THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

Neutral Citation Number [2020] IECA 131
IECA 342 [2019/283]

Donnelly J.
Ní Raifeartaigh J.
Power J.

BETWEEN

PAUL DOYLE

APPELLANT

AND

THE CRIMINAL INJURIES TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

[2019/282]

GARY KELLY

APPELLANT

AND

THE CRIMINAL INJURIES TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 29th day of April 2021

1. I delivered judgment on the substantive issues in this case on the 4 December 2020.

This judgment deals with the question of final orders and costs.

Recapitulation of how the case was argued, the issues arising, and the outcome of the appeal

2. When the case was argued, much of the time was spent by the parties dealing with the question of whether or not there was an EU law right to compensation (deriving from Directive 2004/80/EC) in respect of injuries criminally inflicted in circumstances where the perpetrator committed the offence in Ireland in respect of an Irish victim i.e. in a case without any cross-border dimension. After the hearing but before the judgment was delivered, the decision of the Grand Chamber in the *B.V.* case[1] made it clear that there was such a right.

3. In my judgment of 4 December 2020, I divided the appellants' claims into four parts. The first was whether the respondents were entitled to legal aid. The Court held that neither Article 47 of the Charter, Article 19 of the TEU, nor the principle of effectiveness in EU law (alone or in combination), as informed by the jurisprudence of the European Court of Human Rights on Article 6 of the European Convention on Human Rights, required that legal aid must be provided to the appellants in order to vindicate their rights under the Directive to receive fair and appropriate compensation by bringing a claim before the Tribunal; nor did they require that the Tribunal must make an award of costs in the event of a successful claim. The appeal in respect of this limb of the appellants' claim was dismissed.

4. The second issue related to the exclusion of pain and suffering from the Scheme. The Court held that this claim was premature in the absence of any Tribunal decision on

[1] C-129/19; ECLI:EU:C 220:566 *Italian Presidency of the Council of Ministers v. B.V.*

the appellants' cases. The appeal in respect of this limb of the appellant's claim was dismissed.

5. The third issue related to paragraph 14 of the Scheme, which permits the Tribunal to consider "conduct, character and way of life". I sub-divided this into two further issues: (i) whether the presence of paragraph 14 in the Scheme was itself contrary to EU law, and (ii) the application of paragraph 14 to the applicants' cases. The Court held that insofar as the appellants' claim constituted a challenge to the inclusion of paragraph 14 in the Scheme, it should be rejected; and insofar as the appellants' claim was that it would be unfair to apply paragraph 14 to their cases, their claims were premature as the Tribunal had not yet ruled on their claims. The appeal was therefore dismissed on this claim; part (i) on its merits, and part (ii) because it was premature.

6. The fourth issue was the inability of the appellants to access any information as to how paragraph 14 has been applied in the past by the Tribunal. Here the appellants achieved success; the Court held that their inability to access any information about previous decisions was in breach of their constitutional right to fair procedures (applying the decision in *P.P.A*[2]) and/or failed to meet the conditions for effective protection of their EU law right. The appeal in respect of this limb of the appellants' claim was allowed and submissions were invited as to the precise relief to be granted.

7. At paragraphs 163 and 164 of the judgment, having found in favour of the appellants on the fourth issue as described above, I went on to say:

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[2] *P.P.A. v. Refugee Appeals Tribunal* [2007] 4 IR 94

"*Nonetheless, issues of cost and practicality must be taken into account. Some of the Declarations sought by the appellants are very broad in their terms. Insofar as they seek relief in respect of all previous decisions of the Tribunal, this would in effect require the Tribunal (i) to have someone read through the entirety of whatever records it holds in respect of more than forty years of compensation decisions; (ii) identify decisions in which paragraph 14 was considered and either applied or disapplied; (iii) redact the records in such a way as to anonymize information that would identify the claimants in those past cases; and (iv) make those selected and redacted decisions available in some collated format for the appellants. I do not think that the vindication of the appellants' rights under either constitutional law or EU law would require the Tribunal to go that far. Nor do I consider that it would be appropriate to order the Tribunal to hold some form of preliminary hearing in relation to the paragraph 14 issue for the appellants or more generally. It should be master of its own procedures in this regard.*

I would like to hear from the parties as to what final orders might be made in respect of this issue. It seems to me that, for example, a more restricted declaration than any of those sought by the appellants may be adequate to vindicate the appellants' rights. For example, it might be that receiving (suitably redacted) copies of decisions relating to a much more restricted time-period (such as, for example, the last two years), or listed numerically (such as for example the last ten Tribunal decisions in which paragraph 14 was considered), would be sufficient to give the appellants a general sense of how paragraph 14 has been applied, and would adequately vindicate their rights."

8. Since then, the Court has received written submissions and heard oral argument in respect of the precise relief to be granted and I will turn now to that issue.

