THE HIGH COURT

JUDICAL REVIEW

[2023] IEHC 116

[Record No. 2021/495JR]

BETWEEN

LIAM MAC FHLANACH

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms Justice O'Regan delivered on 10 March 2023.

1. The applicant secured leave on 27 May 2021 to maintain the within judicial review proceedings as against the defendants in respect of a statement of grounds of 25 May 2021 which incorporated a claim for an extension of time. The application is grounded on an affidavit of the applicant of 21 May 2021 and a further affidavit of his solicitor, Mr. McNelis, of the same date. On 5 October 2021 a notice of discontinuance was served in respect of Ireland and the Attorney General and accordingly the matter proceeds as against the Director of Public Prosecutions only. The entirety of the matter is fully opposed based on the statement of opposition of 29

October 2021 and the grounding affidavit of William Kennedy, State Solicitor for County Galway West.

2. The reliefs sought in the statement of grounds is that of an order quashing the conviction made by Judge Eoin Garavan in the Circuit Court on 15 October 2020. Relief number two refers to the refusal of the Circuit Court judge to state a consultative case stated. A further order of *certiorari* is sought in respect of the order of the same judge in the same matter made on 4 December 2020 wherein the Circuit Court judge refused the applicant's application to state a consultative case stated or to reinstate the matter for the purposes of hearing an application to state a consultative case. In addition, an order of mandamus directing the Circuit Court judge to state a consultative case stated has been sought together with an order of prohibition in respect of any further steps to prosecute the applicant on foot of the summonses. Two declarations were sought namely that the Circuit Court judge acted *ultra vires* and/or without jurisdiction and further that the orders of the Circuit Court judge are null void invalid and have no effect. As previously mentioned, the relief of an extension of time to bring the application is also included.

3. In the grounds upon which the relief is sought reference is made to the applicant appearing on an appeal from the District Court before the Circuit Court in Galway when the applicant pleaded not guilty. It is recorded that on 15 October 2020 the Circuit Court judge refused an application for a direction and subsequently refused an application for a consultative case stated to the Court of Appeal. It is asserted, that the Circuit Court judge failed, refused and/or neglected to exercise his powers judicially, to follow the provisions of s.16 of the Courts of Justice Act 1947, or to follow the ratio in the case of *McKenna v Deery* [1998] 1 IR 62 and did not afford the

applicant any or any adequate or fair or opportunity to properly present his application for the consultative case stated. It is asserted that the DPP failed to inform the Circuit Court judge on 15 October 2020 of another matter pending before the High Court by way of the consultative case stated from the District Court concerning the statutory interpretation of "a doctor treating the person" as it appears in s.14 of the Road Traffic Act 2010 (as amended). It is recorded that based upon a motion and grounding affidavit the matter again came before Judge Garavan in the Galway Circuit Court on 4 December 2020 when an application was made to state a consultative case in the Court of Appeal but this was refused. In relation to the order of 4 December 2020 similar failings as identified aforesaid in respect of the Circuit Court judge's order of 15 October 2020 are set out. It is argued that the orders made on 15 October 2020 and 4 December 2020 were unreasonable and/or disproportionate in their effects on the applicant's constitutional rights *inter alia* to a fair trial, to fair procedure and to equal treatment.

4. Both parties tendered prior written submissions which were supplemented by oral submissions. During the course of oral submissions, the applicant confirmed to the court that the following matters contained within the statement required to ground the application were not being pursued: -

(1) No relief was being pursued in respect of the hearing before the Circuit Court judge on 4 December 2020 and the significance of that hearing is now limited to part of the factual background relied upon by the applicant to ground his claim for an extension of time;

(2) at para. e(4)(d) of the statement of grounds it is complained that the Circuit Court judge did not afford the applicant any or any adequate or

fair opportunity to properly present his application for the consultative case stated. This complaint is not being maintained;

(3) at para. e(5) of the statement of grounds it is complained that the respondent failed to inform the Circuit Court judge on 15 October 2020 or 4 December 2020 of the pending matter of the *DPP v Cullen* which had commenced on 9 April 2020 and ultimately concluded with the judgment of Mr Justice Simons on 18 March 2021 (citation [2021] IEHC 135). This complaint was not pursued.

