**APPROVED** **[2020] IEHC 671**

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 906 J.R.

BETWEEN

J.
(A PERSON SUBJECT TO AN ALLEGATION OF ABUSE)

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 21 December 2020**

## INTRODUCTION

1. The principal judgment in these proceedings had been delivered on 19 October 2020, *J. v. Child and Family Agency (historical child sexual abuse allegations)* [2020] IEHC 464. This second judgment addresses the appropriate costs order to be made in the proceedings.

2. The three core issues to be addressed in this costs judgment are as follows. First, whether either party can be said to have been "entirely successful" in the proceedings. Secondly, what weight, if any, should be attached to the various offers made by the Child and Family Agency, prior to the full hearing, to consent to an order setting aside the impugned decision. Thirdly, whether the litigation conduct of either party should be reflected in the costs order.

3. The applicant in these judicial review proceedings is a person against whom an allegation of historical child sexual abuse has been made. The incidents the subject-matter of the inquiry impugned in these proceedings are said to have occurred some fifty years ago, during the summer of 1969. To protect the identity of both the complainant and the applicant, the applicant is referred to simply as "***J.***" or "***the applicant***". The respondent to the proceedings, the Child and Family Agency, will be referred to as "***the Agency***".

**PROCEDURAL HISTORY**

4. The procedural history has been set out in detail in the principal judgment and will not be replicated here. It is sufficient for the purposes of this costs judgment to highlight the following.

5. The primary relief sought in the proceedings had been an order of *certiorari* setting aside a decision-letter dated 26 July 2018 ("***the decision-letter***") to the effect that the Agency had reached a "provisional conclusion" that an allegation of historical child sexual abuse against the applicant was "founded". The decision-letter then outlined that the applicant was entitled to invoke an administrative appeal procedure.

6. The applicant adopted what might be described as a twin-track approach in response to the decision-letter. First, steps were taken to invoke the administrative appeal procedure: the applicant's solicitor sent a letter to the Agency on 9 August 2018 enclosing a notice of appeal. Secondly, a separate letter was sent to the Agency on the same date suggesting that the Agency was acting *ultra vires*.

7. In the event, the within judicial review proceedings were instituted prior to the administrative appeal having been heard and determined. (It seems that an agreement had been reached between the parties to stay the appeal proceedings).

8. There is relevant case law to the effect that a party will generally be required to exhaust their right to an administrative appeal before having recourse to judicial review proceedings against the Agency (*E.E. v. Child and Family Agency* [2018] IECA 159). In reliance on this case law, the Agency had pleaded in the statement of opposition that these proceedings were premature. At the hearing before me, the Agency did not ultimately pursue this prematurity objection. As explained presently, however, the Agency now seeks to call in aid this case law in the context of the costs application (see paragraph 38 below).

9. Prior to the filing of a statement of opposition, the Agency's solicitors twice made offers to compromise the proceedings. More specifically, the Agency had made an offer to compromise the proceedings on certain terms by letters dated 20 December 2018 and 21 February 2019. The letters did not, however, identify the grounds upon which an order of *certiorari* quashing the impugned decision was being conceded. Rather the position being maintained was that the Agency had not acted *ultra vires*. See, for example, the following passage from the letter of 21 February 2019.

> "This offer (and the previous offer) should not be misconstrued as [the Agency] conceding the matters at issue in any way. This is simply a pragmatic approach to avoid this important and sensitive matter being delayed pending this litigation."

10. The offers were not accepted by the other side, and the Agency ultimately delivered a comprehensive statement of opposition on 27 May 2019.

11. It is relevant to the costs issue to refer to an incident which had occurred slightly earlier in the chronology. On 4 March 2019, it came to the attention of the applicant's solicitor that further relevant documentation in the possession of the Agency had not been provided. On 7 March 2019, the documentation was sought by the applicant's solicitor and provided by the Agency's solicitor. This was the first time that the applicant's side had been provided with a copy of a crucial letter of 13 September 2016. This letter

indicated that a decision had previously been taken to close the file in respect of the Agency's investigation into the complainant's allegation.

