

APPROVED

[2023] IEHC 504



THE HIGH COURT
JUDICIAL REVIEW

2023 No. 47 J.R.

BETWEEN

KEVIN O'KEEFE

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 23 August 2023

INTRODUCTION

1. The principal judgment in this matter was delivered on 11 August 2023: *O'Keefe v. Commissioner of An Garda Síochána* [2023] IEHC 489. This supplemental judgment addresses the following two issues. First, the allocation of legal costs. Secondly, whether there should be a stay placed on the High Court's order pending an intended appeal to the Court of Appeal.

NO REDACTION REQUIRED

LEGAL COSTS

2. The principal judgment was delivered electronically. Accordingly, as is standard practice, a *provisional* view in relation to the allocation of legal costs was indicated in the judgment. This view had been to the effect that each party should bear its own costs in circumstances where both parties had been partially successful in the proceedings. The principal judgment went on to explain that if either party wished to contend for a different form of costs order than that proposed, they would have an opportunity to do so when these proceedings were next listed before me on 18 August 2023.
3. On that date, counsel for the applicant contended that his client was entitled to recover at least part of his legal costs as against the respondent. Counsel submitted that the respondent had only conceded, for the first time, that it would not be opposing the judicial review proceedings when it delivered its written submissions on 26 July 2023. Counsel submitted that the bulk of the costs associated with the hearing on 31 July 2023 would already have been incurred by the time this concession was made. Attention is drawn to the fact that, as late as 24 July 2023, the respondent's solicitor had written to the applicant's solicitor inviting the applicant to consent to the destruction of the dog.
4. In reply, counsel for the respondent points out that his side had indicated to the High Court (Hyland J.) at the directions hearing on 25 July 2023 that they would be happy to agree to the court's proposal that the matter might be remitted to the District Court with the dog remaining in detention. Had the applicant also agreed to that proposal, then it would have obviated any necessity to assign a hearing date for 31 July 2023. Counsel also submits that the costs of that contested hearing are likely to exceed the costs of the proceedings as of 25 July 2023. It

is said that the costs to that date would have consisted, primarily, of the costs of an *ex parte* application for leave to apply for judicial review on 22 January 2023. It is further submitted that, rather than send the costs for adjudication by the Office of the Chief Legal Costs Adjudicator, with the attendant expense, this court is entitled to have regard to the fact that the respondent's costs would exceed those of the applicant.

Decision on costs

5. The allocation of costs is governed by Part 11 of the Legal Services Regulation Act 2015 and Order 99 of the Rules of the Superior Courts (as recast). The default position under Section 169 of the Legal Services Regulation Act 2015 is that a party who has been “*entirely successful*” is ordinarily entitled to recover their legal costs as against the unsuccessful party. This is, however, only the default position. The court retains an overriding discretion to make such order as is appropriate in the interests of justice, having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties. In the event that a party has been only “*partially successful*” in the proceedings, the court has a discretion, under Section 168, to order the other party to pay the costs relating to the successful element or elements of the proceedings.
6. The significance of whether a party has been entirely successful or only partially successful has been explained as follows by the Court of Appeal in *Higgins v. Irish Aviation Authority* [2020] IECA 277 (at paragraph 10):

“In answering these questions, it is particularly important to bear in mind that whether a party is ‘entirely successful’ is primarily relevant to where the burden lies within process of deciding how costs should be allocated. If a party is ‘entirely successful’ all of the costs follow unless the Court exercises its discretion to direct otherwise having regard to the factors enumerated in s. 169(1). If ‘partially successful’ the costs of that part on which the party has succeeded may be awarded

in its favour, bearing in mind those same factors. Indeed, having regard to the general discretion in s.168(1)(a) and O.99 R.2(1) a party who is ‘partially successful’ may still succeed in obtaining all of his costs, in an appropriate case.”

