

## THE HIGH COURT

Record No.: 2017/8598 JR

BETWEEN:

BERNIE McDONAGH

APPLICANT

-AND-

LEGAL AID BOARD AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

## JUDGMENT of Ms. Justice Tara Burns delivered on 28th September, 2018

1. The Applicant principally seeks an Order of *certiorari* quashing a decision of the First Respondent made on 5th September 2017 which declined the Applicant's claim for payment of the Applicant's legal fees under the Legal Aid Custody Issues Scheme (hereinafter referred to "as the Scheme") in a separate set of Judicial Review proceedings entitled "The High Court, Record No.: 2014/00664JR, Between Bernie McDonagh v. The Courts Service, Ireland and the Attorney General" (hereinafter referred to as "the 2014 Judicial Review Proceedings").

*Legal Aid Custody Issues Scheme*

2. The Legal Aid – Custody Issues Scheme Provisions and Guidance Document, sets out the scope of the Scheme at s. 4 thereof which states:-

*"The Legal Aid – Custody Issues Scheme is an administrative, non-statutory arrangement whereby payments are made from the vote of the Department of Justice and Equality in respect of certain legal costs in the types of litigation set out below, in which, for the most part, the State is a party (although the State need not be a party to proceedings which are eligible for the Scheme)."*

*The Scheme applies to the following forms of litigation (which are not covered by Civil or Criminal Legal Aid):*

*(i) Habeas Corpus Applications.*

*(ii) Supreme Court Bail Motions.*

*(iii) Such Judicial Reviews as consist of or include Certiorari, Mandamus or Prohibition and concerning criminal matters or matters where the liberty of the applicant is at issue. (emphasis added)*

*(iv) Applications under section 50 of the Extradition Act 1965, Extradition Applications and European Arrest Warrant Applications (including Bail Applications directly related to these cases).*

*(v) High Court Bail motions related to criminal matters."*

Section 9 of the Scheme sets out the requirement that an Applicant must obtain a recommendation from the court that the Scheme be applied to an Applicant. It also states that *"The Court must be satisfied that the case falls within the scope of the Scheme as set out in Section 4."*

*Background to the 2014 Judicial Review Proceedings*

3. The Applicant had been charged before the District Court with an offence of sexual assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990, as amended by s. 37 of the Sex Offenders Act 2001 (hereinafter referred to as "the Act of 2001").

4. The offence occurred on 14th July 2011. The Applicant was 16 years old at the time of the commission of the offence.

5. On 2nd December 2013, the Applicant was convicted of the offence whereupon the matter was adjourned from time to time for sentence.

6. On 11th August 2014, a Certificate pursuant to s. 14 of the Act of 2001 issued in respect of the Applicant, thereby subjecting him to the reporting requirements of the Act of 2001.

7. Arising from the issuance of the aforementioned Certificate, the 2014 Judicial Review Proceedings were instituted. The reliefs sought in the 2014 Judicial Review Proceedings principally related to the said Certificate, however an issue as to whether, being a minor, the Applicant's right to an expeditious trial had been breached, was also raised. A stay had also been sought on the further prosecution of the criminal proceedings before the District Court. While issues of this nature were raised, it is clear that the s. 14 Certificate was the mainstay of those proceedings.

8. In accordance with s. 9 of the Scheme, at the commencement of the 2014 Judicial Review Proceedings, the court was informed that the Applicant would be seeking a recommendation under the Scheme for appropriate legal representation.

