Neutral Citation: [2016] IEHC 350

THE HIGH COURT

[2009 No. 1173 JR]

BETWEEN

FAISOL OLUWANIFEMI SULAIMON (AN INFANT, SUING BY HIS FATHER AND NEXT FRIEND FATAI A. ATIMLA SULAIMON)
APPLICANT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 17th day of June, 2016

1. By notice of motion dated 17th June, 2014, the applicant seeks an order reviewing the taxation of costs by the Taxing Master of the High Court, dated 29th May, 2014, pursuant to Order 99 Rule 38 (3) of the Rules of the Superior Courts 1986, and for such further or other order as the Court shall deem fit, and for an order providing for the costs of this application.

Background
2. The relevant background to this matter is fully set out in the judgments of the High Court (Ryan J. (as he then was) in *Sulaimon (a minor) v. Minister for Justice, Equality & Law Reform* [2010] IEHC 507) and the Supreme Court (O' Donnell and Hardiman JJ.) in *Sulaimon (a minor) v. Minister for Justice, Equality & Law Reform* [2012] IESC 63).

3. The applicant is a minor and was born in Ireland on 24th August, 2008, to a Nigerian couple. Irish citizenship was claimed on his behalf pursuant to s. 6A of the Irish Nationality and Citizenship Act, 1956. However, the respondent refused to issue a Certificate of Irish Nationality. The respondent communicated this decision to the applicant's father by letter dated 5th October, 2009. The respondent determined that the applicant's father was not lawfully resident in Ireland for the required period of three years, during the four years preceding the child's birth. The respondent found that the applicant's father was lawfully resident for a period of 1092 days and thereby fell three days short of the minimum requisite time period of 1095 days.

4. Judicial review proceedings challenging the respondent's decision refusing to issue a Certificate of Nationality were instituted in November 2009 and leave was granted. Pleadings were exchanged between the parties and the matter was heard on 28th April, 2010. In a decision dated 9th July, 2010, Ryan J. held in favour of the applicant. The decision of the respondent refusing to issue a Certificate of Nationality was quashed. The respondent appealed to the Supreme Court. In a decision dated 21st December, 2012, the Supreme Court dismissed the respondent's appeal and the Orders of the High Court were upheld. The respondent was ordered to pay the applicant the costs of the appeal when ascertained and taxed.

5. A Bill of Costs was prepared by the applicant's legal costs accountants and came before the Taxing Master on 19th July, 2013. The Taxing Master heard lengthy submissions from both parties before reviewing the solicitors' files. The Taxing Master delivered a written ruling on 26th September, 2013, wherein he set out his analysis of the proposed costs and the reasoning behind his determination. The Taxing Master reduced the fees claimed by both the applicant's solicitor, and counsel, which are set out below. The applicant made objections to these allowances on the 18th October, 2013 pursuant to Order 99 Rule 38 of the Rules of the Superior Courts. Both parties filed extensive written submissions prior to the hearing of the objections. The Taxing Master made his final ruling on 29th May, 2014, dismissing the applicant's objections in their entirety.

6. The following matters are under review in the current proceedings:

(i) Item number 94: Senior Counsel's High Court Brief fee – claimed at €10,000.00 but reduced on taxation to €7,500.00.

(ii) Item number 97: Junior Counsel's High Court Brief fee – claimed at €6,500.00 but reduced on taxation to €5,000.00.

(iii) Item number 155: Senior Counsel's Supreme Court Brief fee – claimed at €15,000.00 but reduced on taxation to €7,500.00.

(iv) Item number 158: Junior Counsel's Supreme Court Brief fee – claimed at €10,000.00 but reduced on taxation to €5,000.00

(v) Item number 168: This item relates to the Solicitor's General Instruction fee claimed at €107,500.00 and allowed on taxation in the sum of €23,600.00.

The Legal Framework

Jurisdiction of the High Court on a Review of Taxation
7. Order 99, r. 38 (3) of the Rules of the Superior Courts creates the mechanism whereby a party may apply to the High Court for a review of taxation:

> "Any party who is dissatisfied with the decision of the Taxing Master as to any items which have been objected to as aforesaid or with the amount thereof, may within twenty-one days from the date of the determination of the hearing of the objections or such other time as the Court or the Taxing Master may allow, apply to the court for an order to review the taxation as to the same items and the Court may thereupon make such order as may seem just…".

8. Section 27 (3) of the Courts and Court Officers Act, 1995 sets out the High Court's jurisdiction to review a decision of the Taxing Master as follows:

> "The High Court may review a decision of a Taxing Master of the High Court …. made in the exercise of his or her powers under this section, to allow or disallow any costs, charges, fees or expenses provided only that the High Court is satisfied that the Taxing Master,… has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master…. is unjust."

9. Section 27 (3) limits the Court's remit to intervene to circumstances where the Court is satisfied that the Taxing Master has erred as to the amount of the allowance or disallowance only to the extent that the decision of the Taxing Master is unjust: the Court must be satisfied that there was an error which results in an injustice (see *Bloomer v. Incorporated Law Society of Ireland* [2000] 1 I.R. 383; *Superquinn Ltd. v. Bray UDC (No. 2)* [2001] 1 I.R. 459; *Lowe Taverns (Tallaght) Ltd. v. South Dublin County Council* [2006] IEHC 383; *Revenue Commissioners v. Wen-Plast (Research and Development) Limited* [2009] IEHC 453).

10. In *Quinn v South Eastern Health Board* [2005] IEHC 399, Peart J set out the circumstances in which the High Court will be permitted to intervene in the Taxing Master's decision. If the applicant establishes that the Taxing Master has erred as to the amount of the allowance or disallowance and that the error is such as to be clearly and manifestly unjust the court may set it aside.

11. What constitutes an injustice? In *Superquinn*, Kearns J. (as he then was) suggested that it might be possible to delineate a mathematical touchstone against which to measure any impugned award and stated at p. 477:

> "When does an error as to amount become "unjust"? It seems to me that, in exercising its powers of review under Section 27, the High Court should adopt a similar role and standard to that traditionally and habitually taken by the Supreme Court in reviewing awards of damages, that is to say that it should not intervene to alter a finding of amount made by the Taxing Master unless an error of the order of 25% or more has been established in relation to an item under challenge."

12. The merit of incorporating such a specific figure into the test for injustice has been queried in a number of subsequent decisions. In *Quinn v. South Eastern Health Board* [2005] IEHC 399, Peart J. expressed the following reservations:

> "I have some hesitations about such a pragmatic formula in the context of a costs item …. It seems to me therefore that the question of what is just or unjust in this regard must be viewed on a case to case basis, since different factors may be at play, rather than by an arbitrary formula such as is entirely appropriate to the question of the justice of a damages award per se."