Factual Background

5. The applicant was involved in a road traffic accident in Spiddal, County Galway on 18 September 2018. The applicant was subsequently removed to Galway University Hospital. While in the hospital on the evening of 18 September 2018 Garda Gabriel O'Brien attended with a nurse and secured a sample of the applicant's blood. It is acknowledged that when afforded the option of a blood or urine specimen the applicant opted for a blood specimen. Prior to the taking of blood and while the applicant was at the emergency department, Garda O'Brien had a discussion with Dr Umana who indicated to Garda O'Brien that he was satisfied for Garda O'Brien to take a blood or urine sample from the applicant. It is this interaction between Garda O'Brien and Dr Umana that led to the request on behalf of the applicant of the Circuit Court judge to state a case for the opinion of the Court of Appeal. The proposed question of the applicant as it appears in paras. d(3) and e(3) of the statement of grounds is set out in the following terms: -

> "In circumstances where a prosecution under section 4 or 5 of the Road Traffic Act 2010 as amended. Whereby the sample is obtained under section 14 of the

> Road Traffic Act, 2010 as amended, in a hospital wherein the accused was taken. Must the garda who requires the accused to allow a designated doctor or nurse to take a sample, provide evidence that the medical professional is a treating doctor as set out in section 14(4) of the Road Traffic Act, as amended, or can that be inferred by this Court?"

6. On 11 February 2019 summonses were issued against the applicant including a complaint that on the evening of 18 September 2018 the applicant was driving with excess alcohol in his blood contrary to s.4 of the Road Traffic Act 2010.

7. On 18 June 2019 the applicant first appeared before Galway District Court and was ultimately convicted under s.4 aforesaid by the District Court on 18 February 2020. The District Court order was appealed to the Circuit Court which appeal came before Judge Eoin Garavan on 15 October 2020. At the conclusion of the prosecution case against the applicant, the applicant applied for direction and also applied to the judge to state a case under s.16 of the Courts of Justice Act 1947. The relevant portion of s.16 aforesaid is as follows: -

> "A Circuit Judge may, if an application in that behalf is made by any party to any matter … pending before him, refer, on such terms as to costs or otherwise as he thinks fit, any question of law arising in such matter to the Supreme Court by way of case stated for the determination of the Supreme Court and may adjourn the pronouncement of his judgment or order in the matter pending the determination of such case stated."

8. Judge Garavan refused the direction and refused the application for a case stated indicating that the application for a case stated could effectively be renewed at the end of the applicant's evidence and also indicated that the applicant had the opportunity to appeal by way of case stated. Following the applicant's evidence to the Circuit Court the applicant renewed an application for a case stated pursuant to s.16 and this was again refused by Judge Garavan who repeated the applicant's option of appealing by way of case stated. The Circuit Court affirmed the Applicant's conviction.

9. On 16 October 2020 the applicant's solicitor discovered that there was no option to the applicant of appealing by way of case stated and wrote to the prosecuting solicitor indicating that the applicant's solicitors had been instructed to appeal the case to the High Court for determination of the points of law which arose however having discovered that there was no option to appeal by way of case stated it was indicated therefore that the options open to the applicant were to apply on consent for the matter to be re-entered so that the conviction against the applicant by the Circuit Court judge on 15 October 2020 might be vacated and thereafter a consultative case stated could be prepared. It was indicated that if the prosecuting solicitor could not consent to the matter being re-entered the only option available to the applicant would be to apply for leave for judicial review of the decision of the Circuit Court to decline to allow a consultative case stated.

10. The prosecuting solicitor replied by way of letter of 28 October 2020 indicating that as far as the prosecution was concerned the matter was at an end and if the applicant wished to take the issue further then he should take whatever steps he

thought to be appropriate.

11. On 27 November 2020 the applicant's solicitor wrote to the prosecuting solicitor enclosing a notice of motion and grounding affidavit together with exhibits to bring the matter before Judge Garavan in Castlebar Circuit Court on Friday 4th December 2020. At para. 16 of Mr McNelis' affidavit of 21 May 2021 grounding the within application, the solicitor stated that the motion and affidavit aforesaid were filed and produced with the cooperation of the State solicitor Mr Vincent Deane.

12. On 4 December 2020 the matter came before Judge Garavan in the Circuit Court when the applicant's application was made to relist the matter, vacate the conviction in respect of the drunk driving and state a consultative case stated to the Court of Appeal, however, such reliefs were refused.

13. On 18 March 2021 the judgment of Simons J in *Cullen* aforesaid was delivered and on 19 March 2021 that judgment was uploaded on the Courts Website. *Cullen* came before the High Court by way of a case stated from the District Court where the applicant in those proceedings had been convicted of a drunk driving offence following the taking of a blood sample from the applicant who had been admitted to hospital. The question before Simons J was as to the statutory interpretation of "a doctor treating the person" as used in s.14 of the 2010 Act.

