

APPROVED

[2024] IEHC 539



THE HIGH COURT
JUDICIAL REVIEW

2020 619 JR

BETWEEN

MICHAEL WATERS

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA
DIRECTOR OF PUBLIC PROSECUTIONS
MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 9 September 2024

INTRODUCTION

1. The principal judgment in these proceedings was delivered on 25 August 2021, *Waters v. Commissioner of An Garda Síochána* [2021] IEHC 552. This supplemental judgment determines the incidence of the legal costs of the proceedings.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

2. Having regard to the argument now made in relation to costs, it is necessary to recall the grounds upon which the judicial review proceedings were dismissed. The first ground is that the proceedings represent an abuse of process. This ground is summarised as follows (at paragraph 82 of the principal judgment):

“The principal relief sought in the judicial review proceedings is an order of *certiorari* quashing the conviction entered against the applicant in 2013. Crucially, this conviction has been upheld by the Court of Appeal and the Supreme Court have refused leave to appeal against the decision of the Court of Appeal. The criminal proceedings are thus concluded. These judicial review proceedings are inadmissible as an abuse of process in that they involve a collateral challenge to the decision of the Court of Appeal. In effect, what the applicant seeks to do is to have the High Court, under the guise of judicial review proceedings, overrule the decision of the Court of Appeal. (See paragraphs 38 to 49 above).”

3. The second ground is that the proceedings are inadmissible by reason of delay. The position is summarised as follows at paragraphs 52 and 53 of the principal judgment:

“The principal relief sought in these proceedings is an order of *certiorari* quashing the conviction of the applicant by the Circuit Court on 11 October 2013. The three-month time-limit thus began to run from that date. Yet the application for leave to apply for judicial review was not made until 28 September 2020, that is almost eight years later. The proceedings are thus hopelessly out of time.

If and insofar as it is suggested that the delay is explicable, in part, by reference to the fact that the applicant had been pursuing his appeal to the Court of Appeal, this rather misses the point. As explained under the previous heading, the consequence of pursuing the appeal to conclusion was to foreclose the possibility thereafter of an application for judicial review. Far from justifying the delay, the exhaustion of the right of appeal has cut off judicial review as a remedy. [...]

4. For the reasons explained in the principal judgment, there was no basis for an extension of time pursuant to Order 84, rule 21 of the Rules of the Superior Courts.
5. The principal judgment was delivered on 25 August 2021. The parties had been directed to file short written submissions on costs by 1 October 2021. In the event, only the Director of Public Prosecutions filed written submissions within time. The court subsequently listed the matter for oral argument on costs on 22 November 2021.
6. By email dated 18 November 2021, the Applicant sought a four week period within which to file and serve a written reply to the other side's written submissions. This was allowed. To facilitate this, the listing on 22 November 2021 was vacated and the proceedings adjourned generally with liberty to re-enter.
7. The Applicant prepared written submissions dated 5 January 2022. Unfortunately, these written submissions were not filed in the Central Office of the High Court. In the event, the existence of these written submissions was not brought to the court's attention until mid-July 2024. It would have been open to any of the parties to have applied to have the matter relisted before the court in the interim.

DISCUSSION AND DECISION

8. Section 169(1) of the Legal Services Regulation Act 2015 ("*LSRA 2015*") provides as follows:

“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—

- (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.”

9. The Applicant seeks to resist an order for costs by reference to the criteria specified at subparagraphs (a) to (c) above.
10. Before turning to consider the detail of the argument, it is salutary to recall the limits of the function of the court in determining the incidence of legal costs. An application for costs is not an occasion to reagitate the underlying merits of the case. An unsuccessful party cannot seek to resist a costs order on the basis that the court’s substantive decision, which gives rise to the application for costs, is incorrect. Rather, the court will generally approach the allocation of costs on the working assumption that its earlier decision is correct in law. In exceptional cases, where the law had been uncertain, the court may make a modified costs order to reflect the fact that the proceedings have brought clarity.

11. In many instances, there will be a right of appeal against the substantive decision. If an appeal is pursued and is successful, then the appellate court has jurisdiction to address not only the costs of the appeal but also the costs of the court below.
12. It is necessary to make these observations in circumstances where the Applicant's argument on costs involves a direct challenge to the correctness of the principal judgment. In particular, the Applicant alleges that a core finding, namely that the criminal proceedings against the Applicant are concluded, is "*entirely wrong*". The Applicant also criticises the principal judgment for failing to make orders against the Respondents.
13. For the reasons already explained, it is not open to a party to utilise a costs application as a vehicle to challenge the correctness of the court's substantive decision. If and insofar as the Applicant contends that the principal judgment is erroneous, he has a remedy by way of appeal to the Court of Appeal.
14. The Applicant also seeks to rely on the "*conduct*" of the Respondents as a reason for not allowing them their costs. Crucially, however, the conduct complained of is not referable to these judicial review proceedings. Rather, it concerns the earlier criminal proceedings. It is not permissible to rely on the conduct of other, separate proceedings as a ground for withholding costs. As explained by the Court of Appeal in *Word Perfect Translation Services Ltd v. Minister for Public Expenditure and Law Reform* [2023] IECA 189, the focus is on the conduct of the proceedings in which the costs arise. The Court of Appeal held (at paragraph 88) that what is permitted by section 169 of the LSRA 2015 is an evaluation of the reasonableness of the conduct and steps taken in the overall context of the litigation in light of the nature of the proceedings. The Applicant

cannot, therefore, rely on conduct in relation to the criminal proceedings as a ground for resisting the costs of the judicial review proceedings.

15. The Applicant has also argued that it had been “*reasonable*” for him to pursue the judicial review proceedings. With respect, this argument is untenable. For the reasons explained in the principal judgment, these proceedings represent an abuse of process in that they involve a collateral challenge to the decision of the Court of Appeal. Moreover, these proceedings were hopelessly out of time. It was unreasonable and wrongheaded for the Applicant to pursue these proceedings, especially in circumstances where the Respondents had flagged these objections well in advance of the hearing in July 2021.

CONCLUSION AND FORM OF ORDER

16. The Respondents, having been entirely successful in resisting the application for judicial review, are entitled to recover their legal costs as against the Applicant. This represents the default position under section 169 of the Legal Services Regulation Act 2015. The Applicant has failed to identify any factor which would justify making a different form of costs order.
17. For the avoidance of doubt, the costs order extends to the costs of two legal teams, i.e. the team representing the Director of Public Prosecutions and the team representing the other respondents, respectively. It was reasonable for the DPP to have separate representation in circumstances where the complaints made against her Office are different from those against the State respondents.
18. The costs order includes all reserved costs, the costs of the written submissions, and the costs of the supplemental written submissions on costs. In default of

agreement between the parties, the costs are to be adjudicated under Part 10 of the Legal Services Regulation Act 2015.

Approved
Gareth Simons