arise here. The applicants do not satisfy the onerous test set out in *Village Residents Association* or *Friends of Curragh Environment*, including whether those acting for an applicant are doing so on a purely pro bono basis.

14. The Minister says there has never been any decisions to challenge and that the applicants are attempting to challenge, in the abstract, the operation of Rule 64(1) and the exemptions therefrom.

15. The merits of the claim are not sufficiently clear through short argument to merit a protective costs order. What is sought is a hearing on legal arguments that are not rooted in any real or live factual dispute, and an advisory opinion of the court, which is not legally permissible; *Lofinmakin v Minister for Justice, Equality and Law Reform* [2013] 4 IR 274, *Murphy v Roche* [1987] IR 106, *Goold v Collins* [2004] IESC 38.

16. The Minster questions whether the applicants will secure leave to apply for judicial review. She also claims the proceedings are moot and that an order of certiorari and/or an injunction would be void of any effect.

17. The legal question the applicants seek to agitate in the abstract is not one that will otherwise evade review. This issue, if formulated by an applicant with proper standing, can be raised by any other applicant if a school rejects them or if they are unsuccessful in an application for an additional year of schooling. The possibility that issues in proceedings may have an impact on other individuals does not provide a reason why a court should exercise its jurisdiction to hear a moot case.

18. The applicants have failed to make out how and where they contend that a statutory right to primary education for an adult would derive from. It is for the Minister to determine

national education policy as per s.7(b) and to do so having regard to the resources available, as per s.6(b) and 7(4)(a)(i).

Decision

19. This court can make a protective costs order where certain criteria are satisfied, but the case law confirms the exceptional nature of the remedies. There are few examples in Irish law of such an order being made, outside the (now statutory) jurisdiction of environmental cases. Neither the applicant nor the Minister was able to identify any case in the area of education and disability law, in which both legal teams are very experienced, where such an order has been made.

20. The principles governing protective costs orders were set out by Kelly J. in *Friends of the Curragh Environment Ltd v. An Bord Pleanála and ors* [2009] 4 IR 451 and can be summarised in the following extracts from the head note:

> "(1) a protective costs order might be made at any stage of the proceedings, on such conditions as the court thought fit, provided that the court was satisfied that (i) the issues raised were of general public importance; (ii) the public interest required that those issues should be resolved; (iii) the applicant had no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent and to the amount of costs that were likely to be involved, it was fair and just to make the order; and (v) if the order was not made the applicant would probably discontinue the proceedings and would be acting reasonably in so doing; (2) if those acting for the applicant were doing so *pro bono* this would be likely to enhance the merits of the application for a protective costs order. (3) it was for the court, in its discretion, to decide whether it was fair and just to make the order in the light of the considerations set out above".

21. In *Village Residents Association Ltd v. An Bord Pleanála & ors* [2000] 4 IR 321, Laffoy J. emphasised the public interest nature of the proceedings and said she could not "envisage such an approach to a costs issue having any place in ordinary inter partes civil litigation" (at 330). Later in *Rosborough v. Cork County Council & ors* [2008] 4 IR 572, Clarke J. described the court's jurisdiction as relating only to "insulating a plaintiff/claimant who brings public interest proceedings, and who meets the other criteria set out in the jurisprudence" (at 577; my emphasis).

22. Whilst Counsel for the applicants emphasised the current absence of any private interests in these proceedings for the applicants, it is important to remember that neither application started off as a pure public interest case. They were both instituted as judicial review *inter partes* litigation which included claims for reliefs personal to the applicants as well as claims for relief from which other hypothetical persons in similar situations might ultimately benefit. The claims for reliefs personal to the applicants have now fallen away and the only ones left are those from which the applicants will not personally benefit but which they wish to pursue for the benefit of hypothetical people. The applicants' willingness to assert such rights may be laudable, but whether the law on *locus standi* and mootness entitles them to do that here awaits determination.

23. I am not satisfied that proceedings which began life seeking relief personal to the applicants, as well as more general relief, can evolve into public interest litigation to which the exceptional jurisdiction of the protective costs order may be applied. The case law envisages this exceptional jurisdiction being applied only to a purely public interest claim, exemplified well by an environmental law case where the applicant's only interest is and was the protection of the environment, a situation now governed at least in part by statute. There is nothing in the caselaw supporting the expansion of the limited and exceptional jurisdiction of the protective costs order to include a case that was commenced for the purpose of asserting the interests of an individual but which was later narrowed down by circumstances to a sole claim for relief from which other similarly situated hypothetical persons may benefit in the future.