12. Arising out of this belated disclosure, an application was made to amend the statement of grounds. An order giving liberty to amend was made on consent of the parties by the High Court on 15 July 2019. The Agency did not file an amended statement of opposition in response. Instead, the solicitor acting for the Agency filed an affidavit on 27 January 2020, conceding *certiorari*. Again, the grounds upon which this concession was being offered were not specified.

13. The case came on for hearing before me over two consecutive days commencing on 21 July 2020. At the direction of the court, the precise grounds upon which the proceedings were being conceded by the Agency were formally recorded in writing and submitted to the registrar on 18 August 2020.

14. Following the delivery of the principal judgment, the parties were directed to file written legal submissions on the question of costs. These were received on 6 November and 16 November 2020. This judgment has been prepared on the basis of those written legal submissions, i.e. by way of a "paper based" application only.

**LEGAL SERVICES REGULATION ACT 2015**

15. The parties are agreed that the costs order falls to be determined by reference to Part 11 of the Legal Services Regulation Act 2015 ("***the LSRA 2015***"). This is so notwithstanding that these proceedings had been instituted prior to—but heard subsequent to—the commencement of the relevant provisions of the Act.

16. This pragmatic approach on the part of the parties has the consequence that it is unnecessary, for the purposes of this ruling, to address the question of whether the new costs regime has retrospective effect.

17. Section 169(1) and (2) provide as follows.

> 169.(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—
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> (a) conduct before and during the proceedings,
>
> (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
>
> (c) the manner in which the parties conducted all or any part of their cases,
>
> (d) whether a successful party exaggerated his or her claim,
>
> (e) whether a party made a payment into court and the date of that payment,
>
> (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
>
> (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.
>
> (2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.

18. The criteria most relied upon by the parties in the present case are those at (a), (b) and (f) above.

19. Order 99, rule 3(1) of the Rules of the Superior Courts provides as follows.

> "The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable."

**DISCUSSION AND DECISION**

20. As flagged earlier, the three core issues to be addressed in this costs judgment are as follows. First, whether either party can be said to have been "entirely successful" in the proceedings. Secondly, what weight, if any, should be attached to the various offers made by the Child and Family Agency, prior to the full hearing, to consent to an order setting aside the impugned decision. Thirdly, whether the litigation conduct of either party should be reflected in the costs order. These are addressed under separate headings below.

***(i) Whether either party has been "entirely successful" in the proceedings***

21. Part 11 of the LSRA 2015 draws a distinction between a party who is "entirely successful" in proceedings, and a party who has only been "partially successful". The default position is that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings *unless* the court, in the exercise of its discretion, orders otherwise. The reasons for such an order must be stated. A non-exhaustive list of the factors to be taken into account by a court in exercising its discretion are enumerated under section 169(1).

22. No such default position applies in respect of a party who has only been "partially successful". As explained by Murray J. in *Higgins v. Irish Aviation Authority* [2020] IECA 277 (at paragraph 10), such a party may nevertheless be entitled to recover all of their costs in an appropriate case.

> "[…] it is particularly important to bear in mind that whether a party is 'entirely successful' is primarily relevant to where the burden lies within process of deciding how costs should be allocated. If a party is 'entirely successful' all of the costs follow unless the Court exercises its discretion to direct otherwise having regard to the factors enumerated in s.169(1). If 'partially successful' the costs of that part on which the party has succeeded may be awarded in its favour, bearing in mind those same factors. Indeed, having regard to the general discretion in s.168(1)(a) and O.99 R.2(1) a party who is

> 'partially successful' may still succeed in obtaining all of his costs, in an appropriate case."

23. Murray J. goes on in his judgment in *Higgins* to explain that in determining whether a party has been "entirely successful" for the purposes of section 169(1), the correct approach is to look beyond the overall result in the case and to consider whether the proceedings involve separate and distinct issues. If so, it is appropriate to determine which side succeeded on those issues.