13. In *Revenue Commissioners v. Wen-Plast (Research and Development) Limited* [2009] IEHC 453, Hedigan J. agreed with Peart J. in rejecting a formulaic approach to assessment and stated as follows (para. 31):

> "Like Peart J., I do not find a mathematical or formulaic method of assessment to be attractive. I would prefer a more flexible approach predicated upon a subjective examination of the circumstances of individual cases. I also think the court should be wary of conflating 'error' and 'injustice'. The act is quite specific in restricting the courts jurisdiction to intervene. Section 27(3) limits such intervention 'provided only that the High Court is satisfied that the Taxing Master.... has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master …. is unjust.' It is clear there must be error and then, as a result thereof, injustice. I accept the dictum of Kearns J. in Superquinn that the court must always retain the power to intervene where failure to do so would result in an injustice. Such an injustice must however be clear, undoubted and manifest."

Legal Principles on Party and Party Taxation

14. Order 99, r. 37 (18) of the Rules of the Superior Courts provides:

> "On every taxation the Taxing Master shall allow all such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for enforcing or defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons or by other unusual expenses."

15. The onus is on the claiming party to demonstrate to the satisfaction of the Taxing Master that costs incurred are proper and reasonable in all the circumstances (see *Dunne v. Fox* [1999] 1 I.R. 283; *Minister for Finance v. Goodman* [1999] 3 I.R. 333; *Bourbon (A Minor) v. Ward & Anor.* [2012] IEHC 30). Costs on a party and party basis are de minimis in nature (see Bourbon). A party seeking its costs is only entitled to the bare essentials required to conduct the litigation.

16. Section 27 (1) of the Courts and Court Officers Act 1995 provides that the Taxing Master

> "…shall have power on such taxation to examine the nature and extent of any work done, or services rendered or provided by counsel (whether senior or junior), or by a solicitor, or by an expert witness appearing in a case or expert engaged by a party, and may tax, assess and determine the value of such work done or service rendered or provided in connection with the measurement, allowance or disallowance of any costs, charges, fees or expenses included in a bill of costs."

Section 27 (2) of the 1995 Act provides that the Taxing Master

> "…shall have power on such taxation to allow in whole or in part, any costs, charges, fees or expenses included in a bill of costs in respect of counsel (whether senior or junior) or in respect of a solicitor or an expert witness appearing in a case, or any expert engaged by a party as the Taxing Master (or County Registrar as the case may be) considers in his or her discretion to be fair and reasonable in the circumstances of the case, and the Taxing Master shall have power in the exercise of that discretion to disallow any such costs, charges, fees or expenses in whole or in part."

17. When the Taxing Master has examined the nature and extent of the work done, he must then exercise his discretion in making appropriate allowances in respect of the items claimed in the bill of costs. He may allow or disallow any items in whole or in part. The provisions of Order 99, r. 37 (22) (ii) Rules of the Superior Courts apply in relation to the assessment of a solicitor's instruction fee:

> "In exercising his discretion in relation to any item, the Taxing Master shall have regard to all relevant circumstances, and in particular to-
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> (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;
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> (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;
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> (c) the number and importance of the documents (however brief) prepared or perused;
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> (d) the place and circumstances in which the business involved is transacted;
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> (e) the importance of the cause or matter to the client;
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> (f) where money or property is involved, its amount or value;
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> (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."

18. The case-law emphasises the importance of calculating the time spent by a solicitor working on a case. It is necessary for the Taxing Master to make a fair assessment of the number of hours devoted to a particular case which can be costed at an appropriate rate. In *C.D –v- Minister for Health & Children*[2008] IEHC 299, Herbert J. stated that the Taxing Master must examine each of the separate items on the Bill of Costs which make up the instruction fee. He should ascertain what work was done by the solicitor with particular reference to the documentation furnished in support and by what level of fee-earner it was done. He should also indicate what amount of time he considered should reasonably have been devoted to that work "employing as much precision as the nature of the work and the information available to him would permit" The learned judge considered that without that analysis the Taxing Master could not validly exercise his discretion in allowing or disallowing any particular item. This approach was subsequently adopted and applied by the High Court in a number of cases including *Cafolla* and *Bourbon* cited below.

19. It is noteworthy in this case that no time sheets or time estimates were submitted in support of the costs claimed. The burden of proof is on the claimant in relation to these items and it is incumbent in my view on a solicitor who makes a very large claim based on generalised submissions that he spent an enormous amount of time on the case including working outside normal office hours to produce some evidence of the time spent and the level of work done. The Taxing Master repeatedly refers to the absence of such evidence from the file produced to him for examination and he was entitled to do so. As noted by Ryan J in *Cafolla* at p.9 some solicitors may not carry such records. He presumed that such solicitors would be few nowadays. However, for whatever reason in this case the solicitor does not seek to rely upon such records or produce them to the Taxing Master or give any other evidence as to time notwithstanding the complaints raised in that regard in the objections made. If no such records are produced "that is a problem for the claimant solicitor because there is a clear obligation under the Rules to have regard to that element". I am however, satisfied that the Taxing Master made it clear that he took the time and labour expended by the solicitor into account by reference to what he could infer in that regard from the papers he examined which demonstrated the work that had been done in the case. If time records were available they might have provided further evidence upon which to conduct this exercise or evidence supportive of the work which the papers showed had been done or vice versa. I am satisfied that the Taxing Master carried out his duties in this regard insofar as the information supplied and available to him permitted and that his consideration of the time element and the inadequacy of the evidence advanced as described at p. 6 of his report dated 29th May, 2014 is reasonable and entirely justified in the circumstances.

20. In *Quinn v. South Eastern Health Board* [2005] IEHC 399, Peart J. held that Order 99, r. 37 (22) (ii) applies only to the consideration of the solicitor's instruction fee, rather than to counsel's brief fees. However, he noted at pp. 14-15:

> "[E]ven though I drew attention earlier to the fact that the criteria set forth in O.99, r.37 (22) (ii) RSC appeared to apply only to the question of the solicitor's instruction fee and not Counsel's fee, those very same criteria, including the nature of the case, its complexity, the difficulty of the issues involved, the time required to prepare the case, including in appropriate cases the time required to research specialist material to determine whether in the first place there is an arguable case at all, and the skill, expertise and specialised knowledge, seem to me to be matters which would have to be borne in mind and had regard to by any Taxing Master bringing his mind to bear upon the question of what is a Brief fee which is fair and reasonable in order to attain justice when exercising his discretion in accordance with the provisions of s. 27 of the 1995 Act."

21. It is incumbent on the Taxing Master to give an analysis of the reasoning which leads him to his decision. The Taxing Master must, therefore, outline the factors which he took into account in arriving at his decision and the weight that he attaches to them when making an allowance (see *Mahony v. KCR Heating Supplies* [2007] 3 I.R. 633; *Cafolla v. Kilkenny & Ors.* [2010] IEHC 24; *C.D. v. Minister for Health & Children & Anor*. [2008] IEHC 299; *Bourbon (A Minor) v. Ward & Anor*. [2012] IEHC 30).