The parties' submissions on the relief to be granted in respect of previous decisions of the Tribunal

The Appellant's submissions

9. The appellants submit that the Court "accepts that proceedings before the Tribunal are covered by the terms of Article 6 of the European Convention on Human Rights", relying on para 112 of the judgment of 4 December 2020, and that they must be afforded effective judicial protection within the meaning of EU law in light of the European Court of Justice in *B.V.* In their written submissions, they go on to set out in considerable detail some of the jurisprudence of the European Court of Human Rights in relation to Article 6(1) and the requirement for publicity. In this regard they rely on *Pretto v. Italy*[3] (a case involving court proceedings concerning a dispute over the sale of land), *Fazliyski v. Bulgaria*[4] (a case involving court proceedings arising out of the dismissal of an officer from the National Security Service and raising questions in relation to classified information), *Axen v. Germany*[5] (a case involving court proceedings in respect of a claim for damages including loss of earnings arising out of a road traffic accident), and *Moser v. Austria*[6] (a case involving court proceedings concerning the taking of a child into the care of the State). While submissions were made in relation to each of these cases, the overarching submission was that the case law of the ECHR made it clear that there was a "wide entitlement for the public to have access to decisions in proceedings effecting civil rights and obligations as a feature of the requirement of publicity in the pronouncement of

[3] *Pretto v Italy (application no. 798477,* 8 December 1983*)* [1983] ECHR 15
[4] *Fazliyski v Bulgaria (application no. 4090805,* 1 June 2010*)* [2010] ECHR 911
[5] *Axen v Germany* (*application no.* 8273/78, 8 December 1983, Series A No. 72), [1983] ECHR 14
[6] *Moser v Austria (application no. 12643/02,* 21 September 2006*)*

judgment in public". The appellants do accept, however, that even where Article 6(1) of the Convention applies, there is some flexibility as to how the requirement of publicity is to be achieved and that it is context-specific.

10. The appellants' contention is that all decisions of the Tribunal should have been and should now be publicised. They said that the requirement to give effect to the Convention had been part of domestic law since the commencement of the European Convention on Human Rights Act 2003, some eighteen years ago. They accept that there was scope for the Court to excuse a tribunal from a duty to publish or make accessible all decisions in respect of a particular scheme, but submit that the exercise of the Court's discretion should be informed by the overall context and note that the Court had acknowledged that there was very little transparency as to the decision making of the Tribunal because it sits in private, does not publish its decisions and reports infrequently. They say it is relevant that what the appellants seek is information which ought properly to be public in any event. Had the respondents honoured their obligations since 2004, they say, the costs and practicalities of publishing decisions now would be irrelevant, and therefore costs and practicalities should not become relevant now.

11. Without prejudice to their primary contention that the Tribunal is required to publish all its decisions albeit (potentially with redactions or in report form in order to protect the privacy of individual claimants), they note the Court's view at paragraphs 149-164 of its judgment and indicate that they would be satisfied with publication or at least availability being made to them of all decisions in which paragraph 14 had been applied since the coming into force of the EU Directive which was July 2005.

12. The appellants indicate that they have no difficulty with appropriate redaction in order to protect the privacy of parties. However, with regard to the Court's suggestion of a two-year time-frame or a specific number of decisions, they submit that either of these solutions could lead a situation where what is granted is insufficient to enable the appellants to advance an informed argument to the Tribunal on the basis of precedent or in reliance on the principles of consistency. They say that the difficulty with an order containing a temporal restriction (such as two years) is that there is no guarantee of many, or any, decisions involving paragraph 14 within the period. Similarly, with a numerical restriction (such as the last ten cases, which the Court had suggested), that group of cases might have considered paragraph 14 but might not have included any reasoning as to why clause 14 was being applied or disapplied and would not enable the appellants to advance meaningful arguments to the Tribunal.

The respondents' submissions

13. The respondents submit that a number of issues arise for practical consideration and welcome the opportunity to highlight these for the Court, listing them as follows:

1) The format of any released decision; they submit that the relevant decisions would need to undergo significant redaction in order to protect the data/ privacy rights of complainants.
2) Whether the decisions to be furnished should include decisions at first instance as well as decisions of the Tribunal following appeal.
3) They propose only to disclose so much of the decision as is necessary to understand the rationale of why or how the Tribunal applied or did not apply paragraph 14 of the Scheme in any given case, again for privacy reasons.
4) The manner in which the decisions are to be made available: the Tribunal had already indicated that it did not currently have a searchable database of

decisions that permits the identification of decisions where paragraph 14 of the Scheme was considered. They refer to one of the Court's suggestions which was a finite period of two years and comment that there is a "lack of clarity as to the regularity at which paragraph 14 arises for consideration before the Tribunal" and there is therefore no certainty that the issue might have arisen for consideration at all or with any frequency during that two-year period. The respondents therefore favour the second suggestion, an order requiring the Tribunal to make available copies of the last ten decisions of the Tribunal in which paragraph 14 featured or was considered.

