Neutral Citation Number: [2007] IEHC 394

THE HIGH COURT

[2005 No. 852 SS]

BETWEEN

FOUFIK BEN MOHAMED

APPLICANT

AND
GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

THE HIGH COURT

[2005 No. 950 SS]

BETWEEN

KEITH CAFFREY

APPLICANT

AND
GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

Judgment of Mr. Justice Roderick Murphy dated the 30th day of November, 2007.

1. Issue
The respondent in each of these matters seeks an order of the High Court pursuant to O. 99, r. 38(3) of the Rules of the Superior Courts reviewing the taxation of the applicants' costs and for an order providing for the costs of the review of taxation.

Both matters involved applications for an enquiry under Article 40.4.2 of the Constitution where each of the applicants was successful and where the respondent was ordered to pay each of the applicants' costs when taxed and ascertained.

In *Mohamed*, the applicant was an Algerian national without documentation who presented at Immigration and was arrested on 13th June, 2005 and brought before the District Court on 14th June, 2005.

In *Caffrey*, the applicant was arrested on foot of warrants issued in 1997 and 1998 for non-payment of fines as detailed in the affidavit of Mr. Declan Fahy, his solicitor.

The application is based on the pleadings and proceedings in both matters, the bill of costs, respondent's objections and written submissions in support of those objections and the applicants' written replying submissions, the transcript of the hearing of the objections and the Taxing Master's rulings of 28th June, 2006, 4th July, 2006 and 21st May, 2007 together with his report are relied upon. Similar pleadings and proceedings formed the basis for the second matter.

By order of Mr. Justice MacMenamin dated the 17th day of June, 2005 in the first mentioned matter, the court was of the opinion that the applicant's detention was not justified and ordered that he be released forthwith from such detention. It was further ordered that the applicant recover from the respondent the costs of the application and order. A similar order was made by Ms. Justice Finlay Geoghegan on 1st July, 2005 in the second case.

Pursuant to that order the general instruction fee of the applicant's solicitor was claimed in the sum of €14,000 and €14,402 respectively net of VAT and fixed by the Taxing Master in the sum of €9,500 and €9,000 respectively.

2. Proceedings
2.1 The proceedings related to an application for an inquiry pursuant to Article 40.4.2 of the Constitution as to the lawfulness of the applicant's detention. An application for a conditional order came before the court on 16th June, 2005 and 30th June, 2005 respectively *ex parte* when it was ordered that the Governor, as it is phrased in such application, "do produce the body of the applicant and do certify in writing the grounds of his detention" before the court on the morning following.

On the return date no cause was shown by the respondent. In such circumstances the applicant was entitled to an order making the conditional order absolute (see O. 84, r. 10 of the Rules of the Superior Courts). The matter of *Mohamed* was heard *ex parte* on 16th June, 2007 and returned before the High Court on 17th June, 2007 where no cause was shown. The matter was dealt with by a short hearing for 30 minutes. The court ordered that the applicant be released and also that he be entitled to recover from the respondent the costs of the application and order.

In *Mohamed* it was estimated that between eight to ten hours were expended on the file.

In *Caffrey* the necessary affidavits and exhibits were drafted and prepared and counsel briefed in the afternoon of 30th June, 2003. Application for a conditional order was made the following morning and returned before the High court that afternoon when the State indicated that they were not showing cause.

The applicant's legal cost accountant estimated the total time expended to be approximately nine hours.

3. The State's case
3.1 The only matter which the court is now concerned with is the instruction fee claimed of €14,000 which the respondent says is considerably overstated in the circumstance of the case.

The applicant was fully aware of all issues for the purpose of the application for the conditional order. No further issues arose and no further documentation was briefed, with the exception of the conditional order when the matter came before the court the following day.

The respondent submitted that there was a distinction to be drawn between judicial review proceedings and Article 40 proceedings. Within the former there is a difference at the application for leave stage and the hearing of the judicial review proceedings. There is a further distinction between a fully contested judicial review proceeding and one in which there is no contest.