The Taxing Master's Decision

22. The Taxing Master first addressed a preliminary issued raised on the applicant's behalf in his decision of the 26th September, 2013 that the costs attributable to work carried out by his solicitors in the period from 10th February 2009 to 6th October 2009 should be taken into account as between party and party. He rejected this submission holding that the costs of the judicial review could only run from the date on which a final decision had been made by the Minister namely the 5th October, 2009. He distinguished the case from tort or breach of contract cases in which the wrong may have a long and detailed history and it may be necessary to have investigations carried out prior to the institution of proceedings.

23. Initial instructions were received in this case from the applicant's father on the 9th February, 2009. He would later act as his son's next friend. Letters were drafted in the course of an exchange of correspondence in which the applicant's entitlement to Irish Citizenship was asserted. Junior counsel's assistance in drafting some of the correspondence was obtained together with general advices. The refusal to grant the applicant a certificate of nationality was challenged in this correspondence. Ultimately a letter was received from the Principal Officer, Citizenship Division of the Irish National Immigration Service (INIS) dated the 6th October, 2009 stating that evidence of citizenship was required(such as an Irish passport) from the Applicant before a certificate could be issued. Since a passport had been refused in the case it was stated that the provisions of the Irish Nationality and Citizenship Act 1956 (as amended) did not apply. At this stage the advice of senior counsel was obtained. Judicial review proceedings were drafted and leave was sought and granted on the 16th November.

24. The Taxing Master considered that the wrong suffered by the applicant crystallised in the decision made on the 5th October ; until that date the applicant's solicitors were engaged in a review or appeal process, which had it been successful would have rendered the proceedings unnecessary. He noted that it was only subsequent to that date that a section 68 letter was issued to the next friend which refers specifically to the contemplated Judicial Review proceedings and instructions to act in same. He determined that while the solicitors were entitled to remuneration as between solicitor and own client in respect of these matters, they were not entitled to costs for same on a party and party basis on foot of the Order obtained

25. The applicant objected to this aspect of the ruling. This objection was considered by the Taxing Master in his decision of the 29th May, 2014 as follows:

> "…It would be stretching the bounds of reasonableness to hold that Judicial Review proceedings could have been in contemplation of the Applicant's Solicitor, in the context of carrying out work in relation thereto, prior to receipt of the Applicant's final decision….This is not to say that some work would not have been undertaken in considering the correspondence which had passed….prior to receipt of the impugned decision. The point which the Applicant does not accept is that the Solicitor's work in relation to the pre-proceedings correspondence did not relate to Judicial Review proceedings…In fact, I assessed the sum of €4,250.00 to cover taking instructions(which in effect involved perusal of the relevant correspondence and advising the Next Friend) and pursuing the initial ex parte application. I am satisfied that this is a reasonable sum."

26. The Applicant's solicitors sought an instruction fee of €107,500 which the Taxing Master allowed at €23,600. The disparity is very significant. An instruction fee of €92,250 was sought by the solicitors in respect of the High Court costs. In the initial decision of the 26th September, 2013 a total claim of €63,250 was reduced to €15,600.

27. The reduced allowances consisted of a sum of €4,250 for taking instructions and attending at the ex parte stage already referred to above. A sum of €9,000 was allowed for preparation for the hearing and instructing counsel and briefing counsel. This sum also included €1,500 to take account of the "information and novelty elements" of the case. A sum of €1,500 was allowed for attending court on the 9th July 2010. €380 was allowed for attending for taking judgment and €500 for attending court in respect of the respondent's application for a stay.

28. The Taxing Master took the view that the extent of the documentation received by the Applicant's solicitors was not heavy and there was no evidence of extensive work carried out under the discovery heading. There was no evidence of substantial research into legal authorities as claimed. The only legal material cited in the High Court submissions was said to be the relevant statutory provisions. He stated that both the High Court and Supreme Court considered that a net issue arose for determination. Two comparators ranging between €18,000 - €20,000 were taken into account. Two separate sums of €15,000 claimed for preparing for the hearing and briefing counsel, and covering "responsibility and intangible factors" respectively were reduced to €9,000 for preparation for the hearing and brief for counsel and €1,000 for attendance at the hearing on the 9th July.

29. A Supreme Court instruction fee of €29,000 was sought. The Taxing Master determined that the file did not disclose work which could justify a professional fee of "anything even close" to that sum. He found that there was little, if any, involvement by the applicant's solicitor in the formulation of the written submissions. The book of authorities was submitted by the Chief State Solicitor. There was a half day hearing in the Supreme Court. He assessed an appropriate instruction fee at €8,000 finding that the majority of the solicitors' fees and the work underlying them had already been undertaken for the purpose of the hearing in the High Court.

30. Counsels' fees were also reduced by the Taxing Master. Senior Counsel marked a brief fee of €10,000 in respect of the High Court and €15,000 in respect of the Supreme Court hearing. Junior Counsel marked brief fees of €6,500 for the High Court and €10,000 for the Supreme Court. In his ruling of the 26th September, 2013 the Taxing Master considered a letter which had been furnished by Senior Counsel which set out in some detail the basis of the fees marked and the work done. He stated that he took the letter into account and made allowance for "the importance and novelty involved" in the case. He also took into account the current economic climate. A brief fee was allowed for Senior Counsel in the High and Supreme Courts of €7,500, and €5,000 was allowed in respect of Junior Counsel in both courts. In the report of the 29th May, 2014 the Taxing Master did not accept that the case was complex and relied upon Hardiman J.'s statement in his judgment that the statutory provisions at issue were not intrinsically complex or difficult to understand.

31. The Applicant entered a number of objections to this assessment on the grounds that it failed to apply an appropriate uplift for the novel nature of the proceedings and their overall importance for the applicant and others. The case was said to have implications for thousands of others. In particular, the complexity of the case was emphasised and that it was the first case to be taken on the point.

32. In his second ruling on the 29th May 2014, the Taxing Master addressed the issues raised in the objections. He did not consider that the Applicant's solicitor had offered any further information concerning the nature or extent of the work carried out. He noted that the parties were content to rely upon their written submissions on these matters. He was not satisfied that the evidence supported the level of fees claimed and rejected the proposition advanced that the matter required "an extraordinary standard of care" from the solicitors, there being "absolutely no evidence of such on the file". He also accepted that the Respondent's submission that in assessing the instruction fee the applicant relied "primarily on intangible factors to justify the fees claimed" such as the novelty of the case and its importance to his client. He added that he had not received any submissions "concerning how such intangibles affected the work required of the Solicitor and how precisely this should affect the assessment of the instructions fee given that it is clear from the file that the Solicitor relied upon Counsel *ab initio*"

33. The importance of the case to the client was considered but the Taxing Master stated that there was a limit to which that could be translated into the assessment of the Solicitor's professional fees. The limit is governed "to a large extent by the work which can be identified as having been undertaken by the Solicitor in pursuing the case" .In this case the solicitor, not unusually relied heavily on counsel. The solicitor had not undertaken the burden of researching the law, preparing the grounding affidavit, the legal submissions or any of the advocacies in court. In those circumstances the Taxing Master commented that "The only unusual aspect in this case is the extremely high level of instructions fee which has been claimed".

