THE COURT OF APPEAL

Edwards J. **Neutral Citation Number [2022] IECA 271**

McCarthy J.

Kennedy J.

Appeal No: 59/2022

WILLIAM FITZGERALD

Appellant

V

THE DIRECTOR OF PUBLIC PROSECUTIONS.

Respondent

<u>JUDGMENT of the Court delivered by Mr Justice Edwards on the 1st November, 2022.</u>

Introduction

1. This is an appeal against the judgment of the High Court (Meenan J) of the 2nd of July 2021, and the Order of that court made consequent thereto on the 8th of February 2022, which Order was perfected on the 9th of February 2022, refusing the appellant's application upon notice to the respondent for leave to apply for *certiorari* and other relief by way of judicial review for the purpose of quashing certain decisions and orders of the District Court Judge for the District Court Area of Fermoy and District Number 20, sitting at the courthouse, Fermoy, Co. Cork on the 22nd of February 2019 in proceedings entitled the *Director of Public Prosecutions at the suit of Garda David E Delea v. William Fitzgerald.*

2. Those District Court proceedings arose from a summons issued to the appellant to attend before Mallow District Court to answer a charge that on the 4th of February 2018 at Brackbawn, Kilbehenny, in the County of Limerick, a public place, within the District Court Area of Fermoy, he did drive a mechanically propelled vehicle, registration number 96-D-15351, while there was present in his body a quantity of alcohol such that, within 3 hours after so driving, the concentration of alcohol in his breath did exceed a concentration of 22 microgrammes of alcohol per 100 millilitres of breath, to wit 40 microgrammes of alcohol per 100 millilitres of breath, contrary to s. 4(4)(a) and (5) of the Road Traffic Act 2010 ("the Act of 2010").

Some relevant procedural matters.

3. In the first instance, the appellant's application for leave to apply for relief by way of judicial review was made *ex parte* to the High Court (Noonan J.) in the normal way. The application was grounded upon an affidavit of the appellant sworn on the 1st of April 2018. However, the High Court was not disposed to accede to that application but instead granted liberty to the appellant to renew his application upon notice to the Director of Public Prosecutions ("the DPP") i.e., the present respondent. As originally framed, the appellant's proceedings had sought to name the district judge concerned personally as a respondent. In granting the appellant liberty on the 1st of April 2019 to renew his application upon notice to the DPP, Noonan J. had directed the appellant to remove the name of the district judge concerned from the title.

4. In an affidavit filed in support of the present proceedings, and sworn by the appellant on the 24th of January 2020, the appellant makes the following averment:

> "On the 1st of April 2019 Mr Justice Noonan in granting the leave to apply on notice for this judicial review ordered that Judge Marie Keane's name was to be removed as respondent. I returned to Mr Justice Noonan's court prior to lodging the notice of

motion with the amended title and sought to retain the original title in compliance with statutory instrument 345 of 2015 as I was alleging *mala fides*. Mr Justice Noonan did not think that I had alleged *mala fides* is in my affidavit and refused my application."

5. Statutory instrument number 345 of 2015 is entitled "Rules of the Superior Courts (Judicial Review) 2015", and the effect of it was, *inter alia*, to amend Order 84, Rule 22 of the Rules of the Superior Courts 1986 to 2015 by inserting a new sub-rule 2A therein. Order 84, Rule 22 (2A) as so inserted now provides:

"(2A) Where the application for judicial review relates to any proceedings in or before a court and the object of the application is either to compel that court or an officer of that court to do any act in relation to the proceedings or to quash them or any order made therein—

(a) the judge of the court concerned shall not be named in the title of the proceedings by way of judicial review, either as a respondent or as a notice party, or served, unless the relief sought in those proceedings is grounded on an allegation of mala fides or other form of personal misconduct by that judge in the conduct of the proceedings the subject of the application for judicial review such as would deprive that judge of immunity from suit,

(b) the other party or parties to the proceedings in the court concerned shall be named as the respondent or respondents, and

(c) a copy of the notice of motion or summons must also be sent to the Clerk or Registrar of the court concerned."

6. Having been granted liberty to renew his application for leave to apply for judicial review upon notice to the DPP, the appellant issued a Notice of Motion seeking such leave dated the 4th of April 2019. This was returnable to the 30th of April 2019 in the first instance

and was then adjourned from time to time before ultimately coming on for hearing before Meenan J. on the 17th of April 2021.

7. Subsequently, however, the appellant issued a second Notice of Motion dated the 24th of January 2020. In this Notice of Motion, which was returnable in the first instance to the 3rd of February 2020, the appellant sought an order *"granting permission to reinstate the original title of this matter to include Judge Marie Keane as respondent and to amend the relief sought in this matter to include* (seven items listed in the Notice of Motion as *vii* to *xiii* inclusive, the appellant's original proposed Statement of Grounds having sought six items of relief listed *i* to *vi* inclusive)." It appears that this motion was also adjourned from time to time before ultimately coming on for hearing before Meenan J. on the 17th of April 2021 to be heard concurrently with the motion dated the 4th of April 2019 seeking leave to apply for judicial review.

8. It is clear that the motion of the 24th of January 2020 was misconceived in so far it contained a renewed request to reinstate the District Judge as a respondent to the proceedings. Such an application had already been made to Noonan J. on the 1st of April 2019 and had been refused. That issue was accordingly *res judicata*. If the appellant was dissatisfied with the High Court's ruling in respect of the reinstatement request it was open to him to appeal the High Court's order to the Court of Appeal. However, he did not appeal the order of Noonan J. of the 1st of April 2019. Moreover, the rule in *Henderson v. Henderson* (1843) 3 Hare 100, 67 ER 313 precludes a litigant from seeking to re-litigate an issue already determined before the same forum, absent some material change of circumstances. It further establishes that a litigant must bring forward his/her entire case at the one time. He/she cannot withhold evidence to be relied upon, or hold back legal arguments based on the evidence, only to seek to introduce them later, on a drip feed basis or piecemeal basis. It was therefore incumbent on the appellant when he was before Noonan J. on the 1st of April 2019

to put forward all relevant evidence, and all his arguments, in support of his contention that the District Judge should be named on account of allegedly exhibiting *mala fides* towards him. It is clear from his affidavit of the 24th of January 2020 that he did not do so, and that he is not now alleging that new circumstances have come to light or that there has been any material change in the circumstances of which he knew, or ought to have known, on the 1st of April 2019. Rather, what he seeks to do in his motion and affidavit of the 24th of January 2020 is to put forward further particularisation of his complaints against the District Judge in the hope of persuading another High Court judge to revisit his colleague's earlier rulings that the District Judge should not be named. These, of course, were details that he should have provided to Noonan J on the 1st of April 2019 if he was intending to rely upon them, but which he had failed to provide. Not having appealed Noonan J.'s orders of the 1st of April 2019 with respect to removing the District Judge as a named respondent and refusing to re-instate the District Judge as a respondent upon being requested to do so, it was not open to him to then seek to re-ventilate these issues before another (or even the same) High Court judge.

9. There was, however, a second facet to the motion of the 24th of January 2020, namely the appellant's application to be allowed to amend his original proposed Statement of Grounds. While the full procedural history of this request has not been placed before us, we note that at paragraph 3 of his judgment of the 2nd of July 2021, Meenan J. stated: *"Noonan J. directed that it would be for the trial judge to decide whether or not to allow these amendments"*, suggesting that Meenan J. had been given to believe that, at some point, Noonan J. had been requested to make the amendments being sought in the Notice of Motion of the 24th of January 2020.

10. The judgment of Meenan J. does not thereafter make any further reference to the motion seeking to amend the Statement of Grounds so as to expand the range of reliefs being

claimed. However, this is unsurprising in circumstances where ultimately the court was not satisfied to grant leave to apply for relief by way of judicial review on the basis that the criteria for doing so as set out in *G. v. DPP* [1994] 1 I.R. 374 had been satisfied. The question of what specific relief (or reliefs) it might be appropriate to order, and whether it would be necessary to allow an amendment expanding the list of reliefs claimed in the original Statement of Grounds, would only have arisen for consideration once the court was satisfied that in principle it was an appropriate case in which to grant leave to apply for relief by way of judicial review. As the court was not so satisfied, it was not necessary for it to decide whether to grant the amendments being sought in the motion of the 24th of January 2020.

11. The Order of the 8th of February 2022, perfected on the 9th of February 2022, makes clear in its recitals that both the motions of the 4th of April 2019, and of the 24th of January 2020, respectively, were before Meenan J. at the hearing on the 17th of April 2021, and (ignoring costs and ancillary matters for present purposes) the curial part of it states that:

> *"THE COURT WAS PLEASED to reserve its judgment herein*
>
> *And Judgment having been delivered electronically on the 2nd of July 2021*
>
> *And in accordance with the said written judgment*
>
> *The Court doth refuse the reliefs sought and dismisses the applicant's application herein."*

Background to these judicial review proceedings.

12. There was evidence of the following matters before the District Court sitting in Fermoy on the 22nd of February 2019. On the 4th of February 2018, Garda David Delea and his colleague Garda Patricia Hanley were on duty in an unmarked patrol car which was travelling on the old main Cork/Dublin road. Garda Hanley was the driver, and Garda Delea was the observer.

13. In answer to questions asked of him in cross-examination Garda Delea said the only "after" (we infer he meant "after market") technology fitted to the car was TETRA radio and blue lights front and rear. Otherwise, it was a standard family car. There was no on-board camera fitted, and it was not fitted with automatic number plate recognition technology. Garda Hanley also confirmed that the only technology added to the car was TETRA radio and blue lights.

14. The District Court was told that at Churchquarter, Kilbeheny, on the said road, which was a public place, the two gardaí observed a motor vehicle ahead of them, being a wine-coloured Mercedes 96-D-15361, being driven erratically. It was observed on a number of occasions swerving out from its lane across the centre line and back in again, clipping the cat's eyes in the centre line while doing so, and then moving over into the hard shoulder on the other side of its lane. The unmarked patrol car followed this vehicle for a short distance, then blue lights were activated, and Garda Hanley signalled for the driver to pull in, which he did at Brackbawn, Kilbeheny.

15. It should be recorded here, as it will assume a possible relevance later on, that at the appellant's subsequent trial on a charge of drink-driving the evidence of both Garda Delea and Garda Hanley concerning where exactly they had been located when they first observed the Mercedes vehicle was disputed by the appellant. They had said that they were travelling out of the village of Kilbeheny towards Cahir and had observed the vehicle in question when they were in the vicinity of the Community Hall at Churchquarter, Kilbeheny. The appellant cross examined to the effect that this was not correct, that their vehicle had been parked outside of an old co-op, with churns on a dairy stand, just after the post office in the village of Kilbeheny. The witnesses did not accept this.

16. Returning to the narrative, Garda Delea testified that after the Mercedes had been stopped he then got out of the patrol car and went to speak to the driver of the vehicle they

had stopped. He asked the driver for his driving licence, which was produced to him, and that document confirmed that the driver was William Fitzgerald, the appellant herein. Garda Delea testified that the appellant's eyes were glazed, there was a smell of alcohol from his breath and his speech was slurred. Having formed the opinion that the appellant had consumed intoxicating liquor, the Garda concerned duly informed the appellant of this opinion and asked him to provide a specimen of his breath pursuant to section 9(1) of the Act of 2010, by exhaling into an apparatus designed for indicating if there was alcohol present in his breath. He explained in ordinary language to the appellant what would be the consequences of a failure or refusal to provide such a specimen, and the appellant indicated that he understood. Garda Delea said that he assembled the apparatus in the appellant's presence, and that when the appellant then exhaled into it, it gave a positive result for the presence of alcohol.

17. There was further evidence that Garda Delea then formed the opinion that the appellant was after consuming an intoxicant to such an extent as to render him incapable of having proper control of a mechanically propelled vehicle in a public place, and that he was committing an offence under s. 4(1), (2), (3) or (4) of the Act of 2010, as amended. Garda Delea then arrested the appellant under s. 4(8) of the Act of 2010 for drunk driving and explained this to him in ordinary language. The time was 8.23 PM. He then cautioned the appellant in the normal way and nothing turns on this. The appellant was then placed in the rear of the patrol car and conveyed to Fermoy Garda station.

18. There was evidence was that upon arrival at Fermoy Garda station at 8:51 PM the appellant was presented to the member in charge, Garda Farrell. Garda Farrell explained to the appellant the reason for his arrest and advised him as to his rights. The appellant was given a notice of rights, being form C 72S, and this was read over to him. Although the appellant refused to acknowledge receipt of this notice by signing the custody record nothing

turns on any of this in the context of the present judicial review application. Of some relevance was Garda Delea's averment in the course of giving his evidence that *"he* (i.e., the appellant) *kept asking Garda Farrell to clarify the reason for his arrest and the legislation involved."* It was elicited by the appellant in cross examination that while he was being processed as an arrested person in the Garda station his photograph was taken.

19. After the appellant had been subjected to a routine search (about which there is no issue), Garda Delea then explained to the appellant that he would be requiring him to provide two breath specimens by exhaling into an apparatus called the Evidenzer Irl, in respect of which he (Garda Delea) was a trained operator. He further explained that it would be necessary for him (Garda Delea) to observe Mr Fitzgerald for a period of 20 minutes, prior to this test, to ensure that he had nil by mouth and that he did not smoke, as this was in accordance with international best practice and to ensure that there was no false reading from the machine. The explanation was given in ordinary language and the appellant indicated that he understood it. The appellant was then asked if there was any medical reason as to why he would not be able to provide a specimen of his breath or indeed any specimen as required and he said that he there was not. Under cross examination Garda Delea accepted, although he did not recall it, that the appellant may have requested to be allowed to provide a blood sample rather than a breath sample and that in the absence of medical reason as to why he would not be able to provide a specimen of his breath this was not facilitated.

20. The evidence was that the period of observation began at 9:15 PM and continued until 9:35 PM. The appellant was then brought the doctors room and a requirement was made of him under s. 12(1)(a) of the Act of 2010, as amended, to provide two specimens of his breath by exhaling into an intoxilyser apparatus, i.e., the Evidenzer Irl, which was designed for indicating the concentration of alcohol in his breath. It was explained to the appellant in ordinary language that if he failed or refused to provide a specimen as required, and in the

manner directed, that he would be committing an offence, and the potential penalties that might arise in that event were outlined to him. The appellant indicated that he understood.

21. Garda Delea then enquired of the appellant whether he wished to receive the s. 13 statement of the results of the test that would be printed out from the Evidenzer Irl apparatus in either the English or the Irish language, and the appellant opted to receive it in English. The Garda then performed a check of the machine and found it to be in order. He inputted the appellant's details and attached a new mouthpiece. It was confirmed that from the beginning of the period of observation up to this point the appellant had not consumed anything by mouth, nor had he smoked. A first breath sample was provided by the appellant at 9:42 PM and a second breath sample was provided by him at 9:45 PM. The apparatus gave a result of 40 microgrammes of alcohol per 100 millilitres of breath. This was over the statutory limit and fell into the fixed charge notice category for drink driving. The machine then printed out two identical statements for the purposes of s. 13 of the Act of 2010. Garda Delea signed both statements and then proffered them to the appellant for his signature. It was explained to the appellant in ordinary language that if he failed or refused to acknowledge the statements it would be an offence, and the potential penalties that would apply were outlined to him. The appellant then signed both statements and returned one of them to Garda Delea and retained the other as he was entitled to do. Garda Delea duly produced the copy that he had retained to the court as an exhibit.

