[2020] IEHC 656

THE HIGH COURT

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2° OF THE CONSTITUTION

[2020 No. 1290 SS]

BETWEEN

C. I.

APPLICANT

AND

THE MEMBER IN CHARGE OF DÚN LAOGHAIRE GARDA STATION

RESPONDENT

(NO. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on Monday the 21st day of December, 2020

1. In *C.I. v. Member in Charge of Dún Laoghaire Garda Station (No. 1)* [2020] IEHC 512, [2020] 10 JIC 2001 (Unreported, High Court, 20th October, 2020), I dismissed an application for release under Article 40.4 of the Constitution.

2. Both sides now apply for their costs and I have received helpful submissions from Mr. Tony McGillicuddy B.L. for the respondent and from Ms. Eilis Brennan S.C. (with Mr. Kevin Roche B.L.), for the applicant.

3. While Ms. Brennan accepts that the normal order is that costs follow the event, she relies on a number of matters to contend that the court should exercise its discretion to depart from that. While she describes the discretion as being "*at large*", I don't accept that it is as wide as that. The residual discretion must be exercised judicially and in accordance with established principles.

4. The main matters relied upon by Ms. Brennan are as follows:

   (i). Section 169(1)(b) of the Legal Services Regulation Act 2015 allows the court to consider whether it was reasonable for the unsuccessful party to raise or pursue a particular issue, and here certainly the main legal issue raised by the applicant was one which it was reasonable to put forward, although that could be said in many cases.

   (ii). Reliance is placed on *Zalewski v. Workplace Relations Commission* [2020] IEHC 226 (Unreported, High Court, Simons J., 21st May, 2020), whereby an applicant who unsuccessfully challenged the validity of the Workplace Relations Act 2015 received an order for partial costs. Reference was made by Simons J. to the need for litigants not to be deterred from raising significant issues, but that is of no great relevance here because of the existence of the Legal Aid - Custody Issues Scheme which provides for legal aid in Article 40 applications.

   (iii). Reliance is placed on the argument, also an issue in *Zalewski*, that the points raised were important and novel. That in itself is an elastic concept and as Mr. McGillicuddy says, "*every case has some novel dimension*" (indeed, why litigate otherwise), but it is a question of degree.

5. Ultimately, and while acknowledging that at least one of the legal points put forward by the applicant was not clear-cut, I don't think that there is sufficient to be said on behalf of the applicant to displace the ordinary order. Not only that, there are a number of elements pointing the other way:

(i). the context is that caselaw has firmly established the principle of costs following the event as being the default and normal position;

(ii). that is reinforced by s. 169 of the Legal Services Regulation Act 2015, which applies here because the applicant has been wholly unsuccessful in civil proceedings, albeit that there is a jurisdiction to depart from the normal order;

(iii). most importantly, given the existence of the Legal Aid - Custody Issues Scheme, it would undermine that scheme if the court were to order costs in favour of an unsuccessful applicant who had not applied for the scheme;

(iv). relatedly, it would also undermine the principle of mutuality, because as Mr. McGillicuddy points out, the applicant "*if successful would have sought his costs*", and thus when parties go down the road of not seeking to avail of the scheme "*they know the hazard of that*";

(v). on the particular facts here there is also the point that the applicant ran other issues of a fact-specific nature.

(vi). furthermore, he contributed himself to the delay in being brought before a court by falsely claiming to have had COVID-19 symptoms; and while those latter two matters are not determinative, they certainly don't assist the applicant.

Order

6. Accordingly, I will award costs in favour of the respondent.