34. The Taxing Master was not satisfied that this was a test case because it "revolved around its own facts". However, he accepted that "both the decisions of the High and Supreme Court were important and had wider implications for the laws applicable to rules of residency and nationality". Importantly, he added that whether any case is to be regarded as a test case is immaterial unless there is some evidence of professional work which necessarily arose for that reason.

Submissions of the Applicant

35. The applicant submitted that the Taxing Master erred on three grounds:

(i) The Taxing Master erred in holding that the above entitled proceedings did not constitute a test case, and in failing to recognise and/or take any or any sufficient account of the difficulty and complexity of the case, or of the consequential responsibility placed on the legal practitioners;

(ii) The Taxing Master failed to provide any or any sufficient basis for the calculation of the allowances made in relation to the instruction fee or the brief fees;

(iii) The Taxing Master was in error in holding that the applicant is not entitled to recover costs for work carried out prior to 6th October, 2009.

(i) Failing to Have Sufficient Regard to the Nature of the Case

36. The applicant submitted that, in determining the appropriate allowances for the instruction fee and the brief fees, the Taxing Master erred in failing to have regard to the nature of the case and, in particular, in holding that it was not a test case, underestimating the complexity of the case, and the experience required to run the case. The applicant relied on the decision of McGovern J. in *Kenny v. Ireland Roc Limited* [2009] IEHC 146 which provided some guidance in relation to what constitutes a test case. McGovern J. cited the transcript of Kelly J.'s decision as follows, (the matter having been referred back to him for a determination as to whether the case was a test case prior to the taxing master's ruling):

> "The question which I was asked to consider was whether the Kenny proceedings were a 'test case'? … [I]t is not a test case in the sense in which that term is used in other jurisdictions, but it is a test case in a rather more loose and less binding way, in that it gave the court an opportunity to have ventilated before it legal questions as to the applicability of this Directive… It was also the first occasion upon which an Irish court was asked to consider questions pertaining to the applicability of the Directives. To that extent, it is a test case also because it was the first case…"

This, McGovern J felt, was sufficient to endorse the Taxing Master's approach to how he applied the instruction fee.

37. The applicant submits that this was a test case as it was the first time the High Court, and subsequently the Supreme Court, had been asked to consider the operation of section 4 of the Irish Nationality and Citizenship Act, 2004 and, that the Court's findings are of significant importance, both for the State and for non- nationals seeking citizenship.

38. The applicant submits that the Taxing Master completely underestimated the complexity and importance of the case, as well as the amount of work done by both counsel and solicitors. The applicant further submits that the Taxing Master made no reference to the judgment of O' Donnell J in the Supreme Court decision in this matter which evidenced the complex nature of the case. Nor did the Taxing Master consider the impact of the respondent's complex and inconsistent arguments, or the introduction of new arguments during the Supreme Court hearing.

39. It is therefore submitted that he did not have sufficient regard to that complexity or the extent to which this was exacerbated by the conduct of the case by the respondents, particularly in the Supreme Court, or the increased workload as a result.

40. The applicant also submits that the Taxing Master underestimated the responsibility the case placed on the applicant's solicitor and counsel and the special experience required to run the case.

41. The applicant submitted that it is clear from Order 99, rule 37 (22) (ii) and from the judgment in *Best v Wellcome Foundation Ltd. (No. 3)* [1996] 3 IR 378 that both responsibility and expertise are factors that should be taken into account separately from the work undertaken.

> "Ultimately, there are only three criteria upon which the fee is determined:
>
> (1) any special expertise of the solicitor;
>
> (2) the amount of work done;
>
> (3) the degree of responsibility borne."

The applicant contended that there is no indication that the Taxing Master did so in this case.

(ii) Failing to Provide Any or Any Sufficient Basis for the Allowances Made

42. The applicant submitted that it is unclear as to how the Taxing Master arrived at the brief fees allowed for Junior and Senior Counsel.

43. It was further submitted that, despite entering into a more detailed analysis in relation to the instruction fee than in relation to the brief fees, the Taxing Master did not provide sufficient reasons for his assessment of the instruction fee and, in particular, made no effort to estimate the time spent on each item in the bill of costs, the responsibility involved and the expertise required (see *C.D. v. Minister for Health & Children & Anor*. [2008] IEHC 299; *Cafolla v. Kilkenny & Ors*. [2010] IEHC 24; *Bourbon v. Ward & Ors.* [2012] IEHC 30). It is said to be unclear from what the figures allowed by the Taxing Master for the various aspects of the instruction fee are derived and it is submitted that the Taxing Master erred in this regard. It is clear that the solicitors did not submit or rely upon a breakdown of the time devoted by the firm to the case and it was left to the Taxing Master without assistance in that regard, despite extensive submissions on behalf of the applicant, to assess the appropriate allowance. I do not consider that there is any merit in this criticism of the Taxing Master in the circumstances of this case

(iii) Work carried out prior to 6th October, 2009

44. The applicant also submitted that there is nothing in the Rules to mandate that, in the context of judicial review, only costs incurred after the decision reviewed should be allowed. While in some judicial reviews, this approach may be appropriate, it is submitted that the Taxing Master erred in holding that costs that predate the decision reviewed could never be recovered as costs of judicial review proceedings.

45. The applicant relied upon the case of *Pecheries Ostendaises (SA) v Merchants Marine Insurance Company* [1928] 1 KB 750 (CA) in which the Court held:

"It appears to me, therefore, that there is power in the Master to allow costs incurred before the action brought, and that if the costs are in respect of materials ultimately proving of use and service in the action, the Master has a discretion to allow these costs".

46. It is submitted that, following the initial refusal by the Passport Office to issue a passport to the applicant, the applicant's next friend consulted solicitors for the first time. The applicants submit that this decision - the refusal to grant a passport to the applicant - had, in essence, the same effect as the final decision of 5th October, 2009. The applicant's solicitors took instructions on 10th February, 2009 and commenced liaising with the Passport Office and the Department of Justice Equality and Law Reform on foot of this initial refusal (made in October, 2008). They submit therefore that these efforts and work undertaken to resolve the issue prior to the initiation of judicial review proceedings should form part of the costs allowed.

47. The applicant therefore submits that the Taxing Master erred in the allowances made in relation to the instruction fee, and the brief fees, and that those errors are unjust in all of the circumstances.

Submissions of the Respondent

Test Case
48. While the respondent accepts that the decision of the Supreme Court was an important one that had wide implications, she rejects the notion that it was a "test case" and thus justified a greatly enhanced instruction fee. The applicant submits that the Taxing Master erred in his finding that there was little evidence to suggest that the solicitor carried out additional research or other work because of the complexity or novelty of the case that would have justified such a fee.

49. The respondent submitted that the Taxing Master's decision was correct and in accordance with the well- established principles applicable to the taxation of costs on a party and party basis. It was submitted that the Taxing Master's analysis of the nature and extent of the work of both the solicitor and Counsel is correct. The Taxing Master has not erred in principle in his methodology or approach to the taxation and the fees allowed are fair and reasonable in the circumstances.

