THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 572

[2021 276 JR]

BETWEEN

J.M. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND G.M.)

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND THE DIRECTOR OF THE JUVENILE DIVERSION PROGRAMME

RESPONDENTS

THE HIGH COURT

JUDICIAL REVIEW

[2021 688 JR]

BETWEEN

D.H. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND F.H.)

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND THE DIRECTOR OF THE JUVENILE DIVERSION PROGRAMME

RESPONDENTS

THE HIGH COURT

JUDICIAL REVIEW

[2021 695 JR]

BETWEEN

L.B. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND C.B.)

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND THE DIRECTOR OF THE JUVENILE DIVERSION PROGRAMME

RESPONDENTS

THE HIGH COURT

JUDICIAL REVIEW

[2021 692 JR]

BETWEEN

R.G. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND K.G.)

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND THE DIRECTOR OF THE JUVENILE DIVERSION PROGRAMME

RESPONDENT

RULING of Mr. Justice Mark Heslin delivered on the 8th Day of June 2022

1. This short ruling in relation to the question of costs must be read in conjunction with the judgment delivered on 1 February 2022, ([2022] IEHC 149), in which this court held that the 'right' which all four Applicants contended for, pursuant to s.23 of the Children Act, 2001 ("the 2001 Act") ran *"contrary to the will of the Oireachtas as clearly expressed in the plain meaning of the words used in the legislation".* For the reasons set out in that Judgment, the court also found that the contended-for right did not arise by *"virtue of European directive or constitutional provision*". The Applicants were not entitled to any of the reliefs sought and the Respondent was entirely successful.

2. Written submissions were furnished by both sides. Although there were 4 sets of submissions furnished on behalf of the Applicants, it is fair to say that all 4 are similar. I have carefully considered all submissions. The Respondents propose that the following order been made (i) that the application be dismissed; (ii) an order for costs be made in favour of the Respondent to be adjudicated in default of agreement.

3. By contrast, the Applicants submit that it is in the interests of justice to grant the costs of the Applicants, on the grounds that, *inter alia*, the proceedings concerned a novel, important and previously unexplored point of law and it was in the broader public interests that the nature and extent of the right to legal advice pursuant to s. 23 of the 2001 Act should be clarified, which had a significance extending beyond the sectional interests of each applicant. It is also emphasised that the issue raised in relation to Part 4 of the 2001 Act had not previously been determined by the court. It was also stressed that the primary beneficiaries of the proceedings would have been children who relied upon their parents to invoke this court's jurisdiction. In arguing for an entitlement to costs, the Applicants also focus on the acknowledgement in this Court's Judgment that the Applicants' legal advisers *"have no doubt been acting in accordance with the highest standards of their profession, motivated exclusively by the aim of asserting their respective clients' rights vigourously and professionally".*

4. Section 169(1) of the 2015 Act ("the 2015 Act") states:

*"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–*

- *conduct before and during the proceedings*

- *whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
- *the manner in which the parties conducted all or any part of their cases,*
- *whether a successful party exaggerated his or her claim,*
- *whether a party made a payment into court and the date of that payment,*
- *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*
- *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.*

Order 99, Rules 2, of the Rules of the Superior Courts ("RSC") provide:

> *"2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:*
>
> *(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*
>
> *(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.*
>
> *(3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.*
>
> *(4) An award of costs shall include any sum payable by the party in favour of whom such an award is made by way of value added tax on such costs, where and only where such party establishes that such sum is not otherwise recoverable.*
>
> *(5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded.*

5. In light of the foregoing, the 'starting point' is that (as the entirely successful party) the Respondents enjoy a presumptive right (*per*. s. 169(1) of the 2015 Act) to an award of costs against the Applicants (who were entirely unsuccessful). Whereas Order 99 Rule 2(1) of the RSC provides that costs are in the discretion of the court, this court is not 'at large' in the exercise of that discretion; and the court is mandated to have regard, in particular, to the various items set out in s.169(1) of the 2015 Act. In short, the Respondents are entitled to an award of costs unless the nature or circumstances of this particular case, including the conduct of the parties, means that the interests of justice require otherwise.

