



# THE COURT OF APPEAL

Court of Appeal Record Number 2020/161

Whelan J.

Neutral Citation Number [2021] IECA 336

Costello J.

Murray J.

**BETWEEN**

**J.S.**

**APPLICANT/  
APPELLANT**

**- AND -**

**M.S. AND A JUDGE OF THE CIRCUIT COURT, NORTHERN CIRCUIT**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Costello delivered on the 17th day of December 2021**

1. In a judgment delivered on 19 July 2021 ([2021] IECA 204) this court dismissed the appellant's appeal against the order of the High Court granting him judicial review of a decision of a judge of the Circuit Court, Northern Circuit and remitting the underlying proceedings back to the Circuit Court to be heard by a judge other than the judge who made the impugned decision on 22 March 2019. In relation to the costs of the appeal, I indicated that my provisional view was that the costs of the appeal should be awarded against the appellant. The appellant was invited to make written submissions if he wished to contend for

a different order as to costs within 21 days of the delivery of the judgment and the respondents were to reply within 14 days thereafter.

2. The court has considered the submissions furnished. The appellant argued that due to his poverty, no order for costs should be made against him. He submitted that to do so amounts to a breach of his rights under Article 6 and Article 13 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights and Freedoms and the Constitution. He cites *Laskowska v. Poland* (App. No. 77765/01) (Unreported, European Court of Human Rights, 13<sup>th</sup> June 2007) at paras. 50-54, 60-63; *Kijewska v. Poland* (App. No. 73002/01) (Unreported, European Court of Human Rights, 6<sup>th</sup> December 2007) at paras. 46-47; *Kreuz v. Poland* (App. No. 28249/95) (Unreported, European Court of Human Rights, 19<sup>th</sup> June 2001) at paras. 52, 54-57, 59-66; *Wesolek v. Poland* (App. No. 65860/12) (Unreported, European Court of Human Rights, 13<sup>th</sup> June 2019) at paras. 19-20, 27-33; *Iambor v. Romania (no.1)* (App. No. 64536/01) (Unreported, European Court of Human Rights, 24<sup>th</sup> September 2008) at para. 121, and; *Lopata v. Russia* (App. No. 72250/01) (Unreported, European Court of Human Rights, 13<sup>th</sup> October 2010) at paras.154-160, in support of his contention that the court should not make the indicative order. He alleges that he has been subjected to treatment by the respondent which amounts to torture and that the order for costs would, in the circumstances, constitute a further act of torture. He says that the respondent and the courts are responsible for his impoverishment and they have deprived him of his rights as a father and discriminated against him in breach of Article 8 of the ECHR and Articles 7 and 24 of the EU Charter. He says the conduct infringes Articles 40, 41 and 42A of the Constitution and his human rights guaranteed under Article 2 of TEU.

3. The first named respondent did not file submissions. The second named respondent said that the indicative order should be upheld and that the appellant had not made out an argument which would justify the court from departing from the normal rule that costs follow

the event in circumstances where the respondents had been entirely successful on the appeal. They point out that the appeal was misguided as the appellant actually succeeded in the High Court. This was highlighted by the Supreme Court in its determination refusing the appellant leave to appeal directly to the Supreme Court ([2020] IESCDET 136). Notwithstanding this determination, he proceeded with the appeal. Furthermore, following the refusal of a motion seeking extensive reliefs in the Directions list of the Court of Appeal on 26 March 2021, the second named respondent's solicitor sent a Calderbank letter explaining that, in simple terms, he had obtained the relief he sought in the High Court and an appeal from that judgment makes no sense:-

*“It is our position that the Court of Appeal will be confined to determining whether Meenan J. made any errors in his ruling. Furthermore we will contend that it is not permissible to ask the Court of appeal to award massive sums of damages in the context of a judicial review action, and nor is it appropriate to ask the Court of Appeal to determine questions surrounding your relationship with [the first respondent] and your children.*

*Additionally, there is no question which is suitable for referral to the CJEU, in accordance with the law on this procedure.”*

4. The letter went on to say that if he withdrew his appeal by 1 May 2021, the second named respondent would not seek to recover its costs but that if chose to proceed, that the letter would be relied upon to seek costs against him. A reminder letter was sent on 19 May 2021 but the appellant did not reply to either letter and proceeded with his appeal. The second named respondent said that the appellant was warned of the consequences of pursuing his appeal and he should now be fixed with the consequences.

### **Decision**

5. Both the Rules of the Superior Courts and s. 169 of the Legal Services Regulation Act

2015 make clear that the normal position in relation to costs is that costs follow the event; that is, the successful party is entitled to an award of costs against the unsuccessful party. The issue may become more nuanced, but in a case such as this, where the appellant has failed entirely on his appeal, the costs should follow the event unless the losing party can satisfy the court that it ought not so order by reference to, *inter alia*, the matters set out in s. 169(1) of the Act, or can identify “special circumstances” within the meaning of O. 99, r. 1.

6. The applicant has not attempted to address any of the matters in s. 169. Instead, he has, in effect, sought to reargue the merits of the appeal which he has lost. This cannot be the basis for an award of costs which must be predicated on the proposition that the decision of the court is correct.

7. Secondly, he has sought to argue that costs should not be awarded against him due to his poverty. The impecuniosity of a litigant is not a basis to refuse an order for costs against an unsuccessful litigant. The appellant was well-aware of the consequences of proceeding with the appeal in circumstances where the Supreme Court had alerted him to the unmeritorious nature of his appeal against an order in his favour. He must bear the consequences of proceeding in the circumstances. Furthermore, given that he was not eligible for free legal aid, due to his resources, and given the self-evident fact that he was in a position to bring the proceedings and the appeal, the caselaw upon which he relies is not applicable on the facts of this case.

8. For these reasons, I would award the respondents the costs of the appeal.

9. Whelan and Murray JJ. have indicated their agreement with this ruling on costs and the order of the court.