50. The Taxing Master has an obligation to set out both an analysis of the work carried out, and the reasoning which leads to his assessment of the appropriate fees. It is submitted that the Taxing Master has fully complied with these requirements in his assessment of the applicant's bill of costs. It is submitted therefore that the Taxing Master has correctly applied the relevant legal principles applicable to taxation of costs on a party and party basis and that his written decision and report do not indicate any error, much less an error that renders an injustice unto the applicant that would justify the intervention of the High Court.

51. In particular, the respondent argued that the applicant placed excessive reliance upon the perceived complexity and novelty of the case to justify the levels of the fees claimed, rather than focusing on details of actual work done. It was contended, as posited by the Taxing Master in his reports, that the evidence submitted on taxation as to the work done by the applicant's solicitor does not support the level of fees claimed. The respondent relies upon the judgment of Hardiman J, at p. 19 to which I have already referred. Furthermore, it is submitted that the applicant has failed to clearly identify how this complexity affected the work of the solicitor and should affect the assessment of the instruction fee.

Solicitor's instruction fee
52. The respondent submitted that the applicant did not adduce sufficient evidence before the Taxing Master of the nature and extent of the work carried out by the solicitors in this matter that would justify the level of instruction fee claimed. There is no basis for the applicant's claim that the matter required "an extraordinary standard of care". The applicant failed to identify how factors such as the novelty of the case and its importance to the client increased or affected the work required of the solicitor and how precisely this should affect the assessment of the fees claimed. In any event, the respondent contends that it is clear from the Taxing Master's ruling, at pp. 4-5, that he did in fact take these matters into account when assessing the brief fee allowable. It is submitted that the Taxing Master's allowances were reasonable having regard to the nature and extent of the work of the solicitor.

Counsels' fees
53. In relation to the brief fees of the applicant's senior and junior counsel, the respondent submitted that the allowances for each hearing were reasonable in the circumstances having regard to the nature and extent of the work carried out by counsel. The respondent further argued that in making the allowance the Taxing Master was correct in his interpretation and application of s. 27 of the 1995 Act and the relevant case-law governing the taxation of party and party costs. Given the nature and amount of material before the Taxing Master, it was claimed that he was in a position to assess the full nature and extent of the work carried out by counsel.

54. The respondent submitted that the applicant has not demonstrated that the nature and extent of the work carried out by counsel justifies the level of fees claimed on a party and party basis.

55. Taking into consideration the economic climate, as the Taxing Master did, it is submitted that the deductions made were wholly reasonable and in line with the economic downturn at the time in question.

Pre- proceedings work
56. As regards the pre-proceedings work, the respondent argued that the Taxing Master was correct to find that these costs are not recoverable on a party and party basis. The impugned decision occurred on 5th October, 2009, and the costs of the judicial review proceedings under the terms of both the High Court and Supreme Court Orders only run from that date. This was highlighted by the Taxing Master.

57. The nature of judicial review proceedings as a review of the decision-making process means that the costs incurred prior to the making of the impugned decision will generally not be recoverable on a party and party basis. Contrary to the assertions of the applicant that the Taxing Master's finding in this regard is too narrow, and while there is no doubt that the solicitor and counsel carried out work on behalf of the applicant prior to the impugned decision of 5th October, 2009, the respondent submits that in the absence of any specific provision in the Order for costs, they are only entitled to remuneration for this work on a solicitor and own client basis.

58. The respondent submits that the applicant's objections as against the Taxing Master are entirely without merit and should be rejected in their entirety. The fees allowed are eminently reasonable having regard to the nature and extent of the work, its importance and complexity. The applicant has not identified any error on the part of the Taxing Master that has led to a clear injustice and as such the High Court should decline to intervene in the Taxing Master's decision.

The Complexity of the Case: A Test Case?

59. The court has considered the judicial review papers submitted in the course of the case, including the statement of grounds and opposition, the affidavits and exhibits and the Notice of Appeal. They are not very complicated or voluminous. The evidence advanced in support of the application was in large measure agreed. The focus of the parties in the High Court and the Supreme Court was on the relevance and nature of various permissions granted to the applicant's father to remain in the State and the extent to which the periods of residence relevant to him were to be calculated. This required an interpretation of the statutory provisions applicable. I am satisfied that the interpretation of those provisions had consequences that extended far beyond the instant case and were of course of particular and great importance to the future life of the minor on whose behalf this application was brought.

60. The background to the case and the relevant facts are set out comprehensively and succinctly in the judgment of Ryan J. (as he then was) in *Sulaimon (a minor) v Minister for Justice, Equality and Law Reform* [2010] IEHC 507. The applicant's father who was a national of Nigeria arrived in Ireland in 2001. In July 2002 his then wife gave birth to their daughter, an Irish citizen. In March 2005 the father applied for permission to remain in the State under the IBC/05 Scheme. On the 7th July, 2005 a letter issued which was received by the applicant's father on the 11th July, 2005. He was informed that the Minister for Justice, Equality and Law Reform had decided to grant him permission to remain in the State for two years until the 7th July, 2007. The letter made clear that it was not itself evidence of permission to remain in the State and should not be used for any purpose other than to register at his local registration office. Upon registration he would be given a certificate to show that he had been given permission to remain. The father attended for registration on the 22nd July, 2005.

61. In June 2007 the applicant's father applied for a renewal of his permission to remain. The Minister decided to renew his permission for a further three years until the 7th July, 2010 and this permission was communicated by letter dated 23rd July. This was received on the 24th July. The letter also indicated that the permission to remain would only become operative when he had registered at his local registration office.

62. The letter also stated that the Garda National Immigration Bureau (the GNIB) would issue him with a certificate of registration if satisfied that he obeyed the laws of the State, had not been convicted of any offence or been involved in any criminal activity and paid a fee of €100. It would show that he had been given permission to remain in the State. He registered on 14th August, 2007. The applicant was born in Dublin on the 24th August, 2008.

63. In October 2008 his father applied to the Department of Foreign Affairs for a passport on behalf of his son. On the 31st October, this was refused on the basis that the father did not have three years "reckonable residence in Ireland" during the four years preceding the child's birth. He was informed that he could apply to the Department of Justice, Equality and Law Reform for a certificate of nationality which would then enable him to apply for an Irish passport on behalf of his child.

64. The calculation of his reckonable residence was attached to this letter. It found that he had been lawfully resident in the State for 1,092 days, that is 3 days short of three years (1,095 days). The period of residence was calculated by reference to the GNIB stamps on his passport. The period included the period from the 22nd July, 2005 to the 7th July, 2007 (716 days) and the period from the 14th August, 2007 to the 23rd August, 2008 (376 days). The period excluded the days from 7th July, 2005 to 21st July, 2005 inclusive and 8th July, 2007 to 13th August, 2007 inclusive.