3.2 Order 84 of the Rules of the Superior Courts states:

> "2. An application for an order of *Habeas Corpus ad subjiciendum* shall be by motion ex parte for a conditional order.
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> 8. Where cause is shown it shall be by affidavit. The affidavit shall in addition to the facts deposed to, state concisely the grounds relied on as cause. The affidavit shall be filed in the Central Office and notice of filing shall be served on the applicant or his solicitor within the time allowed for showing cause.
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> 9(1) Where cause has been shown as aforesaid the applicant may apply to the court by motion on notice to make absolute the condition order, in whole or in part, notwithstanding the cause shown.
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> 10. Where cause has not been shown in the manner and within the time aforesaid the applicant shall on filing an affidavit of service of the conditional order and a certificate that no cause has been shown, be entitled to obtain a side bar order making the conditional order absolute (unless the conditional order shall have otherwise directed)."

3.3 It is common case that no affidavit showing cause was filed on the proceedings. Submissions were made to the court on the return date, when cause was not shown by the respondent. The matter was not contested and the only issue before the court was whether or not the learned District Court judge had advised the applicant of his right to legal aid. The evidence of the applicant's solicitor in each case was accepted.

3.4 Order 99, rule 37(22)(2)(6) refers to "the time and labour expended by the solicitor" is a determining factor.

The State submits that the Taxing Master, in equating Article 40 applications with the seven judicial review cases referred to, in which he contends that they also deal with a person's right to freedom and liberty are not applicable in the present case. The work done in judicial review proceedings greatly outweighs the work done in the instant case. Notwithstanding the instruction fee claimed exceeds the instruction fee recovered in six of the seven judicial review proceedings. The instruction fee in the six averaged €11,370. The instruction fee for the seventh was €14,500, giving an average for the seven of €11,820.

In the instant case there was no complexity, difficulty or novelty; the time expended by the solicitor was not substantial nor was the number of documents.

While it was accepted that the matter was important and dealt with in the High Court, it did not involve any amount or value in property or money nor was there any other fees or allowances payable which would have reduced the work in respect of which the instructions fee was calculated.

In respect of the general instruction fee, it was well established that the primary focus when assessing a fair and reasonable instructions fee was the specific nature and extent of the work done and thereafter the consideration of comparators.

Placing an emphasis on the comparable cases rather than primarily focusing on the facts and consequent work done would do an injustice to the plaintiff and give it a distorted view of the quantum of the fee. It is the nature and extent of the work done as provided for under s. 27 of the Courts and Court Officers Act, 1995 that is appropriate. The very nature of Article 40 applications necessitates a short, swift period of time as the deprivation of liberty is the abnegation of a fundamental constitutional right. This is accounted for the summary of the work involved referred to in the bill of costs. The court was referred to *Leahy v. The Governor of Cloverhill Prison* and also *Sheehan v. Reilly* [1993] 2 I.R. 81.

The same issues arise in judicial review proceedings for orders of *certiorari* quashing the decision of the Refugee Appeals Tribunal.

The applicant should be fully indemnified in respect of all costs. In *Quinn v. South Eastern Health Board* it was held at para. 5 that:

> "It has always been the case that party and party costs are not calculated on the basis that the client will be fully indemnified in respect of all costs except in exceptional cases."

It was submitted that the applicants under Article 40 do not fall within those exceptional cases. Any failure to appropriately and fully indemnify an applicant for costs in such an application is a failure to recognise the importance of the remedy, and of upholding constitutional and human rights.

4. Taxing Master's decision dated 28th June, 2006.
The Taxing Master recited the order for costs outlined the facts and the work undertaken in each case. He recited the submissions of each party otherwise each decision similarly deals with counsels' fees, with which we are not ultimately concerned. However, it is relevant that the Taxing Master concluded as follows at p. 36 of 42 of *Mohamed* and pp. 43/49 in *Caffrey* in the context of assessing counsels' fees, as follows:

> "In the instant matter, having considered all the material submitted, I have no doubt that this was, to all intents and purposes, a counsel driven case. Because the State, whose resources are ample and are prided with the expertise of a State Solicitor who probably deals solely with this type of case, seems fit to retain a single counsel, does not bind the applicant's solicitor to do so. Authority for this may be found in the judgment of Kearns J. in *Superquinn Limited v. Bray U.D.C. & Ors*. where he states that fees of one party will not bind another:
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> > 'While the fee of an opponent is of course a relevant factor, this does not exonerate the Taxing Master from conducting a root and branch examination of the defendant's bill on its own merits.'"

