THE SUPREME COURT

[Supreme Court Appeal No: 180/2018]

Clarke C.J.

Irvine P.

MacMenamin J.

Dunne J.

O'Malley J.

BETWEEN:

M.

Appellant

AND

THE PAROLE BOARD AND THE MINISTER FOR JUSTICE & EQUALITY

Respondents

Ruling of the Court as to costs delivered on the 30th day of June 2020.

Introduction

1. In its judgment in this case (*M. v. The Parole Board & Ors.* [2020] IESC 24), the Court dismissed the appellant's claim for orders by way of judicial review against the respondents. In brief, the Court held that the Minister for Justice and Equality did not have jurisdiction under s.2 of the Criminal Justice Act 1960 to grant parole to a prisoner who is detained in the Central Mental Hospital on foot of a transfer there from prison.

2. This ruling is concerned with the appellant's application for a recommendation from the Court in respect of the appeal for the purposes of the Legal Aid - Custody Issues Scheme, and for an order reversing the award of costs against him in the High Court and substituting therefor an order of costs in his favour, to be limited to such amount as would have been recoverable had he applied for and been granted the benefit of the Scheme in that Court.

Submissions

3. The appellant did not apply for a recommendation in the High Court, and in his pleadings made the standard claim for costs. It is now said that this was because, through oversight, his representatives did not advert to the possibility that the Scheme would be applicable to proceedings of this nature. In the application for leave to appeal to this Court, both an order for costs and a recommendation under the Scheme were sought. However, counsel on behalf of the appellant did make an application for a recommendation at the appropriate stage in the case management process, and the necessary form and declaration of means were filed.

4. In seeking a limited order for costs in the High Court, the appellant's legal representatives rely upon the well-known authorities such as *Dunne v. The Minister for the Environment (No.2)* [2008] 2 I.R. 775 and *Collins v. The Minister for Finance* [2014] IEHC 79, establishing the principles pursuant to which an unsuccessful party may be considered entitled to costs because the litigation in question is considered to have been, at least to some extent, in the public interest. It is submitted that the fact

that the appellant stood to gain personally from succeeding in the case does not detract from the fact that the judgment of this Court has clarified the scope of the relevant legislation, and that this should be reflected by way of an order in respect of the High Court costs. However, it is suggested that it would be "just and equitable" to limit the order by reference to the Scheme.

5. The respondents have decided not to seek their costs for the appeal, and they do not object to the Court making a recommendation under the Scheme. However, they oppose any interference with the High Court order in their favour. They point out that the appellant's pleadings included a claim for costs and that the Scheme was not referred to at any stage in the High Court.

Conclusion

6. So far as the appeal to this Court is concerned, the application for a recommendation under the Scheme was made at an appropriate time (although it must be said that it is inappropriate to include both a claim for costs and a request for a recommendation in the application for leave). The Court will, therefore, make the recommendation for the purposes of the appeal. The position in relation to the High Court order, however, is quite different.

7. It is entirely clear from the published terms of the Scheme (as it was during the era when the precursor scheme was administered by the Attorney General) that it is not an alternative to costs. It is necessary, in any case covered by those terms, for the practitioners representing a person seeking judicial review relief to make a decision as to whether to look for the benefit of the Scheme or to take the riskier, but potentially more lucrative, option of costs in the event of success in the litigation. It is of course permissible to change tack for the purposes of an appeal, as happened in this case. However, the structure of the Scheme is such that in principle it is not possible to ask for a recommendation at the end of the proceedings in either the trial or appellate court. Litigants may not wait to see the substantive decision before deciding which option to pursue.

8. It may be that, in a truly exceptional case, both a trial judge and the Legal Aid Board might accept that the failure to seek a recommendation at the appropriate stage was the result of genuine error or oversight. However, it would be extremely difficult to accept that such an error or oversight occurred where, as in this case, the proceedings were clearly capable of being found to be within the Scheme (being judicial review proceedings concerned with the personal liberty of a sentenced prisoner) and the pleadings include a claim for costs.

9. The application for the costs of the High Court is, in the view of the Court, entirely misconceived. Firstly, as the Court has had occasion to point out on many occasions, the fact that leave to appeal is granted on the basis of a point of law of general public importance under the current constitutional regime does not mean that an unsuccessful litigant is entitled to avoid the normal rules as to costs. It is to be hoped that the judgments of the Court will clarify any doubt there may be on the issues of law raised but, again, that is not sufficient for the exercise of an exceptional jurisdiction. The issue in this case was, ultimately, resolved by a reasonably straightforward exercise in statutory interpretation.

10. In the circumstances, the Court will make a recommendation in respect of the appeal for the purposes of the Scheme. It sees no reason to interfere with the order for costs in the High Court.