14. At a date undisclosed Mr McNelis discovered the decision of Simons J in the *Cullen* case (para. 11 of the affidavit of Mr McNelis).

15. On 27 May 2021 the applicant secured leave to maintain the within judicial review proceedings which are defended in full in the statement of opposition of 29 October 2021 and the grounding affidavit of such opposition of William Kennedy solicitor of the same date. The respondent argues *inter alia* that the applicant is not entitled to an extension of time under O.84 of the Rules of the Superior Courts and in any event with regard to the substance of the applicant's claim it is denied that the applicant would have secured or would secure either a direction or an acquittal of the drunk driving offence based upon the judgment of Simons J in *Cullen*. The decision of the Circuit Court judge is said to be correct and lawful.

Extension of Time

16. The substantive application of the applicant in these proceedings is essentially that Judge Garavan did not exercise his discretion judicially in refusing to state a case under s.16 of the 1947 Act aforesaid having regard to the Supreme Court judgment in the case of *McKenna* aforesaid. Lynch J in giving judgment on behalf of the Supreme Court stated at p.75 of the judgment as follows: -

> "The discretion conferred on the Circuit Court judge by Section 16 of the 1947 Act is in terms unlimited but all discretions conferred on courts must be exercised judicially. Nevertheless, consultative cases stated are primarily for the guidance and assistance of the judge who is asked to state such a case and if the judge is quite clear in his own mind as to the proper decision in the case, *prima facie* he is entitled to refuse the application and to go ahead and decide the case in accordance with his firm and positive views. The Superior Courts should be slow to interfere in such a case and should only do so if there is not merely an arguable case, but substantial, weighty and solid grounds calling for

a decision by the Supreme Court on the question or questions of law the subject matter of the application by one of the parties to the proceedings."

17. Order 84, r.21 of the Rules of the Superior Courts deals with time requirements within which an application to maintain judicial review in respect of *inter alia* a challenge to a court order might be commenced. In this regard r.21(2) provides that the date when grounds for the application first arose shall be taken to be the date of that order. In the event of noncompliance with the three-month period identified it is nevertheless possible for the High Court to extend time in certain circumstances as provided for by r.21(3) and r.21(4). Such rules provide that the court may extend time but only if satisfied: -

> "(a) there is good and sufficient reason for doing so, and
>
> (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in subrule 1 either: -
>
> > (1) were outside the control of, or
> >
> > (2) could not reasonably have been anticipated by the applicant for such extension."

In a determination as to the existence of good and sufficient reason the court may have regard to the effect such extension might have on a respondent or third party. Insofar as the manner in which the application to extend time might be maintained is concerned this is dealt with under r.21(5). This subrule provides that an application shall be grounded upon an affidavit sworn by or on behalf of the applicant setting out the reasons for the failure to make the application within the period prescribed and verifying the facts relied upon in support of those reasons.

18. In these proceedings there are two affidavits filed on behalf of the applicant both of 21 May 2021, namely an affidavit of the applicant and an affidavit of Mr McNelis, the applicant's solicitor.

In the affidavit of the applicant at para. 8 he deposes to the fact that he was only recently informed by his solicitor of the outcome of the judgment in *Cullen*. The applicant states that if he had been aware of the question posed in *Cullen* he would have been in a position to inform the court of such case pending and his case would almost certainly have been adjourned.

19. In oral submissions the applicant argued that within the affidavits of Mr McNelis and the applicant the grounds for the extension of time comprised the full circumstances of the within matter (herein before outlined) and in particular the application before Judge Garavan of 4 December 2020 together with the development in jurisprudence by reason of the *Cullen* judgment. The applicant states that he is relying on the Supreme Court decision in *MO'S v Residential Institutions Redress Board* [2019] 1 ILRM 149 ('MOS'). It is argued that in *MOS* it was confirmed that in deciding on an application to extend time the court's consideration was to take account of all relevant circumstances and in that case there was a development in the law which resulted in an extension of time where the time elapsed was far greater than the time which elapsed in these proceedings.