5) How decisions are made available; they suggest that decisions should be made available on request to applicants who have submitted applications to the Tribunal for an award. Alternatively, they could allow an interested member of the public to access the most recent ten decisions relating to the Scheme online, and the Tribunal could update the website on a six-monthly basis the ensure the most recent ten decisions are continually available.

14. The respondents take issue with the submission of the appellants that all decisions delivered since 2005 should be made available and say that this fails to take account of the Court's own judgment in which concerns around costs and practicality were cited. They say that this approach would require a view of all decisions for the past fifteen years and would give rise to the cost and practicality problems that the Court had highlighted as being disproportionate to vindicate the rights of the appellants. They also submit that the Court had rejected the argument of the argument that the business before the Tribunal amounts to a formal court proceeding that requires traditional judicial stricture.

Conclusion on the relief to be granted in respect of previous decisions of the Tribunal

15. The appellants seek to rely on the earlier judgment for the proposition that the proceedings fall within Article 6(1) of the Convention and submit that it follows from this that the Tribunal must make all of its decisions public. However, the judgment delivered on 4 December 2020 did not make a finding that that the proceedings of the Tribunal fell within Article 6(1) of the Convention. The height of what was said in this regard was at paragraph 112, but before citing that paragraph, it should be noted that the section of the judgment in question was dealing, solely, with whether or not there was a right to legal aid and/or costs. Earlier in the section, I had examined the features of the Tribunal proceedings and said at paragraph 109 that "[t]he above might suggest that an application for compensation under the Scheme would *not* fall within Article 6 of the Convention were it not for the decision in *Gustafsson v. Sweden*[7]" (emphasis added). I then went on to consider the *Gustafsson* case, where there was a dispute about whether injuries had been criminally inflicted, and said at paragraph 112:

> "*Although it appears unlikely that there would be any dispute before the Tribunal that the appellants had suffered injuries in course of a criminal incident, unlike Mr. Gustafsson, the decision of the European Court of Human Rights would appear to suggest that the safer view for the Court to take is that a claim to the Irish Scheme would fall within the ambit of Article 6(1) of the Convention. In any event, the key question in the present [case] is perhaps not whether the procedure before the Tribunal falls within Article 6(1) of the Convention but whether the EU principle of effective judicial protection (which is informed by Convention law but perhaps not*

[7] *Gustafsson v Sweden* (application no. 23196/94, 1 July 1997)

coterminous with it) requires that an impecunious claimant should be afforded legal aid in his claim for compensation (or an award of costs if he is successful).”

16. This was followed by further discussion and a conclusion that the appellants were *not* entitled to legal aid or costs in making their claims before the Tribunal. What was confirmed was that *even if* one assumed for the sake of the argument on legal aid/costs that the appellants fell within Article 6(1) of the Convention, this would not in any event bring them to the end-point they wished to reach, namely a right to legal aid and/or costs in proceedings before the Tribunal. For the avoidance of doubt, it should also be noted that a conclusion was not reached that the proceedings fell within Article 6(1) of the Convention when reaching a decision on the fourth issue, namely, access to previous decisions of the Tribunal. This was instead dealt with on the basis of (i) constitutional fair procedures; and (ii) effective protection of an EU right. Accordingly, the appellants’ reliance on my earlier judgment for the definitive proposition that the Tribunal’s proceedings fall within Article 6(1) of the Convention is misplaced.

17. I do not accept, either, the appellants’ contention that because the Directive came into force in 2004, it follows that the Tribunal was legally obliged to publish all decisions since then (or more accurately since the date of its transposition date in July 2005). Undoubtedly the Directive conferred a right to compensation from that date and that this would apply retrospectively if necessary; but it does not follow that the appellants are entitled to access to all decisions of the Tribunal since that date in order to vindicate their right to compensation in an application submitted many years later. This was my conclusion, indeed, at paragraph 163 of the judgment; that something less was required to

vindicate their rights and that orders should be made which were sufficient to vindicate those rights.

18. Accordingly, I propose to confine myself to the two suggestions made at paragraph 164 of the judgment i.e. either to impose a temporal or numerical limit on what must be provided by the Tribunal.

19. I am persuaded by the appellants' argument that there is a risk that a temporal restriction of two years might not yield enough, or indeed any, useful information for them because the number of annual compensation claims is not that high and it is not known how often the issue of paragraph 14 arises in applications to the Tribunal. The 2019 Annual Report (published since the delivery of judgment on 4 December 2020) indicates that 145 claims were made resulting in 80 awards. There were 15 appeals.