In relation to the solicitors' instruction fee in both cases the Taxing Master referred to s. 27 of the Courts and Court Officers Act, 1995 which gives the Master an exercisable discretion in assessing costs. He stated that it was "no easy task to assess the nature and extent of the work that went into a case". Having considered s. 27 and *Best v. Wellcome Foundation* [1996] 3 I.R. 378, he continued:

> "Solicitors in considering their fees relative to the nature of the case should not overlook their input, therefore in describing the difficulties they should elaborate upon all the factors which were significant to the case and in this regard solicitors ought to make an allowance for those cases which are 'counsel driven' and their fees must reflect this." p. 92

The Taxing Master then referred to the number of features other than the time factor which must be considered when assessing the instruction fee of the solicitor which were identified by Barr J. in *Crotty v. An Taoiseach* [1990] I.L.R.M. 617. In exercising his discretion in relation to any item, the Taxing Master shall have regard to all the relevant circumstances, and, in particular, to:

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and nature expended by, the solicitor

(c) the number and importance of the documents (however brief) prepared or perused;

(d) the place and circumstances in which the business involved was transacted;

(e) the importance of the cause or matter to the client;

(f) where money or property is involved, its amount or value;

(g) any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

5. Taxing Master's second ruling of 24th July, 2006
The second ruling is entitled *Brennan v. The Governor of Cloverhill Prison*. It deals with nineteen other cases referred to in the schedule in order to clarify the Master's ruling in *Mohamed v. The Governor of Cloverhill Prison* and *Caffrey v. The Governor of Mountjoy Prison.* Counsels' fees were no longer an issue. The ruling dealt only with the determination of the instruction fee in the schedule. In *Mohamed*, item 29, the claim in the bill of costs was €14,000. Mr. Quann, for the State, proposed €5,000 to €6,000. The Taxing Master allowed €9,500. In *Caffrey*, the amount claimed was €13,150. Mr. Galligan, on behalf of the State, proposed €6,000 and the Master allowed €9,000.

6. Hearing before the Taxing Master, 20th March, 2007 in conjoined cases
The Master summarised the submissions made. Mr. Galligan, on behalf of the respondent submitted that the time element was not sufficiently considered by the Master in reaching his decision. The Master had stated that the facts of the case were "not vast and not the most complex in nature".

Mr. English, on behalf of the applicants, submitted that the respondents were trying to adopt a blanket approach to all the cases and were not, despite their submissions, treating each case on its own merits. He had not at any stage advanced the time element or submitted that costs should be assessed on a time basis. The Master had remarked that there were no time records, that all of the cases were counsel-driven. The applicant disagreed with that entirely and rejected that "handsome fees" had been allowed to counsel on that basis.

In reply, Mr. Galligan had said that it would be quite easy for the applicants to estimate the amount of time that was involved in those cases, not solely or exclusively. The Taxing Master had researched High Street figures in the region of €500 to €600 per hour and asked that both parties estimate the amount of hours.

Mr. Galligan contended that, not alone were the *Caffrey* and *Mohamed* cases counsel-driven so were other Article 40 cases that were listed before the Taxing Master.

7. Ruling of 21st May, 2007: Mohamed v. Governor of Cloverhill Prison
Having dealt with the background and the objection by the respondent, the Taxing Master referred to the thirteen items of work carried out from instructions on 15th June, 2005 to attending the court on 16th June and attending the prison officer and the translator.

In respect of the instruction fee the Taxing Master noted that the respondent had placed little emphasis on the nature and extent of the work at the *ex parte* stage. The Master then stated:

> "Ordinarily, in judicial review cases, the initial stage at which the application is made, is not onerous as in these asylum cases. The burden upon the applicant is to show that there is an arguable case for the High Court to review the decision of the interior tribunal or court. Legislation in this area of applications concerning refugees, namely the *Refugees Act, 1996* and the *Illegal Immigrants (Trafficking) Act, 2000*, sets out specific procedural rules whereas in ordinary judicial review cases. The (*sic*) statement of grounds usually shows the applicant has a chance of success and the High Court will grant leave to bring the proceedings. This is not so for these Asylum cases. Section 5 of the *Illegal Immigrants (Trafficking) Act, 2000* stipulates that the court must be satisfied that there are substantial grounds for the court to allow the matter proceed beyond the *ex parte* stage and that the decision ought to be quashed. There is a considerably high standard of proof required than in the normal judicial review cases.
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> Also, the *ex parte* stage is made that more difficult in that the Respondent is on notice of the application and so the applicant must have everything prepared with the utmost care. This initial stage in the Article 40 application may take half a day, whereas the ordinary judicial review *ex parte* stage may take a few minutes. The initial stage in these applications is usually fully contested by the Respondent and thus this represents a difficult hurdle for the Applicant to clear.
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> Prior to the application coming on for consideration of granting leave all papers in respect of the application must be filed in the Central Office and served upon the Respondent. The Respondent may or may not wish to put in a Replying Affidavit and the entitlement of the Respondent to consider such an affidavit departs from the usual practices in Judicial Review cases."