20. In giving judgment on behalf of the Supreme Court Finlay Geoghegan J at para. 60 of *MOS* identified that the court's discretion must be exercised in accordance with relevant principles in the interests of justice. The applicant is obliged to provide reasons for not bringing the application within the time specified in O.84 and any

subsequent period up to the date of the leave application, which reasons must be considered to objectively explain and justify the failure to apply within the time specified. The Court stated: -

> "The case law makes clear that the Court must also have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted. The decision may require the Court to balance rights of an applicant with those of a respondent or notice party. The judgments cited do not, in my view, admit of a bright line principle which precludes a court from taking into account a relevant change in the jurisprudence of the courts when deciding whether an applicant has established a good and sufficient reason for an extension of time. Further, the judgments cited above do not envisage any absolute rule in relation to what may or may not be taken into account or constitute a good reason or a good and sufficient reason."

21. In the matter of the *DPP v Tyndall* [2021] IEHC 283, Simons J at para. 19 *et seq*, when noting that an application to extend time entailed the exercise of a discretionary jurisdiction, was satisfied that each case would be determined on its own particular circumstances. In *MOS* the judgment was informed by the legislative context and in particular the remedial nature of the statutory redress scheme and *MOS* was also influenced by the overwhelming strength of the merits of the applicant's case wherein the respondent accepted that but for the time issue the applicant would be

entitled to relief. Neither of those influential factors apply in the current context.

22. Insofar as it is asserted that there was a change in the jurisprudence of the court this in my view is not an objectively reasonable point that explains and justifies the delay by reason of the fact that the complaint made in the statement of grounds at para. e(4)(c) specifically references the asserted failure to follow the ratio in the case of *McKenna v Deery* aforesaid whereas reference to the judgment in *Cullen* at para. 5 is included in the statement of grounds merely to complain that the DPP failed to inform the Circuit Court judge on 15 October 2020 and the applicant's case was on all fours with the case pending in *Cullen* and, as aforesaid. This aspect of the applicant's claim was not pursued. Although *Cullen* did represent a development in the law it was not such a development as fed into the grounds of complaint in respect of the exercise of the discretion afforded to the Circuit Court judge under s.16 of the 1947 Act.

23. In addition to the foregoing the following matters are relevant in an assessment of the merits of the extension of time application: -

1) It was clearly within the contemplation of the applicant on 16 October 2020 that judicial review proceedings would be warranted in the absence of consent on the part of the prosecuting solicitor which in the events was not forthcoming as per the prosecuting solicitor's letter of 28 October 2020.
2) It is already identified that the instant respondent does not accept the prosecution against the applicant would have resulted in the dismissal of the case against him by reason of the dicta in *Cullen*, and the

respondent argues that the Circuit Court decision was correct and lawful.

3) The application made before the Circuit Court judge on 4 December 2020, notwithstanding that the motion on affidavit furnished to the prosecuting solicitor under cover letter of 27 November 2020 was filed and produced with the cooperation of the State solicitor, did not extend the time provided for in O.84, r.21. Such application was not a pre-requisite to applying for judicial review (see by analogy para 27 of the judgment in *Tyndall* concerning taking up the DAR).

4) If one was to accede to the argument of the applicant that time should not however begin to run until 4 December 2020, nevertheless clearly there was a period of five and a half months thereafter prior to bringing the leave application.

5) There is in my view no merit to the argument to suggest that the extension period of time sought in these proceedings is much shorter than that in *MOS* and therefore this Court should be minded on that basis to extend the time absent reasons in an affidavit which objectively justify the delay and are sufficient to justify the court exercising its discretion in favour of the applicant. Such argument would set at nought any time requirement in O.84.

6) There is nothing to suggest that the efflux of time was outside the control of the applicant or such efflux was caused by something that the applicant could not reasonably have anticipated.

7) There is a public interest in: -

a) ensuring that criminal proceedings are heard and determined expeditiously, and

b) legal certainty and finality of litigation.

8) No evidence was before the Court that the taking of a blood sample by the Respondent while the applicant was in hospital had an adverse impact on the applicant's health status or condition and therefore there is no evidence of an injustice to the applicant in this regard (see *DPP v Hughes* [2012] IECCA 69).

24. For the reasons set out above, I am satisfied that the applicant is not entitled to an exercise of the Court's discretion under O.84, r.21 extending the time within which leave to maintain judicial review proceedings might be made.
The substantive relief will be refused and any stay on the operation of the Circuit Court Order of 15 October 2020 will be vacated.

25. As this judgment is being delivered electronically, with regards to the issue of costs, as the respondent has been entirely successful, it is my provisional view that the DPP should be entitled to her costs, to be adjudicated in default of agreement. As the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 14 days of this judgment being delivered should they disagree with the order proposed. In default of such submissions being filed, the proposed order will be made.