20. As to a numerical restriction, I also accept the appellants' argument that there is a risk that a figure of 10 cases might not yield sufficient information for the appellants' purposes. Although seeking to identify a figure involves an element of guesswork, I would propose to increase the figure from the suggested number of 10 to a figure of 25 in the hope that this greater number will adequately capture a sufficient number of cases containing relevant information. It may also show whether there is any pattern or trend in the Tribunal's approach to paragraph 14. For the avoidance of doubt, I should perhaps say that this figure of 25 should encompass cases where paragraph 14 was *considered* regardless of whether the ultimate outcome was one of (a) no award or (b) a reduced award or (c) a full award.

21. Suitable redactions should be made in order to prevent the identification of any of the parties, which would include redactions not only of names but also of any facts which would tend to identify the parties. The question of redaction was not in dispute between the parties.

22. I do not propose however to give directions beyond that as to the form or method which the Tribunal should use in order to make this information available to the appellants. I would merely observe that if the Tribunal chooses to publish this information on its website, it is difficult to see why it would keep only the last 25 cases on the website at any given time, rather than simply update the website by adding cases as they arise, unless there are technical reasons for this course of action of which the Court is unaware. It is hard to see any necessity to take cases down from the website once they have been put up. The Court is, however, solely concerned with the situation of the appellants before it and does not propose to give any further direction as to how the Tribunal should engage in publication of information.

Summary of final orders to be made on the merits of appeal

23. In summary, I would make an order directing the Tribunal to make available to the appellants, whether by publishing on its website or by sending the material to them, the 25 cases in which paragraph 14 of the Scheme was considered, as directed at paragraph 20 above. Redactions should be made so that no material is disclosed which would be likely to identify parties. Insofar as all other issues raised in this appeal are concerned, they are dismissed.

The parties' submissions on costs

24. There was substantial disagreement between the parties as to how the costs of both the appeal and the High Court proceedings should be dealt with.

The appellants' submissions on costs

25. The appellants seek the costs of both the appeal and the High Court and request the Court to vacate the order of the High Court awarding costs against them.

26. They say that the vast bulk of the costs were incurred prior to October 2019 and therefore the "new costs" regime (the Legal Services Regulation Act 2015) does not apply. The rely on a comment of Murray J. in *Chubb European Group SE v. Health Insurance Authority*[8] (para 20) for the view that, under the 'old' costs regime, the apportionment of costs under the *Veolia* approach should only be done in a complex case.

27. The appellants' position depends on two essential propositions: (i) that the case could not be described as complex in the *Veolia*[9] sense and (ii) that they won the appeal and therefore should be entitled to their costs. They also suggest (presumably in the alternative) that the case was in the nature of a 'test' case and raised issues of public importance and that the *Dunne* line of authority is relevant in this regard (*Dunne v. Minister for the Environment*[10]*).*

28. In support of their contention that the case was not long or complex enough to warrant a *Veolia* approach, they cite a decision of the High Court (Humphreys J.)

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[8] *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183
[9] *Veolia Water UK plc v Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 IR 81
[10] *Dunne v. Minister for the Environment* [2008] 2 IR 775

Chenchooliah v. Minister for Justice and Equality[11]. That appears to have been a two-day case and the trial judge considered that it was not of such a complexity as to warrant *Veolia*-apportionment of costs.

29. As to who 'won' the case, the appellants dispute the submission of the State that there were four issues in the case and point out that they 'won' on the issue of whether there was an EU right under the Directive. They also refer to the motion to convert to plenary proceedings, saying that this was not determined by the Court.

30. In addition to the fact that they were successful on the issue of the making available of previous decisions of the Tribunal, they submit that they also "won the event" because of the following:

- There was no proper hearing in the High Court because the trial judge took the view that they had no rights under the Directive.
- The point which took up most time both in the High Court and in this Court was whether or not they had rights under the Directive. The case made on behalf of the appellants was essentially the case subsequently accepted by the European Court and applied by this Court.
- They say that at least part of the Court's conclusion in respect of access to previous decisions was based on the finding that the Directive conferred a right of compensation on the appellants.
- The cases were to some degree "test cases" in as much as other similar type claims for other applicants were initiated over the intervening years between the High Court

[11] *Chenchooliah v. Minister for Justice and Equality* [2019] IEHC 735

and this Court's judgment and for the most part were adjourned pending the outcome of these cases.

- The motion to convert the proceedings to a plenary form was a precaution arising from other decisions and the very fact that this Court was prepared to deal with these judicial proceedings in the manner it did illustrates they were entitled to proceed by way of judicial review proceedings.