22. Following this procedure, the appellant was returned to the public office and was later released from custody. Subsequently, he was issued with a fixed charge notice by post. The relevant certificate of postage was produced to the court. The evidence was that the appellant failed to pay the fixed charge notice following which the summons referred to above at paragraph 2 of this judgment was issued to him.

23. In advance of the case coming on for hearing, the appellant, who at that point was represented by a firm of solicitors, sought certain matters by way of disclosure. By a letter from his solicitors dated the 9th of May 2018 to the superintendent of An Garda Siochána at Fermoy copies of *"all statements, documents, papers, DVDs, videos, CCTV footage and other items in the states possession relating to the alleged offences"* were sought. A reminder was sent on the 10th of July 2018. The request was replied to on the 12th of July 2018 under cover of a letter from a Sergeant James A. Hallahan which simply stated, *"Further to your request, I enclose herewith the requested documentation in this case."* It is unclear as to precisely what was comprised in the material that it is claimed was forwarded, as no list has been furnished to us. (It is also noted that the appellant disputes receiving the letter of the 12th of July 2018). At any rate, the appellant's solicitors subsequently sought, and successfully obtained, a Gary Doyle order from Fermoy District Court on the 26th of October 2018. The solicitors wrote again to the superintendent on the same date setting out a list of exactly what they were seeking. That list was as follows:

1. A list of all witnesses for the prosecution.
2. Statements of any prosecution witnesses.
3. Contemporaneous notebook entries of all Garda witnesses.
4. Copy of the custody record.
5. Copy of all charge sheets and summonses.
6. Copy of section. 4 or section 10 authorisation (if applicable)
7. Copies of the evidential certificates pursuant to ss. 17 or 19 (1994 Act) or ss. 16 or 17 (2010 Act).
8. Maintenance and service records of the Evidenzer machine from which the breath specimen was taken (if applicable).
9. Copy of the Evidenzer operator's manual (if applicable).

10. Copy of the Drager *(sic)* roadside breath test operator's manual (if applicable).
11. Copy of any previous conviction(s) of the accused.
12. Copy of any previous conviction(s) of any lay witnesses (if applicable).
13. CCTV footage to include footage relating to our client's time at Fermoy Garda station following his arrest.

24. This request was replied to by a letter dated the 17th of December 2018 from a Sergeant Trevor McSweeney in which each item that had been requested was addressed seriatim as follows:

1. Garda David Delea, Garda Patricia Hanley, Garda Eugene Farrell
2. Attached.
3. Attached.
4. Attached.
5. Attached.
6. Not applicable.
7. Attached.
8. Attached.
9. May be available from Medical Bureau of Road Safety.
10. May be available from Medical Bureau of Road Safety.
11. Attached.
12. As of today's date your client has four (4) previous convictions recorded in this jurisdiction including 2 x Public Order, 2 x MDA.
13. Nil.
14. CCTV can be viewed in Fermoy Garda station by appointment or alternatively an application can be made via the Courts for copy CCTV.

25. While the summons issued was returnable for Fermoy District Court on the 21st of September 2018 it was adjourned on that occasion to the 26th of October 2018 at the appellant's request. The Gary Doyle order was then made on the 26th of October 2018 and in consequence of that the matter was then further adjourned to the 21st of December 2018, whereupon it appears to have been further adjourned to the 8th of February 2019. The respondent maintains that it was in for hearing on that date but the appellant disputes this.

26. The District Court list at Fermoy on the 8th of February 2019 was extremely busy and there was simply not enough time to hear the case. The case was accordingly adjourned to a special sitting of the District Court to be held at Fermoy on the 22nd of February 2019. The presiding District Judge on the 8th of February 2019 (who was a different judge to the judge who subsequently dealt with the matter on the 22nd of February 2019) made clear that he was putting it in for hearing on that date and that it would receive priority.

27. The members of this Court were urged by the appellant to review the digital audio recording (DAR) of the hearing on the 8th of February 2019 because, in his belief, it would clarify two issues. Firstly, he believed that the recording would demonstrate that the case was not in for hearing on the 8th of February 2019, contrary to what the respondent maintains, and secondly that he had sought to raise an issue with the court on that occasion concerning alleged outstanding disclosure. We indicated to the appellant that we would listen to the DAR and we have done so. There were two very brief mentions of his case before the court on that date. The first was in the late morning when it was called on for hearing and put back to the afternoon. The second was in the late afternoon. The timeline for the first was between 12:10:27 and 12:11.40, and the timeline for the second was between 16:49:10 and 16:50:06. We have annexed a transcript of both mentions to this judgment. As can be seen therefrom, it is clear that the appellant's case was listed for hearing on the 8th of February 2019 and that the appellant is wrong in believing that that was not the case. It is also clear that the appellant

is correct in suggesting that he had flagged that there would be an issue about disclosure. He told the judge during the first mention, and after the judge had said that he would put it back to the afternoon, that there would be an issue *"about evidence, about CCTV",* to which the judge had responded, *"Oh yes, we will deal with all that at 2 o'clock".* As it transpired the case was not called again until 16:49 due to the state of the list, at which point there was simply not enough time to deal with it with the result that it was adjourned at that point to the 22nd of February 2019 at Fermoy.

Procedural issues at the hearing on the 22nd of February 2019

28. At the outset of the proceedings in the District Court on the 22nd of February 2019 the appellant addressed the court stating, *"I have made a request for evidence which I haven't been given and I'd like to get an order from the court".* He was asked what he was seeking and replied: *"There's CCTV footage from the night in question. I want on-board camera footage or a written statement that the car wasn't equipped with on-board camera. TETRA radio ...".* The judge interjected here to point out that the case concerned a prosecution for drink-driving and enquired what had an on-board camera to do with all of that. She observed that "*… the proofs* (in respect of a drink-driving charge) *are well established. In relation to the proofs required to bring a case home as it were in relation to that, on-board cameras are nothing whatever to do with it."* The judge further requested to know, in circumstances where the case was in for hearing, *"[w]hy were these applications not made before now?"* The prosecuting Garda Inspector intervened at this point to advise the court that he had understood the appellant to be seeking CCTV footage of the 20 minute observation period, and he pointed out that the appellant had been afforded the opportunity to attend the Garda station by appointment to view the CCTV, and that Superintendent Maguire had advised him that if he required a physical copy of the recording he would need to get a court order. Further, he said, Superintendent Maguire had confirmed to the appellant that the footage had

been checked by gardaí and that they were satisfied that the Garda concerned had observed the appellant and had not left the scene during the observation period. The appellant then interjected to say, *"Judge, I'm entitled to all evidence held by prosecution in relation to the incident"* and quoted paragraph 9.1 of the Director of Public Prosecutions Guide for Prosecutors which states: "The constitutional right to a trial in due course of law and to fair procedures … place a duty on the prosecution to disclose to the defence all relevant evidence which is within its possession." The District Judge responded: *"'Relevant' being the most operative word in that"*.

29. The District Judge then enquired whether the appellant had availed of the opportunity afforded to him to review the CCTV footage in the Garda station and the appellant confirmed that he had not done so, contending that the notice provided to him had been short and that it had not been convenient. He was asked by the judge if he had sought to make an alternative arrangement and he confirmed that he had not.

30. After some further exchanges, the Inspector suggested that the case could still proceed that day if the appellant were to go at that point to the Garda station and view the CCTV footage. The District Judge adopted the suggestion, stating: *"Now, you can go up to the Garda station and view your CCTV footage and I will take up the case when you done that."*

31. The appellant then asserted that there was *"other evidence, relevant evidence"* that he also required. Pressed to identify what this was, he said, *"TETRA radio communications and the GPS coordinates from 8:15 on the night in question until 9 o'clock."* The District Judge responded by stating:

> *"Again, Mr Fitzgerald, none of that is relevant by virtue of the fact that I have already explained to you that this is a prosecution under the relevant section of the Road Traffic Act and the evidence is garnered in the context of that section. This is*

not a trawling or fishing mission. This is a specific case and it is dealt with on specific proofs"

32. At this point the appellant sought, and received, confirmation that the digital audio recording (DAR) system in the courtroom was operating. The appellant sought to insist that all evidence was relevant and referred to the case of *Oates v. Browne* [2016] 1 I.R. 481, and another case described in the transcript as *"McGonigle",* which we have been unable to track down, but which we suspect may in fact be *McGonnell v. Attorney General* [2007] 1 I.R. 400, as supporting the proposition that an accused person did not have to give a reason as to why they wanted particular disclosure or evidence. He added, *"all evidence must be presented or it's in breach of the constitutional rights of the accused."*

33. We infer that the passage from *Oates v. Browne* to which the appellant was alluding was the following passage from the judgment of Hardiman J. and appearing at the top of page 517 of the relevant volume of the Irish Reports. The late Supreme Court judge said (*obiter dictum*):

> "[35] … I am also of the opinion that a defendant in any criminal case cannot be compelled to disclose his defence, or even a possible defence, in advance of hearing the prosecution case; or to indicate what defence he wishes to explore in advance of the prosecution presenting their evidence. See Sandes, *Criminal Practice, Procedure and Evidence in Éire* (2nd ed, Sweet and Maxwell, London, 1939) at p 158; O'Malley, *The Criminal Process* (Thomson Reuters, Dublin, 2009) at para 18.30, p 710 and Heffernan and Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury Professional, Dublin, 2014) at pp 671, 674 and 688; *Director of Public Prosecutions v. Buck* [2014] IECCA 45, (Unreported, Court of Criminal Appeal, 27 November 2014) approves *Attorney-General v. Durnan (No 2)* [1934] I.R. 540 which in turn approved *Rex v. Naylor* [1933] 1 K.B. 685, cited in Sandes, above."

34. The District Judge indicated that she was very familiar with *Oates v. Browne* and disagreed that the scope of it was as wide as the appellant was suggesting. She said that *"the case concerns calibration of a machine. That was the whole point of the case"*. The appellant pointed out, correctly, that while the refusal of a request to the District Court for leave to inspect an Intoxilyser machine and investigate its calibration had been at issue, the appeal had not in fact been allowed for a failure to allow the inspection or to order disclosure but because of the District Judge's failure to give reasons for his decision.

35. The District Judge then enquired, *"So, now, what specifically is your application in relation to what is outstanding from discovery (sic) that has already been made?"* The appellant replied:

> *"The CCTV is evidence, relevant evidence that I have not been furnished with. I am entitled to time to assess that evidence. The TETRA radio information is evidence that I have not been furnished with. It is relevant evidence. It gives GPS and will test the truthfulness of the prosecuting gardaí. There was a photograph taken of me on the night; that's more evidence that I wasn't given. And ANPR data from the night is more evidence that I have sought. I sought it under a data protection request which wasn't replied to in time. When they did reply to it, they claimed there was no CCTV. Since then, it has transpired that there was CCTV and they're refusing to allow me to have it."*

36. The District Judge indicated that she was not satisfied that he had been refused access to the CCTV in circumstances where he was now being offered an opportunity to go to the Garda station and look at it. The appellant pressed for a physical copy of the CCTV recording because there had initially been an indication to the effect that there was no CCTV footage, and latterly the prosecution was conceding that there was in fact CCTV footage. The appellant, believing because of this that something sinister was possibly afoot, was insistent

that he should receive a physical copy of the footage. However, the District Judge was unmoved by this. The appellant then enquired:

"And with regard to the other evidence that I'm seeking, Judge?"

37. Replying to this question, the District Judge said:

"Well, you see, you haven't outlined to me what it is you're seeking."

38. It is appropriate to interject here to say that that was not strictly correct. The appellant had indicated that in addition to CCTV he wanted TETRA radio information and, although he was not obliged to give an explanation as to why he wanted it, he had gone on to explain that it would include GPS data that he hoped to deploy *"to test the truthfulness of the prosecuting gardaí."* It will be recalled from paragraph 15 above that the appellant would in due course go on to cross examine both Garda Delea and Garda Hanley as to where they had been located when they claimed to have first observed the Mercedes which he was driving, and he suggested to them that they had not been in a moving vehicle at the location which they had specified (i.e. outside the Community Hall at Churchquarter, Kilbeheny), but rather had been parked outside the old co-op close to the Post Office in Kilbeheny. It emerged from submissions made later in the context of an application for a direction that the appellant had hoped that GPS data from the TETRA radio in the Garda car might assist him in challenging the credibility and reliability of the evidence of the gardaí concerned on these points of detail. However, he went further and put it in these intemperate terms:

"If the GPS on the TETRA radios will prove, that Garda Delea and Garda Hanley were stationary in the time proceeding (sic) this, and that's perjured evidence that they've given, then the GPS will prove that."

39. The District Judge pointed out, deprecatingly, that it was never put to either Garda that they had given "perjured evidence". She was right to do so.

40. It is clear that the most that GPS data could have proved, if it had been available, was that the gardaí had been incorrect in their testimony on these issues of (arguably collateral) detail, a matter that could, it must be accepted, perhaps have been relied upon by the appellant to suggest that their overall credibility and reliability was questionable, although whether demonstrated inaccuracy on that sort of collateral detail would have been sufficient *per se* to impugn their overall credibility and reliability is in our view doubtful. However, be that as it may, it would not establish perjury as was suggested. Witnesses can be incorrect in their testimony for very many reasons (e.g., they may simply be mistaken in their recollection) without necessarily having been guilty of perjury, and allegations of perjury should not lightly be made. The difficulty for the appellant is that he failed to ensure at the time of his application for disclosure/production of TETRA radio/GPS data that the District Judge understood how this could be potentially relevant, much less material, in the context of the prosecution before her. She considered that it had not been shown to be relevant and material and refused the application. *Prima facie*, and this is his fundamental problem, that would appear to have been a decision made within jurisdiction and as such it was not amenable to judicial review, absent something more.

41. Returning to the narrative concerning applications made in advance of any evidence being heard, the appellant also said that he wanted disclosure of a photograph taken of him in the garda station on the night of his arrest, and he wanted ANPR ("Automatic Number Plate Recognition") data.

42. The District Judge continued:

> *"As I've explained to you, there's any amount of case law in relation to the issue with regards to discovery. Discovery is not a fishing mission. You must be specific about what it is you require, and not only must you be specific, it must be relevant to the prosecution. I've already told you that a radio that you are seeking data from, that is*

not relevant, GPS is not relevant, because this is the prosecution under section 4 of the Road Traffic Act of 2010, which sets out very clearly what the proofs are to reach the threshold until (sic) *relation to a prosecution under that section. Nothing other than the proofs necessary will be allowed before the court. It's as simple as that."*

43. At this point, the appellant quoted to the judge the definition of what could constitute relevant material as outlined by Carney J. in *DPP v. Special Criminal Court and Ward* [1999] 1 I.R. 60 and insisted that a failure to provide him with relevant evidence would be a breach of his constitutional rights. The District Judge responded that his constitutional rights had been vindicated by the fact that he had received disclosure in accordance with *DPP v. McGonigle.* (Again, we think this may be an intended reference to *McGonnell.* While that case was primarily concerned with a challenge to the constitutionality of the new system of breath tests rather than with rights to inspection or disclosure, the Supreme Court in upholding the constitutionality of the system noted that one of the important safeguards to the regime was the right of an accused person to inspect the apparatus.). The District Judge went on to say:

"You have raised no issue in relation to that other than CCTV footage. The CCTV footage has been made available to you. You chose not to go to the Garda station and look at it. You're now being given a second opportunity to do so in circumstances whereby you didn't seek to make an alternative arrangement in relation to viewing it. There is no outstanding disclosure, and I making an order that there is no outstanding disclosure."