6. In essence, the Respondents submit that no circumstances exist to displace the presumption that they are entitled to their costs and they assert that there is no basis for this Court to exercise its discretion to depart from the 'normal' or 'general' rule as to costs (i.e. that 'costs follow the event').

7. In the Applicants' submissions, reliance is placed on the Supreme Court's decision in *Dunne v. Minister for the Environment* [2008] 2 IR 775, wherein it was held that the Court has a discretionary jurisdiction to depart from the general rule that costs follow the event, stating (from para. 26) that:

> *"…the Court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction…It is invariably*

> *a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant, but it is the factors or combination of factors in the context of the individual case which determine the issue*. *Accordingly, any departure from the general rule is one which must be decided by a Court in the circumstances of each case*"

8. The Respondents also point out that at para.18 in *Dunne,* the Supreme Court opined that the fact that a plaintiff is not seeking a private personal advantage and that the issues raised are of special and general public importance, are factors which may be taken into account, along with all other circumstances of the case, in deciding whether there is sufficient reason to exercise a discretion to depart from the general rule that costs follow the event. I would pause at this juncture to observe that in the present proceedings, it seems to me that each of the Applicants was asserting a right which they regarded themselves as entitled to avail of, personally. To put matters another way, the fundamental aim of each application was for the Applicants to secure access to the entire of their respective files. The means by which to achieve this was the assertion of a s. 23 right which they did not have. It is beyond doubt however that it was a right they sought to assert for themselves with a view to benefiting in a personal sense from same.

9. The Applicants also draw this court's attention to the decision in *McEvoy v. Meath County Council* [2003] 1 IR 208, wherein, in the context of declining to quash a zoning decision of the Respondent – but having made several findings of fact made in favour of the Applicant during the course of the hearing - Quirke J. granted 50% of the Applicant's costs of the proceedings. In making this determination, the Court considered, *inter alia,* the case of *O'Shiel (a minor) & Ors.* v. *Minister for Education and Science, Ireland and Attorney General* (Unreported, High Court, Laffoy J., 10 May, 1999) wherein aspects of the State's duty under Article 42.4 to provide for free primary education was raised.

10. The Applicants submit that, in *O'Shiel,* the exercise of the court's discretion pursuant to Order 99 RSC to award costs was considered, in particular, the *"special category of case in which the court will award costs to an unsuccessful plaintiff."* Although unable to secure a copy of the judgment, the Applicant cites Quirke J. as commenting as follows, in his decision in *McEvoy,* in relation to that decision:

> *"In that case, the unsuccessful plaintiffs were awarded the full costs of the action on grounds,* inter alia, *that the proceedings had significance which extended beyond the sectional interests of the plaintiffs, that it was in the broader public interests that the extent of various obligations and rights created by Article 42 of the Constitution should be clarified and that* ***the primary beneficiaries of the proceedings would have been children who relied upon their parents to invoke the court's jurisdiction to vindicate their constitutional rights."*** (emphasis added Applicants).

11. It does not seem to me that the present proceedings fall into anything like the same category as described above by Quirke J. At their heart, the present proceedings concerned a contended-for interpretation of words used in a piece of legislation (which Act is designed to divert those admitted to the relevant Programme *away* from the criminal process). Regardless of whether they are admitted to the Programme, or not, their fundamental rights remain protected. An acceptance of responsibility for the purposes of admission cannot be used against a would-be entrant in the context of criminal proceedings. Moreover, admission to the Programme constitutes a 'bar' to their prosecution in respect of the criminal or antisocial behaviour admitted. In the event of not being admitted, and subsequently prosecuted, the individual can avail of the full panoply of fair procedures rights in the context of such a prosecution. It is true that particular emphasis was laid by one of the Applicants on natural and constitutional justice (invoked

