

THE HIGH COURT

Record Number 2021/795JR

[2026] IEHC 658

BETWEEN:

FRANCIS McGUINNESS

Applicant

-AND-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT of Mr Justice Cian Ferriter delivered on 5th October 2026 (Costs)

Introduction

1. This is my judgment on the costs of these proceedings.
2. These proceedings have an involved background as set out in detail in my judgment of 12 May 2026 ("the judgment" or "the principal judgment").
3. The applicant, notwithstanding that he was unsuccessful in these proceedings, seeks either an order for his costs or, alternatively, an order that there be no order as to the costs of the proceedings, in addition to an order for the costs of an extension of time application which he issued and which the DPP withdrew her opposition to on the second day of the hearing of the judicial review.

Little

4. The applicant relies in support of his position as to costs on the judgment of Murray J. in the Supreme Court in *Little v Chief Appeals Officer* [2024] IESC 53 ("*Little*"). It is useful to

briefly summarise the salient aspects of that judgment to set the parties' costs arguments in context.

5. *Little* addressed the question of the proper approach to the question of the costs of unsuccessful appellants in Supreme Court appeals in what could be characterised as “public interest proceedings” in the sense explained by Murray J at para 34 of his judgment, namely proceedings involving a claim against the State (or one of its organs or agencies), which seek public law relief and which directly raise a point of law of general public importance. Murray J (at para 35) set out the following general principles which could be deduced from the case law more generally as to the circumstances in which no order as to costs will be made in such proceedings:

- (i) *It is a necessary, but not sufficient, condition to the exercise of the power not to award costs against an unsuccessful claimant in such proceedings that the proceedings involve a point of law of general public importance (Pervaiz v. The Minister for Justice and Equality and ors. [2020] IESC 73 at para. 7). Built into that requirement is that the issue, if not novel, is sufficiently unclear or, if clear, there is a substantial question of whether it is appropriate to decide if it should be changed.*
- (ii) *It is a relevant, but not necessary, consideration that the proceedings are brought by the party in question in circumstances in which they obtain no personal advantage from the outcome of the proceedings, but in that regard it is relevant whether ‘the subject matter of the litigation is likely to have a significant effect on the category of persons affected by the legal issues’ (ELG v. HSE (No. 2) [2022] IESC 26 at para. 11).*
- (iii) *Before the Court can consider exercising this discretion, the point of law must be stateable, and it is only in unusual circumstances that costs would not be ordered against an unsuccessful applicant where the case is other than one of real substance on the merits. The strength of the case for an exemption from costs is in proportion to the strength of the underlying claim.*

- (iv) *A point of law may be of general importance, yet at the same time discrete in its application. The strength of the case for an exemption from costs is also in proportion to the systemic importance of the point. This reflects the fact that the State may often be the net beneficiary of a clarification of the law in an area of systemic importance, while the party who instituted the proceedings may not secure any equivalent advantage for themselves had they won. It may in an individual case be just that, in those circumstances, the respondent should bear its own costs as the price of obtaining clarification of the law.*

- (v) *Even a case that is weak, although stateable, and although brought by the plaintiff or applicant in the advancement or protection of their own interests, may merit an exemption from an order for costs where the point arises from avoidably unclear legislation. This is a particular situation, which should be viewed as an expression of the court's disapproval that persons affected by obviously unclear laws should have to bear the risk of litigation costs in order to secure a clarification that ought never to have been necessary (Lee v. Revenue Commissioners).*

- (vi) *Similarly, where a case is a 'test case' in the true sense of the term (that is one or more pathfinder cases selected from a larger cohort of pending claims for the purposes of determining issues of law that will govern all actions) the Court may decide not to award costs against the claimant whose case is selected to go forward on this basis (O'Keefe v. Hickey and ors. [2009] IESC 39; Cork County Council v. Shackleton [2007] IEHC 334, [2011] 1 IR 485). Necessarily, in exercising this discretion, the Court should have regard to whether a given case falls into a category where 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 issue (Corcoran at para. 20).*

6. At para 53, Murray J stated that “of course, the successful party must, not least of all having regard to the provisions of LSRA [Legal Services Regulation Act 2015], retain the right to contend that some or all of the costs of the case should be awarded against the unsuccessful party.” He went on to note that:

