

APPROVED



**AN ARD-CHÚIRT
THE HIGH COURT**

[2026] IEHC 583

Record No. 2024/1120JR

BETWEEN/

GERARD KELLEHER

APPLICANT

AND

**THE IRISH PRISON SERVICE, THE MINISTER FOR JUSTICE AND EQUALITY,
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

(No. 3)

(COSTS)

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 12th day of August 2026

INTRODUCTION

1. This judgment deals with the costs application in *Kelleher v The Irish Prison Service (No. 2)* [2026] IEHC 388 (“*Kelleher (No. 2)*” or “*the principal judgment*”).
2. When the Applicant had initially applied for judicial review, he was a prisoner.
3. Consequent upon the application of the enhanced remission provisions, the Applicant was released on 4th February 2025.
4. This led the Respondents to issue a motion seeking to stay the judicial review proceedings on grounds of mootness.
5. That application came before the High Court, and in *Kelleher v The Irish Prison Service & Ors (No. 1)* [2025] IEHC 253 (“*Kelleher (No. 1)*”) (delivered on 9th May 2025), Kennedy J. refused the Respondents’ application to stay the proceedings on grounds of mootness and decided that it was appropriate to allow this application for judicial review to continue.
6. At the hearing of the costs application before me on 18th June 2026, both parties were under what transpires to be the mistaken impression that the costs of *Kelleher (No. 1)* had been reserved to the hearing of the substantive judicial review application.
7. However, the order of Kennedy J. dated 29th May 2025, and perfected on 13th August 2025 *inter alia* recites that the Respondents were directed to pay to the Applicant the

costs of those proceedings (*i.e.*, the costs of the application in *Kelleher (No. 1)*), which were to be adjudicated in default of agreement.

8. The following judgment, therefore, addresses only the costs of the principal judgment in *Kelleher (No. 2)*, where both parties seek their costs.
9. The principal judgment addressed the provisions of s. 27(3) of the Misuse of Drugs Act 1977 (as amended and substituted) (“the 1977 Act”) and a challenge to certain sub-paragraphs of s. 27(3) of the 1977 Act both on grounds relating to the Constitution and the European Convention on Human Rights Act 2003, as amended (“the ECHR Act 2003”).
10. For the reasons set out in the principal judgment, the Applicant’s interpretation of s. 27(3) of the 1977 Act and its various sub-paragraphs was rejected, as was the constitutional challenge and the challenge based on the provisions of the ECHR Act 2003 to that provision.
11. In this costs application, reliance is placed by the Applicant on the judgment of Kennedy J in *Kelleher (No. 1)* and, in particular paras 35, 36, 37, 39, 40, 42 and 50.
12. At para. 50, Kennedy J. *inter alia* had stated that “[t]he nature and importance of the issue and its likely recurrence are significant factors as is the risk that the failure to resolve the issue could potentially prejudice individuals’ ability to assert their statutory entitlements, deprive them of effective remedies an impact on their liberty”.

13. The point is also made that Mr. Kelleher had no personal interest or gain from the proceedings as he had in fact been released at the time of the substantive hearing and the State, therefore, has had the benefit of a judgment clarifying uncertainties in the law.
14. It is argued that Mr. Kelleher effectively became the *legitimus contradictor* in a case of general public importance, which importance was recognised by the judgment of the High Court in *Kelleher (No. 1)*. It is also pointed out that the judgment in *Kelleher (No. 1)* was not appealed by the Respondents.
15. In response, the Respondents submit that Mr. Kelleher's case was not one of general public importance and that it only affected a certain cohort of persons who came within the remit of ss. 15 or 15A of the 1977 Act.
16. It is stated that when the proceedings had commenced, Mr. Kelleher was a prisoner and therefore at *that* time, he had something to gain from the proceedings.
17. It is submitted that the decision in *Kelleher (No. 2)* is not novel and applied well-established principles.
18. In this regard, it is said that the correct interpretation of the prevailing provisions was set out in a number of decisions of the Court of Criminal Appeal, which decisions were referred to in the principal judgment. It is argued that, notwithstanding the existence of such well-settled principles, the Applicant pursued the application on the basis that the

Circuit Criminal Court Judge did not say what the minimum sentence was, whereas it is submitted that the Judge, in fact, did do so.

19. It is further submitted that, in dealing with the constitutional challenge, the principal judgment applied well-settled principles in relation to the equality provisions of the Constitution.

20. Further, it is argued that analogous arguments to those now raised by Mr. Kelleher had been addressed by Kearns P. in *Doyle v The Minister for Justice* [2015] IEHC 514 (delivered on 30th July 2015), and in *Doyle v Minister for Justice* [2015] IEHC 728 (delivered on 20th November 2015), in relation to the similar sentencing and penalties legislative regime which had been inserted into the Firearms Act 1964 by s. 61 of the Criminal Justice Act 2006, and which also arose in the context of an application for temporary release from prison pursuant to s. 2 of the Criminal Justice Act 1960 (as amended).

DECISION

21. As mentioned, notwithstanding the parties' respective assumptions in relation to costs in *Kelleher (No. 1)*, those costs were in fact determined by an order perfected on 13th August 2025, where Kennedy J. *inter alia* directed the Respondents to pay to the Applicant the costs of those proceedings, which costs were to be adjudicated by the Legal Costs Adjudicator in default of agreement. Accordingly, that matter has been already determined by Kennedy J.

