THE HIGH COURT
JUDICIAL REVIEW
DIVISIONAL COURT

[2014 No. 431 JR]

The President
Mr. Justice Noonan
Ms. Justice Kennedy
BETWEEN

ANGELA KERINS

APPLICANT

AND

JOHN McGUINNESS, MARY LOU McDONALD, SHANE ROSS, AINE COLLINS, PAUL J. CONNAUGHTON, JOHN DEASY, ROBERT DOWDS, SEAN FLEMING, SIMON HARRIS, EOGHAN MURPHY, GERALD NASH, DEREK NOLAN, KIERAN O'DONNELL, THE CLERK OF DÁIL ÉIREANN, THE CLERK OF THE PUBLIC ACCOUNTS COMMITTEE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of the Court delivered on the 5th day of April, 2017.

Introduction

1. On 31st January, 2017 the applicant's claim was dismissed.

2. This is the judgment of the court in respect of the costs of these proceedings.

3. All of the respondents seek costs orders against the applicant. She contends that such orders should not be granted but, instead, she should have an order for costs made in her favour against all but the last two respondents. Insofar as those two respondents (Ireland and the Attorney General) are concerned she contends that there should be no order as to costs made by the court.

4. Before considering the merits of these applications it is desirable to identify the principles governing applications of this type.

The Legal position

5. Order 99, rule 1(1) of the Rules of the Superior Courts provides:-

> *"The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."*

6. Order 99, rule 1(4) provides:-

> *"The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."*

7. Thus, while a losing party is usually the subject of an order for costs, the court retains a discretion to depart from the ordinary rule as provided for in Order 99, rule 1(1). This discretion may be exercised in different ways. In some cases the court may make no order as to costs. In others, it may make a costs order in favour of a losing party. The court's discretion falls to be exercised in the particular circumstances and context of a case. The applicant contends that the circumstances of this case justify the court departing from the normal rule and making orders of the type sought by her.

8. As was said by the Divisional Court in *Collins v. The Minster for Finance & Others* [2014] (IEHC79):-

> *"(11) The starting point for any consideration of this question is to be found in the judgment of Murray C.J. in* ***Dunne v. Minister for the Environment*** *[2007] IESC 60 and [2008] 2 I.R. 755 where he observed ([2008] 2 I.R. 755, 783-784) that:-*
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> > *'The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party has an obvious equitable basis. As a counterpoint to that general rule of law the Court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the Courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs.*
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> > *Where a Court considers that it should exercise a discretion to depart from the normal rule as to costs it is not completely at large but must do so on a reasoned basis indicating the factors which in the circumstances of the case warrant such a departure. It would neither be possible or desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue.'"*

9. In *Collins* the Divisional Court summarised principles which it extracted from the case law concerning the award of costs to unsuccessful litigants in constitutional cases. This is what the court said:-

> *"(12) It is true that the pre-existing case law in respect of the award of costs to unsuccessful litigants in constitutional cases can be described as heterogeneous and as revealing a variety of distinct themes. Yet certain principles nonetheless emerge which may now be summarised.*
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> *(13) First, costs (either full or partial) have been awarded against the State in cases where the constitutional issues raised were fundamental and touched on sensitive aspects of the human condition. Examples here might include* ***Norris v. Attorney General*** *[1984] I.R. 36 (homosexuality);* ***Roche v. Roche*** *[2006] IESC 10 (the constitutional status of human embryos) and* ***Fleming v. Ireland*** *[2014] (assisted suicide).*

(14) Second, costs have similarly been awarded to losing plaintiffs in constitutional cases of conspicuous novelty, often where the issue touched on aspects of the separation of powers between the various branches of government. Examples here include ***Horgan v. An Taoiseach*** *[2003] 2 I.R. 468 (what constituted participation in war for the purposes of Article 28) and* ***Curtin v. Dáil Éireann*** *[2006] IESC 27 (aspects of the judicial impeachment power).*

(15) Third, costs have been awarded where the issue was one of far reaching importance in an area of the law with general application. Examples include ***TF v. Ireland*** *[1995] (constitutionality of the Judicial Separation and Family Law Reform Act 1989),* ***O'Shiel v. Minister for Education*** *[1999] 2 I.R. 321 (aspects of the State's duty under Article 42.4 to provide for free primary education),* ***Enright v. Ireland*** *[2003] 2 I.R. 321 (constitutionality of the Sexual Offenders Act 2001) and* ***MD (a minor) v. Ireland*** *[2012] IESC 10, [2012] 1 I.R. 697 (constitutionality of legislation making it an offence [for] under-age males only to have sexual intercourse with under-age females).*

