THE HIGH COURT

[RECORD NO. 2017 997 JR]

BETWEEN

DANIEL KELLY

APPLICANT

AND

THE MINISTER FOR DEFENCE

RESPONDENT

JUDGMENT of Mr. Justice Robert Eagar delivered on the 14th day of January 2019

1. The position in this case is that the judicial review proceedings which were initiated for Noonan J. on the 18th December 2017 are now moot.

2. The applicant is seeking costs in respect of the application for leave to apply for judicial review and the respondent is resisting same.

3. The applicant suffered an accident at work on about the 23rd November 2015 and he sustained injuries to his spine and has been unable to work since that incident. At the time of the application for judicial review he was awaiting spinal surgery and, as a result of being on the public health waiting list, there had been significant delay in obtaining a date for surgery.

4. He said that on the 20th January 2017, Brigade Medical Officer John Murphy notified Lieutenant Colonel Brownen that it was necessary to convene a medical tribunal to determine his fitness for work and a decision to that effect was formally made pursuant to Army Regulation AF 332 A on the 23rd June 2017.

5. A medical tribunal was subsequently convened on behalf of the respondent in July 2017.

6. I have noted that the Brigade Medical Officer identified on the 20th January 2017 as follows: -

> "Para. 4. Given the chronicity and extent of his symptoms, the Medical Board to determine his fitness for continued services is required."

The court also notes that the convening order for the Medical Board specified in para. 2: -

> "Having examined the medical reports of the above named (Pte. Daniel Kelly) and being of the opinion that it is necessary to convene the Medical Board in order to:
>
> (a) Determine the fitness/unfitness of the above named for duty,
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> (b) Determine if he is unfit for further service in the [Permanent Defence Force];
>
> (c) Determine the medical classification of the above named.

7. The hearing was convened on the 30th August 2017 and the medical evidence before the tribunal on that date comprised of a letter from Mr. O'Brien, Consultant Neurosurgeon, which indicated that he was on a waiting list for lumbar surgery as a result of the fact that the surgery had not been carried out and the medical evidence was inconclusive. The medical tribunal postponed the hearing until the end of October.

8. On the 30th August 2017, Mr. Kelly informed his solicitor what had transpired, and his solicitor wrote to the State Claims Agency on the 17th October 2017 requesting that any decision by the Minister to reclassify him to be postponed until after his lumbar disc surgery.

9. A medical report was sent by Mr. John Quinlan, Consultant Orthopaedic Surgeon, noting that Mr. Kelly was 22 years of age and attends his clinic with regard to left knee pain. He also notes he is currently awaiting a spinal operation under the care of Mr. Donncha O'Brien in the Hermitage Clinic.

10. He was subsequently contacted and advised that another medical tribunal would be convened on or about the 15th November 2017. He said that this occurred in circumstances where he had still not undergone the lumbar surgery. His solicitor was notified that the new date for the Medical Board was the 15th November 2017. By letter dated the 10th November 2017, Messrs Malcolmson Law Solicitors on behalf of the applicant, wrote to the claims manager of the State Claims Agency indicating that any assessment by the Medical Board before the outcome of his client's lumbar disc surgery is known would be highly prejudicial to his client's employment in the army and in any event the Medical Board could not possibly assess "our client" properly until the outcome of his lumbar disc surgery is known, and the solicitor called on the Board to confirm that it would postpone its hearing until such time as the outcome of "our client's" surgery is known, and until they have a final prognosis in respect of his injuries.

11. Messrs. Malcolmson Law also said that failing to hear from them, their client would have no option but to seek injunctive relief forthwith without further notice.

12. By letter dated the 14th November 2017, the applicant's solicitor wrote to the State Claims Agency indicating that the Medical Board had failed to confirm that it would postpone its hearing scheduled for 12:00 on the 15th November and they say that Cliona Cleary BL would be attending the Medical Board with Daniel Kelly to make certain representations and to seek an adjournment. On the 15th November, Daniel Kelly and his legal advisers entered the building and were directed into an office. The Medical Board was comprised of Dr. Ahmad and Dr. Shah and they applied for a postponement of the hearing. The doctors were informed that the medical evidence which was before the board on the 30th August 2017 had not changed and that Mr. Kelly was awaiting lumbar surgery. The Board notified the solicitors that the Defence Forces Regulations did not entitle them to make representations on behalf of their client and this provision was set out in the certificate by the Commanding Officer. The legal advisers felt they had to leave

the premises in circumstances where they felt that they were going to be removed if they did not leave.

13. The Board then proceeded to convene the hearing and the applicant repeated the request for a postponement of the hearing and the Board refused to listen to him and made no reply to the request. Dr. Shah contacted the applicant's consultant and spoke to his secretary, and was informed by the secretary that the applicant should be able to obtain an appointment for surgery before Christmas. He was then examined by Dr. Shah. The Medical Board then sought all medical records from the applicant's non-military treating doctors. Upon an undertaking to do so, the Board was adjourned until the 10th January 2018, at which point a determination would be reached regarding the applicant's classification as outlined earlier in para. 6.