44. She added, *"And the matter is in a position to proceed to hearing."*

45. The appellant then queried what was the position in relation to the photograph that was taken of him on the night. The District Judge responded, *"Mr Fitzgerald, we do not view photographs before court in relation to prosecutions under section 4. It would be a matter for*

the guard to confirm and to identify that it was you who he stopped or she stopped on the side of the road. That's all we need in terms of identification. We don't need photographs."

46. The appellant then insisted that it was relevant evidence, but did not say how or why it could be relevant, and the judge seemed to regard him as being argumentative with the court for doing so, because she said:

> *" -- would you kindly respect this court? I am telling you, and it is a matter of law, that there is no necessity for a photograph to be produced for the purpose of a prosecution under section 4 of the Road Traffic Act. The guard to prosecute this case will bring evidence in relation to identifying you. We do not need photographs."*

47. The appellant again persisted in asserting that the photograph was relevant evidence to which he was entitled. It requires to be stated that he had not sought the photograph in question prior to this date. It was not on the list of items specified as being required in response to the Gary Doyle Order in the letter written by his solicitors on the 26th of October 2018. Moreover, although he was not required to do so, he gave no indication as to why he considered that the photograph was relevant. The District Judge appears to have thought that he mistakenly believed it was an essential prosecution proof, and she again sought to dispel any belief he might have in that respect, by stating:

> *"Mr Fitzgerald, I have made it very clear what the position is in relation to the relevant proofs. You are not entitled to a photograph of the purpose of proving the case. You are entitled to, and we go back to the point I made 10 minutes ago, relevant disclosure. That is what the Supreme Court has held. A photograph is not relevant. And I'm holding, as a matter of law, that a photograph taken in the Garda station is not relevant.*

48. It subsequently transpired in the course of the substantive hearing of the case against the appellant which proceeded later in the day that the appellant sought to dispute, *inter alia*,

that Garda Delea had good grounds for administering the roadside breath test. It will be recalled that Garda Delea gave evidence, *inter alia*, that when he spoke to the appellant at the roadside he had noted that the appellant's eyes were glazed, that there was a smell of alcohol from his breath and that his speech was slurred. Mr Fitzgerald maintained that Garda Delea was an unreliable witness, and that the photograph taken of him in the Garda station, if it had been produced, would have shown that his eyes were not in fact glazed. This was, seemingly, how Mr Fitzgerald had believed that the photograph could assist him. However, he had given no clue to the District Judge that that was what he saw as being the relevance of the photograph when the argument about disclosure was being had earlier that day. It also should be observed that any photograph taken in the Garda station was self-evidently not generated contemporaneously with Garda Delea's observation of the appellant at the roadside. It was taken some time afterwards and arguably little weight could therefore have been attached to it even if it had been available.

49. The court rose to enable the appellant to go to the Garda station and view the CCTV footage which he did. When the court resumed the appellant applied to admit the CCTV footage as evidence, *"because it shows that Garda Delea left the observation area several times and was focusing on his notebook or telephone throughout a lot of it, and I want that submitted as evidence."* The appellant then added, *"I would also like to make an application to the Court to have the intoxilyser machine physically examined by a technical expert"*, leading to the following further exchanges:

> *JUDGE: What technical expert? Whom are you talking about?*
>
> *MR FITZGERALD: I would like the Court's direction on what -- who would be an acceptable -- what technical expertise would be –*
>
> *JUDGE: Mr Fitzgerald, my role here is very specific: I'm here to hear the case. I don't prepare the case and I don't deal with the proofs. I do not give advice, that*

day's over. So, I can't tell you about who you should or should not employ in relation to machines or solicitors. That's a matter for you. So you cannot seek an instruction from me as to who should do something on your behalf. The matter has been before the Court on a number of occasions previously, and none of these applications were made. This application –

MR FITZGERALD: Judge –

JUDGE: Sorry, this application is here for hearing, those are my instructions. I'm here to hear it. I'm going to hear it now in five minutes.

INSPECTOR: Okay.

MR FITZGERALD: Judge, this is my first time being before the Court myself. The previous matters I obtained a solicitor who was unavailable on the first day, sought information from the gardaí on the second day. That information hadn't been complied with on the third day. And, on the last day, I wasn't given any chance to speak or address anything, the judge ran out of time and adjourned it today. So this is my first day before the Court, Judge, and I'm making the application, and I making the application for all the evidence held by the State –

JUDGE: I've already dealt with that application this morning, and I made a direction that you go down to the Garda station, you view the CCTV footage, you've done that. The case is now proceeding, Mr Fitzgerald. That was the situation. Now we're taking this matter up at 2.30. Thank you.

50. The case then proceeded as indicated earlier in this judgment. In that regard one further matter requires to be alluded to. In conducting his defence, it was contended *inter alia* by Mr Fitzgerald (although he ultimately did not go into evidence) that the reasons for his arrest had not been properly explained to him. It will be recalled that the Garda evidence was that the reason for his arrest was explained to him in ordinary language and that he had

indicated that he understood. The appellant maintained in a submission to the court that he was entitled to receive the exact wording of the legislation, and it was put in cross examination that he had demanded that and that it had not been provided. Garda Delea did recall this and said that he explained to Mr Fitzgerald that he did not have a physical copy of the legislation with him but that he had explained to him in normal terms what the offence was. Garda Hanley had no recollection of Mr Fitzgerald requesting a physical copy of the legislation but maintained that if it had been asked for he would have informed him that they did not carry it with them in the Garda car. Mr Fitzgerald also maintained that he had reiterated his demand for a physical copy of the legislation in the Garda station and a Garda witness accepted that, while Sgt McSweeney, the member in charge, had initially not been disposed to provide it, in the end, exceptionally, a physical copy of the relevant legislation was in fact provided to the appellant.

51. The appellant made an application for a direction on various grounds at the end of the prosecution case and his application was refused. The appellant was then asked if he was going into evidence and he initially said that he was, but that before doing so he wished to renew his application for disclosure of the TETRA radio information, the GPS, the photograph and the CCTV. This led to the following exchanges:

> *JUDGE: I have dealt with those matters this morning. I have told you what proofs are necessary for the purposes of establishing a prosecution. It is evidence and sworn evidence by the gardai is the basis upon which this prosecution has proceeded. They have given sworn evidence before a court in relation to the procedures which they invoked. If you are in a position to rebut any of that evidence, you may do so. Now if [you] wish to come and give me sworn evidence, I will hear your evidence please.*
>
> *MR FITZGERALD: No, Judge, thank you.*
>
> *JUDGE: Okay, refused to go into evidence.*

MR FITZGERALD: It's not refusing to go into evidence, Judge, but the evidence is being withheld from me. And my defence –

JUDGE: Declined to go into evidence if you wish, declined to go into evidence. I will reiterate: I am satisfied that there has been no failure to disclose. This is a prosecution on -- you can sit down, Mr Fitzgerald -- this is a prosecution under section 4 of the Road Traffic Act of 2010, which is a prosecution for driving or attempting to drive a mechanically-propelled vehicle, having consumed alcohol. We have heard the evidence of the gardaí with regard to the manner of driving and also in relation to the procedures which were invoked at the garda station following a lawful arrest of the accused on the occasion of the incident complained of. We have been furnished with the certificate in relation to section 13 of the Road Traffic Act, which provides that the accused person provided a breath sample which returned a reading to the gardaí which provided for 40 milligrams of alcohol per 100 millilitres of breath. There is evidence in relation to the furnishing of a fixed penalty notice, and that was not paid. In those circumstances, I am satisfied that the threshold has been met, case to answer, the accused has elected not to give evidence, I convict."

The Judicial Review Application

52. In response to his conviction, the appellant brings the present application for leave to apply for judicial review. In his Notice of Motion he seeks:

(1) An order of *certiorari* quashing the decisions of the District Judge in the proceedings at Fermoy District Court on the 22nd of February 2019 to refuse to order disclosure of evidence and to convict;

(2) A declaration that the refusal to inform the applicant in detail of the reason for his arrest rendered his detention unlawful;

(3) A request for a preliminary ruling from the European Court of Justice on whether the prosecution's refusal to furnish evidence in their possession complies with European Union Directive 2012/13/EU;

(4) Such further orders as the court sees fit;

(5) Leave to apply,

(6) Costs.

53. The grounds relied upon were:

(i) District Judge Marie Keane's persistent refusal to order disclosure of evidence is contrary to the right to a fair and impartial hearing and presumption of innocence as provided for in Articles 47 & 48 of the Charter of Fundamental Rights of the European Union, Article 6 of the European Convention on Human Rights and Articles 38 & 40 of the Irish Constitution;

(ii) District Judge Marie Keane's statement that the only proofs allowed would be those required to bring home a conviction demonstrates bias and is contrary to the right to a fair and impartial hearing and presumption of innocence as provided for in Articles 47 & 48 of the Charter of Fundamental Rights of the European Union, Article 6 of the European Convention on Human Rights and Articles 38 & 40 of the Irish Constitution;

(iii) The stated refusal by Sgt. McSweeney to inform me in detail of the reason for my arrest is in contravention of Article 5 of the European Convention on Human Rights and Article 40 of the Irish Constitution;

(iv) District Judge Marie Keane's refusal to order discovery of relevant evidence is contrary to Article 7 of European Union Directive 2012/13/EU.

54. The application was grounded in the first instance upon an affidavit of William Fitzgerald sworn on the 1st of April 2019. In this affidavit, the appellant sets out the history of

this matter from his perspective. He points out that he initially made a data protection request (he does not say to whom, but it may be inferred that it was to relevant authorities in An Garda Siochána) on the 8th of February 2018 in which he sought to obtain *"all data relating to myself, including but not limited to audio/video/CCTV, pulse record, criminal record etc. All data relating to vehicle registration number: 96 D 15351 including but not limited to CCTV/on-board camera etc. While registered to myself, especially relating to Fermoy Garda station/Traffic Corp on the night of Sunday, 4-Feb-2019."* He avers that he received a reply to the effect that they had failed to establish the existence of data relating to audio, video, CCTV or on-board cameras.

55. The appellant then describes the correspondence engaged in by his then solicitors and the application for the Gary Doyle order, and how it was responded to. He avers that when he sought a copy of the CCTV footage he was told that he would need a court order for it to be provided to him. He describes receiving a communication from a Superintendent Maguire offering him facilities to view the CCTV footage at the Garda station. He says that he received this communication shortly after 6 o'clock on the evening of the 7th of January 2019 and was told that he would have to avail of the facility before 9 o'clock that evening, and he contends that the notice was too short. He says that he told the superintendent that he was unavailable and that when he reiterated his request for a copy of the footage he was told he could not have a copy and that he would have to ask a judge. When he asked for the reason, the reason given was "Data Protection."

56. The appellant then briefly alludes to his appearance before Fermoy District Court on the 8th of February 2019, stating that *"at first calling I told the judge that there were issues regarding disclosure of evidence"* and that the judge had said that he would deal with it at 2 o'clock. However, he said, by 5 o'clock the matter had not been reached and the case was adjourned to the 22nd of February 2019.

57. The appellant then provides a description concerning what occurred on the 22nd of February 2019, and his evidence in that regard, up as far as paragraph 20 of his affidavit, is consistent with my review of the transcript as set out above. However, the affidavit then continued:

> "21. When Sergeant McSweeney actively refused to furnish me with a copy of the legislation claiming that he had been doing this a long time and he only had to tell me in ordinary language, my detention became unlawful.
>
> 22. The fact that Judge Keane repeatedly read from a computer screen leads me to believe that there was a third party prompting her in real time.
>
> 23. The fact that Judge Keane stated that the only proofs which she would permit where those required to 'bring home' a conviction demonstrates bias and is contrary to the requirements of a presumption of innocence, a fair trial and equality of arms.
>
> 24. I queried the status of the prosecution of the alleged breach of section 52 of the Road Traffic Act 1961 (as substituted by section 4 of the Road Traffic Act 2011) several times and was eventually told by Inspector O'Sullivan that it had never been before the court and by Judge Keane that it had been dismissed. Both of which were untrue.
>
> 25. Judge Keane's manner was very dismissive of my submissions, applications and queries. She appeared to be intent on getting her predetermined decision that I was guilty and would not allow anything that might interfere with that objective."

58. The appellant's said affidavit was responded to by the filing of a short affidavit on behalf of the respondent. This affidavit was sworn by Mr Brian McLaughlin, a principal prosecutor in the judicial review section of the office of the Director of Public Prosecutions,

on the 17th of February 2020. It merely exhibits the correspondence *inter partes* concerning disclosure referred to earlier in this judgement.

59. Before the matter came on for hearing the appellant filed two further affidavits, namely a supplementary affidavit sworn on the 24th of January 2020, and the second supplementary affidavit sworn on the 23rd of April 2021.

60. At paragraph 5 of the affidavit of the 24th of January 2020 the appellant stated that *"Judge Marie Keane insisted on hearing the matter on the day despite being informed that the matter had been listed for mention as disclosure had not been dealt with."*

61. The matters averred to at paragraph 6 of the affidavit of the 24th of January 2020 have already been alluded to at paragraph 4 of this judgement. The remainder of the affidavit of the 24th of January 2020 (insofar as it deals with the proceedings before the District Court that are in controversy) states:

> "7. For the avoidance of doubt; Judge Marie Keane was adversarial in her dealings with me and acted towards me with ill will and *mala fides* and after being made aware of the law, deliberately and knowingly ignored the law in contravention of my constitutional and natural rights and her oath of office as can be heard on the DAR recording which I submit as exhibit B.
>
> 8. A *mala fide* act can be described as: *"intentional dishonest act by not fulfilling legal or contractual obligations, misleading another, entering into an agreement without the intention or means to fulfil it, or violating basic standards of honesty in dealing with others."*
>
> 9. I was furnished with a purported transcript of the district court proceedings by DPP solicitor Brian McLaughlin which contains several errors and omissions. I repeatedly requested from him that he rectify the issue and emphasise the point

that he had an obligation to not mislead the court by putting flawed documents before it Mr McLaughlin refused to rectify the matter and told me he would be bringing an application before the court in December in relation to it. I submit the transcript as exhibit C.

62. In the appellant's second supplementary affidavit sworn on the 23rd of April 2021, the appellant joins issue with an aspect of the affidavit of Mr McLaughlin referred to above at paragraph 58. Mr McLaughlin had exhibited a letter dated the 12th of July 2018 from a Sgt. James A. Hallahan addressed to the appellant's then solicitors, English & Associates, enclosing documentation that had been requested. The appellant contended in his second supplementary affidavit that he never received that letter.