in that a fair procedures right of access to the entire Garda prosecution file was also said to exist, independent of the wording in the statute) but it could not be said, in my view, that the case truly concerned the nature or extent of fundamental or constitutional rights. It concerned access to material over-and-above the information and documentation to which each applicant had already been given access. Insofar as the issues in the case were of the wider public importance it seems to me that this was very much a 'by-product' of the right which each applicant contended for, in the context of each of their particular circumstances, where they were each desirous of seeing the entire Garda prosecution file at what was a very early-stage, no decision having been made to prosecute any of them.

12. The Respondents also rely on the decision in *GO'R v Director of Public Prosecutions* [2012] 1 IR 193 in which the Applicant was unsuccessful in his application to restrain the trial on the basis that the alleged victim of the offence was coached as to how she should give evidence. Charleton J. refused the relief sought, *inter alia*, on the basis that the Applicant had a viable and appropriate alternative remedy, namely an application to the trial judge. However, the Court held that since this was a novel point of law, and one which may impact outside the terms of that particular criminal trial, it may be that the usual costs order that costs follow the event is not appropriate. Following the hearing of submissions on the 14th October 2011, the Court awarded the Applicant 50% of his costs taking into account the public interest and the benefit for the administration of justice in general.

13. The Respondents' emphasis on a point being *novel* and having *wider implications* also features in their submissions with regard to 'test cases'. The Respondents acknowledge that s. 169(1) does not specifically refer to this being a factor, but submit that there is authority for the proposition that, where a case is in the nature of a 'test case' so that its outcome will potentially affect the position of persons other than the litigants, particularly if it raises issues as to the constitutionality of legislation or the proper interpretation of the Constitution or of legislation, this may be taken into account by the court in the exercise of its discretion as to costs if the plaintiff or applicant is unsuccessful.

14. In this regard rely on is placed on the decision of Binchy J in *P.C. v Minister for Social Protection* [2016] IEHC 343, wherein the learned judge stated (at 13-15) the following:

> *"[i]t seems to me that the concept of a test case may include those cases where a challenge to the constitutionality of a statutory provision, if successful, would inevitably result in a large number of claims being made against the State or an emanation of the State, provided that the challenge itself is substantive in nature and not frivolous or vexatious. This was such a case… Moreover, while the plaintiff brought these proceedings exclusively in his private interest, I consider that the issues raised in the case are of significant general public importance…..As I made clear in the substantive judgment, a determination adverse to the State would have had very significant long term implications for the State, … It is an issue of considerable significance to the Defendants and I am persuaded by the dictum of Murray C.J. in Dunne that the absence of one of the criteria that would normally define a public interest challenge (in this case the absent criteria being that the plaintiff should not have private interest in the case) does not exclude the court exercising its discretion to make an award of costs in favour of the plaintiff, having regard to the special circumstances described above."*

15. As the Applicants emphasise, Binchy J. added that whether a case qualifies as a test case or a public interest challenge is not determinative of the issue of whether to depart from the general rule that costs should follow the event, but rather is a factor that the court may take into account.

16. *P.C.* concerned the unsuccessful plaintiff's attempt to obtain a declaration that s. 249 (1) of the Social Welfare (Consolidation) Act, 2005, was contrary to various provisions of the Constitution and the European Convention on Human Rights. At paras 14 and 15 of his Judgment Binchy J stated inter alia:

> *"[14]…It was perhaps somewhat surprising that there had never been a determination in this jurisdiction as to the legal character of entitlements created by social insurance contributions, and it was inevitable that at some stage proceedings would be brought seeking clarification as to what, if any, propriety interest results from such contributions. That question has been clarified in my substantive judgment to the benefit if the Defendants.*
>
> *15. As I made clear in the substantive judgment, a determination adverse to the State would have had very significant long term implications for the State, affecting the flexibility available to the State in the manner in which it chooses to distribute funds collected for the welfare of the most vulnerable in society. This is especially so at a time when this country, along with almost all other countries in the developed world, faces acute challenges in the medium to longer term in funding the pension needs of its citizens."*