24. The Court of Appeal has confirmed in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183 that even where a party has not been "entirely successful", the court should still have regard to the matters referred to in section 169(1) (a) to (g) when deciding whether to award costs.

25. I turn now to apply these principles to the facts of the present case. These judicial review proceedings presented two issues for determination. First, whether the decision-letter of 26 July 2018 should be set aside as invalid. Secondly, whether the matter should be remitted to the Agency for reconsideration, or, alternatively, whether the Agency should be permanently restrained from carrying out any further inquiry into the allegation of historical child sexual abuse.

26. The applicant has been entirely successful on the first issue. (The question of whether it had been reasonable for the applicant to pursue the proceedings to full hearing in light of the concessions made by the Agency is a separate question, which is addressed under the next heading below). The applicant was not, however, entirely successful on the second issue. Whereas the court, in the principal judgment, held that it would not be appropriate to make an order pursuant to Order 84, rule 27(4) of the Rules of the Superior Courts *directing* the Agency to reconsider the complaint, it did not make an order restraining the Agency from any further inquiry into the events alleged to have occurred in the summer of 1969.

27. In other cases, the fact that an applicant did not succeed in obtaining the *precise* form of order which they had sought might not necessarily preclude a finding that they have been entirely successful. The form of order might be regarded as of only secondary importance when compared to the substantive relief obtained. In the present case, however, the question as to what were the legal consequences of setting aside the decision-letter was an issue of central importance. Whereas, as discussed under the next heading, the applicant did secure some benefit from the principal judgment, he did not entirely succeed in his ambition of obtaining a restraining order.

28. It follows therefore that the default position under section 169(1), i.e. that costs follow the event, does not apply to these proceedings in circumstances were neither party can be said to have been entirely successful.

***(ii) Agency's offers to compromise the proceedings***

29. Section 169(1) of the LSRA 2015 provides that one of the factors to which a court should have regard to in allocating costs is whether a party made an offer to settle the matter the subject of the proceedings, and, if so, the date, terms and circumstances of that offer. The court should also have regard to whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings.

30. The Agency contends that both of these statutory criteria are applicable to the present case. It is submitted that there is a "significant public policy consideration" in ensuring that a public body who concedes the substantive reliefs sought in judicial review proceedings, and subsequently successfully defends an application for *further* reliefs in the proceedings, is not subject to a full costs order in favour of an applicant. Such a precedent would, it is said, encourage cases to be run to a full hearing even where the main issue in the case has been conceded.

31. There is, at the level of principle, much merit in these submissions. Part of the legislative intent underlying the new costs regime under the LSRA 2015 is to encourage parties to adopt a reasonable attitude to litigation. A party who does not accept a meaningful offer to compromise proceedings runs the risk that there may be costs consequences for same.

32. These principles are not, however, engaged in the present case for the simple reason that the Agency continued to insist that it had acted lawfully. This had the effect of rendering its offers of settlement ineffective. The entire premise of the offers was that the Agency would consent to an order of *certiorari*, yet not only did the Agency not identify the grounds upon which such an order should be granted, it made no concession that it had acted *ultra vires*. In the absence of such a concession there was no proper basis on which the High Court could exercise its jurisdiction to make an order of *certiorari* without hearing the case.

33. Whereas the courts will, generally, facilitate the settlement of proceedings, the making of an order of *certiorari* is a solemn matter and requires that the court be satisfied that there is a proper legal basis for making the order. The nature of the remedy has been described as follows by O'Higgins C.J. in *State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381 (at 392).

> "From this emergence three centuries ago of the means by which the Court of King's Bench controlled the judicial process of lower courts, the remedy of *certiorari* has been developed and extended to reach far beyond the mere control of judicial process in courts as such. Today it is the great remedy available to citizens, on application to the High Court, when any body or tribunal (be it a court or otherwise), having legal authority to affect their rights and having a duty to act judicially in accordance with the law and the Constitution, acts in excess of legal authority or contrary to its duty. Despite this development and extension, however, *certiorari* still retains its essential features. Its purpose is to supervise the exercise of jurisdiction by such bodies or tribunals and to control any usurpation or action in excess of jurisdiction. It is not available to correct errors or to review decisions or to make the High Court a court of appeal from the decisions complained of. In addition it remains a discretionary remedy."