24. This is not a public interest case of the type that could invoke the jurisdiction of a protective costs order and on that basis, I refuse this application. If it is the case that I am wrong on that, I now proceed to consider other grounds on which the applicants asserted their case.

Other requirements for a protective costs order

25. I am satisfied that, firstly, the financial resources of the parties are such that would justify a protective costs order in appropriate circumstances and, secondly, that the applicants will discontinue their proceedings if the order they seek is not made. The applicants' legal team have taken on this case on the basis that they will not seek fees from the applicants (apart from a modest payment made to the applicants' solicitors at the beginning of the litigation). I do think it is necessary for these applicants' legal team to commit to not seeking costs from the Minister if they ultimately succeed in order to satisfy that requirement for a protective costs order to be made.

26. In addition to those requirement, the court must be satisfied of the merits of the case "following short argument" (as per Dyson J. in *R. v. Lord Chancellor* at p.766, as followed by Laffoy J. in *Village Residents Association Ltd* at p.329. The applicants' Counsel confirmed that the application for leave, which has not yet been heard, will be a lengthy application which he estimated would take two days as there are complex issues including mootness, locus standi, and whether the applicants' proceedings impermissibly seek an advisory opinion from the court (*Lofinmakin v Minister for Justice, Equality and Law Reform* [2013] 4 IR 274) to be determined. That seems to be inconsistent with being able to establish the merits of a case following short argument. I make no comment on whether the applicants would ultimately succeed in securing leave, but for the purpose of this application for a protective costs order, I confirm that I have not been satisfied of the merits of the case following short argument. Indeed it is probable that any such merits could not be established without the extensive submissions that the applicants' Counsel expects will be required for the application for leave. This cannot satisfy the requirement for the court to be satisfied of the merits of the case following short argument.

Section 7 of the Education Act 1998

27. The applicants' principal public interest relief is the declaration they seek at paragraph 7 of the Statement of Grounds "that the *Extension of Enrolment of Students over the age of*

18 guidelines (issued by the Minister on 21 April 2021) and in Rule 64(1) of the Rules for National Schools (and/or the Rules for National Schools generally) unlawfully interferes with the Applicant's Constitutional and statutory right to an appropriate education". Whilst that relief refers simply to statutory rights, it is scoped out further at paragraph (a)(iv) where the grounds for the relief sought are set out as arising from s. 7 of the Education Act 1988. The applicants plead that curtailing their attendance at a special school as a result of the application of the Rules for National Schools and the Guidelines denies their rights to an appropriate education as they were denied a year of education due to lockdown during COVID restrictions.

28. The applicants' Constitution right to primary education ceases upon reaching the age of 18 (*Sinnott v. The Minister for Education* [2001] 2 IR 545) but they rely on the following dicta of Hardiman J. in that case to identify a right to remain in primary education beyond their 18th birthday by virtue of s. 7:

> "377. This decision has the consequence that the Plaintiff's case prescinds, not only from any alternative constitutional basis, but from any basis at all in the very significant and specific statutory provisions relation to education and otherwise, and notably from the Education Act, 1998. In answer to a specific question, Counsel for the Plaintiff stated that he did not rely at all on the provisions of this Act, even as an alternative to his preferred argument. He also confirmed that this reluctance did not arise from a view that any of the Acts provisions were repugnant to the Constitution.
>
> 378. The case was argued as well as a case could be, and the express narrowing of the Plaintiff's claim was done in pursuance of a very deliberate strategy. This strategy, in turn, is based on a very precisely articulated view of Article 42.4. This is that the right conferred by that provision, unique amongst all the constitutional provisions securing rights to citizens, is a wholly unqualified one and extends throughout life if needed. No consideration of expense, or of competing values, alternative claims on State expenditure or of debatable policy, on this view, can interfere with the State's obligation in relation to primary education. This obligation was contended to be "a constitutional transaction of the very highest order"; "one of a very small number of mandatory expenditures in the Constitution"; a right ranking in priority to any other; the consequence of a decision by the people in 1937 that "we will splash out on this one thing only". It was contended that Article 42.4 "puts this item of national expenditure on a plane apart from and above all other expenditure". The reason expressly given for the decision not to rely on the terms of the Education Act, 1998 was that, even though the statutory rights in relation to education might be broader than the Constitution provides for (and certainly makes specific reference to persons with disabilities) yet those rights are subject to constraints in terms of available resources which, it is contended, Article 42 is entirely independent of.