9. On 17th November 2014, a District Court Order was drawn up and perfected which confirmed that the Applicant had been convicted of the offence charged on 2nd December 2013. This Order did not become known to the Applicant's solicitor until 13th May 2015 when a copy of that Order was brought to his attention in a letter from the solicitor acting on behalf of the Respondents in the 2014 Judicial Review Proceedings. The Applicant was invited to withdraw the 2014 Judicial Review Proceedings in light of the District Court Order. The letter added:-

*"In those circumstances, we would not object to your application for your costs under the Custody Issues Scheme."*

*If you decline to accept this proposal before the call-over tomorrow we will be obliged to seek an adjournment of the hearing so that we can file an affidavit inter alia to exhibit the said order and we will rely on this letter to seek full costs against your client including costs already incurred. We will also, in that event, object to any payment under the Custody Issues Scheme being made in respect of matters arising after today's date by reason of the foregoing."*

Apparently, this letter overstated the State's position in relation to any application by the Applicant in relation to the Scheme. In a later email, this was corrected to reflect that the State would be adopting a neutral stance on the issue. This email has not been exhibited before me.

10. On foot of this invitation, the Applicant decided to withdraw the 2014 Judicial Review Proceedings. The proceedings were struck out with the High Court granting a recommendation under the Scheme that the costs of the Applicant including solicitor and two counsel be paid for by the State, in accordance with s. 9 of the Scheme.

11. On 22nd July 2015, the District Court concluded the proceedings before it by considering the sentence to be imposed. Matters were finalised in a manner which resulted in the conviction which had been recorded against the Applicant being withdrawn. Arising from this, the Applicant no longer was subject to the reporting requirements of the Act of 2001.

12. On 17th February 2016, the Applicant made a claim to the First Respondent for payment of legal fees in the 2014 Judicial Review Proceedings under the Scheme. This was declined by the First Respondent. Following a request by the Applicant's solicitor to review this decision, the First Respondent again determined to decline the Applicant's claim for payment of legal fees for reasons set out in a letter dated 5th September 2017. The letter stated *inter alia*:-

*"It is clear from [the Scheme's] title, from the overall provision of its guidance document and in particular from categories of litigation identified in section 4 above, that the [Scheme] is concerned with "custody" issues and the provision of legal aid to assist an accused person who needs to take proceedings to protect their rights during a criminal trial process. It is in that context that Section 4(iii) must be interpreted....*

*With regard to the Judicial Review proceedings initiated in respect of Bernie McDonough on the 10th November 2014 and the subject of your claim for payment, those proceedings sought an order of certiorari with respect to the Certificate issued by the Court in accordance with its obligations to do so under section 14 of the Sex Offenders Act 2001. These proceedings had no bearing on the "liberty" of the applicant. Bernie McDonough was not in custody at that stage (nor, I understand, any later stage) and, indeed, the issuing of the required Certificate by the Courts Service could not have had any impact on his liberty. I understand that in September 2014 and in advance of the Judicial Review proceedings being commenced that the Courts Service had confirmed to you the mandatory obligation to issue the Certificate and the fact that Bernie McDonough had been convicted.*

*As outlined above, the issue of a Certificate pursuant to section 14 of the Sex Offenders Act is an automatic consequence of a conviction under that Act and it is not immediately nor directly related to the defence of the accused person or to issues pertaining to the protection of their rights. The trial and conviction of Mr McDonough were completed on the 2nd December 2013. The Judicial Review proceedings were commenced almost a year later. The Judicial Review proceedings therefore do not pertain to a "criminal matter" which would come within the scope of the Scheme."*

13. The Applicant claims that the First Respondent's decision in this regard is *ultra vires* the Scheme and/or *ultra vires* its powers under the Scheme in that it has erred in law and/or has taken irrelevant considerations into account.

*Sex Offenders Act 2001*

14. Pursuant to section 3 of the Act of 2001, a sexual assault offence is a sexual offence for the purposes of the Act. Section 7 of the Act provides that a person is subject to the requirements of the Act if he is convicted of a sexual offence.