34. The making of an order of *certiorari* is not in the "gift" of any party.

35. Even if the court had jurisdiction to make an order for *certiorari* in the blind, the terms of settlement were objectively unreasonable. The applicant had, correctly as it transpires, identified a number of very serious deficiencies in the Agency's decision-making process. The Agency had applied the incorrect standard of proof; one of the two decision-makers had never met the complainant; and the Agency had failed to disclose the existence of the earlier decision to close the file in respect of the complaint. These points were only conceded by the Agency *subsequent* to the full hearing: it will be recalled that the precise grounds upon which the proceedings were being conceded by the Agency were only formally recorded in writing and submitted to the registrar on 18 August 2020. (See paragraphs 46 to 49 of the principal judgment).

36. Had the applicant accepted the terms of settlement offered by the Agency, he would have been left in the entirely unsatisfactory position of being at risk of being the subject of a further investigation in circumstances where the Agency—at that stage—refused to concede that it had acted unlawfully in its first investigation. In the premises, it had been necessary for the applicant to pursue the matter to full hearing.

37. The applicant also achieved a further benefit, over and above the concessions belatedly made by the Agency, from pursuing the matter to full hearing. Specifically, the principal judgment clarifies the nature and extent of the statutory obligation imposed on the Agency by section 3 of the Child Care Act 1991. The court held that, whereas the Agency certainly retains a discretion to investigate the complaint further, it is not under a *statutory obligation* to do so. The statutory power to investigate historical child sexual abuse; to make findings; and to publish those findings to an individual's family and employer; must be exercised in a reasonable and proportionate manner.

***(iii) Litigation conduct***

38. The Agency seeks to reanimate the objection made in its statement of opposition to the effect that the judicial review proceedings were premature, pending the exhaustion by the applicant of the administrative appeal. With respect, it is not open to the Agency to pursue this objection now in circumstances where it had adopted the pragmatic approach at the hearing in July 2020 that the court should hear and determine the real questions in controversy between the parties. The prematurity objection was, in effect, abandoned.

39. At all events, an administrative appeal would not have represented an adequate alternative remedy in this case because of the seriousness of the shortcomings in the initial decision-making process. In particular, the failure of the Agency to disclose the fact that a decision had previously been taken to close the file in respect of the Agency's investigation into the complainant's allegation undermined the effectiveness of the appeal. It is well established that an applicant is entitled to a primary decision in accordance with fair procedures, and that an appeal does not cure a fundamentally unfair hearing at first instance (*Stefan v. Minister for Justice* [2001] IESC 92; [2001] 4 I.R. 203).

**CONCLUSION AND FORM OF ORDER**

40. Having regard to the criteria under section 169(1) of the Legal Services Regulation Act 2015, I am satisfied that the applicant is entitled to an award of costs in his favour. This is so notwithstanding that he was not "entirely successful" in the proceedings. In brief, the offers of settlement on behalf of the Agency were ineffective by reason of the failure to identify any basis on which the High Court could exercise its jurisdiction to make an order for *certiorari*. Further, and in any event, by pursuing the matter to full hearing the applicant secured substantial benefits over and above those he would have derived had

he accepted the offers of settlement. The applicant, therefore, acted entirely reasonably in pursuing the matter to full hearing.

41. The order will recite that the applicant is entitled to recover his costs as against the Child and Family Agency. The costs are to include the costs of two counsel; all reserved costs; the costs of the written legal submissions; and the costs associated with the "paper based" costs application. Such costs to be measured by the Office of the Legal Costs Adjudicator in default of agreement. A stay will be placed on the costs order in the event of an appeal.

*Appearances*
Raymond Comyn SC and Sharon Brooks instructed by Collins, Brooks & Associates for the Applicant
Morgan Shelley instructed by Arthur Denneny for the Child and Family Agency

Approved