> 379. …The strategy of the Plaintiff's advisers involve the rejection of any easier routes to public provision for his needs. These remain wholly unexplored: I think this is unfortunate as it runs the risk of making the best the enemy of the good. And if either of the issues identified is resolved unfavourably to the Plaintiff, fresh proceedings may become necessary to deal with issues which, one might think, could have been agitated here. I will return to the statutory provisions, however, later in this judgment since, although they are not relied upon on behalf of the Plaintiff, I consider their existence to be of relevance at least in so far as remedies are concerned".

29. The applicants may have been able to assert such an individual, personal right within s.7 on their own behalf had circumstances permitted them to continue with their proceedings as originally constituted. However in relation to their application for a protective costs orders, I do not think that s. 7 encompasses the sort of generalised right for all persons who may find themselves in a similar situation in the future, for which the applicants now seek to contend. Section 7(1)(a) seems to me to encompass an individual right in requiring the Minister to ensure "that there is made available to each person resident in the State, including a person with a disability or who has other special education needs, support services and a level and quality of education appropriate to meeting the needs and abilities <u>of that person</u>" (my emphasis). Support for the individual nature of the rights in s. 7 can be found in the decision of O'Neill J. in *S.McD. v. Education & ors* [2008] IEHC 265 where, at p. 31, O'Neill J. found that the use of the word "shall" in s. 7(1):-

> "and particularly in the context of the function under s. 7(2) of providing support services tends to suggest an obligation to provide a service to cater for the specific <u>educational needs of a particular person</u>. Given that this provision may be exclusive to that person, the use of the expression "shall" in this regard is persuasive that it was intended by the Oireachtas that a failure to discharge the duty to provide would be actionable <u>at the suit of the person denied the service in question</u>." (my emphasis)

30. In addition, s. 7(1)(a) does not confer a right to a particular type of education but, rather, confers the Minister with a function to ensure an "appropriate" education. This requires an objective assessment of the support, services and education to which that person may be entitled. Support for this analysis can be seen in the decision of *S.McD*. where, at p. 32, O'Neill J. stated that he was satisfied:-

> "that there is a binding statutory duty <u>actionable at the suit of the applicant, to provide</u> him with the appropriate tuition and training and socialisation skills. In essence, the first name Minister is required by the Constitution and by the Act of 1998 to ensure that this appropriate tuition and training of the applicant is provided <u>to the applicant</u>." [my emphasis]

O'Neill J found the applicant had not demonstrated deficiencies in the services the Minister had proposed as there had been no engagement with the proposals and therefore the applicant had failed to prove a breach of statutory duty. Previously, in *O'Carolan v.*

The Minister of Education [2005] IEHC 296, McMenamin J., in the High Court, found that the placement of the applicant's child in an institution was objectively adequate, in spite of his parents' view that he should be placed in a different institution they had located. He said "The primary question for consideration is not individual preference but constitutional and statutory duty as established in evidence". More recently, in G*.F. and L.F. v. Minister for Education and Skills & ors* [2022] IEHC 379, Barrett J. had regard to extensive affidavit evidence of experts nominated by each side in determining that the supports being provided to the applicants' child at school did not constitute an appropriate education.

31. In this case, the applicants' school was advised by letter from the Minister dated 21 April 2021 of the application of the Rules and the exemptions from the Guidelines to students over the age of eighteen, as the applicant then was. The letter set out the ongoing care and support that would be provided by the HSE for such a student and also referred to some potential future involvement of the Minister in allocating funding towards an education component of the HSE service as well as making further adult education provision available through mainstream education/screening or specialised training programmes. That potential future involvement by the Minister in the provision of education to the applicants was not challenged by the applicants, but they contended that requiring a student over the age of eighteen to move from their special school without any individual consideration of either their needs, or of any application they might make for an extension, constituted a failure to provide them with an appropriate education in accordance with the Minister's duties under s. 7.

32. Assessing what an appropriate education might require will involve an assessment of a student's needs and of the education that is proposed for them. It is difficult to see how this can be done within a hypothetical factual matrix, which seems to be how these applicants now intend to continue their proceedings. It is also difficult to see how the appropriateness of an education service could be assessed without recourse to independent expert evidence, albeit possibly assessed alongside the views of the student's parents that their child should remain in their special school beyond the age of eighteen because of the face to face education they missed during lockdown or any other reason (and in saying that, I do not seek to minimise the importance of a parent's view of what is best for their child but rather that an assessment of the appropriateness of an education service might not be able to be assessed on those views alone).