<u>The judgment of the High Court</u>

63. In his judgment dated the 2nd of July 2021, Meenan J., provides a brief context setting introduction. He then lists the substantive reliefs initially claimed by the appellant, before alluding to the renewed application to re-instate the District Judge as a named respondent, and for amendments to the Statement of Grounds expanding the list of reliefs being claimed. In regard to the latter he observes *"Noonan J. directed that it would be for the trial judge to decide whether or not to allow these amendments."*.

64. The High Court judge then proceeds to outline the applicable legal principles which he considers he must apply, and these were identified as being the principles set out in the judgment of Finlay C.J. in *G. v. DPP* [1994] 1 I.R. 374. He then identifies the appellant's various complaints as set out in his grounding affidavit and submissions, including that he was denied disclosure of certain evidence (CCTV, GPS data and TETRA radio data are specifically referenced); his belief that the District Judge was being prompted in real time by

a third party through a computer screen; and bias on the part of the District Judge (based upon his claim that she had said "*that the only proofs which she would permit were those required to 'bring home' a conviction*". The High Court judge also alluded to the fact that the applicant had made a number of complaints which were not referred to in his grounding affidavit, and referenced in that regard the appellant's requests at trial (i) for disclosure of the photograph taken of him in the garda station, and (ii) to have the intoxilyser machine physically examined by a technical expert.

65. The judgment then rehearses in summary what occurred on the 22nd of February 2019 at Fermoy District Court, based upon the transcript record. Having done so, the High Court judge expressed the view that he was satisfied that the District Judge had conducted the trial in an entirely appropriate way in accordance with law.

66. In the next section of his judgment the High Court judge considers the appellant's specific complaints. While he does not use headings, we will do so for convenience.

CCTV from the Garda Station

67. The High Court judge noted that the appellant had been afforded an opportunity to view the footage taken in the garda station, and observed that, *"[i]t is notable that the contents of this recording were not referred to, in any material way or at all, in the course of the applicant's cross examination of the gardaí involved."*

GPS/TETRA Radio Data

68. The High Court judge remarked that this material was *"not relevant to the charges which faced the applicant other than as a general issue of credibility"*. He was undoubtedly correct in this and the appellant has not sought to suggest otherwise. He noted that the appellant had cross-examined the gardaí concerning the position of the (garda) car prior to him being stopped. He stated that the District Judge accepted, as she was entitled to do, the evidence of the gardaí concerning the manner in which the appellant's car was being driven

before being stopped, and that there had been no real challenge by the applicant as to the evidence given on compliance with the various statutory provisions to prove a charge of drunken driving.

69. The High Court judge then pointed out that it is well established in law that the obligations of disclosure are not limitless, and that a conviction is not to be regarded as unsafe *per se* simply because there has been a partial failure to meet obligations of disclosure, and he cited *The People (DPP) v McCarthy* [2008] 3 I.R. 1 as authority for that. Moreover, and in any case, the High Court judge was not satisfied that there had been a failure by the prosecution to comply with its disclosure obligation because *"the applicant has not established that not having the GPS coordinates or information from the TETRA radio prejudiced his defence in any material way"*.

Application to inspect the intoxilyser Machine

70. The High Court judge observed, correctly, that the issue concerning an examination of the intoxilyser machine featured only briefly at the hearing of the charge and was not referred to in the applicant's grounding affidavit. Although he refers to affidavit singular, and may therefore be taken to have been referring to the principal grounding affidavit sworn on the 1st of April 2019, we note ourselves that neither of the appellant's two later affidavits refer to it either, nor does the appellant's Statement of Grounds. While the issue was referred to in written submissions put before the High Court, we would observe that legal submissions can only be legitimately addressed to matters that have been pleaded and supported by evidence. The High Court judge noted that while the courts have accepted that a right to carry out such an inspection exists in principle, the application by the appellant in this case to have the apparatus in question expertly examined was made late in the proceedings and was not pursued by him. He further held that, *"the manner in which the application was made afforded the District Judge no opportunity to give reasons",* an allusion to the appellant's

inappropriate request for the Court's direction (i.e., that the court should provide him with advice) concerning the technical expertise he should retain. Further, he observed, the application to be allowed to inspect *"was made in circumstances where the maintenance and service records had already been provided to the applicant prior to the hearing, and the applicant raised no issue concerning these"*.

The failure of the arresting garda to provide him with the actual wording of the statute

71. Addressing the contention by the applicant in his Statement of Grounds that there was a refusal to inform him in detail of the reason for his arrest which rendered such arrest unlawful, the High Court judge referred to the evidence that had been given by the arresting garda accepting that he had not provided the appellant with a physical copy of the legislation but also stating that the reason for the arrest had been explained to the appellant in ordinary language and that the appellant had understood it. He then referred to the judgment of Blayney J. in *DPP v. Mooney* [1992] 1 I.R. 548 in which it was held that a garda when making an arrest does not have to use technical or precise language and that it is sufficient if an arrested person is told "in substance" why they have been arrested. The High Court judge concluded that the applicant was not entitled to a physical copy of the relevant legislation and was at all stages fully aware of the reasons for his arrest.

72. In substance, the High Court judge was saying that neither the facts averred, nor the law, supported a stateable ground for judicial review under this heading.

Alleged bias/lack of impartiality on the part of the District Judge

73. The High Court judge considered the complaints under this heading. First, he examined the assertion that the District Judge's statement that *"Nothing other than the proofs necessary will be allowed before the Court"* provided evidence of bias. He examined the context in which the impugned sentence was spoken and, quoting the entirety of the

paragraph in which it appeared (reproduced at paragraph 41 above), concluded that *"it is clear from the transcript that the conduct of the hearing by the District Judge was entirely appropriate".*

74. The High Court judge also considered the appellant's claim that as the District Judge *"repeatedly read from a computer screen* [it] *leads me to believe that there was a third party prompting her in real time,"* and, with considerable restraint and understatement in our view, characterised the claim as "*border*[ing] *on the bizarre*".

Overall Conclusions

75. The High Court judge concluded that the applicant had failed to meet the threshold of establishing an arguable case, which was a prerequisite to being granted leave to apply for judicial review.

76. Further, and in any event, the applicant's complaints in relation to the District Judge's rulings with respect to disclosure were misconceived as they were decisions made by the District Judge acting within her jurisdiction. He referenced the judgment of Birmingham P. in *DPP v. Fahy* [2018] IECA 223 as providing support for his conclusion in that respect.

77. He further stated that he was satisfied that the issues raised in the application did not require a ruling from the European Court of Justice.

78. In a subsequent separate ruling on costs the High Court judge awarded the costs of the motion to the respondent.

Submissions

79. We have received written submissions from the appellant, which were amplified by him in oral argument at the hearing of the appeal, and we have considered these. Further, at the oral hearing we were invited by the appellant to listen in chambers to the DAR of the hearing on the 22nd of February 2019, and to note the District Judge's disposition towards

him as evidenced by her "tone", at the following times: 10:51 – 11.04, 14.19, 15.01, 15.18, 15.23, 15.26 and 15.27. We confirm that we have done so.

80. We have also received written submissions from the respondent, which again were amplified by her counsel in oral argument at the hearing of the appeal, and we have also considered these.

81. We will refer to the parties' respective submissions to the extent considered necessary in the curial part of this judgment.

82. It should also be stated that we have received a further document filed by the appellant entitled "Submissions to Revisit the Judgment & In the Matter of Costs Re: 2019/187/JR". This document, which is dated the 16th of July 2021, appears to have been addressed to the High Court, and it suggests that the appellant may have returned to the High Court after Meenan J. had delivered his judgment of the 2nd of July 2021, requesting, *inter alia*, that pursuant to the inherent jurisdiction of the court he should revisit/alter his judgment because, in the appellant's perception, it contained errors. In so far as any such jurisdiction may exist, it need hardly be emphasised that it is a jurisdiction to be exercised sparingly, and only in the case of a manifest error or errors with the potential to lead to a fundamental injustice, and it does not provide a charter for a disappointed litigants to seek to engage in argument with, or to seek to re-open, judgments which have gone against them simply because they disagree with them. If there was such a request, and the High Court judge did not accede to it, then in principle his refusal to revisit would be capable of being appealed to us. However, the appellant's affidavits do not refer at all to an application to the High Court to revisit/alter its judgment. Moreover, there nothing in the Notice of Appeal before us to suggest that a discrete order refusing an application to revisit is part of the appeal before us. No order of the High Court reflecting a refusal (if indeed there was such a refusal) to do so

has been exhibited or produced. The appellant seemingly relies on the sentence in the Order of the 8th of February 2022 which says,

> *"And in accordance with said written judgment*
>
> *The Court Doth Refuse the Reliefs sought and dismisses the Applicant's application herein"*

as covering all refusals of relief to the appellant howsoever made, or whenever made, and without producing any record of such a refusal, or evidence to support a claim that there was such a refusal even if unrecorded.

83. Be that as it may, we do note that the Notice of Appeal against the judgment of the 2nd of July 2021 and the order consequent upon that (of the 8th of February 2022, perfected on the 9th of February 2022) does reference, in the section contained within it entitled "Grounds of Appeal, at subparagraph III (1) (4), a refusal by the trial judge *"to hear the appellant's application to revisit his judgement and order before perfection of his order pursuant to the inherent jurisdiction of his court. This application included requests of correction of errors and omissions, amplification of reasoning and reserve part of his decision."* Further, amongst the orders sought from this Court in the Notice of Appeal are claims, in section IV, for :

> *"(c) in the alternative, an order granting the application to revisit the judgment submitted by the applicant prior to the perfection of the Order pursuant to the inherent jurisdiction of the court;*
>
> *(d) in the alternative, an order of Mandamus requiring the learned judge to address the application to revisit his judgement submitted by the applicant prior to the perfection of its final order pursuant to the inherent jurisdiction of the court;*

(e) in the alternative, a declaration confirming the rightful modus operandi for an application to revisit judgement or order before same is perfected pursuant to the inherent jurisdiction of the Court"

84. In circumstances where the Notice of Appeal contains these references, we are prepared notwithstanding the pleading and evidential deficits that we have identified, to have regard *de bene esse*, and in the context of the overall appeal, to the contention that there was a request to the High Court judge to hear an application to revisit his judgment on the basis set out at subparagraph III (1) (4) of the appellant's Grounds of Appeal, and that that request was not acceded to. In so indicating, we are not to be taken as regarding any such refusal as having been validly appealed, or as expressing any view on the merits of the application that was said to have been refused. Rather, we will simply take into account as part of the overall circumstances of the case that the appellant claims that there was such a request and that it was refused.

85. Subject to this, the appellant's claim that he is entitled to leave to apply for judicial review will be considered solely in the context of the matters that he has pleaded, and applying the threshold criteria laid down by the Supreme Court in *G. v. DPP* [1994] 1 I.R. 374.

The *Oates v. Browne* jurisprudence

86. Before proceeding with any detailed consideration and analysis of the appellant's claim that he is entitled to be granted the leave that he seeks, it is appropriate to digress at this stage to say a little more about *Oates v. Browne* in circumstances where it has featured significantly in argument at every stage of this and the related District Court litigation.

87. The case involved a judicial review arising out of the refusal by District Judge Browne to accede to an application brought by the solicitor (a Mr Cullen) of a man accused of a drink-driving offence (Mr Oates) to be allowed to inspect an intoxilyser machine, and the

maintenance and calibration records associated with that machine. No reasons had been given for the refusal and Mr Oates had been convicted. The judicial review was successful but the appellant in the present case was correct in saying that the appeal was ultimately allowed not because of the District Judge's failure to order inspection of the machine and disclosure of the maintenance and calibration records, but because he had failed to give reasons for his decision to refuse the application, which was a breach of fair procedures.

88. As Hardiman J. noted in his judgment for the Supreme Court in *Oates v. Browne* , the defendant in a criminal case is not required to show his/her hand by revealing their proposed strategy or intended evidence in advance of the trial. The practical implications of this rule are as follows: In seeking disclosure from the prosecution, a defendant need not put forward why he/she maintains that the documents/evidence being sought are potentially material/relevant; the prosecution must assess the merits of the request for themselves and must do so fairly. The obligation extends, as Carney J. held in *DPP v. Special Criminal Court and Ward* [1999] 1 I.R. 60 at 71, to:

> "any document which could be of assistance to the defence in establishing a defence, in damaging the prosecution case, or in providing a lead on evidence that goes to either of those two things."

89. As Heffernan and Ní Raifeartaigh point out in their work *Evidence in Criminal Trials* (Dublin, Bloomsbury, 2014), at paragraph 11.58:

> "the question of whether the material is relevant to the proceedings may not lend itself to a precise, bright line determination. Because the defence is not required to show its hand by revealing its proposed strategy or intended evidence in advance of trial, the prosecution's assessment of the potential relevance of particular material will necessarily involve some measure of speculation. It seems that in some circumstances at least, the courts are willing to accept prosecutorial decisions to confine disclosure

to matters bearing on the case that the prosecution will reasonably expect the defence to mount."

90. Inevitably, it will happen from time to time that the prosecution and the defence will have different views as to what is potentially material and/or relevant. In that event, a judge who has seisin of the proceedings may be asked to determine the issue and to rule accordingly. Where that arises, the same principles as applied to the prior dealings *inter partes* will apply at such a hearing. Once again, the defendant cannot be required to show his/her hand by revealing their proposed strategy or intended evidence in advance of the trial. A defendant may, of course, offer to do so on a voluntary basis but cannot be compelled to do so. So, if a defendant opts not to disclose his/her defence strategy, or possible defence, or to suggest how the material being sought could possibly assist him/her, then the judge concerned must assess the merits of the application, i.e. as to whether what is being sought is potentially material and/or relevant, for himself/herself based on what else they know about the case. That will include consideration of the nature of the prosecution, what evidence the prosecution is likely to be seeking to adduce in support of its case (i.e. what the judge in the present case has characterised as "the proofs required to bring a case home"), and the various ways in which a person in the shoes of the defendant might possibly seek to contest the prosecution's case.

91. The admonition of Kearns J. when giving judgment for the Court of Criminal Appeal in *The People (DPP) v. McCarthy* [2008] 3 I.R. 1, and cited by the High Court judge in the present case, is relevant in that context. It will be recalled that Kearns J. said:

> "[46] … the obligations of disclosure are not limitless nor are they to be assessed in a vacuum or upon a purely theoretical or notional basis."

92. If, upon an application for disclosure/production of evidence being made, it is not self-evident as to how material which is being sought could possibly assist the defendant in

establishing a defence, in damaging the prosecution case or in providing a lead on evidence that goes to either of these two things, then such a defendant, standing on his/her right to not have to say how the material being sought could assist them, could potentially end up with an adverse ruling on the materiality/relevance issue, and be unsuccessful in obtaining an order requiring the prosecution to disclose that which they were seeking, simply because the judge has not been provided with enough information to enable him/her to be persuaded in the course of their deliberations that the material being sought is potentially material and/or relevant. Accordingly, while a defendant is entitled to stand on his/her rights, it may in some circumstances be tactically and strategically more advantageous to that defendant to voluntarily indicate in general outline how the material being sought could be of assistance. He or she cannot be compelled to do so, but the disadvantages associated with possibly not obtaining the material being sought may make the wisdom of standing on his/her rights questionable and prompt the volunteering of an explanation as to how the material being sought could potentially assist them. In other cases, it may be adjudged by a defendant to be more advantageous to stand on their rights. Any decision in an individual's case as to the correct approach or tactics in that regard will be a strategic one for him/her in consultation with their legal team (if any).