65. The Department of Foreign Affairs refused to review this decision holding that the only acceptable proof of lawful residence consisted of immigration stamps on passports or registration cards that are given to persons registered with the GNIB. These were the only documents that could objectively be verified by the department. The letters of the 7th July, 2005 and the 23rd July, 2007 were stated not to constitute evidence of the father's permission to remain and clearly indicated a need to register.

66. On the 18th May, 2009 the applicant applied to the Minister for a certificate of nationality under s. 28 of the Irish Nationality and Citizenship Act 1956 (as amended). This application was refused. It was stated that for certain non-nationals, periods of lawful residence commenced only when a GNIB officer decides to issue a stamp on the basis of checks carried out to ensure that a person is still meeting all the conditions which would allow them to remain. Lawful residence could only be proved by a thorough examination of GNIB stamps. It was emphasised that permission to remain would only become operative when the father was registered. It added that the passport office had been correct to determine that the applicant was not a citizen and in those circumstances s. 28 of the 1956 Act did not apply.

67. By letter dated 28th September, 2009 the applicant requested the Minister to reconsider the matter. It was submitted that the applicant's father was entirely blameless for the Minister's administrative delay in considering the renew application in 2007. It was also stated that there was no statutory basis for the Minister's insistence on the father having immigration stamps on his passport in order for his residence in Ireland to be reckonable.

68. Section 6A of the 1956 Act (as inserted by s. 4 of the Irish Nationality and Citizenship Act 2004) regulates the citizenship entitlements of certain children born in Ireland to foreign national parents. Section 6A(1) provides that no person shall be entitled to citizenship unless one of his parents has been resident in Ireland for a period of not less than three years, or periods the aggregate of which is not less than three years, during the period of four years immediately preceding the birth. The child's parent must have been lawfully resident for at least three of the four years prior to the child's birth.

69. Section 6B(4)(a) provides that a period of residence shall not be reckonable for the purpose of calculating a period of residence under s. 6A if it is in contravention of s. 5(1) of the Immigration Act 2004 which provided that no non-national may be in the State other than in accordance with the terms of any permission given before the passing of the Act or under the Act after it's passing by or on behalf of the Minister.

70. Section 1 of the 2004 Act provided that "permission" must be construed in accordance with section 4(1) which provides that an immigration officer may on behalf of the Minister give to a non-national a document or place on his or her passport or other equivalent document an inscription authorising the non-national to land or be in the State.

71. Ryan J. stated the issue in the following terms:-

> 13. The question for decision in the case is whether the Minister was correct in excluding from the calculation of reckonable residence the periods between the making of the decision to permit the father to remain in the State and the dates when he attended the registration office and registered. If either [of] the two periods is included, the father will have sufficient residence to entitle his child (the applicant) to a certification of nationality.
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> 14. Did either or both of the Minister's letters of the 7th July, 2005, or the 23rd July, 2007, amount to permission to

remain? Or was it the case, as the Minister contends, that his letters merely enabled the father to obtain the necessary permission from an immigration officer at the registration office. If the letters themselves gave permission and were not merely conditions precedent to obtaining permission, then the periods were wrongly excluded."

72. Having reviewed the legislation and the correspondence the learned judge stated his conclusion as follows:-

> "17. In neither letter is it stated that the Minister's consent is predicated on the fulfilment of a condition that the recipient attend at the registration office. The first letter said that it was not itself evidence of permission to remain. In order to obtain such evidence, the father had to get the necessary documentation. Something similar seems to have been intended by the second letter, although the words are different. The Minister had given permission to remain, but it was necessary for the addressee to take an administrative step to get the documentation to evidence the permission. There is of course a distinction between the permission and the document that is evidence of the permission. This is the point that, in my view, the Minister has failed to take into account.
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> 18. The facts are not in dispute and what has to be considered is a fairly abstruse point of interpretation which is unrelated to any issue of practical significance. There is no question but that the applicant's father has actually been living here for more than the required statutory period. There is no doubt that he has been in continuous residence since 7th July, 2005. And it is also clear that his presence in the country has been with the permission of the Minister. So what is the problem? It is said that he has been in the State otherwise than in accordance with a permission that comes within the definition of the Immigration Act 2004. On the respondent's case, even if the Minister gave permission using his official seal, that would still not be sufficient. The argument is that the only permission that conforms to the statutory requirement is a permission given by an immigration officer in the form of a document or an inscription and nobody else, not even the Minister himself, can provide a permission that is in any respect lawful and effective. It should be remembered that the immigration officer can only exercise this function "on behalf of the Minister." If the respondent's interpretation were correct, the principal would be unable to do what his agent was authorised to do on his behalf."

73. The court was satisfied that the applicant's father has been in the State with the permission of the Minister since 7th July, 2005 and that the applicant was entitled to a certificate of nationality.

74. On appeal the same issue arose for determination. The written submissions submitted by both parties reflected this. However, in the course of argument the respondent made somewhat different submissions to support the respondent's decision. These were noted in the judgments of the Supreme Court and the submission is made that these oral submissions created significant difficulties in the course of the case and made the matter more difficult to address. The case was rendered more complex and it is submitted that this should be reflected in the fees which are properly allowable. The shift in argument was described by O'Donnell J. in his judgment as follows:

> "14. Indeed in the High Court, the Minister argued that the Act only contemplated one permission, namely that given in accordance with s. 4 by an immigration officer, and accordingly the Minister's decision was not permission but simply a preliminary step to permission. That claim was repeated in the written submissions to this Court. As the High Court judge observed, this argument leads to the strange conclusion that although the immigration officer was acting on behalf of the Minister, and therefore his agent, he (the agent) could do something (grant permission) which it was asserted the principal could not. However, in oral submissions to this Court, Michael Collins S.C. on behalf of the Minister took a more nuanced line. He conceded that there were two possible sources of permission. Under s. 4 an immigration officer could grant permission on behalf of the Minister. However, the Minister could also grant permission. Nevertheless, he maintained that the Minister had deliberately not exercised that power in this case. He had instead decided that permission should be granted by the immigration officer. On this argument the formal legal, and only, permission in this case occurred (or in the language of the letter of the 23rd July, 2007 "became operative") only when permission was inscribed by the immigration officer on the passport of Mr. Sulaimon.
>
> …
>
> 16. … Counsel maintained that although the Minister had power to grant permission he had not done so here because, it was argued, permission had to be construed in accordance with s. 4 and accordingly, even if not executed by an immigration officer, it had to comply with the other aspects of that section. Therefore a permission granted by the Minister had to be in writing and more importantly given to the non-national involved. Although it was conceded that there was a documentary record of a ministerial decision, no such document has been given to the non-national. Although the letter of the 7th July, 2005 had been given to the non-national (instead of being sent directly) it was not on its terms either the permission or evidence of it".

This alternative submission was rejected by the court (see paras. 16 to 20 of the judgment of O'Donnell J.).

75. The learned judge was satisfied that registration does not constitute permission: it is simply evidence of a permission previously given.