“even if the point in the case is one of general public importance and the State party obtains some benefit from the clarification to the law resulting from the proceedings, there is a large area of possible objection to [releasing an unsuccessful party from the obligation to pay costs]: that the case was an obviously weak one; that the point was ultimately found to be covered by well-established authority; that the nature of the private advantage at stake for the unsuccessful party in the action is such that it would be unjust not to award costs (for example if the proceedings were brought for a commercial purpose); that the conduct of the unsuccessful party is such that costs should be awarded against it; that the point of law in issue is so discrete and particular to the case of the unsuccessful party that the threshold for exempting them from costs is not met”.

7. As regards the question of awarding costs in favour of an unsuccessful party, at para 62, Murray J stated that *“the cases since the decision in Dunne have consistently applied 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: as Charleton J. put it in Minister for Justice v. McPhillips [2015] IESC 47 orders of this kind are ‘a genuine rarity’ (at para. 50)”* and set out categories of cases in which such rare orders have been made.

The parties’ submissions

The substantive issues

8. The essential basis of the applicant's position as to costs is that the judgment dealt with matters which the Supreme Court determined to be of general public importance and that the judgment clarifies the law on a foundational aspect of the criminal law, namely the question of whether an orally pronounced conviction may have legal consequences.

9. Counsel for the applicant submitted that the judgment was of systemic benefit for the State in clarifying the proper interpretation of the trilogy of authorities represented by *Burke v DPP* [2007] 2 ILRM 371 (*“Burke v DPP”*, decided by Charleton J.), *Muntean v Hamill* [2010] IEHC 391 and *Harvey v Leonard* [2008] IEHC 209 (*“Harvey v Leonard”*), and in clarifying the judgment of Hogan J in *McCabe v Governor of Mountjoy Prison* [2014] IEHC 309 (*“McCabe”*) flowing from those authorities. He points to the fact that Charleton J was one of

the judges, along with Hogan J, who sat on the panel of Supreme Court judges which determined that leave to appeal against the Court of Appeal decision should be granted on the basis that the appeal raised points of law of general public importance. He submitted that my judgment involved an important clarification of the effect of those decisions, and also importantly clarified why the judgment of McCarthy J for the Supreme Court in *Feeney v Clifford* [1989] IR 668 did not apply to the criminal summary trial oral conviction issue. He also contended that my judgment clarified the application of the principle of *autrefois convict* to an orally pronounced conviction. Counsel submitted that the DPP was the main beneficiary of my judgment. He further submitted that the judgment clarified the law on remittal following prohibition.

10. Counsel for the applicant also laid emphasis on the fact that I was critical in my judgment of the fact that the Circuit Court judge had failed to afford the applicant fair procedures and had not concluded the appeal hearing to sentence stage prior to her retirement. He submitted that on the application of the *Little* principles, clarification of the important points of law in the judgment provided a wider systemic benefit which went beyond the personal interests of the applicant; that the Supreme Court had found that there was an arguable case which potentially had real substance on its merits; that my judgment did not dissent from the Supreme Court's view that the case raised issues of general public importance and that the state of the law was unclear prior to my judgment and had been clarified by the judgment. By reference to the matters set out in para. 53 of the judgment of Murray J in *Little*, he submitted that the applicant's case was not an obviously weak case and that while there was some private advantage for the applicant, there was a wider systemic benefit that transcended the applicant's individual interests and that the issue of law was not a narrow or discrete one but was of a foundational character.

11. The DPP for her part submits that the applicant does not come within the type of circumstances discussed in *Little* which would justify departure from the default rule enshrined in s.169 Legal Services Regulation Act 2015 ("s.169") that the successful party is entitled to his costs of the proceedings. The DPP submits that the judgment simply confirms the legal position which had been known for some 150 years i.e. that a conviction in a summary criminal matter does not have legal effect unless the trial court has also pronounced on sentence, that the applicant's case was an obviously weak one and that the proceedings were brought purely for his private advantage such that the circumstances as a whole merit the application of the

default rule set out in s.169 namely that costs should follow the event. The DPP also submitted that, on the question of prohibition, the applicant's case was very much confined to its facts and he had not raised anything which justified a judicial review to be instituted.