31. In support of their contention that it was a test case, the appellants referred to *Dunne v. Minister for the Environment*[12]. They contend that the case raised issues of special and general public importance which support the Court's discretion to award costs in their favour and was not a case in which the appellants should be penalised for not succeeding on every argument made. In response to a question from the Court about the *Chakari* case[13], which the Court understood to have been called on by the appellants for trial despite the fact that judgment was outstanding in this case and against the view of the respondents that the judgment should be awaited, counsel said that the *Chakari* case was settled ultimately in light of the decision. She also said that there had been differences between the case and that it would not be appropriate to delay it any further as it was at an advanced stage and ready to proceed. She says the fact that *Chakari* settled in fact shows that this judgment did have an important effect on other cases. She said that the case did clarify both for the Tribunal, the Department of Justice and for applicants the parameters of raising issues around the treatment of their applications under their Scheme.

[12] *Dunne v. Minister for the Environment* [2008] 2 IR 775
[13] *Chakari v. Criminal Injuries Compensation Tribunal* [2018] IEHC 527

32. Counsel also refers to *CA v. Minister for Justice and Equality*[14] in which MacEochaidh J. said, in the context of a challenge to the Direct Provision Scheme: "*To award the respondent the costs of the issues which it won would have a chilling effect on litigation of this sort and might have the effect of denying vulnerable and marginalised people their constitutional right of access to the courts*". She submitted that there was some similarity when one was dealing with litigation by the applicants, who were victims of crime.

The respondents' submissions on costs

33. The respondents refer to the new costs regime but accept that most of the work was undertaken under the 'old' regime. They submit that both the "old" and "new" costs regimes allow in any event for a "*modular appraisal and award of costs, particularly in circumstances where the moving party only succeeds on a discrete point and does not succeed on the headline issues that took up the majority of court time*". They refer to *Chubb European Group SE v. Health Insurance Authority*[15], *Higgins v. Irish Aviation Authority*[16] and *McDonald v. Conroy*.[17]

34. In terms of practical assessment, the respondents submit the court can have regard to the relative amount of court time expended on each legal issue. They rely on the characterisation by the Court that there were four issues and say that in the case of the first three, the Court rejected the appellants' arguments (i.e. the claims in relation to legal aid and/or costs; compensation for pain and suffering; paragraph 14 of the Scheme). They submit that the appellants are entitled to their costs in respect of the fourth issue only, being the right of access to previous decisions of the Tribunal. They submit that the point

[14] *CA v. Minister for Justice and Equality* [2015] IEHC 432
[15] *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183
[16] *Higgins v. Irish Aviation Authority* [2020] IECA 277
[17] *McDonald v. Conroy* [2020] IECA 336.

on which the appellants succeeded was a "discrete issue" which was "ancillary to the headline arguments" and took up far less time in preparation and in terms of court time. They also submit there is little parity between the "events" upon which the appellants and respondents respectively succeeded.

35. They submit that the best way of dealing with the matter would be for the Court to apply a percentage to each particular issue and award percentages of costs on the basis of a simple division of the number of issues upon which a party has been successful or on the basis of the Court's overall assessment of the time taken any issue and/or the comparative importance attributed to the issue. Applying this approach in light of the four issues identified, they submit that the Court might award 25% of the costs of each appeal to the appellants and this should be the "high watermark" of the appellant's claim for costs. They go further and submit that it would also be open to the Court to calculate the appropriate percentage as perhaps closer to 12.5% of the costs because of the emphasis that was placed by the appellants on the first two issues and in respect of which they were not successful.

36. They also point out that there were two sets of proceedings and the arguments in each case were effectively identical in each case and that this could be reflected in awarding a percentage of the costs deemed appropriate in one case, with a further reduction of that percentage in the second case.

37. The respondents urge the Court not to consider the decision of the Grand Chamber in *B.V.* as an "event" in the proceedings because the decision would have been delivered and the right recognised whether or not the appellants had brought their proceedings. They

accept that the High Court's finding, based on the law as it was then understood, that there was no such right was reversed on appeal. However, they say the recognition of this right did not lead to the Court granting the reliefs sought in respect of the first three issues and did not play a decisive role in the Court's decision to grant relief on the fourth issue because the appellants would still have succeeded on the constitutional ground even if the decision in *B.V.* had not been delivered. They submit that a legal development arising from a court proceeding requires a concrete practical impact in order to be characterised as an event. In this regard they refer to *Student AB (A Minor Suing by his Father and ex Friend CD) v. The Board of Management of a Secondary School*.[18]

38. In support of their submission that these were complex proceedings, the respondents rely on *Kearney v. Bank of Scotland*[19]. They say that in the present case the High Court hearing lasted for four days and there were further listings before the court to address further questions arising from the proceedings including the delivery of supplementary submissions. The appellants had introduced further complexity into the case by bringing a motion to convert the proceedings to plenary hearing after the judgment had been reserved. Supplementary submissions were also delivered during the appeal following the delivery of the judgment in *B.V.* In all of those circumstances, they submit, this case bore no resemblance to the much more simple hearing in issue in the *Chenchooliah* case cited by the appellants. They also rely on *McAleenan v. AIG (Europe Limited)*[20] and *BA and RA V. Minister for Justice and Equality*[21] as examples of modular orders being made under the old costs regime. In the latter case, the applicants brought a