For the reasons explained in this court's 1 February 2022 Judgment, what was at issue in the present proceedings is nothing so fundamental and far-reaching as the question of a proprietary interest in social welfare contributions. Nor did the present cases assert that the Juvenile Diversion Programme was unconstitutional or that any provision in the 2001 Act was incompatible with the constitution.

17. The view expressed by Binchy J to the effect that it was "*inevitable*" legal proceedings would be brought to seek clarification of the issue, is not a view I could express with regard to the Applicants' claims. In other words, I do not believe it could fairly be said that these proceedings concerned an issue 'crying out for' clarification, where surprise could be expressed at the fact that such proceedings were not brought sooner. That is to take nothing away from the Applicants undoubted right to have brought their claims which were litigated with professionalism and skill. It is, however, to say that the point at issue in the present proceedings seems to me to be one far more 'net', far less novel, and without the wider significance or potential for adverse implications for the State identified in *P.C.*

18. The Applicants also rely on the decision in *F. v Ireland* (Unreported, Supreme Court, Hamilton CJ., 27 July 1995) where the Plaintiff sought a declaration that certain provisions of the Judicial Separation and Family Law Reform Act 1989 were invalid having regard to the Constitution. Although failing in the application, the Supreme Court held that while that case was of considerable importance to the parties involved, it was also of significance to litigants in at least 3,000 other cases in which orders had already been made under the 1989 Act. The Court held that there was no doubt that the appeal involved issues of considerable public importance and awarded costs of the appeal to the Plaintiff against the Attorney General. The Applicants submit that a similar approach was adopted in *Curtin v Dail Eireann* [2006] IESC 27. Fundamentally, however, the Applicants in the present case did not challenge any statutory provision as allegedly unconstitutional. They contended for a particular interpretation of a statutory provision, which provision and which statute were never said to be unconstitutional. Rather they argued that it meant what it does not. They were, of course, perfectly entitled to make that argument which was entirely stateable and was run with skill and no little ingenuity, but it was an argument that failed.

19. Of particular significance to the instant costs issue is the decision of a Divisional Court in *Collins v. Minister for Finance* [2014] IEHC 79 (Kelly, Finlay Geoghegan, Hogan JJ.). In its 26 November 2013

judgment, the Court had rejected the plaintiff's challenge to the *vires* of certain Ministerial orders made pursuant to the Credit Institutions (Financial Support) Act 2008 ("the 2008 Act") [see *Collins v. Minister for Finance* [2013] IEHC 530]. The Court further rejected the plaintiff's challenge to the constitutionality of the 2008 Act. Although multiple issues were raised in the course of the litigation, two fundamental contentions fell for consideration. First, it was said that the 2008 Act violated Article 15.2.1 of the Constitution by failing to articulate appropriate principles and policies in the body of that Act. Second, the plaintiff argued that the 2008 Act violated Article 11 of the Constitution in that it allowed for the appropriation of public monies in circumstances where no upper limit to that appropriation had been stipulated by the Oireachtas in advance. The backdrop to the proceedings concerned the recapitalisation, in 2010, of two credit institutions by the Minister for Finance by means of the issue by the Minister of promissory notes in favour of Anglo Irish Bank and Educational Building Society. It was agreed that there was no separate vote in Dáil Éireann in respect of these notes. The Court observed at the commencement of the principal judgment that: *"Apart from the intrinsic importance of the validity of this procedure, the plaintiff has also raised a series of constitutional questions in relation to the operation of the State's finances many of which have heretofore received little or no judicial consideration."*

20. In circumstances where the Court rejected the plaintiff's claims, the Defendants sought their costs against her on foot of the 'ordinary rule' that costs follow the event (see Order 99, Rule 1 of the RSC). The plaintiff, on the other hand, sought her costs against the Defendant. In resisting that application, Counsel for the Defendants contended that although the issues raised were of importance, this did not necessarily mean that it was in the *public interest* that these issues should be litigated. The Defendants accepted that the consequences of an adverse finding would have been very serious for the State parties but maintained that this was not the critical issue, arguing that there was no good reason why this point should have been litigated.