93. Returning to the decision in *Oates v. Browne*, the inspection of the intoxilyser apparatus, and the maintenance and calibration records associated with it, which had been sought was self-evidently potentially relevant, as the Supreme Court had previously indicated in *Whelan v. Kirby* [2005] 2 I.R. 30. It was also the situation that a requested entitlement to inspect such an apparatus, and to have disclosed associated maintenance and calibration records for such an apparatus, was a special case because of the existence of a statutory presumption (albeit one that was theoretically rebuttable) as to the correctness of the output of such an apparatus, in terms of the statement generated as to the results of its analysis. The

position in reality is as described by Geoghegan J. in the following passage from his judgment in *Whelan v. Kirby* [at p. 43 of the report of that case in the Irish Reports], and quoted by Hardiman J. in *Oates v Browne* [at para. 38]:

> "It can be argued with some validity that apart from cases with very unusual facts the presumptions arising from the certificates in the intoximeter cases are for all practical purposes irrebuttable, notwithstanding the statutory provision to the contrary, if there are no circumstances where an accused can be permitted through an independent expert of his own to investigate the reliability of the apparatus or at the very least if it is not generally known in what circumstances (if any) such apparatus can be unreliable."

94. In *Oates v. Browne* the Supreme Court, reiterating a view that it had earlier expressed in *Whelan v. Kirby*, considered that, quite apart from the general rule that a defendant cannot be required to disclose his/her defence or defence strategy in advance of their trial, there could in any event be no onus on an applicant seeking inspection of an intoxilyser, and records associated with it, to establish that the results of the inspection might assist their defence, because of the presumptively correct status in law of an intoxilyser machine's analysis, the need to be able to challenge the reliability of that analysis, and the self-evident potential materiality and/or relevance of an inspection of the apparatus in question, and the maintenance and calibration records associated with it, in the context of an investigation of its reliability. Hardiman J. elaborates on this at paragraphs 25 to 27 of his judgment, which bear quotation in full:

> "Discretion
>
> [25] It is manifestly true, on the basis of both *McGonnell v. Attorney General* [2006] IESC 64, [2007] 1 I.R. 400 and *Whelan v. Kirby* [2004] IESC 17, [2005] 2 I.R. 30, that the fact that there is a right to apply for inspection and for documents does not

mean that such application must be granted. On the other hand, it follows from the existence of the right to apply, stated to be 'of particular relevance', that inspection and/or documents equally may be granted. Whether they are granted or not is a matter for the judicial discretion of a District judge.

It is to my mind a significant factor affecting the exercise of this discretion that, on the face of it, the s. 21(1) presumption cannot be rebuttable 'in reality' unless the defendant can conduct some form of investigation into the operation of the machine which produces the print out to which the s. 21(1) presumption applies. This was expressly held by Geoghegan J. in *Whelan v. Kirby* [2004] IESC 17, [2005] 2 I.R. 30 in 2004. That case was decided shortly after the evidential breath test procedure had become general, although statutory provision had been made some ten years earlier. Section 21(1) provides that the print out of the Intoxilyser machine shall 'until the contrary is shown, be sufficient evidence … of the facts stated therein'.

The effect of this section is to throw onto the defendant the proof of the inaccuracy or unreliability of the machine or the print out it generates. I cannot see how this can be done unless there is an opportunity to observe the machine in operation, in the way Mr Anderson, consulting engineer, said in evidence in the District Court he desired to observe it, and to establish that the machine has been properly maintained and serviced, as its manufacturer's directions require.

The constitutionality of a statute which attributed this status of presumptive correctness to a statement in a print out, and at the same time removed from the driver the opportunity of having an independent analysis carried out, was preserved, in

McGonnell v. Attorney General [2006] IESC 64, [2007] 1 I.R. 400, only by virtue of the driver's opportunity to apply to the court to inspect the Intoxilyser machine.

Accordingly, it is important not to interpret the statute, as elucidated in *McGonnell v. Attorney General* [2006] IESC 64, [2007] 1 I.R. 400, in a reductive way, for example by saying that the driver cannot rebut the print out because he has not been permitted to inspect the machine, and cannot inspect the machine because he cannot demonstrate what the likely effect of such inspection would be. That is a catch-22. *Whelan v. Kirby* [2004] IESC 17, [2005] 2 I.R. 30, in a passage cited below, quite specifically rejected the submission that, in order to obtain access to the machine for inspection purposes, one has to say what the result of the inspection would be. The Supreme Court in that case held that there is no onus on the applicant to establish that the results of the inspection might assist his defence. The reasons for this inspection are, as Geoghegan J. held at para. 24, p. 45, 'self evident'.

In *Director of Public Prosecutions v. Moore* [2006] IEHC 142, (Unreported, High Court, Ó Néill J., 5 May 2006), a case where inspection of the machine was ordered, and a case was stated at the request of the prosecution, Ó Néill J. held that a District judge dealing with such an application must consider:-

> '… whether without that evidence [ie evidence of the inspection] the accused is disadvantaged in his defence, to such an extent that it could be said he cannot have a fair trial.'

[26] The power to require a defendant to provide a breath specimen for evidential analysis, as opposed to a specimen of blood or urine which could equally have been

demanded, puts it in the power of the gardaí to determine whether or not a defendant can have an independent analysis. By selecting a breath specimen as a means of breath testing, the garda renders impossible an independent analysis of the evidential specimen, for the reasons stated earlier in this judgment. That is not to say that the garda in this case opted to demand a specimen of breath for that purpose. He did it, no doubt, because it had become usual to do so.

[27] Against that background, s. 21 gives a presumptively correct status to the machine's analysis and casts upon the defendant the onus of showing the contrary. This appears to me to be a burden impossible to discharge 'in reality' unless facilities requested in the present case are granted. I do not exclude the possibility that there may be some extraordinary feature which might make the inspection and the provision of documents otiose. I do not accept that the defendant has to prove something in the nature of probable cause for analysis before having a right to inspect. The result of the State's analysis must be 'contestable', as FitzGerald C.J. held in *Maher v. Attorney General* [1973] I.R. 140."

Directive 2012/13/EU

95. It is convenient at this point to also set out the provisions of Article 7 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, a measure in EU law with vertical direct effect, and upon which the appellant has also placed great reliance. It provides:

Article 7

Right of access to the materials of the case

1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.

2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.

4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.

5. Access, as referred to in this Article, shall be provided free of charge."

96. By way of commentary it may be observed that this important legislative provision reinforces and, in many respects, largely mirrors existing Irish domestic law with respect to disclosure. Recital 27 of the preamble to the Directive makes clear that one of its objectives is to ensure that *"[p]ersons accused of having committed a criminal offence should be given all the information on the accusation necessary to enable them to prepare their defence and to safeguard the fairness of the proceedings."*

97. Importantly, while Article 7 creates clear obligations in pursuit of that objective these are anchored to the familiar notions of materiality and relevance.

98. Thus, while there is an obligation in sub article 7(1) to provide arrested and detained persons with documents related to their case, the obligation is limited to *"documents which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention"*.

99. Similarly, the obligation to provide timely access to evidence in the possession of prosecuting authorities, which we find in sub articles 7(2) and 7(3), is confined to *"all material evidence."* Recital 31 of the preamble to the Directive makes clear that access to the material evidence as defined by national law should include access to materials such as documents and where appropriate photographs and audio and video recordings.

Grounds of Appeal

100. The following Grounds of Appeal are pleaded in the appellant's Notice of Appeal.

"1. The learned judge did not give the applicant a fair hearing;

2. The learned judge did not listen to all the evidence, including the audio recording;

3. The learned judge did not address the core elements of the applicant's submissions namely the EU Directive and Supreme Court decision on Disclosure 2012/13 (especially its article 7);

4. The learned judge refused to hear the applicant's application to revisit his judgement or order before the perfection of his order pursuant to the inherent jurisdiction of his Court. This application included requests of correction of errors and omissions, application of reasoning and reserve part of his decision."

101. The Notice of Appeal goes on, as required by the relevant rules, to set out the legal principles, and the specific statutory provisions, being relied upon by the appellant. It also identifies what the appellant sees as being the issues of law before the court, and in summary these are specified as being concerned with the fairness of the appellant's trial before the High Court in circumstances where he claims (i) that he did not receive clear reasoned decisions in respect of rulings made; (ii) the High Court judge did not apply the law concerning a defendant's entitlement to disclosure of documents/information, and to be furnished with relevant evidence, both on foot of Irish jurisprudence, and pursuant to article 7 of Directive 2012/13/EU; (iii) he did not receive a fair hearing in which his right to relevant evidence, his right to a defence and his right to equality before the law was respected, and (iv) that the High Court judge would not accept that he had full jurisdiction to review what the appellant characterises as *"those illegal acts of the lower court"* by way of judicial review, and refused to do so.

<u>Grounds of Opposition</u>

102. In the Notice of Opposition filed by the respondents on the 30th of March 2022 it is pleaded that the entire appeal is opposed on the grounds that:

1. The appellant has prosecuted his appeal against the District Court conviction that forms the subject matter of the judicial review proceeding and that appeal has been determined. Arising out of the appeal the appellant's conviction was duly affirmed at Cork Circuit Court on 28th of January 2022. That being the case this appeal is entirely misconceived.
2. The appellant has not identified an actionable error of law by the learned trial judge and is confusing the jurisdiction of the High Court with that of the court at first instance. Judicial review is about process, jurisdiction and adherence to a basic level of sound procedures. It is not a reanalysis of the evidence.
3. The appellant is attempting to use the jurisdiction of this Court to seek reliefs not sought in the High Court. Rather than highlight an error made by the learned High Court judge, the appellant seeks reliefs, specifically declaratory reliefs, that are not within the jurisdiction of this Court to grant.
4. This was an application for leave and the learned High Court judge correctly applied the principles in *G. v. DPP* [1994] 1 I.R. 374 when refusing leave. The learned High Court judge gave a detailed analysis as to why the applicant's case did not meet the threshold as set out in *G. v. DPP*.
5. The learned High Court judge was entirely correct in refusing the appellant leave to apply for judicial review.

The Court's Analysis and Decision

103. Adopting a thematic approach based on issues raised in the appeal pleadings and submissions, it is proposed to address matters under the following headings:

- The respondent's preliminary objection.
- The alleged failure of the High Court judge to afford the appellant a fair hearing.

- The alleged failure of the High Court judge to take account of all of the evidence.
- The alleged failure of the High Court judge of the High Court judge to address the core element of the appellant's submissions.
- The respondent's contentions that the appellant has failed to identify an actionable error of law and is seeking reliefs that were not reliefs sought in the High Court and as such are not within the jurisdiction of this Court to grant.

The Respondent's Preliminary Objection

104. The respondent has pleaded, effectively as a preliminary objection, that appellant prosecuted an appeal against the District Court conviction that forms the subject matter of the judicial review proceeding and that that appeal has been determined. It is asserted that arising out of the appeal the appellant's conviction was duly affirmed at Cork Circuit Court on 28th of January 2022. The respondent says that that being the case, this appeal is entirely misconceived.

105. However, the issue is not as straightforward as counsel for the respondent has sought to portray. It emerged at the appeal hearing that the position is as follows. The appellant did lodge an appeal to Cork Circuit Court against his conviction for drunk driving by Fermoy District Court on the 22nd of February 2019. However, for reasons which are unnecessary to explore, he did not turn up to prosecute his appeal in the Circuit Court. The appeal did not therefore proceed and was struck out in the circumstances, which was all that the Circuit Court could do. It is important to understand the nature of the jurisdiction enjoyed by the Circuit Court with respect to District Court Appeals. The Circuit Court when exercising its appellate jurisdiction from the District Court conducts a complete rehearing. It does not engage in a review of what occurred in the court below. Following its rehearing it may then either convict or acquit the accused. However, if for some reason the appeal is not being

proceeded with the Circuit Court can make no order, beyond striking it out. Although the language of affirmation is often used by both judges and legal practitioners alike to describe the consequences of a strike out in such circumstances, this is a misnomer. The Circuit Court enjoys no jurisdiction to "affirm" a conviction by the District Court where it has not conducted a rehearing. An affirmation implies that the actions of the court at first instance have been reviewed and have been "affirmed" by judicial determination as having been correct. That is not what occurs when an appeal is simply not proceeded with and is struck out. The correct position in law is that the District Court order simply stands in the absence of any appeal having been proceeded with.

106. Accordingly, it cannot be said that this appeal is misconceived for the reason suggested by the respondent in her Notice of Opposition. Whilst the respondent has legitimately made the point that a right of appeal exists and was taken but not pursued, and in some circumstances those facts or either of them could be a bar to the grant of *certiorari*, we are satisfied that this is not such a case.

The alleged failure of the High Court judge

to afford the appellant a fair hearing.

107. There are a number of facets to the appellants complaints under this heading. At paragraph 1.1 of his written submissions the appellant complains that:

> "At the hearing of the matter, the applicant was instructed to cease reading from the written submissions and was instructed to stop playing the DAR from the District Court hearing (due to audio problems with the videoconferencing platform). The court gave an undertaking to read the submissions and listen to the DAR. The judgement however refers only to the transcript of the District Court hearing being considered and fails to address many of the points argued in the submissions. The learned judge downgraded

the IESC decisions referred by the appellant into DPP's guidelines, effectively attempting to change the order of precedence of the authorities before the court."

108. This court has not been furnished with either a transcript or a DAR record of the proceedings before the High Court, and so they are not in evidence before us. Despite this, and in order to address the arguments made, we are prepared to accept at face value the appellant's assertion that the High Court judge gave the undertakings mentioned in the circumstances outlined by him.

109. We do not consider that simply because the High Court's judgment references only the District Court written transcript that there is any reason to believe that the accompanying audio was not listened to.

110. We infer that the High Court judge was asked to listen to the DAR for the same reason that we were also requested to do so, namely to hear for ourselves the "tone" in which the District Court judge addressed the appellant in the course of her dealings with him on 22nd of February 2019, on the basis that her "tone" would somehow be indicative of, or supportive of the appellant's contention of, judicial bias.

111. We have listened to the DAR and do not consider that there was anything untoward in the District Judge's tone. It is appropriate to offer some commentary in support of the view just proffered. What follows focuses on the time stamps highlighted to us by the appellant during the hearing of the appeal:

> 10:51-11:04-the Judge tells Mr Fitzgerald to go to the Garda Station to view the requested CCTV footage evidence; she takes a firm tone with Mr Fitzgerald. He interrupts her, and she has to repeat herself a number of times. He asks if the DAR is operating and she replies "of course."

14:19-Mr Fitzgerald has returned from the Garda Station; he speaks over the Judge, requiring her to raise her voice.

15:01-Mr Fitzgerald is putting questions to a Garda witness, the Judge intervenes when she considers that Mr Fitzgerald has put an unfair question to the witness; she again adopts a firm tone with Mr Fitzgerald.

