APPROVED **[2023] IEHC 308**

THE HIGH COURT

2023 No. 642 SS

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

BETWEEN

MICHAEL JOSEPH MCGEE
THOMAS MICHAEL DIGNAM

APPLICANTS

AND

THE GOVERNOR OF CASTLEREA PRISON

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 14 June 2023

INTRODUCTION

1. The principal judgment in these proceedings was delivered on 19 May 2023, *McGee v. Governor of Castlerea Prison* [2023] IEHC 248. This supplemental judgment addresses the allocation of legal costs.

2. The within proceedings take the form of an application for an inquiry pursuant to Article 40.4.2° of the Constitution of Ireland. The application was refused for

the reasons set out in detail in the principal judgment. The order of the court was drawn up shortly after the delivery of the judgment, and in advance of any determination on costs, so as not to delay the applicants in pursuing any appeal.

SUBMISSIONS

3. The parties were directed to exchange written submissions in relation to the allocation of legal costs. The respondent filed written submissions on 20 May 2023. The first applicant filed a statutory declaration dated 26 May 2023 which addresses, amongst other matters, the question of legal costs.

4. It is submitted on behalf of the respondent that costs should follow the event, i.e. that the respondent, having been successful in resisting the application, is entitled to recover his legal costs as against the applicants. The respondent relies in this regard on the provisions of Section 169 of the Legal Services Regulation Act 2015.

5. In reply, it is submitted on behalf of the applicants that no order for costs should be made. It is submitted that it would be inappropriate to make an order for costs in circumstances where the procedure under Article 40.4.2° is a "*fundamental national right*" intended to vindicate the right to liberty of an individual. It is also submitted that this is why stamp duty is not levied on such applications.

DISCUSSION AND DECISION

6. It is correct to say, as the respondent does, that the default position in relation to the legal costs of civil proceedings is that a party who has been "*entirely successful*" will ordinarily be entitled to their costs. This is subject to the overarching discretion of the court to make a different form of costs order for

stated reason. The types of consideration which can be taken into account in this regard are enumerated in a non-exhaustive list under Section 169 of the Legal Services Regulation Act 2015. Further guidance as to the exercise of the statutory discretion has been provided in recent case law of the Court of Appeal including, in particular, the judgments in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183 and *Lee v. Revenue Commissioners* [2021] IECA 114.

7. It may be open to question whether these principles apply with full force to an application under Article 40.4.2°. Such proceedings are *sui generis* and are intended to protect one of the most fundamental of all constitutional rights, namely an individual's right to liberty. In this regard, I respectfully agree with the observations of the High Court (Phelan J.) in *H.B. v. Governor of Mountjoy Prison* [2022] IEHC 313 (at paragraphs 29 and 30) as follows:

> "It seems to me that the costs considerations in an Article 40.4.2 inquiry may not be precisely the same as in other types of proceedings. One difference is that an application for an inquiry into detention may be made by any person if there appear to be grounds for so contending. More fundamentally, the application is rooted in the provisions of the Constitution itself and is unique in this regard. It reflects the primary importance attached in our constitutional order to the protection of liberty and guarding against arbitrary detention and imprisonment without warrant. The central importance of personal liberty under the Constitution means that the detainer has to stand over the detention in law. Given the importance of the Article 40.4.2 inquiry application in safeguarding the constitutional right to liberty, it is essential that cost rules are not developed or applied in a manner which undermines the effectiveness of that great remedy. It is a given that for the remedy to be effective, the Courts must be accessible in a real way and for this it is necessary that lawyers be prepared to act, a position which will only prevail where they are paid for the services they provide. Absent provision for payment for legal services, legal assistance cannot be assured to a person in unlawful detention who wishes to establish that unlawfulness through a court enquiry.

> Indeed, it is presumably in recognition of the importance of access to remunerated legal representation as a feature of the constitutional right of access to the Courts that the State operates a Legal Aid in Custody Scheme (formerly known as the Attorney General's Legal Aid Scheme). This is non-statutory administrative scheme whereby payments are made by the Department of Justice and Equality in respect of legal costs in certain types of litigation not otherwise covered under the criminal or civil legal aid scheme. On application under this Scheme lawyers are remunerated irrespective of whether the application is successful. Accordingly, lawyers bringing an application under Article 40.4.2 are not dependent either on their client's ability to pay them for legal services or on their client recovering costs under a costs order at the conclusion of proceedings where they have elected to rely on the Scheme."

8. For completeness, it should be recorded that the applicants in the present case had been offered the possibility of availing of the Legal Aid – Custody Issues Scheme operated by the Legal Aid Board but declined this offer. The prisoner, i.e. the second applicant, argued the case himself, with the assistance of a McKenzie friend.