33. The application of the Rules and Guidelines to the applicants (and/or their hypothetical application to somebody in a similar situation in the future) shows that the Minister did not abandon her involvement in providing education services to students over the age of 18 who are to be transitioned to HSE care but, rather, that the Minister continues to be potentially involved in providing those students with education and support. Whether that could be considered to satisfy the Minister's obligation to provide persons resident in the State with an appropriate education in accordance with the requirements of s. 7(1)(a) may have to await determination in a later case.

34. For the purpose of this application for protective costs order, I do not consider the evidence, which includes the letter of 21 April 2021, demonstrates the Minister abandoning students over 18 such as might establish a breach of s. 7 in some sort of general, non-individualised, way. A breach of s. 7 might be established viz-a-viz an individual student required, by virtue of the Rules and Guidelines, to leave a special school after their eighteenth birthday, but that could not be established without an assessment of what an appropriate education for that student would require and why the Minister's potential future involvement in providing them with educational support after they move to a HSE service does not satisfy the requirements of s. 7 test, in the event that a court was to be satisfied that a statutory right to an appropriate education after the age of 18 exists.

The Need for Legislation

35. The applicants argued that the Rules and Guidelines cover matters that should have been dealt with by legislation. However, s. 7(b) the Education Act 1998 confirms that it is for the Minister to determine national education policy. Certainly, an administrative arrangement such as this should not be exercised arbitrarily, capriciously, in bad faith or as to be so inflexible as to cause an injustice (*Dunne v. Minister for Environment & ors* [2007] 1 IR 194) but I am not satisfied that this scheme has been exercised in that manner, particularly given that the highest point of the applicants' case involves a statutory right to an "appropriate" education but could not involve a right to primary education beyond the age of eighteen (*Sinnott*). Neither am I satisfied of the merits of the applicants' arguments that the Guidelines discriminate unlawfully against a person with special needs, although I note that this aspect of the applicants' written submissions was not heavily pressed during oral arguments.

Is this scheme evading review?

36. The applicants contend that refusing their application for a protective costs order will enable this scheme to evade review. I do not agree. The State has provided, by statute, a potential avenue for persons who find themselves in the situation of the applicants before these proceedings were commenced, or for someone such as the applicants who is concerned about the treatment of students with special needs as a result of the application of these Rules and Guidelines. Section 41 of the Irish Human Rights and Equality Commission Act 2014 gives the Commission the following role:

> "41. (1) The Commission may institute proceedings in any court of competent jurisdiction for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons.
>
> (2) The declaratory relief the Commission may seek to obtain in such proceedings includes relief by way of a declaration that an enactment or a provision thereof is invalid having regard to the provisions of the Constitution or was not continued in force by Article 50 of the Constitution.

The educational needs of a young person with a disability could come within "the human rights of any person or class of persons". It would be a matter for the Commission to determine whether or not to institute such proceedings but, for the purpose of this application, it is relevant that there is statutory provision for a national body to bring proceedings of the type these applicants now wish to pursue. The applicants concede that such a remedy might be appropriate, but argue it is not adequate because there is no guarantee that the Commission would be prepared to take such a case on. However there is no evidence before the court of any attempts having been made by the applicants or, indeed, any other persons interested in the educational rights of persons with disabilities, to engage with the Commission with a view to persuading them to exercise their statutory power. The existence of that statutory power persuades me that it is not necessary to grant the applicants a protective costs order in order to ensure that this scheme does not evade review.

Conclusion

37. For the reasons set out above, I am refusing the applicants' application for a protective costs order.

Indicative View on Costs

38. My indicative view on costs is that, whilst in the ordinary course of events, and in accordance with s. 169 of the Legal Services Regulation Act 2015, costs would follow the event. However, I consider this may be one of the exceptional cases where no order for costs should be made. I am conscious of the novel nature of the application made by the applicants in these proceedings and the fact that they are motivated by a concern for other people who might find themselves in a situation similar to that in which the applicants found themselves at the time these proceedings were instituted. I will hear any further submissions the parties wish to make before making whatever final orders including costs orders as may be required and I will list the matter before me on 2 March at 10:30 a.m. for same. In the event that either party wishes to furnish the court with written submissions, I require those to be filed with the court two days before the matter is back before me.

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