15:18-Mr Fitzgerald alleges that *"the State has continuously refused to disclose relevant evidence."* The Judge intervenes as follows *"you cannot throw out words such as relevant, you need to specify what it is you contend is being withheld by the State. Will you itemise those items."* This is not the first time the Judge has requested this, leading her to adopt a more forceful tone in seeking this information from Mr Fitzgerald.

15:23-15:27-Mr Fitzgerald alleges that the Gardaí have given "perjured evidence". The Judge takes a stern tone with Mr Fitzgerald as she issues him with the warning *"if you are making an allegation of perjury you need to be very careful in relation to the manner in which you make such an allegation."* Mr Fitzgerald interrupts the Judge while she is saying this, requiring her to raise her voice slightly. They engage in a discussion regarding the alleged "perjured evidence" during which the Judge adopts a formal and firm tone with Mr Fitzgerald.

112. The exchanges highlighted are not to be taken as being a comprehensive account of our review of the audio record, but our observations concerning the judge's tone at the times in question accurately reflects our overall impression, which was that while she was for the most part formal, firm and business-like in her exchanges with the appellant, she was

occasionally forthright and stern when the occasion merited it. However, at no point was she discourteous towards, or disrespectful of, the appellant, who was inclined to be argumentative with her rulings, to talk across her, and to make inappropriate assertions unsupported by evidence e.g., that the gardaí had given "perjured evidence." A judge is absolutely entitled to to insist upon proper decorum and respectful behaviour in his/her court and adherence to well established rules of evidence and procedures. The audio record provides absolutely no evidence of bias on her part. Moreover, both the transcript and the audio record make clear that the appellant was in no way intimidated by the District Judge, and that he was well able to stand up for himself.

113. It would perhaps have been better if the High Court judge had confirmed in his judgment that he had listened to the audio record transcript, having said that he would do so. However, in circumstances where the audio record revealed nothing to us indicative of bias or that could otherwise have assisted the appellant in showing that the proceedings on the day were otherwise than fair, we do not regard it as surprising that the High Court judge would have expressed himself in terms simply that *"it is clear from the transcript that the conduct of the hearing by the District Judge was entirely appropriate"*. The complaint of unfairness on account of a failure to reference the audio record is not made out in our judgment.

114. We are also not satisfied that a complaint of unfairness is made out on the basis that the High Court judge did not confirm that he had read the appellant's submissions, and because it is said he did not deal with all of the appellant's submissions.

115. A judge is not required to confirm in his/her judgment that they have read written submissions tendered to the court. It is a question of personal style as to how a judgement is constructed. Some judges will summarise the submissions by both sides before addressing the legal issues that arise, while others consider it unnecessary to do so. Moreover, there is often

a middle ground where some judges will only identify and address with specificity the submissions that appear to them to go to the core of the case.

116. The appellant has not itemised, or identified with particularity, the submissions which he claims were not dealt with. The fact that the High Court judge in this case may not have addressed with specificity in his written judgement all of the submissions made by the appellant does not mean that the appellant's written submissions were not read, or that they were not considered.

117. The written submissions deployed in the High Court have been provided to us. They had much in common with the written submissions that have been put before us in the Court of Appeal. It is evident to us from our consideration of these documents, and also the appellant's pleadings, that his core arguments in support of his claim that he should be granted leave to apply for judicial review are that he has an arguable case that his trial was unfair because (i) his trial before the District Court was forced on in circumstances where he had not received disclosure of information, and had not been provided with evidence, which he believed he ought to have been given, both on the basis of superior courts case law, and on the basis of Directive 2012/13/EU; (ii) that the District Judge in ruling that what he was seeking was not material and/or relevant, and also in refusing his application to inspect the intoxilyser, had denied his right of defence; (iii) that there had been a failure at District Court level to engage with his claim that his arrest been unlawful due to what he alleges was a failure to inform him in detail of the reason for his arrest; and (iv) that the District Judge had exhibited bias towards him in various things that she had said, with the result that he did not therefore receive a fair and impartial hearing.

118. The judgment of High Court of the 2nd of July 2021 manifestly addresses those core arguments (although evidently not to the satisfaction of the appellant), and we are therefore satisfied to conclude that Meenan J. may be taken as having both read and considered the

appellant's submissions. The fact that the judgment may not have addressed with specificity every nuance or subset of such arguments as may have been advanced is not *per se* a reason to impugn the High Court's judgment, or such that it requires intervention by us.

119. We now turn to the complaint that the High Court judge *"downgraded the IESC decisions referred by the appellant into DPP's guidelines, effectively attempting to change the order of precedence of the authorities before the court."* We are somewhat at a disadvantage in that the appellant did not itemise at the appeal hearing, or in his written submissions to this Court, the Supreme Court authorities that he now suggests were downgraded or disregarded in favour of the DPP's guidelines. However, and in that regard, there is but one reference in the judgment of the High Court to the DPP's guidelines and it is in paragraph 5(i), which states:

> *"5. In his grounding affidavit and submissions to the Court, the applicant sought to identify a number of instances in which he maintained the District Judge erred in legal principle and departed from fair procedures: -*
>
> > *(i) The applicant maintained that he was denied disclosure of certain evidence which he considered to be relevant to the prosecution. He referred to the CCTV footage from the garda station to which he was taken following his arrest. He maintained that this was in breach of the respondent's 'Guidelines for Prosecutors';"*

120. The appellant's written submissions before the High Court included sections headed "Disclosure", "The Duty to Disclose", and "Application for Inspection". Within those sections there are detailed, and it has to be said well-presented and cogent, legal submissions concerning the rights of an accused to disclosure and to receive evidence, and the related right, arising in the case of breath-sample based drink driving prosecutions, of an accused to request to be allowed to inspect an intoxilyser machine, and the rationale for that. The

appellants submissions referenced sections 1 and 2 of Chapter 9 of the DPP's Guidelines for Prosecutors, 4th edition, which we infer is what the High Court judge was alluding to in paragraph 5(i) of his judgment quoted above, but they also went on to cite, and quote from, a number of cases, including *DPP v. Tuite* [1983] 2 Frewen 175, *DPP v. Special Criminal Court [1999] 1 I.R. 60* and *McKevitt v. DPP* (Unreported, Supreme Court, 18th March 2003); and *Oates v. Browne* (previously cited); and the quotations from *Oates v. Browne* included internal quotations from *Whelan v. Kirby* (also previously cited) and the *State (Healy) v. Donoghue* [1976] I.R. 325. The appellant is correct in saying that the case law to which he had referred was not alluded to by the High Court judge in the section of his judgment dealing with the disclosure controversy. However, we must, in fairness to him, point out that the existence of the appellant's right to disclosure of information/production of evidence that was relevant and material was never in issue (the issue was whether what he was seeking was in fact relevant and material); and in dealing with the issue concerning the District Judge's refusal to allow appellant's application to inspect the intoxilyser machine, the High Court judge refers specifically to the appellant's written submissions, and to his reliance on *Oates v. Browne,* at the beginning of paragraph 12 of his judgment. He said:

> *"12. The issue concerning an examination of the intoxilyser machine featured only briefly at the hearing of the charge and was not referred to in the applicant's grounding affidavit. There is reference to this in the applicant's written submissions, where he relied upon Oates v. Browne [2016] 1 I.R. 481."*

121. While it is certainly true that in making submissions to the High Court in support of his claim that he had wrongly been refused disclosure of information and of evidence by the District Judge, the appellant had placed reliance on case-law, the fact that the High Court judgment does not allude specifically to the cases cited to him does not appear to us to be material in this instance. The judgment acknowledges that the appellant was complaining that

he was denied disclosure of certain information and evidence which he considered to be relevant to the prosecution, and nowhere in the judgment does the judge seek to gainsay that a defendant is entitled to receive disclosure of information/evidence which is material and/or relevant for any of the purposes specified by Carney J. in *DPP v. Special Criminal Court and Ward*. That is, in effect, taken as a given. The controversies in the District Court had instead revolved not around the existence of a legal right to disclosure of information/production of evidence which was material and/or relevant, but whether what the appellant was seeking was in fact material and/or relevant. If it was not, then there was no failure to make disclosure. The High Court judge was not hearing an appeal against the rulings of the District Court judge. His concern was not ultimately with the merits of her decisions in the context of disclosure provided they were made within jurisdiction, although having conducted his review he stated that he was satisfied that there had been no failure to make disclosure. His concern, rather, was with the process and whether it was fair and conducted in accordance with law. It was not therefore essential for him to reference authorities relied upon by the appellant in the District Court, and before the High Court, in support of arguments going to the merits of applications that were refused, i.e., that in each case he was entitled to disclosure of the information / production of the evidence that he had sought. The general nature of the such arguments as were advanced by the appellant in the court below was acknowledged, and that was enough to provide context for the High Court's consideration of whether the process had been fair. In conclusion we do not consider that the High Court judge committed an error in principle in not referencing the cases cited by the appellant in support of the merits of his disclosure applications. We should again reiterate that in dealing with the issue concerning the District Judge's refusal to allow appellant's application to inspect the intoxilyser machine, the High Court judge refers specifically at paragraph 12 of

his judgement (quoted above) to the appellant's written submissions, and to his reliance on *Oates v. Browne.*

122. We also do not think that that the High Court judge downgraded the status of Supreme Court jurisprudence that may have been cited to him, or that it is fair to suggest that he equated the status of the DPP's Guidelines with such authorities. While he did explicitly reference the appellant's reliance on the DPP's Guidelines, that was to afford them no special status (other than that they might reasonably be assumed, given their provenance, to accurately reflect the law, including that based on Supreme Court jurisprudence).

123. There is also a stand-alone complaint that the High Court judge refused to address core elements of the appellant's submissions. At paragraph 1.3 of his written submissions to this court he asserts:

> *"In addition of the failure (sic) to give a reasoned decision, the learned judge furthermore refused to address the core elements of the submissions. Doing so, he failed to take judicial notice (as required by section 3 of the European Convention Human Rights Act 2003 (sic)) of the decisions of the ECtHR who established such requirement (to address the core elements of the submissions) as part of the definition of a Fair Hearing (see the Court's comprehensive guides on Article 6.1 referred to in section 1.2)*
>
> *To summarise, the core elements which were not addressed in the judgment are primarily related to Disclosure and Right of Defence pursuant to the Constitutional requirements confirmed and/or expanded by EU Directive 2012/13.*
>
> *In detail, those core elements not addressed were clearly listed in section 1.5 "Correction of Omissions" of the Application to Revisit the Judgment, quoted below:"*

124. The appellants written submissions go on to reference, and quote from, the document that had been submitted in support of the application to revisit the High Court's judgment (to which we referred earlier in paragraph 82 above). Section 1.5 of that document lists eight points of complaint concerning alleged failures by the High Court judge to address points relied upon by the appellant. The matters complained of relate both to submissions and to matters of evidence, that we understand the appellant to be now saying were either not taken into account at all, or were not sufficiently taken into account. Accepting that there may be some overlap, we will endeavour to identify and deal with those that appear to relate to submissions in this section of our judgment, and similarly will identify and deal with those that appear to relate to matters of evidence in the next section of our judgment.

125. The points of complaint in paragraph 1.5 of the document prepared in connection with the application to revisit the High Court's judgment that appear to relate to submissions were points 1, 2, 3, 4, 6, and 8. We will deal with points 5 and 7 in the next section.

126. Point of complaint no. 1, is put forward in these terms:

> *"1 No reference to the fact that the date for hearing should not have been set as the matter was adjourned from a listing on the 8th of February 2019 for mention without having been dealt with (no reference to the request for the DAR proving this) and disclosure had not been addressed in accordance with District Court Practice Direction DC 11:*
>
> *'Setting a case down for hearing*
>
> > *Before fixing a case for hearing the parties to the case must be able to indicate to the court that all disclosure issues have been satisfied and must also provide the court with a realistic and achievable estimate of*

the time required for the hearing and (without prejudicing an accused person) list the number of witnesses to be heard.'

127. In many ways this seems to us to encapsulate the appellant's core grievance. His difficulty, however, are that major aspects of it are not pleaded by him

128. Although that grievance may not have been framed in these exact terms in his pleadings, what follows is our understanding of what is at the root of his case. It is his contention, certainly as advanced before us, that he did not understand that the case would be in for hearing on the 22nd of February 2019, rather that it was his understanding that it was being put in on that date to deal with preliminary issues as to disclosure/requests for production of evidence. This was in circumstances where he had attempted to have such preliminary issues dealt with on the 8th of February 2019 but there been insufficient time on that date to enable them to be dealt due to the volume of other cases in the list. He has argued before us that he was in effect taken by surprise when the District Judge presiding on the 22nd of February 2019 declared it to be her understanding that the case was in for hearing and was demanding to know why disclosure/outstanding evidence had not been sought previously. Although he says, and the transcript bears him out, that he attempted to explain the position, he believes his explanations were unreasonably discounted and rejected, that his attempts to seek disclosure and evidence even at that stage were wrongly and unfairly refused, and that he was in effect forced on when he was not ready.

129. Accordingly, we understand point number 1 to be in effect a complaint that the High Court judge failed to engage with all of that.

130. It is appropriate at this point to offer a few observations on this narrative, before addressing the alleged failure being attributed to the High Court judge. Firstly, the DAR transcript of the District Court proceedings on the 8th of February 2019, which we have annexed to this judgment, reveals that certainly insofar as the prosecution was concerned the

case was listed for hearing on that date, and not just for mention for the purpose of dealing with issues around disclosure/evidence requested. This was against a background where considerable disclosure had been made/evidence produced (albeit that the appellant was dissatisfied with it) based on an exchange of correspondence *inter partes* and the subsequent obtaining of a Gary Doyle order.

131. Secondly, the DAR transcript for the 8th of February 2019 does confirm that the appellant did attempt to raise issues as to allegedly outstanding disclosure/requested evidence when the matter was first mentioned during the morning. He was initially told that these issues would be dealt with at 2.00 PM. In fact, it became apparent as the day went on that the case would not be reached at all due to the sheer volume of cases in the list that day, and the judge then presiding (District Judge Sheridan, who is the judge permanently assigned to District No 20) decided of his own motion to put the matter was put back to a special sitting of Fermoy District Court to be held on 22nd February 2019. The transcript reveals that in doing so he was assiduous to emphasise that it would be in for priority hearing on that date. Notwithstanding that it was stated in the clearest of terms that the matter was being put in for a priority hearing on the 22nd of February 2019, the appellant, whom the prosecuting Inspector may be heard on the DAR to confirm as being then present in court, does not seem to have appreciated this, and there has been no explanation as to why that should be so.

132. District Judge Keane, a moveable District Judge, who was the presiding judge assigned to sit at Fermoy for the special sitting on the 22nd of February 2019 was therefore correct in her understanding that the case was listed for hearing on that date, and not just for mention as the appellant contends.