76. Hardiman J. in a concurring judgment agreed with the judgment delivered by O'Donnell J. but also emphasised the entirely novel and refined case made by the respondent on the appeal. He concluded that this argument involved a "total departure from reality". It was not grounded on the evidence and "amounts to an argument that a hypothetical minister might perhaps, in a hypothetical universe, have understood his powers in this way and acted accordingly". However, it was a nuanced and complex argument which had to be addressed not only by the counsel and solicitor on behalf of the applicant in the course of the hearing but was fully addressed by the Supreme Court.

77. I am satisfied therefore, that the appeal was unnecessarily complicated by the respondents. It already involved an issue of fundamental importance to the future life of the minor applicant. It had in its original formulation enormous significance for the applicant and any other person seeking to avail of the statutory provisions in issue. It involved a clarification of the law in terms of the administration of the relevant sections concerning the granting of residence and the calculation of periods of residence for the purpose of making applications for naturalisation. It was of course a matter of statutory interpretation and a point of law of high public importance. It had serious implications for the administration by the respondent of the registration of permissions granted to non-nationals to remain. Indeed, Hardiman J., described the decision to refuse the child a certificate of nationality and an Irish passport as not merely wrong but wrong-headed. He stated:-

> "20. … It was justified by a bewildering display of unembarrassed casuistry. I use that term in its original sense of a

process for resolving difficult individual cases by the inflexible application of what are alleged to be general rules, often involving a quibbling or evasive way of dealing with real difficulties."

78. This passage perhaps exemplifies the difficulties which were originally faced by the applicant's solicitors in addressing the problems which arose early in the case but which they pursued in the words of the learned judge "doughtily". It was this approach by the respondent which laid the foundation for a much more complex range of submissions during the hearing in the Supreme Court, all of which failed, but which had to be addressed by the solicitors and counsel on behalf of the applicant. The increased complexity and nuanced nature of these arguments in the Supreme Court required the solicitor and counsel involved on behalf of the minor applicant to exhibit a high level of expertise in their understanding of the statutory framework structure and case law and its application in everyday decision making with which they were familiar. They undoubtedly had a heavy burden to carry having regard to the nature of the applicant's case and the potential consequences of the more general nature of the points raised by the respondent. An uplift was allowed in the fees allowed in the High Court for the importance and novelty of the point but, it seems to me, not for the additional difficulties caused for the applicants in the Supreme Court.

79. It is clear from the judgments of the Supreme Court that the case in that Court was rendered more complex and involved a somewhat increased level of professional application by solicitor and counsel because of the manner in which the case and the issues raised were addressed by the respondents in relation to oral argument on appeal. A very high level of experience and expertise was necessary on behalf of the solicitors and counsel in the case to deal with these developments.

80. The fundamental question in any taxation concerns the nature and extent of the work which was necessary and completed by the solicitor and counsel involved. The Taxing Master had full access to the papers in the case which were not very extensive. The case was rooted in an early exchange of correspondence and the decision ultimately made in the calculation of the father's period of lawful residence in the State. That calculation was not in itself a complex matter. It was rendered complex by the stance adopted by the respondent. However it boiled down to a net issue in what was a relatively straightforward case of statutory interpretation. There is nothing to suggest that the extent of the discovery was voluminous or in any way unwieldy.

81. The novelty of the case arose from the fact that the statutory provisions had not been the subject of definitive judicial decision on any previous occasion. The stance taken by the respondent towards the minor applicant raised profound issues as to his status in the State and his future life and identity. It did so for many more people in the same situation and many more who would be subject to future decisions under the same statutory provisions. It was therefore of urgent public importance that the correctness of the respondent's interpretation and application of these statutory provisions be determined. There is no doubt therefore that this was, if not a test case, certainly the first occasion upon which the court was asked to consider the appropriate interpretation of the provisions. Therefore it may be regarded as a test case because it was the first case of its kind. The entire context of the provisions and their legislative and constitutional history needed to be researched and understood as did the practical application of the provisions on a day to day administrative basis. This required a full understanding of the machinations of the immigration system. The special knowledge of the applicant's solicitor and counsel enabled them to successfully complete this work to a very high standard.

82. While all of these factors are relevant to the assessment to be made of the appropriate allowances in respect of costs claimed, they should not be exaggerated and the essential element for taxation of costs remains the nature and extent of the work done. The various descriptions of a case as complex, a test case or requiring special knowledge do not of themselves define the extent of the work required or done. They are matters which must be taken into account in respect of each case and though they are of a somewhat intangible nature, their relevance must be anchored in the reality of a particular case.

83. The necessity to focus upon the work done was emphasised in a case relied upon by the applicant *Gaspari v. Iarnrod Eireann - Irish Rail* (unreported High Court 30th July, 1995, Kinlen J.) in which at a late stage the plaintiff's straightforward claim for damages for personal injuries arising out of a railway crash involving a train travelling from Dublin to Knock became a test case in respect of 191 claims made arising out of the same accident. The enormous burden of work taken on by the solicitor was emphasised by Kinlen J. The solicitor was obliged to consider over 100,000 documents on discovery from which he extracted some 20,000 relevant documents. An instruction fee of IR£120,000.00 was upheld by the court. The mountain of work required to be undertaken by the solicitor in that case may be compared to the relatively modest number of documents considered in this case. A proportion has to be maintained by the Taxing Master when considering the principles applicable and applying them to the work done by solicitor and counsel in any particular case. The assumption in Gaspari of the burden of the lead case had enormous consequences for the work load of the solicitor concerned, as demonstrated in the evidence of the plaintiff's solicitor Mr. Ferry, which was accepted by the Taxing Master. It does not appear to me that the Taxing Master erred in this case in his assessment of the nature and extent of the work required in this judicial review application and in respect of the evidence to be adduced or the legal issues raised. He examined all of the papers in the case and the court is satisfied that his consideration of the case does not disclose any error of principle in his consideration of the work done. His reasons are clear save to the extent of the fees allowed in respect of the Supreme Court.

84. The court is satisfied that the determination by the Taxing Master of what work was done or required in the case and the issues raised thereby forms the necessary backdrop against which he must consider and measure the further consequences for that work load of the matters arising under O. 99, r. 37(22)(ii). It is that reality which will inform the exercise of the Taxing Master's discretion in respect of any allowance to be made concerning the complexity of the case, the novelty of any question, the skill and specialist knowledge and responsibility borne by the solicitor and counsel, the importance of the matter to the client and the fact that this was the first case to be the subject of a definitive ruling. These issues must be considered in a realistic and proportionate way having regard to the work which is required to address the difficulties raised under each of the headings set out in the subparagraphs of the rule.

85. It is clear that the Taxing Master found the claim made of €107,500.00 as an instruction fee on behalf of the solicitor somewhat exorbitant. In assessing the claim and the objections made the court is not satisfied that the work required in this case could conceivably justify the awarding of such a figure as a matter of principle on the facts of the case and having regard to the work actually done or required. It is not the court's function to measure the instruction fee but to assess the principles applied and I do not find any error of principle in the approach adopted in rejecting this figure or in assessing the nature of the work completed in the High Court.