21. In the Court's view, a critical issue raised in the proceedings had never previously been judicially considered (namely, whether, the concept of appropriation contained in Article 11 and Article 17 of the Constitution required that sum so appropriation be defined by reference to a set limit). Given the fundamental nature of the plaintiff's objection (which, if correct, would have affected budgetary allocation in a far-reaching manner) the Court took the view that it was in the *public interest* that this point once raised should be determined. The Court also emphasised *"the very novelty of the issue".* The Court went on to make clear that entirely different considerations would come into play if, for example, the issue had been fully considered and determined in earlier proceedings; also emphasising that the issues raised were by no means straightforward and required careful and elaborate judicial consideration, which was a further factor of relevance in this context.

22. Before proceeding further, it seems appropriate to note that the present applications seem to me to have had the following characteristics or features:-

- no challenge was made to the constitutionality of any Statute or provision in same;
- all 4 Applicants contended for a particular interpretation of a section in an Act;
- they did so because they each asserted a private 'right' to access additional material which they would otherwise have no entitlement to;
- they were incorrect in the interpretation they contended for;
- at the heart of the case was not the existence or breadth of fundamental constitutional rights, nor did the proceedings relate to sensitive personal issues;

- any *potential* implications of the proceedings for others were a 'by-product' of the cases made, especially in circumstances where the taking of legal advice is not a mandatory pre-requisite for entry to the Programme (and, thus, the contended-for 'right' of access to additional material for the purposes of availing of legal advice, which the Applicants unsuccessfully argued for, need not necessarily have *any* wider implications, even if the Applicants had been correct);
- that being so, the issue at the heart of this case could not fairly be called weighty or exceptionally significant;
- these proceedings could not fairly be said to be of exceptional public importance;
- the Applicants were minors suing by their parents and next friends, but this was necessarily so, given that the Programme itself relates to minors only;
- many Applicants for Judicial Review involve Applicants seeking to establish/invoke 'rights' which, if established, could potentially have a more general application but that, of itself, does not mean that the proceedings are *public* as opposed to private in nature and, in the particular circumstances of this case, it is not necessarily the case that there would be any wider effects;
- each of the Applicants brought the proceedings in order to try and overturn a decision to refuse them access to material which they had been denied and, thus, each were seeking a *private* 'benefit', via the interpretation of s.23 of the 2001 Act (or related fair procedures 'right') contended for;
- the judgment of this court neither identified any prejudice to the Applicants themselves, nor to the wider public (in particular other potential entrants to the Programme) as a consequence of the interpretation of s.23 (be that the correct interpretation or the one contended for by the Applicants – i.e. this is not a situation where it might be said that there was or is an issue requiring legislative intervention);
- the issues which fell for determination were not unduly complex or novel;
- the essential point was one of statutory interpretation against very well-established legal principles, in particular, the 'literal rule' of construction;
- I do not believe that it could fairly be said that, as a result of these proceedings, that which was previously unclear has now been clarified. Whilst taking nothing away from the skill with which the Applicants' legal representatives made the case on behalf of each of them, the meaning of s. 23 was not unclear prior to these proceedings;
- Rather, the Applicants sought, with great skill, but unsuccessfully, to persuade this Court that a particular meaning could be found in the section, notwithstanding the fact that the contended-for 'right' was nowhere found in the words actually used by the Oireachtas in s.23 or elsewhere in the 2001 Act;
- It could not be said that the issue underlying these proceedings was in any obvious need of clarification. Still less could it be said to relate to an issue 'crying out' to be judicially determined. It could not be said that it was in any way 'surprising' that this Court had not been asked to determine the question previously. Thus, these proceedings could not fairly be considered to involve any particular or conspicuous novelty.
- The Programme operated successfully for years prior to the present proceedings being brought. In circumstances where the taking of legal advice is not a mandatory requirement for consideration for entry onto the Programme, it does not seem to me that these proceedings