133. Thirdly, in so far as the appellant suggests that District Court Practice Direction DC11 may not have been complied with, it is not clear to what extent the appellant had made known to the prosecution in advance of the matter being set down for the 8th of February 2019

(presumably by the prosecution) that he was not satisfied with the disclosure made/evidence produced, save in respect of his request for a physical copy of the CCTV footage from the Garda station. In regard to the latter, his position had been made clear. He had been told he would need a court order, although there was no objection to him merely viewing the footage, and he had made plain his dissatisfaction with that. We should also observe that Court Practice Directions, though they should be respected and not be lightly disregarded, are not law, breach or disregard of which can entitle a litigant to any remedy.

134. Turning now to the judgment of the High Court, the point requires to be made that a judge hearing an application for leave to apply for judicial review is required to consider that application only in the context of what is pleaded in the proposed Statement of Grounds and not on any wider basis. The case pleaded by the appellant was that he was seeking (i) certiorari of the refusal to order disclosure of evidence and to convict, (ii) a declaration that the refusal to inform the applicant in detail of the reason for his arrest rendered his detention unlawful and (iii) a request for a Preliminary Ruling from the European court of justice on whether the prosecution's refusal to furnish evidence in their possession complies with European Union Directive 2012/13/EU. He put forward four grounds upon which he was seeking those reliefs, and these may be summarised as (a) that District Judge Keane's persistent refusal to order disclosure of evidence was contrary to the right to a fair and impartial hearing and the presumption of innocence, as provided for in various international and domestic legal instruments; (b) that District Judge Keane's statement that the only proofs allowed would be those required to "bring home" a conviction demonstrated bias and was contrary to the right to a fair and impartial hearing and the presumption of innocence, again as provided for in various international and domestic legal instruments; (c) that the stated refusal by Sgt. McSweeney to inform him in detail of the reason for my arrest was in contravention of Article 5 of the European Convention on Human Rights and Article 40 of

the Irish Constitution; and (d) that District Judge Keane's refusal to order discovery of relevant evidence was contrary to Article 7 of European Union Directive 2012/13/EU.

135. Thus, the unfairness alleged in so far as it related to disclosure/production of evidence, and which required to be addressed in the High Court's judgment, was the claim that the District Judges refusal of applications made to her on the day to order disclosure and the production of evidence was contrary to the right to a fair and impartial hearing and the presumption of innocence, and contrary to the appellant's asserted entitlement to be provided with such in accordance with the various international and domestic legal instruments upon which he relied. The case was not pleaded on the basis that the trial had been unfair because the appellant's trial had gone ahead in circumstances where he was allegedly taken by surprise, was not ready and/or had not had adequate time to prepare, in other words that he had been "forced on." That case is simply not made in the pleadings. Indeed, such a case could not have been made because the District Judge in fact entertained the appellant's applications, albeit that she regarded them as being made late in the day, for further disclosure of information/production of evidence, but having done so was not disposed to allow them, being of the view that the materials being sought were not material and/or relevant. In doing so, she was effectively ruling that there was no outstanding disclosure/failure to produce relevant evidence, and therefore no inhibition to the trial proceeding that day. Those were decisions made within jurisdiction and if the appellant was dissatisfied his remedy was to appeal to the Circuit Court. It might have been a different matter if the District Judge had been disposed to allow the appellant's applications, or any of them, but notwithstanding that she had then refused an application to adjourn the trial. The appellant might then have been in a position to complain that he had not had sufficient time to consider the implications of, and how best to deploy, the additional information/evidence that was ordered to be provided to him. However, that did not happen.

136. We are satisfied that the case that was actually made in the pleadings was adequately addressed by the High Court judge. We reiterate that nowhere in the judgment was it gainsaid that an accused has an entitlement to disclosure of information/production of evidence which is potentially relevant and/or material for any of the purposes identified by Carney J. in *DPP v. The Special Criminal Court and Ward*. That right is, as the appellant has identified, widely recognised and finds reflection in both domestic and international jurisprudence and legal instruments, including Directive 2012/13/EU. No one at any stage of theses proceedings, least of all the High Court judge, has sought to gainsay that, but the right is not an unlimited one, or one to be applied in an absolutist and indiscriminate fashion. It is circumscribed by a requirement that what is sought must be either patently, or else be demonstrated to be, potentially material and/or relevant. The refusals in the appellant's case were because the judge considered that what was being sought was neither self-evidently of potential materiality and/or relevance, nor had its potential materiality and/or relevance been demonstrated to her satisfaction. The case made on the pleadings was to the effect that those decisions were unfair because she had effectively ignored the law and, moreover, had not been impartial in her dealings with the appellant. Those were the issues that required to be addressed by the High Court judge in his judgment in the context of considering whether the appellant had put forward an arguable case for relief by way of judicial review, and we are satisfied that he did so adequately. We are therefore not disposed to uphold the said Point of Complaint No. 1.

137. Point of Complaint No. 2 is put forward in these terms:

> *"No reference to the District Court Judge misleading the court through her misinterpretation of Oates v Browne"*

138. We do not consider that there was any evidence that the District Court Judge misinterpreted *Oates v. Browne*. On the contrary, it is the appellant who has ostensibly

misinterpreted *Oates v. Browne.* As we have taken care to explain in the section of this judgment entitled "The *Oates v. Browne* jurisprudence", in circumstances where the appellant was standing on his entitlement not to have to say why he was looking for disclosure of the information/production of the evidence he was seeking, it was for the judge concerned to assess the merits of the application, i.e. as to whether what was being sought was potentially material and/or relevant, for herself based on what else they know about the case, including the nature of the prosecution, what evidence the prosecution was likely to be seeking to adduce in support of its case (i.e. what the District Judge in the present case characterised as "the proofs required to bring a case home"), and the various ways in which a person in the shoes of the defendant might possibly seek to contest the prosecution's case.

139. While the appellant takes vehement objection to the District Judge's assertion at one point that *"nothing other than the proofs necessary will be allowed before the court",* the remark has to be viewed in the full context in which it was made, and it is clear that the District Judge was endeavouring to explain to the appellant that in circumstances where he was not disposed to indicate how he considered that the material he was seeking might potentially assist him (which was his right) more, and it was not self-evident to the judge, she had to assess his requests in the context of what evidence the prosecution was likely to be seeking to adduce in support of its case and the possibilities for contesting that. We are satisfied that the High Court judge engaged appropriately with the impugned remark at paragraph 14 of his judgment and adequately dealt with it. While the District Judge may have expressed herself infelicitously, it is nonetheless clear to us what she was attempting to convey, and that she did in fact understand the *Oates v. Browne* jurisprudence. We are not therefore disposed to uphold the said Point of Complaint No. 2.

140. Point of Complaint No. 3 is put forward in these terms:

"No reference to the District Judge's claim that the gardaí had a constitutional right to privacy"

141. The context in which this issue arises is that at the very start of the proceedings on the 22nd of February 2019 the appellant made a request for a court order directing that he be provided with a copy of the CCTV footage recorded at the Garda station during the currency of his detention there. It was pointed out to the court by the prosecuting inspector that, in response to a request to the Superintendent for this, the appellant had been told he could view the footage in the Garda station but that he had not availed of this. The appellant then sought to insist to the court that notwithstanding that there had been such an offer he was still entitled to a physical copy.

142. The District Court judge disagreed stating, *"I don't know how many people were going in and out of the Garda station but I'm sure there was any amount of people going in and out of the Garda station on the occasion, and their constitutional rights must be protected, and that's why you can't get this documentation for yourself."* The appellant nevertheless was insistent that he was entitled to it leading to the following further exchanges:

"MR FITZGERALD: No judge, excuse me all the persons that would be on that CCTV are gardaí and myself, and I'm the only private citizen on that CCTV. They are public servants in a public building, and it's evidence. And as we said, Judge, its relevance –

JUDGE: Sorry, excuse me, Mr Fitzgerald, because you are a member of the Garda Síochána doesn't seem to me that you lose your personal rights under the Constitution. They are also humans and entitled to their protection of privacy and protection of their rights. So there are not in a different class to anybody else, so that argument is going nowhere. Thank you.

143. We find it unnecessary to express any view on whether the District Court judge was right in deciding not to provide the appellant with a copy of the footage in question at that point on the basis that the gardaí concerned, as humans, were entitled to the protection of their privacy and protection of their rights; because matters moved on and the issue rapidly became moot. The appellant was again afforded the opportunity to view the footage in question in the Garda station and on this occasion did so. When he came back from the Garda station he did not renew his application to be provided with the actual footage so that he could introduce it in evidence, nor did he seek to impugn the testimony of any garda witness in cross examination on the basis of what he had observed during that viewing.

144. However, in a subsequent application for a direction, the prosecution having closed their case, the appellant sought to suggest that the CCTV had shown *"that Garda Delea repeatedly, several times, left the observation area and was focusing on his phone"*. However, that had never been put to Garda Delea in cross examination. In response to this late assertion, the prosecuting Inspector registered an objection and said that he was in a position to call evidence in rebuttal if required; that the State would say, *"yes, Garda Delea was in and out at first, but once the 20 minute period of observation commenced after this man refusing to sign for the notice of rights, Garda Delea would have never left his side."*

145. The appellant then remarked in rejoinder, *"Well, Garda Delea, it's obvious, its visible on the CCTV, that Garda Delea is interested in what's in his hand, he's looking back into the office, I'm not in constant observation by Garda Delea, and that's a requirement"*.

146. It had never been put to Garda Delea that he had been focussing on his phone, and/or looking back into the office, and that he had not kept the appellant under constant observation. Moreover, despite the appellant's assertions during the direction application, there had been no application to the judge during the cross-examination of Garda Delea that the footage, which by this point the appellant had viewed such that he knew exactly what was

captured by it, should be played in court so that the witness, the judge and everybody else could view it and see for themselves what had in fact occurred. This could have been done without any necessity for the appellant to go into evidence.

147. The appellant could also have given evidence himself, although he was under no obligation to do so and is not be criticised for not doing so. The fact remains, however, that not having done so, and not having sought to confront Garda Delea with a suggestion that he had failed to properly supervise him, and to suggest to the witness that there was CCTV footage that would in the appellant's belief bear him out in that respect, the appellant cannot now be heard to complain that he was the victim of some alleged unfairness arising out of the judge's determination an earlier stage, for the reasons stated by her, and whether that was right or wrong, that he should not be provided with a physical copy of the CCTV recording. That was water under the bridge at that point. In the new circumstances of, in the meantime, having actually reviewed the CCTV recording for himself in the Garda station, and having formed the view that it captured something that could perhaps assist him, he could either have renewed his application to be given a physical copy so that he could introduce it in evidence himself (if necessary, seeking that the District Judge would as a preliminary step view the recording for herself during a *voir dire* so that she could be satisfied as to its potential materiality and/or relevance), or if he did not want to go into evidence he could at least have asked the judge, in support of matters he intended putting to Garda Delea, to direct the prosecution to play the recording in court, which she had power to do. However, he did neither of those things, and so the appellant cannot now assert that he was in some way prejudiced by the earlier decision which had been overtaken by events (specifically the fact that in the meantime he was again afforded, and on this occasion had availed of, the opportunity to view the footage). He was not ultimately deprived of an opportunity of deploying the footage to his possible advantage, and so the earlier decision about which he

persists in complaining about had in effect become moot. It was unnecessary in the circumstances for the High Court judge to allude to it, and we are not therefore disposed to uphold Point of Complaint No. 3.

148. Point of Complaint No. 4 is put forward in these terms:

> *"No reference to the District Court Judge's statement that her instructions were to hear the case that day and its relevance in relation to her independence"*

149. This complaint arises out of a remark made by the District Judge at one point, in these terms: *"Sorry, this application is here today for hearing, those are my instructions"*. The appellant places much reliance on this as providing evidence of external influence, an absence of judicial independence and a lack of impartiality. In our view that remark has to be seen in the context in which it was made.

150. The appellant, having been told repeatedly that the matter was in for hearing, and having had his applications for disclosure of information/production of evidence refused on the basis that the judge was not satisfied with what he was seeking was of potential materiality or relevance, then announced that he wished to make an application to the court to have the intoxilyzer machine physically examined by an expert. The exchange that ensued has been described already at paragraph 49 above.

151. The "instructions" the District Judge was referring to can readily be inferred as having been comprised of nothing more than her judicial assignment to preside at a special sitting in Fermoy on that day, the court list for that day, and the sort of ancillary information that would routinely be provided to a judge in advance of a sitting by court administrative staff concerning the nature and anticipated duration of matters appearing in the list. Not a scintilla of evidence to suggest otherwise was provided either to the High Court or to this Court and that being so the High Court did not require to engage with it. The impugned remark could not on any reasonable view have been seen other than as utterly innocuous.

152. All of that having been said, it is clear from the High Court judgment that the High Court judge fully appreciated that the appellant was contending that the District Judge had not been impartial. He had taken care to engage with other aspects of that complaint at paragraphs 14 and 15 of his judgment, the former being the matter we have discussed at paragraph 139 above, and the latter being another assertion of inappropriate external influence, namely the preposterous claim that *"a third party was prompting her* [i.e., the District Judge] *in real time"* through her computer screen..

153. We are also not therefore disposed to uphold Point of Complaint No. 4.

154. Point of Complaint No. 6 is put forward in these terms:

> *"No reference to the refusal to allow a medical examination and the taking of a blood sample."*

155. This complaint can in effect be dismissed *in limine.* It is not something that is pleaded as grounding his claim for relief by way of judicial review. Moreover, as was pointed out to him by the District Judge in her ruling, he had no entitlement in law where the gardaí had opted to take a breath sample from him, and no medical or other reason was being put forward by him as to why could not provide one, to insist on a medical examination and the taking of a blood sample. It is not pleaded that the District Judge was guilty of an error of law made other than within jurisdiction, or that her ruling in regard to that was to be impugned on some other basis. There was no necessity in the circumstances for the High Court judge to address this issue. We accordingly reject Point of Complaint No. 6.

156. Finally, under this heading we have Point of Complaint No. 8, which is put forward in the following terms:

> *"No reference to the audio file submitted as exhibit D in which:*
>
> - *the applicant repeatedly requests the wording of the legislation under which he had allegedly been arrested and is repeatedly refused with*

claims that there was no obligation to inform him of the details, despite that information was available to him;

- *the applicant expresses his belief that the gardai have an obligation to inform him in detail of the reasons for his arrest;*
- *the applicant expresses that he doesn't know if he is lawfully arrested;*
- *the applicant expresses that he doesn't know if he is obliged to remain in the Garda station."*

157. The provenance of the audio file referred to was as follows. While the appellant was being arrested at the side of the road, he seemingly activated the audio recording function on his mobile phone and recorded his dealings with the gardaí from that point up until the point that he was searched in the garda station, whereupon the phone was found on his person and was switched off. We now know all of this because the appellant informed the District Judge about the recording in the course of making submissions to her, and it appears on the transcript. The circumstances of the making of this recording, which in so far as we can gather from references to it on the District Court transcript, are that it appears to have been done covertly and surreptitiously, and without the consent of the gardaí present whose voices were being recorded as well as the appellant's voice. Although referred to in submissions, it was never put in evidence in the District Court. In so far as the subsequent judicial review proceedings are concerned, the appellant does not refer in any of his affidavits to this audio recording and the circumstances in which it was made, much less offer proof that he in fact created it. However, be that as it may, at the very end of his second supplementary affidavit he proffers three exhibits, being "D", "E" and "F", without indicating what they are. We now understand that "D" may refer to the audio recording. It is unclear in what format that recording was submitted to the court, eg., whether an audio file in some digital format was down loaded from the appellant's phone and provided on a CD-ROM or a memory stick, or

whether a transcript of the recording was provided (we certainly do not have one), or whether it was provided in some other form.