The Taxing Master referred to Donaldson J. in *Property and Reversionary Investment Corporation v. Secretary of State for the Environment* [1975] 2 All E.R. 436 regarding taxation being a valuation judgment based on discretion and experience. He believed that the allowance was a proper, fair and just fee having regard to all the facts and circumstances of the case.

In *Caffrey*, also on 21st May, 2007, he believed that the respondent had made no meaningful proposition to upset the allowance made in respect of that instruction fee.

8. Decision of the court

8.1 The categorisation by the Taxing Master of the *Mohamed* application appears from the above as if it were a judicial review of an asylum decision. The *ex parte* application was, of course, an Article 40 application and not an application to review the decision of an inferior tribunal in an asylum case. The reference to the statement of grounds usually showing the applicant's chance of success is contrasted with "these asylum cases" which require "a considerably high standard of proof than in the normal Judicial Review cases".

There may also be a sense of misunderstanding in the reference to the *ex parte* stage being more difficult in that the respondent is on notice of the application requiring the applicant to have everything prepared with the utmost care. This is, of course, not so in the present case nor, indeed, in the ordinary *ex parte* application. Accordingly, the reference to "this initial stage in the Article 40 application" taking half a day in contrast with the ordinary judicial review *ex parte* taking a few minutes, appears to be mistaken. It is common case that the *ex parte* application took a very short time. The order absolute itself, the following day, took 30 minutes in the absence of cause shown.

The Taxing Master refers to a medical analogy by referring to such application being "a legal accident and emergency application" with an additional difficulty of an interpreter/translator being required. The borrowing of such a medical analogy may have limited application in terms of immediate urgency and costs claimed. Accident and emergency staff have also to deal with patients who do not speak English or who, indeed, may be unconscious. The reference of accident and emergency might equally apply to proceedings before District Judge McDonald on 7th March, 2006 when the applicant was unrepresented when brought before the Bridewell Court. The applicant was assisted by the translator, the prison officer and the Gardaí who arranged the attendance of the solicitor who made the *ex parte* application a week later.

The Taxing Master referred to s. 27 and referred to the "Refugee Act, 1996" and the provisions of the Geneva Convention and decisions made in countries such as the United Kingdom, Canada, Australia and other countries bound by the Convention as well as principles of Irish law in relation to the complexity of the matter which "surely must show that the leave stage itself is a complicated matter and thus complexity is above that of the ordinary judicial review case".

In arriving at a sum sufficient and adequate to produce a fair and reasonable remuneration for the instruction fee for the solicitor, the Taxing Master stated that such cases involving a citizen's liberty must rank with similar legal accreditation to those of Chancery matters. While liberty of the person may, indeed, be a greater good than a mere property right, it is not clear how this can be the basis of comparison for an instruction fee.

The Taxing Master said that he had set out the novel features of the application and the ground that had to be covered in successfully challenging the applicant's detention, which resulted in a change in legislation. It is not clear what legislative change affected Article 40 rights. There have, of course, been statutory provisions in relation to asylum cases.

8.2 The Taxing Master was of the view in respect of both cases that "this was not simply a case driven by counsel but rather all lawyers in this case worked at equal measure". The Master accepted that his earlier finding on 28th June, 2006 that "to all intents and purposes" this was a counsel-driven case did not fairly describe the part played by the solicitor in the preparation and administration stages of the applications. The reasons given do not appear to justify the change in the absence of detailed task and time records. It is difficult to objectively reconcile the changed emphasis.

The explanation given was that the Taxing Master that, having had an opportunity of carrying out a "root and branch" examination, was of the view that no one lawyer was equipped to advance those matters before the High Court. This, according to the Master, was borne out in paras. 4.1 to 4.6 of the applicant's written submissions.