[18] *Student AB (A Minor Suing by his Father and ex Friend CD) v. The Board of Management of a Secondary School* [2019] IEHC 453
[19] *Kearney v. Bank of Scotland* [2020] IECA 224
[20] *McAleenan v. AIG (Europe Limited)* [2010] IEHC 279
[21] *BA and RA V. Minister for Justice and Equality* [2015] IEHC 861

public law claim that succeeded in one discrete issue but failed in the broader issue and MacEochaidh J. ruled the applicants were entitled to 30% of their costs.

39. They say that the respondents had brought a legally complex case that was premature and lacked evidential weight; they raised questions regarding EU Treaty rights, constitutionally compliant procedures, statutory interpretation and comparative international practice, and all of this in a context where no time had been afforded to allow a factual matrix to develop. They point out that the respondents were not even aware that Mr. Kelly had criminal convictions when leave was obtained. It could not be said fairly that the approach adopted had been vindicated or endorsed by the Court in circumstances where they had succeeded on one discrete issue.

40. The respondents reject the argument that this was a test case or that the principles in the *Dunne* case apply. The *Chakari* case, which also concerned claims by an appellant in respect of the Scheme, appeared in the Court's call-over list on the 13 November 2020 and when enquiry was made as to whether it might be appropriate to vacate the hearing date until judgment in this case was delivered, counsel for the appellant submitted that this was *not* necessary. In those circumstances, the respondents could not understand how the proceedings could now retrospectively be characterised as a "test case".

41. The respondents also submit that the High Court had not only decided the case on the basis of there being no EU law right, as stated by the appellants, but had also dismissed the case on grounds of prematurity. The respondents had raised significant preliminary issues in their pleadings, including the prematurity argument, but the appellants had failed to narrow the issues in any way.

42. The respondents submit that the Court has jurisdiction to order the set off of any respective costs order against each other relying on *Gravity Construction Limited v. Total Highway Maintenance Limited*[22] and *Monteiro Da Silva v. Rosas Construtores*.[23]

Conclusion on Costs

43. The Court considers that the costs should be addressed under the 'old regime' on the basis that the vast bulk of the costs were incurred prior to the entry force of the Legal Services Regulation 2015 Act and the recast Order 99 (Order 99 as amended by SI 584/2019).

44. There were four distinct claims for relief in the appeal and one procedural motion. The four distinct claims were in respect of (1) legal aid/costs; (2) exclusion of pain and suffering; (3) paragraph 14 of the Scheme, which in turn sub-divided into (i) whether or not the Directive precluded a provision such as paragraph 14 being contained in the Scheme, and (ii) the application of paragraph 14 to the appellants; and (4) access to previous decisions of the Tribunal. The procedural issue was the motion to convert the proceedings to plenary proceedings.

45. Underpinning all of the arguments made by the appellants was the larger issue of whether there was an EU law right to compensation under the Directive. A considerable amount of time at the hearing (which occupied one day on appeal) concerned this issue. An unusual feature of the case is that the decision of the Grand Chamber in the *B.V.* case clarified the law in this regard between the hearing and the judgment, and it transpired that

[22] *Gravity Construction Limited v. Total Highway Maintenance Limited* [2021] IEHC 91
[23] *Monteriro Da Silva v. Rosas Construtores* [2020] IECA 301

the appellants were correct in the argument they had made. The respondent correctly maintains that the EU right would have been clarified even if these proceedings had not been brought. However it is also true that the respondent strongly resisted the proposition that there was any EU right in the appellants' circumstances, a position which was revealed to be legally incorrect.

46. However, the decision of the Grand Chamber in *B.V.* that the Directive conferred a right to compensation in non-cross-border situations did not ultimately bring the appellants much further down the road towards the reliefs that they sought. The Court held that it did not lead to an entitlement to legal aid and/or costs. It also held that it did not prohibit a provision such as paragraph 14 of the Scheme. The Court also held that two of the claims were premature and therefore did not reach the merits of the claims (including the application of EU law): these were the claim in respect of the "pain and suffering" exclusion, and the claim in respect of the application of paragraph 14 to the appellants. The only role the EU right played in respect of the relief actually granted was what might be described as a joint role, along with constitutional fair procedures, in grounding a right to access some previous decisions of the Tribunal.

47. In view of the above, neither party won or lost all the issues; each party succeeded on some issues and not on others, although it must be said that the State successfully resisted most of the claims for relief.

Is this suitable for a Veolia type approach?

