



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 44

Record Number: 2016/472

**Peart J.
Whelan J.
McGovern J.**

BETWEEN:

M.C.

APPLICANT/APELLANT

- AND -

CLINICAL DIRECTOR, CENTRAL MENTAL HOSPITAL

RESPONDENT

- AND -

MENTAL HEALTH (CRIMINAL LAW) REVIEW BOARD

NOTICE PARTY

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 7TH DAY OF MARCH 2019

1. Following the delivery of this Court's judgment on the 18th January 2019, two issues remain for determination. Firstly, in the respondent's notice filed in this Court, the CMH cross-appealed that part of the order of the trial judge that ordered that the CMH pay 50% of the costs of the appellant in the High Court, notwithstanding that the proceedings had become moot. Secondly, the costs of the unsuccessful appeal itself. It is agreed that the question of the costs of the appeal itself should await the outcome of the respondent's cross-appeal against the costs order made in the High Court.

The cross-appeal

2. The trial judge made an order in favour of the appellant in respect of 50% of her High Court costs notwithstanding that he considered the proceedings to be moot following her absolute discharge from the CMH.

3. The trial judge's reasons for making such an order are set forth at para. 18 of his costs judgment dated 25th July 2016 ([2016] IEHC 467) as follows:-

"18. Whilst it is clear in this case that this was an application seeking to provide for the private interests of the applicant, I am also satisfied that the proceedings in this case have raised public law issues which are of great importance. This Court also distinguishes the Supreme Court decision of *The Child and Family Agency v. O.A* [2015] IESC 52 from the present case on its facts, as that case dealt with District and Circuit Court issues, which had been a cause of concern for some years. In those circumstances I am exercising my discretion on the basis of these factors to require the respondents to pay 50% of the applicant's costs of and incidental to the proceedings."

4. Immediately prior to so stating, the trial judge, at para. 17 referred to a passage from Delany & McGrath: *Civil Proceedings in the Superior Courts*, 2nd Ed. (Round Hall, 2005) in relation to certain categories of case considered to be exceptional cases warranting a departure from the normal rule in relation to costs, namely that costs follow the event. In that regard he referred to what the authors stated in relation to "test cases" and "public interest challenges".

5. The respondents submit that the present case cannot be properly regarded as a test case, particularly in circumstances where there was no full hearing because the proceedings had become moot. Also, it is submitted that it should not be regarded as a test case, because there are no cases waiting to be heard in which the issue that was sought to be determined would be relevant, and therefore that it was the appellant alone who stood to benefit. In such circumstances it was private interest litigation, and not a test case on a public law issue of general importance.

6. The respondents submit also that the present case cannot be properly considered to be a public law challenge, and is unlike a number of cases referred to by the authors, Delany & McGrath, as coming within the meaning of a "public interest challenge", such as cases where the applicants have no private interest in the outcome of the case, or where a matter of public law of general public importance or some significant constitutional issue is raised. Cases referred to in this regard are *McEvoy v. Meath County Council* [2003] 1 IR 208, *Jordan v. Minister for Children and Youth Affairs* [2013] IEHC 625, and *Dunne v. Minister for the Environment, Heritage and Local Government* [2006] IESC 775.

7. It is submitted that the trial judge fell into error in awarding 50% of the costs in the High Court because, while acknowledging that the High Court enjoys a wide discretion in relation to an award of costs, there was no proper basis in the present case for exercising that discretion by awarding the appellant 50% of the costs in the High Court in circumstances where the proceedings had become moot by reason of an external event outside the control of the CMH, and where, therefore, there was no determination of the issues raised by the appellant.

8. In response the appellant emphasises that what gave rise to her proceedings was a dispute or disagreement between two public entities as to the meaning of s. 13A of the Act of 2006 by which she was personally affected, and that in the circumstances it was left to her to attempt to seek the necessary clarification as to the meaning of the section in order to alleviate her situation.

9. The appellant also refers to the fact that while this Court was satisfied that the substantive issue as to the interpretation of the

section was found to be moot, the Court went on to recognise that a potential claim for breach of constitutional rights had occurred, albeit that it concluded also that even if that claim was successful, any damages that the claim would attract would be nominal at best.

10. It is submitted that the trial judge was entitled on the facts before him to consider that the appellant had raised issues that were novel and of importance in relation to statutory interpretation, and the interplay between the decision-making power of the Review Board and the Clinical Director of the CMH, and that it was therefore within a reasonable exercise of his undoubted discretion as to costs to award the appellant 50% of her costs in the High Court. In that regard counsel has referred to this Court's description in its judgment of the situation that arose between the Board and the Clinical Director as "an impasse".

11. As for the case law to which reference was made by the respondent, it is submitted that it is clear from the cases referred to that there is no closed category of cases in which the "normal rule" that costs follow the event may be departed from, and that even if the Court is satisfied that this does not fit neatly into what might be considered to be a test case or a case brought in the public interest, it is nevertheless a case where the trial judge was acting within the margin of appreciation to be permitted to him in the exercise of his discretion.

Conclusion

12. The question of costs is an issue in respect of which the trial judge enjoys a wide discretion, particularly where that costs issue arises after the hearing of the case has concluded, thereby putting the trial judge in the unique and best position to assess how his/her discretion should be exercised in relation to costs. That unique position enables the trial judge to take account of any particular circumstances that are relevant, such as, but not limited to, the number of issues won or lost by each party, and the degree to which certain of the issues that were lost lengthened the duration of the hearing (see e.g. Clarke J. in *Veolia Water UK Plc v. Fingal County Council* [2006] IEHC 240), the nature of the case itself, such as where it is a test case, or is one in which a matter of general public importance was raised in the public interest as opposed to in the personal interest of the plaintiff.

13. In the present case it cannot be said correctly that the case was a test case in the sense in which that phrase must be understood. It is a case in which the appellant was affected by an unfortunate situation that arose between the Clinical Director and the Review Board, but it cannot be said that any other person, let alone a great number, was affected and would benefit from any clarification which the Court may have provided had the matter been fully determined.

14. Neither in my view is the case one which can properly be said to raise an issue of general public importance. While the proper interpretation of s. 13A of the Act was an issue in the proceedings, that fact alone does not make the issue one of general public importance. Many cases are brought where the Court is called upon to clarify the meaning to be attributed to a particular statutory provision. But that alone does not mean that the question is one of general public importance.

15. Neither in my view can it be properly said that the appellant was acting in the public interest. She brought the proceedings so that she on an individual basis could address a difficulty which she felt affected her adversely.

16. While I can readily appreciate the sympathy which the trial judge will have felt towards the appellant in this case, who felt it necessary to bring these proceedings in order to alleviate her position, as she saw it at the time, that alone is not a sufficient basis to award her 50% of her costs where the proceedings were moot by the time they came to be determined, and could have been withdrawn, and which were ultimately determined against her. The discretion which the trial judge enjoys must be exercised in accordance with established principle.

17. In my view the order made cannot be said to be in accordance with established principles, and I would vacate the order made. In normal circumstances, where the proceedings were determined against the appellant, an order for costs against her would follow. But in this case it has been indicated by the respondent that it would be content in all the circumstances that no order would be made against the appellant in relation to the costs in the High Court. I would therefore make that order.

18. The Court should now proceed to hear the parties in relation to the costs of this appeal.