14. The applicant's solicitor then wrote indicating that even if the applicant was fortunate enough to have surgery to before Christmas, it was highly unlikely that the success of the surgery would be known before the 10th January 2018 and they requested the respondent to postpone the convening of the Medical Board until such time as the prognosis is available for their client. They pointed out that their client was a victim of the waiting lists in the public health system and has been desperately waiting for this surgery but that this was not a matter within his control. On the 18th December 2017, counsel on behalf of the applicant applied ex parte, for leave to apply for judicial review. Noonan J., having read the statement grounding the application for leave to apply for judicial review, and the affidavit of the applicant, ordered that the application be made on notice to the respondent and directed that the applicant had liberty to issue a notice motion. That was issued and, on the 21st December 2017, the order of Noonan J. noted that counsel on behalf of the respondent indicated that she was giving an undertaking that there would be no hearing of the Medical Board until the 27th February. It was clear that the respondent was prepared to contest robustly the application for judicial review.

15. Mr. Kelly in an affidavit sworn on the 16th March 2017 stated that the lumbar operation was carried out on the 13th February 2018.

16. The proceedings are now moot.

Jurisprudence
17. The normal rule is that costs follow the event, in accordance with O. 99, r. 4 of the Rules of the Superior Courts. In this matter, there was no determination of the substantive case made by the applicant because the judicial review proceedings initiated by them were rendered moot, following his lumbar surgery in early 2018. The applicant now seeks costs, but cannot claim to have won the substantive action or "event". The normal rule cannot apply, where the merits of the case can no longer be assessed.

18. The jurisprudence for application for costs in relation to a judicial review matter that is moot is set out in the decision of the Supreme Court in *Cunningham v. The President of the Circuit Court and the Director of Public Prosecutions* [2012] 3 IR 222. In the headnotes it was noted that: -

> "1, that a court should, in the absence of countervailing factors, ordinarily lean in favour of making no order as to costs in cases which had become moot as a result of a factor or an occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings had become moot."

19. Clarke J. went on to note at para. 38 that it was for the party seeking to have the proceedings treated "as having become moot by reason of external factors" to adduce sufficient evidence as to allow the court "to determine the extent and materiality of such factors and whether they arose…".

20. While in Cunningham, there was "a virtual absence of evidence" as to why the DPP reached the decision to end the criminal proceedings, that is not the case here. It is clear that the applicant was waiting for some time for treatment as a public patient and that he had no clear date of when he would undergo surgery, prior to initiating legal proceedings. The timing of this surgery was a matter for the HSE and it was not in the power of either parties to determine.

21. It is clear that the surgery in February 2018 constituted a factor or an occurrence, which rendered the application for judicial review moot. The application for costs then turns on the question of whether there are any countervailing factors that will lead this Court to depart from the ordinary position not to grant costs in such circumstances.

22. In this case, the respondent appeared to take the following approach: -

> (i) The Medical Board refused to give any undertakings as to the treatment and operation of the applicant, and at some stage in the course of the proceedings appeared to suggest that he was a private patient when in fact he was a public patient;
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> (ii) In that context, they say they had no visibility on the private treatment administered or recommended, or on the full diagnosis or prognosis of the applicant;
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> (iii) Despite requesting medical records repeatedly at the Medical Board and despite receiving undertakings from the applicant to provide such records, the respondent submits that they did not receive these records.
>
> (iv) The respondent also seems to have thought it inappropriate for the counsel and solicitor on behalf of the applicant to make an application for an adjournment of the Board in circumstances where he had not undergone the operation.

23. The applicant disputed by way of affidavit the assertion that he was a private patient for the purpose of receiving treatment for his lumbar injury, noting that attendance with Mr. John Quinlan, Consultant Orthopaedic Surgeon, was at most an attempt to expedite treatment as a public patient.

24. The applicant swears by way of affidavit that the convening order for the Medical Board specifically provided that the Board would be convened to determine whether or not he was fit for further service in the Defence Forces.

25. Considering the gravity of such a determination on the applicant's employment, the applicant argued that a medical assessment should not be carried out until he received lumbar surgery and a prognosis was available. The applicant's legal representatives sought to make representations in this regard in November 2017 and were refused.

26. Following the final adjournment of the Medical Board to January 2018, at which point a determination was to be made, and absent any guarantees that he would receive his surgery before Christmas, the applicant initiated judicial review proceedings.

27. While these proceedings became moot due to an external factor outside the control of either party, I am satisfied that there are sufficient countervailing factors favouring the applicant.

28. The Court will make an order granting the applicant the costs of his judicial review proceedings.