

THE HIGH COURT

[2023] IEHC 201

[Record No. 2021/596 JR]

BETWEEN

J.S. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND E.S.)

APPLICANT

AND

MINISTER FOR EDUCATION

RESPONDENT

[Record No. 2021/598 JR]

BETWEEN

S.M. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M.M.)

APPLICANT

AND

MINISTER FOR EDUCATION

RESPONDENT

JUDGMENT of Ms Justice Bolger delivered on the 24th day of April 2023

1. In my decision of 16 February 2023 ([2023] IEHC 80), I refused the applicants' applications for a protective costs order by reference to the case law which, up to my decision, related only to environmental cases. The basis for my refusal was, *inter alia*,

that I had not been satisfied of the essential requirement of public interest and of the merits of the case following short argument. I described the application as “*novel*” which was because it was the first time a jurisprudence existing solely (up to my decision) in environmental law was sought to be applied to a case of disability/education rights. The applicants claim that I also described the decision as an “exceptional” case but, in fact, my reference to “exceptional” was to the possibility that it “may be one of the exceptional cases where no order for costs should be made” (at para. 38).

2. The applicants assert that this is an appropriate case for the court to exercise its discretion to award the applicants their full or partial costs. They refer to cases where costs were awarded to unsuccessful litigants who had raised novel public interest issues; *S. v. Ireland & The Attorney General (Costs)* [1995] WJSC-SC 2306, unreported, Supreme Court, 27 July 1995, *Collins v. Minister for Finance* [2014] IEHC 79 and *Corcoran v. Commissioner of An Garda Síochána* [2021] IEHC 11. They also seek to rely on the State’s agreement in other cases to indemnify an appellant’s costs (*Carter v. Minister for Education & ors* [2018] IEHC 539 and *Burke v. Minister for Education* [2020] IEHC 418).

3. I do not consider it relevant that the State may have previously decided to indemnify an appellant and find that to be of no binding or persuasive authority on this Court.

4. The substantive issue in this case did involve “sensitive personal rights”, a factor that Simons J. considered relevant in determining costs in *Corcoran*. However, this application was solely for a protective costs order, a point on which the jurisprudence is well established, albeit in environmental cases only prior to this decision. I applied

that jurisprudence to this disability/education rights claim and, in refusing the application, I rejected the applicants' assertion that the case was "a public interest case" (at para. 24).

5. Therefore, I do not consider this application satisfies the very high threshold required for a costs order in favour of an unsuccessful applicant. However, I do consider it reaches the threshold for a no costs order having regard to the novel nature of the application made and the fact that the applicants were motivated by a concern for other people who might find themselves in a situation similar to that in which the applicants found themselves at the time these proceedings were instituted.

6. I therefore make no order as to costs.

Counsel for the applicant, Paul George Gunning BL.

Counsel for the respondent, Barry O'Donnell SC, Lewis Mooney BL.