provided certainly which was previously lacking, or amounted to the disposal of an important question of general concern to the wider public. Nor could it be said that, even though the Applicants lost, these proceedings had the effect of clarifying a matter of systemic or general importance.

23. In the present case, the issues were certainly nothing near as complex or truly novel as those which arose in *Collins.* I am not at all satisfied that what was at the heart of the present applications concerned an issue which could accurately be described as of *public* interest. There are, it seems to me, numerous statutory provisions which have not previously been the subject of High Court proceedings and, thus, have not been judicially determined. Why this is so seems obvious (i.e. there was no lack of clarity and the statute in question was operated without confusion or difficulty). It seems fair to say that this was the situation in respect of s.23 of the 2001 Act for years prior to the present proceedings being brought and, as I have observed, there could be no surprise expressed that proceedings of the present type were *not* brought sooner.

24. The fact that an applicant argues (wrongly) for a particular meaning of a statutory provision, which has not *previously* been judicially determined, does not, it seems to me, necessarily mean that the case is public in nature, or that it can automatically be said to raise a particularly novel, or obscure, or complex, issue requiring determination in the public interest. This may be the case, depending on the particular context, facts and circumstances, but it is not axiomatic.

25. At para 10 of the decision in *Collins,* the Court made clear that it considered that *"it was in the public interest that the constitutionality of the far-reaching legislation*" in question should be judicially determined. The Court went on to state that these considerations, in themselves, justified the Court exercising its discretion to refuse to make an order for costs in favour of the successful Defendants. The Court then identified the *"real question"* as being whether to "*go further*" and make an award of costs (whether in full or in part) in favour of the losing plaintiff. The analysis set out by the Court in *Collins* (which ultimately resulted in the awarding of 75% of her costs <u>to</u> the plaintiff) was in the following terms:

"11. The starting point for any consideration of this question is to be found in the judgment of Murray C.J. in Dunne v. Minister for the Environment [2007] IESC 60, [2008] 2 I.R. 755 where he observed ([2008] 2 I.R. 755, 783-784) that:

"The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party has an obvious equitable basis. As a counterpoint to that general rule of law the Court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the Courts to establish a cohesive code according to which costs would always be imposed on certain successful Defendants for the benefit of certain unsuccessful plaintiffs.

Where a Court considers that it should exercise a discretion to depart from the normal rule as to costs it is not completely at large but must do so on a reasoned basis indicating the factors which in the circumstances of the case warrant such a departure. It would neither be possible or desirable to attempt to list or define what all those factors are. It is invariably a combination

of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant, but it is the factors or combination of factors in the context of the individual case which determine the issue.

12. It is true that the pre-existing case law in respect of the award of costs to unsuccessful litigants in constitutional cases can be described as heterogeneous and as revealing a variety of distinct themes. Yet certain principles nonetheless emerge which may now be summarised.

13. First, costs (either full or partial) have been awarded against the State in cases where the constitutional issues raised were fundamental and touched on sensitive aspects of the human condition. Examples here might include Norris v. Attorney General [1984] I.R. 36 (homosexuality) Roche v. Roche [2006] IESC 10 (the constitutional status of human embryos) and Fleming v. Ireland (2014) (assisted suicide).