The extension of time application

12. The applicant contended that he was compelled to issue a motion for extension of time, arising from the DPP raising a point about delay in her statement of opposition, and that the application was contested in written and oral submissions up to the morning of the second day of the hearing when the DPP dropped her resistance to that application. If there had not been opposition to that the application, it might have been possible to conclude the substantive hearing before me within one day as opposed to the day and a half or so that it did take. Counsel for the applicant submitted that, on the basis of the application of the ordinary principles encapsulated s.169, the applicant is entitled to the costs of that issue, irrespective of the court's view on the costs of the proceedings as a whole.

13. The DPP submitted that the extension of time application was a motion which the applicant decided to bring and which was brought in the context of judicial review proceedings which he lost entirely and that there was therefore no basis for any discrete costs order in respect of that application which did not in any event materially add to the length of the hearing.

Discussion

14. As is clear from the principal judgment, these judicial review proceedings followed an unusual course. The proceedings were issued on 31 August 2021. The application for leave to apply for judicial review was put on notice. The proceedings as instituted focused on an alleged failure of fair procedures in the hearing of the Circuit Court appeal of a District Court summary conviction, on the basis that the Circuit trial judge decided against making a case stated without notice to the applicant and in his absence, with separate grounds advanced relating to alleged wrongdoing by the Gardaí. The High Court made an order in September 2021 for the release of the DAR of various hearings before the Circuit Criminal Court. It appears that the transcripts of the DAR recordings were not finally provided until October 2022. Ultimately, the High Court (Hyland J) heard a contested application for leave to apply for judicial review in May 2023. The applicant at that point sought to substantially refocus his

case on the contention that he had been orally convicted on 9 July 2019 in the Circuit Court, that that conviction had legal effect, and that therefore the matter could not be remitted for hearing by a fresh Circuit Court judge (the original Circuit trial judge having retired by the time the judicial review leave application came on for hearing). The High Court refused to grant leave. The Court of Appeal upheld the High Court decision to refuse to grant leave.

15. As noted in my judgment, the Supreme Court overturned the Court of Appeal (and High Court) by granting leave to the applicant to apply for judicial review, on the basis that there were points of law of general importance raised in the proceedings being those set out at para. 21 of its determination (as discussed at paras. 27 to 29 of my judgment). These points were not previously pleaded by the applicant.

16. On the basis of the foregoing sequence as to the evolution of the applicant's case, I do not see that there is any real argument that the *Little* principles could apply up to the point at which the Supreme Court granted leave. I am however prepared to accept that from the point of the Supreme Court granting leave onwards the case on the face of it raised points of general public importance because the Supreme Court so determined in its determination on the applicant's application for leave to appeal to the Supreme Court and that therefore the *Little* principles are potentially of application from that point onwards.

17. In my view, there is no basis at all to the contention that this case fell within the very exceptional category of case, as discussed by Murray J in *Little* at para 62 (as set at para 7 above) whereby costs could be awarded in favour of the applicant against the DPP and I reject the applicant's application in that regard, which in fairness was not pressed at the costs hearing before me.

18. As regards the application of the *Little* principles as to when no order as to costs is appropriate, I accept for the purposes of this ruling that there were points of general public importance raised given the determination of the Supreme Court panel to that effect. It must be recalled however that all that the Supreme Court ultimately did was grant leave to the applicants to pursue his case in judicial review on those points. While it is the case that I did not in the judgment take issue with the Supreme Court's characterisation of his revised case as raising points of law of public importance, the detailed consideration of the applicant's case

ultimately revealed that the case was not one of wider systemic importance and could be resolved by reference to well established authorities and principles.