22. This judgment, therefore, addresses only the costs involved in *Kelleher (No. 2)*.
23. Generally, the position on costs is addressed in s. 169(1) of the Legal Services Regulation Act 2015 (“the 2015 Act”) and (a recasted) O. 99, rr. 2 and 3 of the Rules of the Superior Courts 1986 (as amended and substituted) (“the RSC 1986”) (S.I. 584 of 2019).
24. The operative provisions of the 2015 Act came into force on 7th October 2019 and the new provisions of O. 99 of the RSC 1986 took effect from 3rd December 2019.
25. The default position is that *costs follow the event* where a party has been entirely successful 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 the matters set out at ss. 169(1)(a) to (g) of the 2015 Act).
26. Section 169(1) of the 2015 Act *inter alia* provides that 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 were unreasonable in refusing to engage in the settlement discussions or in mediation.

27. Whilst primarily addressing how the Supreme Court treats of costs in cases before that court, Murray J. also restated the approach which the Court of Appeal and the High Court should adopt when dealing with the question of costs in *Little v The Chief Appeals Officer & Ors (No. 2)* [2024] IESC 53 (“*Little (No. 2)*”).

28. At para. 34 of his judgment in *Little (No. 2)*, Murray J. defined public interest proceedings as civil litigation which had the following elements:

“(a) *It involves a claim against the State, or an organ or agency of the State (including a statutory body). Normally, the proceedings themselves will be initiated against the State or such organ, agency or body but, if unusually, such a claim may arise by way of defence or counterclaim in proceedings brought by the State;*

(b) It seeks relief in public law, whether in the form of a challenge to the validity, legality or compatibility having regard to the Constitution, European Law, the European Convention on Human Rights or the general principles of administrative law, of an enactment, measure, act, omission or decision of a body of the kind specified in (a), whether by way of plenary action, proceedings by way of judicial review or statutory appeal;

(c) It raises directly a point of law of general public importance;

(d) Although – as I have noted – there are decisions using this term to refer exclusively to proceedings brought solely for the purpose of vindicating a right

or interest of the public generally, and not the advancement of the personal interests of the litigant, when I use these cognate phrases in the course of this judgment, I am not so limiting them.”

29. The Applicant’s challenge, in my view, meets this definition of public interest proceedings.

30. That said, there is, however, no factor in Mr. Kelleher’s case which brings it within the category of an exceptional case which could be described as foundational, far-reaching, of constitutional conspicuous novelty or involving a matter of fundamental importance in the manner set out at para. 71 of *Little (No. 2)* and as further referred to by the Supreme Court in its ruling in *Chain Wen Wei v Minister for Justice & Anor (No. 2)* [2025] IESC 9 at para. 12, or which would warrant making a costs order in his favour.

31. Further, by way of analogy, in *Amariei v The Chief Appeals Officer & Ors* [2026] IESC 28, the Supreme Court stated that arising from its judgment in *Little (No. 2)*, the principles dealing with the question of costs set out in Murray J.’s judgment in *Little (No. 2)* require “*a far stricter test in awarding costs to an unsuccessful litigant in public interest litigation than to the decision whether to exempt such a litigant from an adverse costs order*”.

32. In terms of this question of exemption, the issue which arises is whether or not the Respondents are entitled to their costs or whether the Applicant comes within the category of those cases referred to by Murray J. at paras 35, 68 and 69 of his judgment

in *Little (No. 2)*, where the High Court enjoys a discretion not to award costs against an unsuccessful applicant in public interest proceedings.

33. At para. 69 of *Little (No. 2)*, Murray J. stated that in determining whether to exercise that discretion not to award costs against an unsuccessful plaintiff or applicant in public interest proceedings, regard had to be had to all the facts and circumstances, when carrying out that balancing exercise, and he referenced a number of non-exhaustive factors at para. 35 of his judgment.

34. In assessing such factors, whilst it is true that some of the arguments made on behalf of the Applicant were the subject of previous authority, I do not consider that these proceedings fall within the category of cases where it would, in the circumstances, be characterised as unjust not to award costs to the Respondents.

35. Rather, in assessing and balancing the following factors, I consider that there should be no order as to costs arising from the principal judgment.

36. Whilst these proceedings do not constitute a test or pathfinder case, and nor could it be said that they fall into a category where the subject matter of the litigation was such that the determination of costs was likely to have a significant deterrent effect on a category of persons affected by the legal issue, the other non-exhaustive factors outlined by Murray J., at paras 35 and 69 of his judgment in *Little (No. 2)*, when applied to the facts and circumstances of Mr. Kelleher's case, in my view, support making no order as to costs insofar as the principal judgment is concerned.

37. In this regard, as referred to earlier, in *Kelleher (No. 1)*, the High Court (Kennedy J.) at para. 50 generally considered that the nature and importance of the issue to be decided in the substantive case, and its likely recurrence, was a significant factor, as was the risk that the failure to resolve the issue could potentially prejudice individuals' ability to assert their statutory entitlements, deprive them of effective remedies, and impact on their liberty. Whilst I have not found for the Applicant, the substantive proceedings were sent forward as involving a point of law which was stateable and of general public importance where it was argued that the various sub-paragraphs of s. 27(3) of the 1977 Act were unclear.

38. Further, at the time of the hearing of the substantive proceedings, Mr. Kelleher had been released from prison and it cannot be said that he had any personal advantage to be gained from the outcome of the proceedings, whereas there is an overall benefit to the Respondents in having these matters determined in an area of the criminal law which is of general systemic importance.

39. There was also a degree of complexity in the relationship between the various sub-paragraphs s. 27(3) of the 1977 Act, as amended and substituted, and which were addressed in the principal judgment.

40. Further, the outcome of the proceedings is relevant to those cohorts of prisoners who come within these categories of offences.

41. In the circumstances, therefore, I shall make no order as to costs arising from the principal judgment.

CONLETH BRADLEY

12th August 2026