48. The first question is therefore whether the case falls within *Veolia* principles at all. It will be recalled that it has been doubted whether, under the old regime, costs should be apportioned according to issues won or lost in cases which are not sufficiently complex to

warrant application of the *Veolia* principles (see paragraph 20 of *Chubb* where Murray J. said that "at least one view", Clarke J. in *Veolia* limited his explanation of the power of the Court to reduce the costs of the party who prevailed on the 'event' by reference to the costs of issues on which the other party prevailed to cases that were "complex").

49. The case took four days in the High Court and one day on appeal. There were multiple sets of submissions (including after the appeal hearing) and numerous returns to the High Court after the original hearing. Further, as described above, multiple issues were raised. These were not merely different arguments directed towards the same end; the claims made were separate and distinct as were the reliefs sought. The fact that the case took only one day at hearing on appeal may not reflect the multiplicity and complexity of the issues arising; more indicative is the length of the judgment which was necessary to cover all of the issues. No doubt it would have been longer if it had not been for the judgment in the *B.V.* decision.

50. Accordingly, I would consider this to be a case containing a level of complexity which does warrant the application of the *Veolia* principles. I therefore reject the appellants' contention that the case should be treated a non-complex case and that, because they secured some relief, they should be taken to have won and are therefore entitled to the entirety of their costs. Before turning to the application of the Veolia principles, I will address a different argument made by the appellants in support of their submission that they should be awarded their costs.

Does the case fall into the exceptional category of cases in which the court awards costs in favour of a losing party?

51. As described in further detail above, the appellant maintains that the case involved matters of general importance for claimants to the Scheme and that it was in effect a "test" case.

52. I do not consider that this is one of those cases where an award of costs may be made in favour of a losing party on the *Dunne v. Minister for Environment* line of authority, not least because this could not remotely be described as a case where the appellants brought the case on a disinterested basis in the public interest. Nor was it a "test" sense in the usual sense of that word. It was neither selected to be a test case by anybody nor was its status in that regard conceded by the appellants themselves when the *Chakari* case was dealt with at a call-over on the 13 November 2020. I would accept that there were important points of general importance in the case, but something more than that is required to fall within this line of authority. I consider the principles to have been well summarised in *Collins v. Minister for Finance & Ors*[24] [2014] IEHC 79, where the Divisional Court described them as follows: -

> *"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] I.E.S.C. 10 (the constitutional status of human embryos) and Fleming v. Ireland (2014) (assisted suicide).*

[24] *Collins v Minister for Finance* [2017] 3 I.R. 99

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 power 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] I.E.S.C. 27 (aspects of the judicial impeachment power).

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 T.F. v. Ireland [1995] (constitutionality of 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 (constitutionally of the Sexual Offenders Act 2001) and M.D. (a minor) v. Ireland [2012] I.E.S.C. 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) (sic).

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…

Fifth, as Murray C.J. pointed out in Dunne, *the fact that the litigant 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…*
>
> *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.*"

53. My view is that the appellants do not fall within any of the exceptional categories described above merely because they have raised points of importance which may be useful to other claimants under the Scheme. Something more is required to fall within the exceptional category of cases described above.

Application of Veolia principles

54. In my view, if one were to award costs to the appellants on the basis of what part(s) of the appeal they had "won", strictly speaking, this would have to be confined to that part of the case dealing with access to previous decisions i.e. the fourth limb of their claim. The Court proposes to increase that percentage by taking into account the time spent arguing about whether or not the Directive provided for an EU right in non-cross-border situations. This is in circumstances where the position adopted by the appellants was ultimately vindicated by the Grand Chamber decision in *B.V.,* and taking into account the importance of that matter in general terms, even though it did not lead to the appellants obtaining the other precise reliefs which they sought. The Court proposes to award the appellants 33% of their costs of the appeal, and 67% of the costs in favour of the respondents.

55. As to the High Court costs, the trial judge awarded costs against the appellants. They now seek costs in respect of the High Court proceedings as well as this appeal. They contend that they did not have a proper hearing from the High Court judge because she considered their claims to be entirely misconceived on the basis of her view, now shown by *B.V.* to be incorrect, that there was no EU law right to compensation for injuries criminally inflicted where there was no cross-border dimension to the case. The respondents point out that the trial judge dismissed the claims not only on that basis but also on the basis of prematurity, which is correct.

56. I am of the view that the apportionment of costs which I have applied to the appeal should apply likewise to the High Court proceedings on the basis of the logic that if the decisions on appeal are a correct interpretation of the law, it follows that this should have been the outcome in the High Court and the appellants should similarly have succeeded in that court only to the extent of obtaining relief in respect of access to previous decisions of the Tribunal together with (in the Court's discretion), a further allowance for their success in the EU law right argument.