(16) Fourth, in some cases the courts have stressed that the decision has clarified an otherwise obscure or unexplored area of the law. This point was emphasised by Murray C.J. in dealing with the costs question in ***Curtin****. This was, after all, the first case in which the impeachment provisions of Article 35 had ever been commenced by the Houses of the Oireachtas in respect of a serving judge. As the Chief Justice observed:-*

> *'Article 35.4 is silent as to the procedures to be followed by the Houses of the Oireachtas when considering a motion for the removal of a judge. The adoption of procedures for that purpose was left to each House. No such procedures had been adopted by either House before the question of the appellant's removal had been raised. This was understandable given that since the foundation of the State no substantive question concerning the removal of [a] judge had been brought before the Oireachtas. This meant that to a significant extent all those concerned, the Government, both Houses of the Oireachtas and the appellant were required to address novel but crucial constitutional questions in an uncharted constitutional terrain. In the event it was the Courts which were asked to resolve them.*
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> *In these circumstances, before the Court addressed the discrete issues arising between the parties, it was necessary to interpret and define the meaning and ambit of Article 35 of the Constitution as a whole with a view to identifying the appropriate balance between the function of the Houses of the Oireachtas to call for the removal of a judge for stated misbehaviour and the separation of powers between the Judiciary and the other organs of State as guaranteed by Article 35 itself. For this purpose, the Court, as a constitutional court, had to consider questions that went, at least to some extent, beyond the specific issues raised, and determined, by way of constructive interpretation, how the final adjudication process must be addressed by the Houses of the Oireachtas when and if they come to a final decision. In addressing the broader issues the Court has provided certainty and obviated the risk of later litigation regarding them as well as providing a guide for the Oireachtas as to the procedures to be followed in the future.*
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> *In doing so the Court has clarified for the future the constitutional norms in a core area of constitutional governance as between the three organs of State, irrespective of the issues in this case. In this sense the case is exceptional and sui generis.*
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> *In all these circumstances the Court, in the exercise of its discretion, has decided that the appellant should be refused his application for full costs and be awarded half the costs of the proceedings in the High Court and half the costs of the appeal in this Court against the Attorney General.'*

(17) Fifth, as Murray C.J. pointed out in ***Dunne****, the fact that the litigation has not been brought for personal advantage and that the issues raised 'are of special and general public importance are factors which may be taken into account'. As* ***Dunne*** *itself shows, however, the mere fact that a litigant raises such issues in circumstances where no suit is brought for purely personal advantage does not in itself justify a departure from the general rule. In that case the plaintiff challenged the constitutionality of s.8 of the National Monuments (Amendment) Act 2004 on the ground that it provided insufficient protection for national monuments which might be impacted by motorway development. Even though the plaintiff did not challenge this legislation for personal advantage and the issues raised were of general public importance, costs were nonetheless awarded against the losing plaintiff.*

(18) Sixth, even in those cases where the court was minded to depart from the general rule and award the plaintiff costs, this did not necessarily mean that the plaintiff was held to be entitled to full costs. Thus, for example, in both ***Horgan*** *and* ***Curtin*** *the respective plaintiffs were awarded 50% of their costs. In yet other cases – such as* ***Roche v. Roche*** *and* ***Fleming v. Ireland*** *– full costs were awarded to the losing party in this court."*

10. This court is of opinion that the above accurately summarises the factors which the court ought to take into consideration on this application for costs.

11. It is to be noted that in the **Collins** case the court awarded the plaintiff 75% of her costs. It did so because of five factors which it identified. They were:-

(a) The importance of the novel question of constitutional law;

(b) the weighty issues raised by the litigation;

(c) the importance to the State and its citizens that the constitutionality of the important and novel executive and legislative decisions with far reaching consequences be judicially determined;

(d) the fact that the plaintiff was a public representative, did not act for personal advantage and that the State did not pursue a *locus standi* objection to the proceedings in order that the substantive issues could be judicially determined; and

(e) the decision clarified and provided certainty for the State in the operation of its financial procedures.

The applicant's arguments
12. The applicant's starting point is that she voluntarily attended before the Public Accounts Committee (PAC) to assist it in its parliamentary work. Having been invited to attend she believed that as a citizen she ought to do so so as to assist an institution of the State.