In fact, the Taxing Master said that he was not in a position to carry out a root and branch examination because of the lack of documentation (and evidence of time spent). Moreover, the references in paras. 4.1 to 4.6 of the applicant's replying submissions to the objections filed by the respondent dated 30th January, 2007 under the heading "extent of the work done" refers to briefing counsel for conditional order application and for order absolute application, being two of sixteen items. Those paragraphs, as summarised above, deal with the complexity of constitutional, immigration, community and criminal law as well as the European Convention on Human Rights but make no reference to interaction with any other lawyer or counsel. The submissions deal with the degree of responsibility borne by agents in taking initial instructions. Reference is made to the responsibility of the solicitor dealing with the deprivation of liberty of the client.

While one can, of course, understand an emphasis on the solicitor's work in respect of instruction fees and the emphasis on counsel in relation to the earlier taxation of counsel's fees where the Taxing Master had described the case as counsel-driven, there must be consistency. There would appear to be logical inconsistency in maintaining, for the purpose of counsel's fees that the application was counsel-driven and, in a separate application, now before this Court in relation to solicitor's instruction fee, that it is solicitor-driven as is indicated in the applicant's written submissions.

8.3 The Taxing Master referred to *Maltyby v. D.J. Freeman & Company* [1978] W.L.R. 431 where Walton J. stated:

> "In a good many cases although by no means all – it (time expended) is also the logical starting point in that it gives in itself a good indication of the weight of the matter as a whole. I would, however, make one gloss; however meticulous time records are kept, this will always, save in the plainest of all possible cases, represent an undercharge no professional man (or senior employee of a professional man) thinking about a day's problems the minute he lifts his coat and umbrella from the stand and sets out on the journey home. Ideas – very often valuable ideas occur in the train or car or home, or in the bath, or even whilst watching television. Yet nothing is ever put down on a time sheet (or can be put down on a time sheet) adequately to reflect this out of hours devotion to duty."

Thirty years later we may adopt the helpful remarks of Walton J. in relation to time expended being the logical starting point but temper the somewhat outdated observations regarding undercharge of the time the "professional man or senior employee of a professional man". I have no doubt that all people undertaking a task, whether intellectual or manual, whether at home or place of learning, industry or service, including work at home, think about the day's problems during their leisure time. The reality of the tasks of the self-employed and the employed is that chargeable work is normally, if not universally, measured on the expertise of the worker and on the basis of time devoted to the task. Expertise, in turn may be rated as ordinary professional service and, only exceptionally, in supranormal service which may attract a premium rate. To this extent the brilliant (or highly acclaimed) musician may command a performance rate over and above that due to the qualified musician and the qualified musician with years experience may command a performance fee more than that of a recent musical graduate.

Fees and earnings are determined by the market. There are, of course, distortions in the market, depending on the degree of

monopolistic or monopsonistic restrictions which exist but this is not a matter which arises in the present application.

8.4 The starting point is the instruction fee charged to the client in respect of which the client is responsible. In many cases, however, the client, especially in Article 40 cases, may not himself or herself be capable of discharging the fee while some lawyers – solicitors and barristers – may, at times, take on such cases on a *pro bono* basis, others work on a contingent basis which may, in turn, be either what is determined by agreement or on taxation or as a contribution to the overall solicitor/client costs.

There is no evidence as to whether a fee was agreed, or even indicated to the applicant as being the cost of the application. Considering the urgency of the Article 40 application and the status of the applicant himself it may have been that there was no such agreement or indication.

However, it does seem to the court that the fee or the notional fee agreed or indicated must be the starting point for the State's indemnity to operate in the event of an award for costs being made against it. Why should an indemnifier be asked to pay a fee to be agreed or taxed in default of agreement by a defendant when, in fact, a plaintiff would never be asked to discharge such a fee?

The Taxing Master said that consideration must be given to the principles elucidated in his ruling of 28th June, 2006. He invited submissions on the return date as what the applicant and respondent considered appropriate with regard to the quantum of fees in the bill of costs in the *Mohamed v. Governor of Cloverhill Prison* matter (2005 No. 852 SS).

8.5 Each case had to be dealt with on its merits. The Taxing Master referred to Donaldson J. in *Property and Reversionary Investment Corporation Limited v. Secretary of State for the Environment* [1975] 2 All E.R. 436 at 443 who stated that:

> "… it is necessary to assess a sum which is fair and reasonable. Each case has to be considered on its merits and be subject to the discretion of the Taxing Master. In this case various figures will no doubt come to mind. They can be tested relative to the remuneration generally accepted or previously held to be fair and reasonable in comparable transactions, due allowance has been made for all distinctions. In the end it is a value judgment based on discretion and experience. We have had to make a value judgment. Our figure may not be the right figure, indeed such a figure probably does not exist, but we hope that it will be a right figure – one which is reasonable in all the circumstances."