19. While I accept that the judgment may have been of assistance in contextualising some more “outlier” judgments in the body of jurisprudence, I do not believe it can be objectively said that the judgment clarified an unclear area of law more generally or represented a contribution to the jurisprudence which was in any way novel or of systemic importance. The judgement did not provide clarification on some fundamental aspect of law which was uncertain. Rather the judgement clarified that the arguments advanced on behalf of the applicant as to the purported legal consequences of an orally pronounced conviction in circumstances where the summary trial judge had not proceeded to sentence were not well founded in law and indeed ran contrary to the accepted legal position for some 150 years. Hogan J in *McCabe* had explained why the decision in *Burke v DPP* could not be regarded as good law; my judgment did not contain any novel insight in that regard. *Harvey v Leonard* and *Feeney v Clifford* were distinguishable for reasons I explained in my judgment. Standing back, it simply cannot be said that the judgment provided clarification on a significant area of the law where there was uncertainty or that the judgement has the systemic benefits for which the applicant contends. Rather, the applicant advanced a case which ambitiously sought to swim against a strong tide of prevailing jurisprudence. He did so to advance his own personal interests. He was wholly unsuccessful.

20. In the circumstances, in my view, on the application of the principles set out in *Little* and in particular at paragraphs 35 and 53 of that judgment, the applicant has not made out a case for departing from the default rule that the costs should be awarded to the successful party. His case was taken for purely private advantage. The case was a weak one. It was not of systemic importance. It did not arise from unclear legislation. It was not a test case. In my view, it follows that the DPP is entitled to her costs of these proceedings subject to the question of the costs related to the extension of time application to which I now briefly turn.

21. While the DPP's opposition to that application was only withdrawn on the second day of the hearing, at a point when the substantive issues between the parties had been the subject of the parties' oral submissions, and at the court's encouragement, I do not accept that the application added as materially to the length of the hearing of the proceedings as the applicant contended for. In any event, the applicant chose to bring an extension of time application

when, on his revised case on the principal issues, he did not need to do so. The question of extension of time was ultimately a makeweight issue in the proceedings as a whole which the DPP took a pragmatic view on during the hearing at the invitation of the court. In the circumstances I think the fair and appropriate order to make on that application is no order as to costs.

22. I will, accordingly, make no orders as to costs in respect of the extension of time application and I will make an order as to costs in favour of the DPP in respect of the rest of the proceedings.

Effect of this costs order on earlier costs orders

23. It is necessary to briefly address the costs order made by the Supreme Court on 22 May 2025. The Supreme Court made an order that the applicant do recover from the DPP the costs of the Supreme Court appeal, such costs to be adjudicated in default of agreement. The Supreme Court ordered that "The costs of the High Court and the Court of Appeal as between the [applicant] and the [DPP] be costs in the cause" and the Supreme Court made no order as to the costs of the appeal as against or in favour of the Commissioner of An Garda Síochána "with the costs orders in the High Court and Court of Appeal in respect of [the Commissioner of An Garda Síochána] remaining extant".

24. The Supreme Court further ordered that any costs in respect of the Courts Service "be left over to the High Court trial judge". In fact, counsel for the Courts Service appeared at the outset of the hearing on costs before me as between the applicant and DPP and stated that that the Courts Service had the benefit of costs orders in the High Court and Court of Appeal. I permitted the Courts Service to take up a copy of those orders on the basis that the Courts Service was no longer a party to the proceedings by the time the matter came on for hearing before me. Given that the Courts Service was not properly a party in respect of the matters identified by the Supreme Court as being the relevant issues in the proceedings (being the oral conviction issue and the prohibition issue) and the issues addressed by me in the judgment, there was no basis to disturb the original costs order of the High Court and Court of Appeal in respect of the Courts Service.

25. Likewise, it is clear from the terms of the Supreme Court costs order of 22 May 2025 that the costs orders in the High Court and Court of Appeal in favour of the Commissioner of An Garda Síochána remain extant and I have no role in respect of those.

26. Given that I have awarded the costs of these High Court proceedings (save for the extension of time motion) as between the applicant and the DPP to the DPP, the effect of that order in light of the order of the Supreme Court that the costs of the High Court and Court of Appeal as between the applicant and the DPP be costs in the cause, is that the DPP is also entitled to her costs of the Court of Appeal.

Conclusion

27. For the reasons set out above, I will make an order as against the applicant for the DPP's costs of the High Court proceedings, save for the costs of the extension of time application, those costs to be adjudicated in default of agreement.

28. I will discuss the final form of the costs order with the parties as necessary.