57. The respondents suggested that any costs in favour of the appellants should be reduced for one of them because of duplication within the proceedings. We accept that the cases presented on behalf of both appellants were, substantively, the same. Furthermore, the same counsel and solicitor represented both appellants both in the High Court and in this Court.

58. In those circumstances, I consider that the Court should make (i) an order in favour of the first applicant for 33% of all his costs; and (ii) an order in favour of the second applicant for 33% of his costs *with the exception* that in the case of the second applicant the following costs should not be recoverable, namely, the brief fee, fees for attending court, instructions fee, and fees for drafting and presenting legal submissions. The respondents are entitled to an order for 67% of their costs as against the first applicant and 67% of their costs as against the second applicant *with the exception* that in the case of the second applicant the following costs should not be recoverable, namely, the brief fee, fees for attending court, instructions fee, and fees for drafting and presenting legal submissions. Costs are to be adjudicated in default of agreement between the parties.

59. There is one further matter I wish to mention. This concerns the appellants' motion to convert the form of the proceedings to plenary proceedings. The history of this motion is as follows. The respondents in the present case pleaded prematurity as a preliminary objection but did not raise any issue as to the *form* of the proceedings as such (i.e. that the proceedings were brought by way of judicial review). After the hearing in the High Court but before judgment was delivered, the High Court (Barrett J.) delivered judgment in another case against the Tribunal, namely the *Chakari* case ([2018] IEHC 527). Barrett J. dismissed the claim, saying that the appropriate form of challenge was by way of plenary proceedings or, if the applicant wished to challenge a decision of the Tribunal, that he should progress his application to the point where there was a decision which was susceptible to judicial review. Following that decision, and on a date after the High Court had reserved judgment in the present case, the appellants issued a motion to convert the proceedings to plenary proceedings and to deliver judgment on that basis. This was clearly a last-minute attempt to prevent their case (or any part of it, presumably) from being

dismissed on the basis of a procedural objection rather than on its merits, following what had occurred in *Chakari*. This motion was opposed by the respondents and written submissions were delivered.

60. The trial judge said that she did not need to adjudicate on the circumstances in which it might be appropriate to convert judicial review proceedings into plenary proceedings because (1) she agreed with Barrett J. and (2) she had reached her own conclusion that the applications were "fundamentally misconceived" i.e. because they were premised, wrongly, in her view, on the contention that the applicants had a right to compensation under both Irish and EU law.

61. One of the grounds of appeal was that the trial judge erred in failing to adjudicate on the motion. Another ground of appeal was that the trial judge erred in failing to accede to the appellant's application to convert the proceedings to plenary proceedings. The respondents for their part sought to uphold the trial judge's conclusions on both of these matters.

62. At paragraph 85 of the judgment of 4 December 2020 I said that, like the High Court judge, I would not rule on the motion either and gave the reason that it was not properly before the High Court because of its lateness. The appellants appear to consider that the Court was thereby endorsing their decision to proceed by way of judicial review, but this is far from the case. The recent decision of this Court in *DPP v. Galvin*[25] discusses the authorities as to the correct form of procedure (whether judicial review or plenary procedure) which should be used for different types of claim, and nothing in the present

[25] *DPP v. Galvin* [2020] IECA 319

case should be taken as disagreeing with that analysis. What was conveyed by the remark at paragraph 85 was merely that the motion had issued too late in the day for it to be properly considered as part of the case and that the Court would not engage with the arguments as to the proper form of the proceedings.

63. The question now arises as to what should be done about the costs of the motion in the above circumstances. I do not propose to approach the costs as if the Court had ruled on the motion on its merits because that is not the basis on which the motion was approached in the judgment of 4 December 2020. Rather, I propose to approach it on a narrow basis, consistent with the view that it was not properly before the Court because of its lateness. This being so, I am of the view that the costs of the motion should be awarded in favour of the respondents who were put to the expense of having to prepare, unnecessarily, for a motion which was not properly before the Court.

Summary of Costs Orders to be made

64. In summary, the following orders should be made:

a. An Order that the appellants are entitled to the full costs relating to the motion to convert;

b. An Order that the first appellant is entitled to recover 33% of his costs in the appeal and in the High Court;

c. An Order that the second appellant is entitled to recover 33% of his costs in the appeal and in the High Court with the exception of the brief fee, fees for attending court, instructions fee, and fees for legal submissions;

d. An order providing that the respondents are entitled to recover from the first applicant 67% of their costs in the appeal and in the High Court;

e. An order providing that the respondents are entitled to recover from the second applicant 67% of their costs in the appeal and in the High Court with the exception of the brief fee, fees for attending court, instructions fee, and fees for legal submissions; and

f. Costs to be adjudicated upon in default of agreement.

As this judgment is being delivered electronically, I wish to record that Donnelly J. and Power J. have read it in draft form and are in agreement with it.