

THE HIGH COURT

[2021] IEHC 623
[2020/2815 P]

BETWEEN

NICOLAE DUMITRAN

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

RULING of Mr. Justice Mark Sanfey delivered on the 4th day of October, 2021.

1. On 27th August, 2021, I delivered a judgment in relation to a challenge by the plaintiff to the constitutionality of s.78(5)(a) of the Finance Act 2005 as amended. That judgment ('the substantive judgment') should be read in conjunction with the present ruling, which concerns the costs of the action, in respect of which the parties have each proffered written submissions.
2. As the substantive judgment makes clear, the only relief sought by the plaintiff – that the subsection was invalid having regard to various articles of Bunreacht Na hÉireann – was refused by me. The defendants therefore submit that they were wholly successful in the proceedings, and that the court “wholly rejected” all of the arguments raised by the plaintiff. It is submitted that “there are no reasons why the court should depart from the usual rule that a wholly successful party should receive their costs”.
3. The plaintiff on the other hand argues that the case “...raised issues of importance which had a much more general application [than] solely the Plaintiff’s own interests. It resolved the issue of fairness in the minimum penalty that may be imposed on any person committing the same offence as the Plaintiff coming before the District Court, it gave guidance to the District Court on how to deal with the sentencing parameters set and it comprehensively addressed minimum penalties that may be set by the Oireachtas. These are all significant issues, affecting a great many people coming before the courts”. It is submitted that “the particular nature and circumstances of the case are such that it would be appropriate for the court to make an order for costs in favour of the Plaintiff”.
[Plaintiff’s written submissions]
4. The applicable statutory provisions governing the award of costs are sections 168 and 169 of the Legal Services Regulation Act 2015 and the recast O.99 of the Rules of the Superior Courts as introduced by the Rules of the Superior Courts (Costs Order) 2019 SI 584/2019. The principles set out in these provisions are admirably summarised by Murray J at para. 19 of his judgment in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183: -

“(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and 0.99, r.2(1)).

- (b) In considering the awarding of costs of any action, the Court should '*have regard to*' the provisions of s.169(1) (O.9, r.3(1)).
 - (c) In a case where the party seeking costs has been '*entirely successful in those proceedings*', the party so succeeding '*is entitled*' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).
 - (d) In determining whether to '*order otherwise*' the court should have regard to the '*nature and circumstances of the case*' and '*the conduct of the proceedings by the parties*' (s.169(1)).
 - (e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s.169(1)(a) and (b)).
 - (f) The Court, in the exercise of its discretion may also make an order that where a party is '*partially successful*' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).
 - (g) Even where a party has not been '*entirely successful*' the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O.99, r.3(1)).
 - (h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a))." [Emphasis in original]
5. In *Corcoran v. Commissioner of An Garda Síochána* [2021] IEHC 11, Simons J stated as follows: -
- "19. The courts have discretion, to be exercised on a case-by-case basis, to depart from the general rule that a successful party is entitled to its costs. One of the factors to be considered, under s.169(1), is the '*particular nature and circumstances of the case*'. The statutory language is broad enough to allow the court to consider whether the issues raised in the proceedings were of general public importance, and, if so, whether this justifies a modified costs order. In exercising its discretion in respect of costs, a court must seek to reconcile (i) the objective of ensuring that individuals are not deterred by the risk of exposure to legal costs from pursuing litigation of a type which – although ultimately unsuccessful – nevertheless serves a public interest, with (ii) the objective of ensuring that unmeritorious litigation is not inadvertently encouraged by an overly indulgent costs regime.
20. 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”.