14. Second, costs have similarly been awarded to losing plaintiffs in constitutional cases of conspicuous novelty, often where the issue touched on aspects of the separation of powers between the various branches of government. Examples here include Horgan v. An Taoiseach [2003] 2 I.R. 468 (what constituted participation in war for the purposes of Article 28) and Curtin v. Dáil Éireann [2006] IESC 27 (aspects of the judicial impeachment power).

15. Third, costs have been awarded where the issue was one of far reaching importance in an area of the law with general application. Examples include TF v. Ireland [1995] (constitutionality of the Judicial Separation and Family Law Reform Act 1989), O'Shiel v. Minister for Education [1999] 2 I.R. 321(aspects of the State's duty under Article 42.4 to provide for free primary education), Enright v. Ireland [2003] 2 I.R. 321 (constitutionality of the Sexual Offenders Act 2001) and MD (a minor) v. Ireland [2012] IESC 10, [2012] 1 I.R. 697 (constitutionality of legislation making it an offences under under-age males only to have sexual intercourse with under-age females)

16. Fourth, in some cases the courts have stressed that the decision has clarified an otherwise obscure or unexplored area of the law. This point was emphasised by Murray C.J. in dealing with the costs question in Curtin. This was, after all, the first case in which the impeachment provisions of Article 35 had ever been commenced by the Houses of the Oireachtas in respect of a serving judge. As the Chief Justice observed:

"Article 35.4 is silent as to the procedures to be followed by the Houses of the Oireachtas when considering a motion for the removal of a Judge. The adoption of procedures for that purpose was left to each House. No such procedures had been adopted by either House before the question of the appellant's removal had been raised. This was understandable given that since the foundation of the State no substantive question concerning the removal of the judge had been brought before the Oireachtas. This meant that to a significant extent all those concerned, the Government, both Houses of the Oireachtas and the appellant were required to address novel but crucial constitutional questions in an uncharted constitutional terrain. In the event it was the Courts which were asked to resolve them.

In these circumstances, before the Court addressed the discrete issues arising between the parties, it was necessary to interpret and define the meaning and ambit of Article 35 of the Constitution as a whole with a view to identifying the appropriate balance between the function of the Houses of the Oireachtas to call for the removal of a judge for stated misbehaviour and the separation of powers between the Judiciary and the other organs of State as guaranteed by Article 35 itself. For

this purpose, the Court, as a constitutional court, had to consider questions that went, at least to some extent, beyond the specific issues raised, and determined, by way of constructive interpretation, how the final adjudication process must be addressed by the Houses of the Oireachtas when and if they come to a final decision. In addressing the broader issues the Court has provided certainty and obviated the risk of later litigation regarding them as well as providing a guide for the Oireachtas as to the procedures to be followed in the future.

In doing so the Court has clarified for the future the constitutional norms in a core area of constitutional governance as between the three organs of State, irrespective of the issues in this case. In this sense the case is exceptional and sui generis.

In all these circumstances the Court, in the exercise of its discretion, has decided that the appellant should be refused his application for full costs and be awarded half the costs of the proceedings in the High Court and half the costs of the appeal in this Court against the Attorney General."

17. Fifth, as Murray C.J. pointed out in Dunne, the fact that the litigation has not been brought for personal advantage and that the issues raised "are of special and general public importance are factors which may be taken into account." As Dunne itself shows, however, the mere fact that a litigant raises such issues in circumstances where no suit is brought for purely personal advantage does not in itself justify a departure from the general rule. In that case the plaintiff challenged the constitutionality of s. 8 of the National Monuments (Amendment) Act 2004 on the ground that it provided insufficient protection for national monuments which might be impacted by motorway development. Even though the plaintiff did not challenge this legislation for personal advantage and the issues raised were of general public importance, costs were nonetheless awarded against the losing plaintiff.

18. Sixth, even in those cases where the court was minded to depart from the general rule and award the plaintiff costs, this did not necessarily mean that the plaintiff was held to be entitled to full costs. Thus, for example, in both Horgan and Curtin the respective plaintiffs were awarded 50% of their costs. In yet other cases – such as Roche v. Roche and Fleming v. Ireland - full costs were awarded to the losing party in this Court.