86. I reject the submission that the Taxing Master gave no or no adequate reasons for his decision. He was clear that he received no submission concerning how these matters of complexity, novelty or the importance of the case to the client affected the work required of the solicitor or how it should affect the assessment of the instruction fee. He accepted the case was of great importance to the minor applicant and that it was a novel point. However, he could not ascertain from the file that the work done by the solicitor could possibly justify the claimed instruction fee of €63,250.00. He stated that no further material was offered when objections were raised in this regard. It is clear from the objections raised that the submissions made were largely focused on assertions concerning the complexity and novelty of the case without attempting to connect those assertions to any material or work necessitated by same

to justify an up-lift in the fees to the extent claimed.

87. It is also clear in relation to the allowance made for the solicitor's instruction fee in the High Court and in particular the High Court hearing that what one might regard as an ordinary instruction fee was allowed in that regard, of €7,500.00 with an "up-lift" of €1,500.00 in respect of the importance and novelty of the case. I am not satisfied that the undoubted importance and novelty of the case by itself justifies the raising of fees or the expectation of fees to the extravagant level claimed in this case. The court is satisfied that in the circumstances an appropriate instruction fee was determined by the Taxing Master in respect of the High Court including the up-lift allowance.

88. The determination by the Taxing Master that this was in essence the type of case in which very heavy reliance is placed on counsel both in formulating submissions and in advocacy reflects the reality. It seems to me therefore that the fees assessed in respect of senior and junior counsel in the High Court are in accordance with the principles set out in the authorities and do not indicate any error on the part of the Taxing Master. The same considerations were applied to the assessment of their appropriate fees and the reasons for same are readily discernable in the ruling and the report of the Taxing Master.

89. I am therefore satisfied that the allowances made in respect of the solicitor's instruction fee and counsel's fees in the High Court are not unjust and the court will not set aside the determination of the Taxing Master in that regard.

The Supreme Court Appeal

90. An unusual feature of this case was the extent to which the arguments in the Supreme Court expanded well beyond the written submissions and arguments made in the High Court and indeed the extensive written submissions furnished to the Supreme Court in advance of the hearing. This was commented upon in the judgments of the Supreme Court. It involved novel and unexpected submissions which solicitor and counsel had to address immediately. It became central to the argument before the court. The Taxing Master does not appear to have appreciated the degree to which this fundamental change and approach added to the burden on the applicant's legal team. Indeed the emphasis of the Taxing Master is on the similarity and limited work required on behalf of the solicitor in the Supreme Court because it reflected that done by him in the High Court. The fact that the hearing in the Supreme Court took only a half day is relied upon to imply that the burden of work undertaken in the Supreme Court was of a somewhat limited nature. No reasons for the allowances made in respect of senior and junior counsel's fees in the Supreme Court are given by the Taxing Master either in his first report or following objections. It seems to me that undue emphasis was placed on the shortness of the hearing as an indicator of the work necessitated by solicitor and counsel. A shorter hearing is often an indication of a considerable degree of application in reducing the issues for the Supreme Court and focusing upon the more important aspects of the appeal thereby saving time and ultimately costs for the litigants and the court. That having been said, the unanticipated expansion of the oral arguments gave rise to further complexity and difficulties for the solicitor and counsel in dealing with this important appeal and is not referenced in any meaningful manner by the Taxing Master. The centrality of this oral argument on the appeal is evidenced in the two detailed judgments delivered by the court which fully expound the nature and extent of these complex and novel arguments. I am not satisfied that this aspect of the case was properly considered by the Taxing Master or that due allowance was made for the further application and work required in the course of the hearing in addressing these issues. It brings into focus not only the issues concerning the importance and complexity of the case but the skill and expertise required by advocates having to address at short notice, in effect immediately, a profound shift in argument. I am satisfied that the Taxing Master was in error in not taking these matters into account in respect of the Supreme Court Appeal and these allowances should be increased accordingly. I am satisfied that a failure to make an allowance for an uplift of the solicitor's instruction fee and senior and junior counsel fees in this regard gives rise to an injustice which is "clear, undoubted and manifest".

Work carried out prior to 6th October, 2009

91. I am satisfied that the amount allowed by the Taxing Master in respect of the instruction fee leading to the application for leave to apply for judicial review is reasonable and not unjust and that there was no error in this regard. A sum of €4,250.00 was allowed to cover that matter.

92. The Taxing Master decided that the cost of the judicial review could only run from the date upon which the impugned decision was made on the 5th October, 2009. The origins of this decision lay in two earlier letters of the 7th July, 2005 and the 7th July, 2007 concerning the father's leave to remain. The Taxing Master held that the earlier engagement between the applicant's solicitor and the authorities was in essence a review or appeal process of an administrative nature which, had it been successful, would not have required any action to be taken on behalf of the applicant by initiating these proceedings. He held that this engagement was distinguishable from work that is often required in a contract or tort case in which it is necessary to take detailed instructions and carry out extensive enquiries or procure expert reports before initiating proceedings. I am satisfied, having regard to the nature of the judicial review proceedings which are concerned, not with the merits of a decision, but the lawfulness of the process by which it was reached, that the distinction drawn is a valid one.

93. Items 1 to 12 in the bill of costs were claimed in respect of this issue. The Taxing Master allowed a sum of €4,250.00 to the solicitors specifically related to taking instructions from the next friend and consulting with him prior to seeking leave. A figure of €15,000.00 was sought by the applicant's solicitor in relation to services provided prior to October 5th but was disallowed in its entirety. I am satisfied that there was no error in principle in disallowing this sum. Instructions were obtained to challenge the decision made. The papers were drafted on the basis of these instructions and the correspondence which had passed between the decision making authorities and the applicant's solicitors and his father. That is the norm in applications seeking to quash the decisions of administrative tribunals: there is nothing exceptional about the process followed in this case. It was quite straightforward and I am satisfied that an appropriate and reasonable allowance was made for the work done in respect of this aspect of the judicial review proceedings. I am not satisfied that the Taxing Master was in error in this regard or that his decision caused any injustice to the applicant.

Conclusion

94. Therefore I am satisfied that the finding of the Taxing Master should be upheld in respect of all the allowances made in the High Court. However I am satisfied that in respect of the instruction fee and counsel's brief fees in the Supreme Court there should be a reasonable uplift, or increase, to take proper account of the very serious alteration in the substance of the case made in oral argument in the course of the appeal. This should be measured in a manner which is proportionate to and in the context of the court's findings that the allowances made in respect of the High Court costs were not made in error. The more complex and further novel arguments which had to be considered and addressed promptly and clearly, required further consideration by the Taxing Master of the factors to be taken into account under Order 99 Rule 37 (22)(ii) in respect of the allowances to be made in respect of the Supreme Court claim. I will hear counsel as to the form of the order to be made.