9. There is a risk that an overly rigid application of the principle that costs follow the event might act as a deterrent to parties having resort to the procedure under Article 40.4.2° even in *bona fide* cases. As against that, the making of a costs order against an unsuccessful applicant will be appropriate where it had been *unreasonable* to bring proceedings by way of *habeas corpus*. The procedure should not be abused and the making of costs orders can have a disciplining effect. Applications pursuant to Article 40.4.2° are accorded the highest priority and are heard as a matter of urgency. The utility of the procedure would be undermined were it to be invoked improperly in cases where the appropriate remedy is an appeal.

10. It follows that in determining the allocation of costs in a *habeas corpus* application, it will be necessary to consider whether it was reasonable to have brought the application notwithstanding that it was ultimately unsuccessful. Such an approach is consistent with Section 169 of the Legal Services Regulation Act 2015. Under that provision, the court is to have regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including, *inter alia*, whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings.

11. The proceedings in the present case raised a point of law of general public importance. More specifically, the proceedings raised an issue as to whether the legislative provisions pursuant to which the second applicant had been convicted are valid having regard to the Constitution of Ireland. It had been contended on behalf of the applicants that the provisions of Section 10 of the Non-Fatal Offences against the Person Act 1997 represented a disproportionate interference with the constitutional right to freedom of expression. This contention was, ultimately, rejected by the court for the reasons explained in the principal judgment. It was held that there was no proper basis for stating a case to the Court of Appeal pursuant to Article 40.4.3° of the Constitution of Ireland. Nevertheless, the issue raised was one of general public importance.

12. As explained by the Court of Appeal in *Lee v. Revenue Commissioners* [2021] IECA 114, the fact that proceedings are of general public importance is something which may be taken into account in the exercise of the court's discretion in relation to costs:

> "Fourth it is clear that the Court retains an exceptional jurisdiction to exempt a litigant from the consequence of this principle where proceedings were of general public importance. That jurisdiction continues following the

> enactment of the Legal Services Regulation Act 2015. The essential factors guiding it were, I think, well summarised recently by Simons J. in *Corcoran and anor. v. Commissioner of An Garda Siochana and anor.* [2021] IEHC 11 at para. 20. Having referred to the balancing exercise involved in reconciling the objective of ensuring that litigants are not deterred from pursuing litigation which serves a public interest with the aim of not encouraging unmeritorious litigation, Simons J. continued:
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> > 'In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant's case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights.'
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> As this description suggests, the '*public interest*' cases in which the court absolves the losing party from the cost consequences that usually follow the failure of their litigation may cover a wide terrain. In their purest form, they will involve significant issues of Constitutional or European law of general importance that have been pursued by the claimant to advance a public concern rather than to obtain a private and personal advantage. In some such cases the public interest in the underlying issue has been such as to justify the grant to the unsuccessful claimant of orders for the payment by the successful respondent of a proportion, or all, of their costs. The circumstances in which orders of this kind have been made are comprehensively examined in the decision of the Divisional Court in *Collins v. Minister for Finance* [2014] IEHC 79."

13. Having regard to these principles, I am satisfied that the appropriate costs order in the present case is that each party should bear its own costs. Whereas most of the complaints raised by the applicants were more properly matters for an appeal and did not go to the lawfulness of the prisoner's detention, the point in respect

of the constitutional validity of Section 10 of the Non-Fatal Offences against the Person Act 1997 is of public importance.

ADDITIONAL MATTERS RAISED BY APPLICANTS

14. The first applicant, in his statutory declaration, has purported to raise a number of additional matters, extraneous to the question of the allocation of legal costs. These consist largely of a criticism of the principal judgment. None of the additional matters raised by the applicants are properly matters to be dealt with by the High Court which is now *functus officio*. If and insofar as the applicants are dissatisfied with the outcome of the application before the High Court, they have a constitutional right of appeal to the Court of Appeal.

15. More generally, and as indicated in the final paragraphs of the principal judgment, if and insofar as the second applicant wishes to challenge his sentence and conviction, then the appropriate remedy is an appeal to the Court of Appeal from the order of the Circuit Court.

CONCLUSION

16. In the exercise of my discretion under Section 169 of the Legal Services Regulation Act 2015, I make no order as to costs. Instead, each party must bear its own costs.

Appearances

The first and second named applicants appeared as litigants in person
James B Dwyer SC and Grainne O'Neill for the respondent instructed by the Chief State Solicitor

Approved Garrett Simons