158. At any rate, the issue pleaded in the appellant's Statement of Grounds concerning the lawfulness of his arrest is dealt with by the High Court judge at paragraph 13 of his judgment. It was unnecessary for him to refer to the matters of evidence identified by bullet points above, as they would have had no bearing on the legal issue which the High Court judge had to determine. The audio file referred to, which may well have confirmed the matters asserted in the said bullet points, would not have altered that position and there was therefore no necessity to specifically refer to it, even if it had been available to be listened to. The Garda evidence was that he had received an explanation of the reason for his arrest in ordinary language, and that he had indicated that he understood it. The appellant does not dispute this, indeed he expressly acknowledged that that was so in his written legal submissions to the High Court. The legal question for the High Court judge in those circumstances was, *"was an arguable case being advanced that that was not enough?"* He held that an arguable case in that regard could not be advanced, because it was clear that the issue had already received judicial consideration in *The People (DPP) v. Mooney* [1992] 1 I.R. 548, a decision which was binding on him, wherein it had been held that a garda in making an arrest does not have to use technical or precise language, provided the arrested person knows in substance why he is being arrested the arrest is valid. We would observe in passing that there are a good many other authorities to the same effect, but it is unnecessary to list them. The fact that the appellant himself may not have considered the extent of the explanation that was provided to him to be sufficient to render his arrest lawful was neither here nor there. He is quite simply wrong in believing there is an obligation to provide him with the exact wording of any statutory provision being relied by the arresting garda, or that he is entitled to receive a physical printout of the relevant provision(s). As it happens, he did ultimately receive a

printed copy of the relevant sections of the Act of 2010 in the Garda station. This was a concession afforded to him, but he had no entitlement to it in law. There is nothing to suggest that he has an arguable case for judicial review in regard to the reasons furnished to him as to why he was arrested. We are satisfied that the High Court judge dealt adequately and sufficiently with the issue. We are not therefore disposed to uphold Point of Complaint No. 8.

The alleged failure of the High Court judge

to take account of all of the evidence.

159. We can deal with Points of Complaints Nos. 5 and 7 under this heading.

160. Point of Complaint No. 5 is in the following terms:

> *"No reference to eyes being glazed in Garda Delea's evidence and the relevance of the photograph to this evidence."*

161. We have already made some observations in paragraphs 47 and 48 of this judgment concerning the controversy relating to the photograph taken in the Garda station and whether it could have assisted the appellant, specifically in dealing with the suggestion that his eyes were glazed. We re-iterate those observations. Thus, it is relevant, firstly, that disclosure or production of the photograph was not sought prior to the 22nd of February 2019. Secondly, it was taken on a different occasion and in a different location (i.e., during the appellant's processing after he had been taken to the Garda station), to the occasion and location in which Garda Delea was said to have observed the appellant's eyes to be glazed (which was said to have occurred when Garda Delea was interacting with the appellant at the roadside after the appellant's car had been stopped and before he was arrested). Thirdly, the appellant did not intimate to the District Judge as to how he thought the photograph might assist him. The potential materiality/relevance of the photograph was not self-evident to the District Judge, who was clearly under the impression that the appellant mistakenly believed that its production by the prosecution was in some way essential to their case, which of course it was

not. There is nothing to suggest that in the circumstances the District Judge's decision not to order disclosure/production in evidence of the photograph was other than a decision made within jurisdiction that would not, absent something else, be amenable to judicial review.

162. The High Court judge only alludes very briefly to the photograph. He does so in the context of commenting, at paragraph 6 of his judgment, that *"[t]he applicant also made a number of complaints which were not referred to in his grounding affidavit"*. The High Court judge was mistaken in so commenting, in that the photograph is referred to in paragraph 12 of the appellant's grounding affidavit sworn on the 1st of April 2019 as being amongst several items of evidence that he had sought. Be that as it may, what can be said is that the High Court judgment does engage at all with whether the photograph might have been material or relevant for the purpose of challenging Garda Delea's contention that when he observed the appellant before he arrested him the appellant's eyes appeared to him to be glazed. In that regard we consider it to be significant that it was never suggested by the appellant in cross-examining Garda Delea that he (the garda) had not observed his eyes to be glazed (amongst other things to which there was also no challenge, such as Garda Delea's evidence that there was a smell of alcohol on his breath, and that he was slurring his words), or that he did not have a suspicion on reasonable grounds that the appellant had consumed intoxicating liquor sufficient to have required him to blow into the breath screening apparatus. In fact, the issue of a supposed wrongful refusal by the District Judge to order disclosure/production of the photograph is not raised anywhere in the appellant's written submissions to the High Court. We are therefore satisfied that the District Judge's decision not to order disclosure/production of the photograph was simply not an issue that the High Court judge was either asked to, or needed to, engage with.

163. Moreover, and in any case, given that the photograph was not taken at the same time and in the same place and under the same conditions as the observation to be challenged, we

have the gravest doubts that even if the appellant had had possession of the photograph when cross-examining Garda Delea it could have been deployed in a way that would have yielded something of materiality in the sense spoken about by Carney J. in *DPP v. Special Criminal Court and Ward,* whatever about its possible relevance in theory. Even if we are wrong about that, as was pointed out in the *People (DPP) v. McCarthy* [2008] 3 I.R. 1, and rightly alluded to by the High Court judge, a conviction is not to be regarded as unsafe *per se* simply because there has been a partial failure by the prosecution to make disclosure. Of course, there has been no such finding in this case, and we are not to be taken as making any such finding. It is our view that even if the appellant had been able to raise a doubt in respect of the claim that his eyes could be said to have been glazed, there was abundant other (unchallenged) evidence to support Garda Delea's claim that he had formed a suspicion on reasonable grounds that the appellant had consumed intoxicating liquor sufficient to have required him to blow into the breath screening apparatus.

164. In the circumstances outlined we are not disposed to uphold Point of Complaint No. 5.

165. Point of Complaint No. 7 is put forward in these terms:

> *"No reference to the fact that the only evidence that there was no on-board camera was from the prosecuting gardaí who also initially, falsely claimed that there was no CCTV in the garda station."*

166. We utterly fail to see the relevance of this. There is not a scintilla of evidence that the garda vehicle was fitted with an onboard camera. The District Court received sworn testimony from both Garda Delea and Garda Hanley, elicited by the appellant in the course of his cross-examination of them, that it was not so equipped. No evidence was adduced to the contrary, or even to suggest the contrary. The prosecution cannot be required to produce as evidence recordings that were never made. While the appellant believes he may initially have been given incorrect information concerning whether there was a CCTV recording from the

Garda station, no evidence was adduced that might suggest there was anything sinister in that misrepresentation even if he is right. There was nothing claimed with respect to an alleged on-board camera of any relevance to the appellant's claim to be entitled to leave to apply for judicial review, and there was nothing in that respect to which the High Court judge needed to have regard. We therefore dismiss Point of Complaint No. 7 *in limine*.

The alleged failure of the High Court judge of the High Court judge to address the core element of the appellant's submissions.

167. We do not accept that there was a failure by the High Court judge to address the core element of the appellant's submissions. We reiterate the observations made earlier in addressing Point of Complaint No. 1. We consider that all of the complaints that were properly pleaded were addressed. It was not open to the appellant, simply because he was a lay litigant, to seek to argue matters that he had not pleaded with specificity. The same rules must apply in the case of a lay litigant as apply to a represented litigant. The issues of alleged breaches of his right to a fair hearing and of impingement on his presumption of innocence because the various applications made by him for disclosure/production of evidence were refused on the 22nd of February 2019 were addressed, but were not found, on an application of the principles set down in *G. v. DPP,* to entitle the appellant to leave to apply for judicial review. This was because the impugned decisions were not shown to have been made in excess of jurisdiction, or in disregard of the law, or in circumstances indicative of either substantive or procedural unfairness. The claims based upon bias/want of impartiality were also addressed and properly rejected as not giving rise in the circumstances to an arguable case for relief by way of judicial review. The claim based upon an alleged refusal to provide reasons for the appellant's arrest at the level of detail that the appellant was demanding was further addressed and was properly rejected.

168. The appellant's legal submissions both before the High Court, and before this Court, relied heavily on case law emphasising the constitutional right to fair procedures and trial in due course of law, and on the duty to disclose to the defence all relevant evidence as an aspect of that. They also referred extensively to broadly analogous rights and duties which are guaranteed under the European Convention on Human Rights (in particular Article 6), the Charter of Fundamental Rights of the European Union (in particular Article 47), and to EU Directive 2012/13/EU which is directly effective (in particular Article 7). While the judgment of the High Court does not reference this case law or these instruments this was manifestly because no-one, neither the prosecution, nor the District Court judge, nor the High Court judge whose judgment is the subject of the present appeal, has sought to gainsay for a second that the appellant has the rights and duties contended for. However, what the appellant seems unwilling to accept is that these rights and duties are neither absolute nor do they apply indiscriminately. They apply only in respect of evidence that is relevant and material. It was that hurdle that the appellant failed to cross in the District Court, and the issue for the High Court judge was whether the District Judge's decisions to refuse the appellant's requests were arguably made in excess of jurisdiction, or made in disregard of the law, or made in circumstances that were unfair or which denied the appellant fair procedures and trial in due course of law. The High Court judge considered all of the complaints that were pleaded and concluded that an arguable case for judicial review had not been made out on any of those bases. We do not accept that the judgment is insufficiently reasoned, or that the reasons provided require amplification. While it might have been better if the High Court judge had expressly referenced the case law and instruments in which the appellant was placing so much store, even though their applicability was not in truth in controversy, if only to reassure the appellant that he had fully appreciated and considered his arguments, it was not essential that he should do so. His primary obligation was to engage with the actual legal controversies

before him, and in our assessment he did so. We do not therefore consider than an error based on a failure to consider the core elements of the appellant's submissions has been demonstrated.

169. For the avoidance of doubt we do not consider that the appellant has put forward an arguable case that his rights, howsoever deriving, to disclosure and to production of evidence were disrespected. We appreciate that he is dissatisfied with the District Judge's rulings with respect to, *inter alia*, the CCTV, the TETRA Radio/GPS data, the photograph and his late request to inspect the intoxilyzer machine, but we consider that it has not been shown that her rulings in that regard were even arguably in excess of jurisdiction, in disregard of the law, or lacking in impartiality or otherwise unfair.

170. We should also say something at this point about the High Court judge's decision not to seek a preliminary reference under Article 267 TFEU from the Court of Justice of the European Union concerning the correct interpretation of Directive 2012/13/EU. He was absolutely right not to do so. There was no dispute in the proceedings before him concerning what Article 7 of the Directive says or requires. It was *acte clair*, and under the *acte clair* doctrine the court must apply that law in those terms and is under no duty to refer a question for preliminary ruling to the Court of Justice of the European Union.

The respondent's contentions that the appellant has failed to identify an actionable error of law and is seeking reliefs that were not reliefs sought in the High Court and as such are not within the jurisdiction of this Court to grant.

171. We can deal with this quite briefly. It will suffice to say that for all of the reasons stated above we think the High Court judge was right to refuse the appellant leave to apply for judicial review in the circumstances of the case. The respondent is correct that the appellant has failed to identify an actionable error of law. It is also the case that he has

attempted to seek reliefs that were not reliefs sought in the High Court and as such are not within the jurisdiction of this Court to grant.

Conclusion

172. The appeal, including the appeal against the costs order, must be dismissed.

The Costs of the Appeal.

173. As the appellant has been wholly unsuccessful in his appeal, our indicative order as to costs is that the appellant should be ordered to pay the costs of the respondents incurred in connection with this appeal, the amount of which shall be determined by adjudication in default of agreement. If the appellant wishes to contend that a different order as to costs should be made, he may, within fourteen days of the delivery of this judgment, contact the Office of the Court of Appeal and request a short oral hearing at which submissions will be made by the parties in relation to the appropriate order for costs. The appellant should note that in the event that he is unsuccessful in altering the provisional order for costs which we have indicated, he may be required to pay the costs of the additional hearing.

ANNEX TO THE COURT OF APPEAL's JUDGMENT
OF THE 1st OF NOVEMBER 2022

WILLIAM FITZGERALD

DAR EXTRACT

CORK.MALLOW.PORTABLE 1: DISTRICT COURT

8 FEBRUARY 2019

The Court sat at 11:39:43. Mr Fitzgerald's case was called for the first time at 12:10:27.

START OF DAR: 12:10.27 – 12.11.40

Court Clerk: William Fitzgerald. Mr. Fitzgerald, will you come up, please? [Brief pause]. William Fitzgerald? There's no appearance.

Unidentified speaker: He's here.

Court Clerk: Is he? William Fitzgerald? Oh, Mr Fitzgerald, will you come up please?

Solicitor: Oh, Judge, I appeared in that matter on the last occasion, and I am applying to come off record, please.

Judge: Right.

Solicitor: Thank you, Judge.

Judge: Now, …

Inspector: It's a late matter that is listed for hearing today, Judge.

Judge: Is there a plea?

William Fitzgerald: Sorry, Judge, I am very hard of hearing?

Judge: Is there a plea?

William Fitzgerald: No, Judge, I took the Inspector's advice and I put in a complaint to GSOC.

Inspector: Judge, I didn't advise the man to raise the issue, I didn't advise the man to complain to GSOC.

Judge: This is nothing to do with GSOC. This is to do with whether you were drink driving or not.

William Fitzgerald: It has to do with it. It has to do with everything that happened.

Judge: It's in for hearing, will we leave it until 2 o'clock?

Inspector: It would be in the afternoon, Judge. We'll proceed today.

Judge: 2 o'clock please.

William Fitzgerald: Sorry, Judge, I am hard of hearing.

Judge: 2 o'clock please.

William Fitzgerald Judge, if I could have a minute, there is an issue about evidence, about CCTV.

Judge: Oh yes, we will deal with all that at 2 o'clock. 2 p.m., that's the hearing.

END OF DAR: 12:10.27 – 12.11.40

Court sat without a break until 14:47:26, by which time Mr Fitzgerald's case had still not been reached. The court then adjourned until 16:45:35 when it resumed the list and continued until 18:53:21. Mr Fitzgerald's case was called again at 16:49:10.

START OF DAR: 16:49:10- 16:50:06

Court Clerk: The next one is William Fitzgerald. It's drink driving.

Inspector: Mr. Fitzgerald is here, Judge, I think. With the list …[interjection].

Judge: And there isn't a plea?

Inspector: No, that is contested.

Judge: Right. So why don't we put that in on 22nd.

Inspector: The 22nd here, Judge? The special court?

Judge: Yes, and can we give it priority because he has been here all day? Say 10.30, and we will deal with it at 10.30 on the 22nd, which is -- Friday -- this day fortnight, and it's a special court so there won't be any hanging around, and that is, as I say, to get priority hearing. 22nd February '19, 10.30, for hearing. Ok, right.

END OF DAR: 16:49:10- 16:50:06