13. She had an entitlement to be treated fairly but that did not happen. Instead on 27th February, 2014 she was subjected to an examination in respect of matters of which she had no prior notice. She was subjected to comment that was extremely damaging to her reputation both personally and professionally. She calls attention to what is contained at paras. 18, 20, 27 and 30 of the judgment of this court of 31st January, 2017 (the principal judgment). The applicant was present for much of the damaging commentary which took place during the seven hour sitting of the PAC on 27th February, 2014. She was absent through illness during the hearing of 10th April, 2014 where she was "assailed" in her absence. In that regard attention is drawn to paras. 26 and 27 of the principal judgment.

14. All of this activity took place in the context of the PAC acting *ultra vires* its powers. This is clear as a result of the decision of the Committee on Procedure and Privileges of 16th July, 2014 refusing compellability powers to the PAC. In this regard reliance is placed on para. 32 of the principal judgment.

15. It is argued that the court has acknowledged that the applicant has been damaged. The court could not however provide any redress to the applicant because of the protected position of the members of the PAC.

16. The next argument is that the proceedings raised issues of both special and general public importance. The applicant points out that the PAC is a standing committee of Dáil Éireann. It has a particular role in respect of questions of public expenditure falling within the remit of the Comptroller and Auditor General. Whilst the importance of the function and role of the PAC was not in dispute, it is said that the proceedings raised matters of public importance concerning the proper discharge of its functions by the PAC and its members. In this regard attention is drawn to para. 36 of the principal judgment where it was recognised that the case raised "*important questions of freedom of speech in parliament, the separation of powers and the extent to which the court may intervene in the affairs of the Oireachtas*". Thus, it is said, the case involves issues of exceptional public importance in the sense intended by the Supreme Court in *Dunne*.

17. A further argument is that the case involves significant novelty. This is so, it is said, because it is the first case in which the question of conduct of committee business has arisen since the enactment of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 following the constitutional referendum in October 2011 concerning Oireachtas inquiries. The applicant was under no compulsion to attend before the PAC making this case different to cases such as In *Re Haughey* [1971] I.R. 217 and *Maguire v. Ardagh* [2002] 1 I.R. 385. This distinguishing feature is, it is said, of very considerable public importance given that the committee system operates to a significant extent on voluntary participation of witnesses in hearings before it. Thus the legal position of witnesses (whether in attendance or not), where a committee is not exercising powers of compulsion, is addressed in the court's judgment for what appears to be for the first time.

18. Finally, it is said that this is the first occasion in which a court has ruled in clear terms that Article 15(13) of the Constitution extends to utterances in parliamentary committees as opposed to utterances in the chamber.

Respondents' submission
19. The first to fifteenth respondents seek their costs and contend that there is no basis for departing from the normal rule as specified in O.99, r.1(4) that costs follow the event. Whilst they acknowledge that the court has a discretion to depart from that rule in some circumstances, they contend that the burden falls on the applicant to persuade the court that it should do so. They acknowledge that the Supreme Court in *Dunne* recognised that a court may award costs to a losing party if "*in the special circumstances of a case the interests of justice require that it should be so*". But it is for the applicant to demonstrate why there should be a departure from the normal rule. They contend that the applicant has not done so.

20. They point to a number of factors militating against the applicant.

21. First, they contend that the issues raised by the applicant are not of exceptional public importance. That is the test which, they contend, has to be met *per* Murray C.J. in *Curtin* where he spoke about "*the exceptional and sui generis*" nature of the issues in that case. They point out that in *Curtin's* case Murray C.J. spoke of both the Government/the Oireachtas and the appellant being required to address "*novel but crucial constitutional questions in an uncharted constitutional terrain*". They contend that none of this was present in this case. They cite other examples such as *Jordan v. Minister for Children and Youth Affairs* [2013] IEHC 65, *Pringle v. Government of Ireland* [2014] IEHC 174 and *Collins v. Minister for Finance* [2014] IEHC 79. They contend that the issues raised in those cases are of greater importance than those in the present case and in *Collins* they point out that the Divisional Court described it as a case "*of conspicuous novelty*". This case, they say, does not reach the necessary threshold of public importance to warrant a departure from the normal rule as to costs.