15. Section 12 of the Act of 2001 makes it an offence to fail to comply with the reporting requirements imposed by the Act. It specifies:-

*"(1) A person who –*

*(a) Fails without reasonable excuse, to comply with subsection (1), (2), (3) or (4) of section 10, or*

*(b) Notifies to the Garda Síochána, in purported compliance with that subsection (1),(2), (3) or (4), any information which he knows to be false or misleading in any respect*

*shall be guilty of an offence".*

*(3) A person guilty of an offence under this section shall be liable, on summary conviction, to a fine not exceeding £1,500 or imprisonment for a term not exceeding 12 months or both."*

16. Section 14 of the Act of 2001 provides *inter alia*:-

*"(1) If the conviction...of a person for an offence gives rise to his becoming subject to the requirements of this Part, the court before which he is convicted of the offence shall forthwith, after the conviction, issue to each of the persons referred to in subsection (5) a certificate stating –*

*(a) That the person has been convicted of the offence,*

*(b) The sentence, if any, imposed on the person in respect of the offence, and*

*(c) That the person has become subject to the requirements of this Part.*

(2) If a sentence is imposed on a person in respect of the offence referred to in subsection (1) after a certificate relating to that offence has been issued under that subsection, the court which imposed the sentence shall forthwith, after the imposition of the sentence, issue to each of the persons referred to in subsection (5) a certificate stating the sentence that has been imposed on the person.

(3) If –

(a) the conviction referred to in subsection (1) is quashed on appeal or otherwise, the court which quashes the conviction or varies the sentence shall forthwith, after the quashing of the conviction... issue to each of the persons referred to in subsection (5) a certificate stating that the conviction has been quashed.” (emphasis added)

What the scheme covers?

17. It is important to state, that the rights or wrongs of the 2014 Judicial Review Proceedings are not at issue in the current proceedings. Neither should they have been a consideration to the First Respondent in considering the Applicant’s application. Either side to the 2014 Judicial Review Proceedings could have litigated the matter and sought an appropriate cost order, if successful. Or, the First Respondent could have objected to the Court making a recommendation regarding the applicability of the Scheme rather than indicating to the Applicant and the Court that it was taking a neutral stance.

18. A literal reading of s. 4(iii) of the Scheme is to the effect that the Scheme applies to two categories of Judicial Review: Judicial Reviews concerning criminal matters which include a relief sought of *certiorari*, *mandamus* or prohibition and Judicial Reviews concerning matters where the liberty of the Applicant is at stake which include a relief sought of *certiorari*, *mandamus* or prohibition.

19. The First Respondent disagrees with this interpretation pointing to the title of the Scheme and argues that the Scheme must be interpreted in accordance with the title and therefore the Scheme can only apply to cases where the liberty of the Applicant is at stake. The First Respondent points to the origins of the Scheme, namely the seminal case of *Application of Woods* [1970] IR 154 in support of this proposition.

20. *Application of Woods* involved a Habeas Corpus application where the prisoner sought that a stranger make representations on his behalf. Counsel for the Attorney General, in the course of the case, indicated that the Attorney General would defray the legal costs incurred on such an application, if a prisoner was unable for personal reasons to procure the services of solicitor and counsel, should the court so order. The court determined, on the facts of the case, that this was not such a case as the complaints raised on the Applicant’s behalf were not well founded with one exception, but such exception was irrelevant to the legality of the prisoner’s detention, as the prisoner was already serving a lawful sentence. Accordingly, the Supreme Court declined to require the Attorney General to defray the prisoner’s legal costs as the well-founded argument had no significance to his custody.

21. While the court in the *Woods* case did not provide legal aid to the prisoner in a situation where his liberty was not at issue that does not mean that its ratio continues to apply, without extension, to a Legal Aid Scheme which came into existence over 40 years later. Indeed, the Attorney General’s Scheme, the precursor to the Scheme the subject matter of these proceedings, was revised on a number of occasions including 1991, 1992, 1998, 2000 and 2005. For instance, the scope of the scheme published in 1992 was stated to be:-

*“The Scheme applies to the following forms of litigation (which are not covered by Civil or Criminal Legal Aid): (i) Habeas corpus applications; (ii) Bail motions; (iii) Such Judicial Review as consist of or include Certiorari, Mandamus or Prohibition”*

It is therefore clear that the original scheme has been extended over a period of time since its inception.