19. We consider that the present case is an exceptional one which warrants a departure from the general rule to the point whereby this Court would justified in making a partial order for costs in the plaintiff's favour. In this regard, we would note the following factors:

- *the importance of this novel question of constitutional law;*
- *the weighty issues raised by this litigation;*
- *the importance to the State and its citizens that the constitutionality of the important and novel executive and legislative decisions with far-reaching consequences be judicially determined;*
- *the fact that the plaintiff is a public representative, did not act for personal advantage, brought the challenge following the decision in Hall v Minister for Finance and the State did not pursue the locus standi objection in order that the substantive issues raised be judicially determined;*
- *the decision clarified and provided certainty for the State in the operation of its financial procedures."*

26. Even allowing for the different factual contexts, none of the above factors identified by the Court at para.19 in *Collins* could be said to apply in the present case. On the contrary, there is a very stark

contrast between the characteristics of the present proceedings (which I have identified earlier in this ruling) and the factors identified by the Court in *Collins*.

27. In their submissions, the Respondent's draw this court's attention to the decision of Simons J in *Ryanair DAC v. An Taoiseach, Ireland and the Attorney General* [2020] IEHC 673. In that case, although unsuccessful in an application for judicial review, Ryanair prevailed on certain issues and also argued that the case raised issues of public importance, in circumstances where the judgment addressed issues concerning the separation of powers as between the Executive and Legislative branches of government. In applying the normal rule that costs follow the event, Mr. Justice Simons held (at para 19) that while the Judgment did:

> *"… address the question of separation of powers, the case was ultimately resolved on the narrow ground that the content of the government's public statements on travel during the coronavirus pandemic was not mandatory in its terms. In a sense, the outcome of the case can be said to have been obvious and entirely predictable. Not every case which raises issues of constitutional law can be said to be of general public importance."*

28. In coming to that conclusion, Simons J considered what issues would determine whether a case raised issues of general importance:

> *"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."*

Guided by the principles which were outlined by the Divisional Court in *Collins,* and fortified by the analysis of Simons J. in *Ryanair*, I cannot take the view that it was in the "*public interest*" for this Court to rule on the interpretation of s.23 contended for by the Applicants (as a means for each of them to access additional material which they asserted, wrongly, that they were entitled to).

29. For the reasons set out in this ruling, I take the view these proceedings did not comprise what might properly be called *"public interest"*- litigation in the manner explained in the jurisprudence. I nonetheless asked myself if the case could fairly be considered to be one which clarified a matter of 'systemic importance'. The answer seems to me to be in the negative. It does not seem to me that, as a result of the present proceedings, clarity has been brought to an issue which was, hitherto, opaque. Insofar as it might be said that all would-be entrants to the Programme are now *clear* as to the fact that the right to legal advice, per s. 23 of the 2001 Act does not come with it, access to the entire Garda prosecution file, I do not believe it could fairly be said that this was *unclear* prior to this Court's judgment. That is not to suggest for a moment that it was inappropriate for the Applicants to bring the proceedings which were conducted with professionalism and argued with skill. My point is that the decision to take these proceedings came with consequences, were the Applicants to be unsuccessful as has proved to be the case. It is also to have approached the issue by asking, not only whether these proceedings were 'public interest' in nature, but, satisfied that they were not, to proceed to ask if it could be said that they nonetheless performed what might be called a 'public service'. Both questions seem to me to produce an answer in the negative.

30. Thus, I am not satisfied that there is a sound basis which would justify a refusal of an order for costs in favour of the *wholly successful* Defendants. In short, it seems to me that the justice of the situation is met by not departing from the 'normal' rule that 'costs' should 'follow the event'. Indeed, it seems to me that it would be to create an injustice were the Court to refuse to award costs in favour of the party which has been wholly successful.