22. These respondents also point out that the lack of a private interest is a significant consideration in deciding on the question of costs. They point out, as Murray C.J. did in *Dunne*, that the fact that litigation has not been brought for personal advantage is one which should be taken into account. That was also the view of the Divisional Court in *Collins*. Likewise it was the view of Quirke J. in *McEvoy v. Meath County Council* [2003] 1 I.R. 208 where he cited with approval the distinction drawn by Dyson J. (as he then was) in *Regina v. Lord Chancellor exParte Child Poverty Action Group* [1999] 1 W.L.R. 347, between ordinary private law litigation on the one hand, and *'public interest challenges on the other'*. Dyson J. described a public interest challenge as one which "*raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case*". That is not the case here, it is said.

23. For these reasons these respondents contend that the ordinary rule should apply. If, however, the court were to decide to depart from it they point out that the courts have traditionally exercised restraint when departing from the general rule. Full costs orders in favour of an unsuccessful party are rare. They point out that in *Curtin* costs were refused to the unsuccessful applicants in the High Court but that on appeal the Supreme Court awarded the applicant 50% of his High Court costs and a like percentage of Supreme Court costs. A similar percentage was employed in *McEvoy's* case together with 100% of the daily transcript costs. In *Collins* the unsuccessful plaintiff was awarded 75% of his costs. In other cases, as little as one third or on occasions no order as to costs was made.

24. They contend that the applicant has not made a sufficiently persuasive case to justify a departure from the normal rule. They also point out that these respondents were successful but that they were so on the question of jurisdiction thus rendering it unnecessary for the court to deal with a range of other grounds of review which had been raised by the applicants such as issues of

constitutional justice, *audi alteram partem* and the application of the "*Anisminic*" principle. They acknowledge that whilst the applicant's personal interest is not absolutely fatal to her costs application it is important to note that she sought not merely declarations but also damages.

25. The remaining respondents echoed the submissions of the first fifteen respondents. They pointed out that the issues were principally between the applicant and those respondents. The State's involvement was very limited and, arguably, they should not have been joined at all to the proceedings.

Conclusions
26. The court has come to the conclusion that in the circumstances of this case it ought to depart from the normal rule and to make limited orders for costs in favour of the applicant against the first to fifteenth respondents.

27. The applicant attended before the PAC in a voluntary capacity and was dealt with on 27th February, 2014 by the respondents in the manner described in the principal judgment. She was not in attendance for medical reasons at the meeting of 10th April, 2014 but in her absence was dealt with in the manner described in the principal judgment. We have already pointed out that the court is limited by the terms of the Constitution from making any comment which would touch directly on the utterances of any member of the PAC but nonetheless it cannot be gainsaid that much of what was put to the applicant and said about her in the course of the two meetings in question was damaging to her reputation personally and professionally.

28. The court is satisfied that the institution of these proceedings was a proportionate reaction on the part of the applicant to the situation arising from what took place before the PAC.

29. The court is also satisfied that the applicant raised issues of special and general public importance and of some novelty. She raised issues concerning the legal safeguards (if any) available to witnesses who appear before the PAC in a voluntary capacity. The PAC has an important function. Questions concerning the proper discharge of its function and the conduct of its members are matters of public importance.

30. The case also raised, as acknowledged by the court at para. 36 of the principal judgment, "i*mportant questions of freedom of speech in Parliament, the separation of powers and the extent to which the court may intervene in the affairs of the Legislature*".

31. The court is also satisfied that the case raised issues of importance for these respondents. It determined that Article 15(13) extends to utterances in committee as well as utterances in the parliamentary chambers. The case also cast a light on the position of persons who volunteer to appear before the PAC. This may well have implications for the PAC in future since the court was told that it operates to a significant extent on voluntary participation of witnesses in hearings before it.

32. In coming to its conclusions the court accepts that there was a personal interest on the part of the applicant in bringing the proceedings but that is not fatal to an application of this sort. As has already been pointed out, it views the institution of these proceedings as a proportionate response on the applicant's part to what occurred.

33. The court also bears in mind that the case law demonstrates that if the court is persuaded to depart from the general rule it has rarely awarded full costs in favour of an unsuccessful party.

34. The court is of opinion that the justice of the case will be met if the applicant is awarded two thirds of her taxed costs against the first to fifteenth respondents together with 100% of the costs of the transcript.

35. Insofar as Ireland and the Attorney General are concerned the court is of the view that no order for costs should be made in favour of them against the applicant. The disputes were between the applicant and the other 15 respondents. These two respondents made helpful submissions on the legal issues but were not involved apart from that. They should abide their own costs.