6. Both of the foregoing passages from Murray J and Simons J were cited with approval by Meenan J in *Sherry v. Minister for Education and Skills* [2021] IEHC 224 in determining whether the particular “nature and circumstance of the case” and the “conduct of the proceedings by the parties” warranted a departure from the principle that the entirely successful party be awarded costs against the unsuccessful party.
7. There is no doubt that the defendants have been entirely successful in resisting the plaintiff’s claim, and that the arguments of the plaintiff were rejected in the course of the judgment. Can it then be said that it was reasonable for the plaintiff “to raise, pursue or contest” all or any part of his case?
8. The plaintiff contended that a fine of €5,000, even when mitigated by 50%, was “unjust and disproportionate to the circumstances of the offence and the offender. The alternative is to impose a sentence of imprisonment which, even if suspended, would be a disproportionate penalty for a first offender in the circumstances of the case” [para. 23 statement of claim]. It was clear from the submissions made on behalf of the plaintiff that his main contention was that, on pleading guilty, a fine should only be imposed on him in circumstances where a sentence of imprisonment was first deemed inappropriate; however, a possible fine of €5,000 was disproportionate given the nature and circumstances of the case, and in particular the probable inability of the plaintiff to discharge any such fine. The plaintiff’s position was that he was not likely in the circumstances of the case to receive a sentence of imprisonment if he pleaded guilty, but that if he were unable to discharge the fine, a sentence of imprisonment would be imposed on him in lieu of a fine, notwithstanding the view of the court that his offence was not sufficiently serious to warrant a sentence of imprisonment.
9. This is a slightly different point to that argued before the Supreme Court in *Osmanovic v. Director of Public Prosecutions* [2006] 3 IR 504. In that case, the applicants were charged with offences under s.186 of the Customs Consolidation Act 1876 as amended. The applicants argued, *inter alia*, that there was a wealth based discrimination in the provision under which they were charged; as Murray CJ characterised the argument, “...that the rich are fined and the poor are sent to prison”. The Supreme Court rejected this argument; however, it does not appear to have been specifically argued before the Supreme Court that imposition of a fine should only be considered where a sentence of imprisonment is deemed inappropriate, so that where a court had made such a determination, an inability to impose a fine appropriate to the circumstances of the case would render the sentencing provision disproportionate and thereby unconstitutional.
10. In the event, this Court was not persuaded that s.78(5)(a) of the Finance Act 2005 as amended imposed an obligation on the sentencing court to consider a fine only when the court did not consider a sentence of imprisonment appropriate, and considered that the

range of options open to the sentencing court, including suspending the sentence or making a community service order, would allow that court to fashion a just and proportionate sentence. This conclusion was consistent with the views of the Supreme Court in *Osmanovic* as set out in the substantive judgment, and in particular the comment by Murray CJ at para. 31 that "...the option of a suspended sentence is open to the judge in any given instance where in all the circumstances that might appear to him or her to be just".

11. It is true to say that the substantive judgment deals with significant issues which have a general application, rather than dealing solely with the plaintiff's interests. That is not to say that the plaintiff acted from a spirit of altruism or public-mindedness; clearly, he hoped to escape the consequences of his actions through a finding by this Court that the section under which he was charged was unconstitutional. On the other hand, the fine of €5,000, even if fully mitigated, could be regarded as a heavy penalty for the plaintiff, in circumstances where the loss to the Revenue Commissioners was said to be €360.
12. It seems to me that, given the dicta of the Supreme Court in *Osmanovic* in particular, these proceedings were something of a "long shot". However, that is not to say that the plaintiff's case was by any means unstateable, and indeed substantial arguments were ably made by counsel in support of the plaintiff's case. It may be that the substantive judgment is of assistance to sentencing judges in assuring them of the constitutionality of the provision in question, and their ability to engage fully with the range of sentencing options in a manner best suited to the justice of each individual case. It should also be said that, as regards the conduct of the application by the plaintiff, the matter was brought promptly before the court, and costs kept to a minimum by ready agreement between the parties as to the basis upon which the matter was to be fought.
13. Having regard to the nature and circumstances of the case, and the conduct of the proceedings by the parties, I am satisfied that this is a case in which it is appropriate to order otherwise than that the defendants be entitled to their costs as against the plaintiff. I do not consider it an appropriate case in which to award the plaintiff his costs; that should only be done in very exceptional cases, and I do not think the present case warrants such an order.
14. In all the circumstances, I think the most appropriate order is that each side should bear their own costs. There will therefore be no order as to costs for the reasons set out above.