22. In relation to the current Scheme, while the title of the Scheme refers to “*custody issues*”, the plain and ordinary meaning of s. 4 of the Scheme is that Judicial Reviews concerning criminal matters which include a relief sought of *certiorari*, *mandamus* or prohibition and Judicial Reviews concerning matters where the liberty of the Applicant is at stake which include a relief sought of *certiorari*, *mandamus* or prohibition, are covered by the Scheme. That meaning is absolutely clear.

23. If this is not what was meant by the section, then I fail to see how such an obvious error was not mended since it first appeared in the former Attorney General’s Scheme and its continuation into the Scheme the subject matter of these proceedings. Indeed, there is no evidence before the Court that this is an error which was not noted prior to these proceedings. To interpret the section in any other manner would do violence to the words of the section. I do not see that the reference to Custody Issues in the title overrides the very clear and unambiguous words of the section.

24. Accordingly, I am of the view that the section should be interpreted as it reads, namely in a disjunctive manner and that Judicial Review cases concerning criminal matters which include a relief sought of *certiorari*, *mandamus* or prohibition and Judicial Reviews cases concerning matters where the liberty of the Applicant is at stake which include a relief sought of *certiorari*, *mandamus* or prohibition are covered by the Scheme.

25. However, even if I am incorrect in that view, I agree with the Applicant’s contention that he meets both of the conditions set out in s. 4 of the Scheme in any event.

26. Clearly, the 2014 Judicial Review Proceedings concerned a criminal matter arising from the certification of the Applicant as a Sex Offender of foot of a conviction for a sexual assault. Further, the criminal proceedings had not been finalised when the 2014 Judicial Review Proceedings were launched, with the issue of sentence still to be determined. Most significantly however is the fact the finalisation of the sentence in the District Court resulted in the conviction being withdrawn, thereby resulting in the Sex Offenders Certificate being quashed pursuant to s.14(3)(a) of the Act of 2001. Accordingly, the First Respondent’s argument that the Sex Offenders certification pursuant to s. 14 is not a criminal matter is wholly without merit: the certificate finds its origin and continued existence in a criminal conviction.

27. In relation to the question of whether the certification pursuant to s. 14 of the Act of 2001 put the Applicant’s liberty at stake: breach of the reporting requirements arising from a s. 14 certification is a criminal offence attracting a penalty of 12 months imprisonment pursuant to s. 12(3) of the Act of 2001. A Judicial Review which concerned itself with the legality of imposing reporting requirements on an individual, the breach of which is a criminal offence, very much raises the issue of the Applicant’s liberty being put at stake. Accordingly, I do not find merit in the First Respondent’s argument that the 2014 Judicial Review Proceedings did not raise

issues which related to the Applicant's liberty being put at stake.

28. I am cognisant of the fact that it is one of the functions of the First Respondent to administer this Scheme and it is not for the Courts to usurp this function. As stated by White J in *MKL v. Minister for Justice and Equality* (Unreported, High Court, 1st June, 1997) when considering the ex gratia scheme set up in relation to the Magdalene Laundries at paragraph 26 of the judgment – "*it would only be in exceptional circumstances that the court would interfere with a decision on eligibility or an award.*". However, I am of the view that these are exceptional circumstances as the First Respondent has erred in its determination of the clear meaning of s. 4 of the Scheme and its application to the Applicant's claim for legal fees in the 2014 Judicial Proceedings.

29. Accordingly, for the reasons set out above, I am of the view that the decision of the First Respondent made on 5th September 2017 to decline the Applicant's claim for payment of his legal fees in the 2014 Judicial Review Proceedings is *ultra vires* the provisions of the Scheme and is *ultra vires* the powers of the Respondent under the provisions of the Scheme and therefore is null and void and of no effect.

30. I will therefore grant an Order of *certiorari* quashing the decision of the First Respondent made on 5th September 2017 which declined the Applicant's claim for payment of the Applicant's legal fees in the 2014 Judicial Review Proceedings.