The emphasis in that case was a fee that was fair and reasonable. Time spent on the business, divided up into partners' time, solicitors' time and legal executives' time at different rates, was one of the factors considered though the factor was of relatively small importance in that case.

In the present cases it would appear that the Taxing Master did not take the agreed time of nine hours and eight to ten hours into account, notwithstanding the agreement of the parties.

8.6 The Taxing Master said that he was required to conduct what was described as a root and branch examination on the brief and papers to ascertain the work carried out by counsel and solicitor. It was not possible to conduct such an examination. He had not been given the file and briefing documents in *Bryan v. Governor of Mountjoy* (one of the nineteen cases). There were no working papers, notes or memos or otherwise of counsel's input or any interaction of counsel with the applicant's solicitor with the exception of the furnishing of a fee note, nor any written briefing of counsel. In the absence of such documentation it was difficult to carry out the statutory function under s. 27 of the Courts and Court Officers Act, 1995. However, he had previously stated that the nature of an Article 40 application leant itself to a short, swift skirmish where the litigious ground is decided in two short applications in court over one or two days.

8.7 In relation to the instruction fees in the nineteen cases tabulated by the Taxing Master, the court is conscious that the brief comments alone do not necessarily indicate the work, responsibility or complexity of each matter. Only two were referred to as "Deportation/Unlawful Detention". The costs claimed were €23,500 and €20,000 and the Master allowed €12,000 and €10,000 respectively.

The amounts claimed were, in all cases, in excess of the amounts allowed. The amounts allowed varied from €7,500 to €13,500. The latter was for three days' work, including a weekend. The Taxing Master made an allowance of €9,000 in eleven of the twenty cases, €9,500 in two of the cases and €10,000 in a further three cases.

In no case did the Taxing Master make a determination either in the amount claimed or in the amount proposed by the State.

It is not clear whether all cases involved conditional and absolute orders which were contested. Eight are noted "Conditional Order" and "Order Absolute".

8.8 The time expended can be a determining factor when assessing the fee as referred to in O. 99, r. 37(22)(ii)(b) which refers to the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor. Fairness and reasonableness is an overriding factor. The Taxing Master referred to the short, swift skirmish where the litigious ground is decided in two short applications in court over one or two days. He also referred to the documents in the cases being limited. They are not vast and are not the most complex in nature. The grounding affidavit is treated as the facts of the case and that no money or property was involved. Many of the criteria set out in O. 99, r. 27(22)(ii) were not relevant. The case was not unusually complex, difficult or novel. It involved a net point which was not contested by the State and, to that extent, was not contentious.

In *The State (Aherne) v. Cotter* Walsh J. stated:

> "It should be noted that an Article 40 enquiry is procedurally a very simple process. The whole procedure is set out in the Constitution itself."

The Taxing Master's ruling of 24th July at p. 3(g) stated:

> "It is also fair to say that with the passage of time and the growing number of Article 40 applications that the novelty which was attached to such applications in the past no longer exists."

In his written ruling of 28th June, 2006 the Taxing Master stated that:

> "In the instant matter, having considered all the material submitted, I have no doubt that this was, to all intents and purposes, a counsel-driven case." (at p. 45)

Later, at p. 50 of the same ruling the Taxing Master stated:

> "Solicitors in considering their fees relative to the nature of the case should not overlook their input, therefore in describing the difficulties they should elaborate on all the factors which were significant in the case and in this regard solicitors ought to make an allowance for those cases which are 'counsel-driven' and their fees must reflect this."

8.9 Kearns J. in *Superquinn Limited v. Bray U.D.C. & Ors*. in the context of the other party's fees held:

> "While the fee of an opponent is of course a relevant factor, this does not exonerate the Taxing Master from conducting a root and branch examination of the defendant's bill of costs on its own merits."

In circumstances where it was not possible to conduct a root and branch examination for the reasons stated in the Taxing Master's ruling of 24th July, 2006, the Master should have taken into account the agreed estimate of time spent in relation to the work done as claimed in the bill of costs in his ultimate assessment, particularly where each case was deemed to be counsel driven.

While the court is reluctant to interfere with the discretion of the Taxing Master, it would seem that there were some inconsistencies in the determination of each matter.

8.10 I will hear counsel as to whether the matter should be remitted to the Taxing Master or by the court.