7. The Court of Appeal further held that, in determining whether a party has been “*entirely successful*” for the purposes of Section 169(1) of the LSRA 2015, the correct approach is to look beyond the overall result in the case and to consider whether the proceedings involve separate and distinct issues. In a case where a party obtains the relief which it claimed but has failed to prevail on a distinct issue in the action, it is very difficult to see how it could be said that they have been “*entirely successful*”.
8. In the present case, the applicant has succeeded in obtaining the substantive relief which he sought in the proceedings, namely an order of *certiorari* setting aside the District Court order directing the destruction of the dog pursuant to Section 22 of the Control of Dogs Act 1986. To this extent, the applicant can be said to have been “*partially successful*” in the proceedings. However, the applicant failed on the legal issue which took up most of the hearing time and in respect of which most of the costs will have been incurred. More specifically, the applicant was unsuccessful on the issue of whether the remittal of the complaint to the District Court should be conditional on the continued detention of the dog in a professionally run kennels. The applicant had strenuously opposed the imposition of such a condition. It was submitted that the High Court did not enjoy jurisdiction to impose such a condition. Further, it was submitted that such a condition would not be appropriate on the facts of the case. The applicant was unsuccessful on all of these grounds for the reasons explained in the principal judgment.

9. This represents a discrete “*event*” for costs purposes, and it is appropriate that some apportionment be made in the allocation of costs to reflect this fact. There is a clear demarcation between the issue upon which the applicant succeeded, and that upon which he was unsuccessful. Crucially, the pursuit of the issue in respect of remittal will have increased the overall costs of the litigation to a material extent. The hearing on 31 July 2023 took up an hour of court time and was concerned exclusively with the form of remittal. The hearing would have been even longer but for the fact that both parties had filed written submissions in advance at the direction of the court. The preparation of these submissions will, obviously, have resulted in both sides incurring additional costs.
10. The costs incurred in respect of the remittal application are likely to be greater than the aggregate costs of the proceedings as they stood on 25 July 2023. More specifically, the costs of a contested hearing and the preparation of written submissions will be greater than those of an *ex parte* leave application and a number of directions hearings.
11. In allocating costs, the court is also entitled, pursuant to Section 169 of the LSRA 2015, to consider whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings. Here, it was unreasonable for the applicant to have pursued his objection in relation to the form of remittal. The applicant failed to put forward any evidence which would suggest that the nominated family member was a suitable person to take control of the dog. Put otherwise, having regard to the evidence before the court, this was not a finely balanced application. Rather, it was obvious what the outcome would be. Had the applicant been prepared to agree to an order for remittal conditional on the continued detention of the dog, then the judicial review proceedings could have

been disposed of, on consent, on 25 July 2023. Instead, the applicant's insistence on contesting the form of the order for remittal caused the parties to incur the expense of a contested hearing on 31 July 2023, together with the costs of written legal submissions.

12. It would, in principle, be open to the court to make separate costs awards and direct that the costs be adjudicated, i.e. measured, under Part 10 of the Legal Services Regulation Act 2015, with the competing costs awards being netted off against each other. This would inevitably leave a balance in favour of the respondent: the costs associated with the contested hearings on 31 July 2023 and 18 August 2023 would exceed those incurred in the proceedings prior to 25 July 2023. Rather than put the parties to the additional expense of an adjudication, however, the fairest order is that each party bear its own costs of the proceedings. If anything, this is generous to the applicant in that it obviates his having to pay a balance to the respondent.

STAY PENDING AN APPEAL

13. The applicant has sought a stay on the High Court order remitting the complaint to the District Court, pending the hearing and determination of an intended appeal to the Court of Appeal.
14. The first question to be addressed, in determining whether or not to impose a stay, is as to whether there is any stateable or arguable basis for the intended appeal. If there is, then the court has to assess the potential injustice which may result from, on the one hand, intervening in favour of the applicant only for the appeal to fail, as opposed to not intervening in favour of the applicant only for

the appeal to succeed. (*C.C. v. Minister for Justice and Equality* [2016] IESC 48, [2016] 2 I.R. 680 (at paragraph 36)).

15. Accordingly, it is necessary for this court to make some assessment of the intended grounds of appeal as part of its determination of the application for a stay. This puts the court in the embarrassing position of having to express a view on the correctness or otherwise of its own findings. It should be emphasised that this exercise is strictly confined to assessing whether the intended grounds of appeal meet the low threshold of arguability. The decision on whether the findings in the principal judgment were right or wrong is exclusively a matter for the Court of Appeal.
16. Counsel for the applicant has identified two intended grounds of appeal as follows. First, it is said that this court erred in its interpretation of Section 22 of the Control of Dogs Act 1986. Secondly, it is said that this court erred in its understanding of the remittal jurisdiction, and, in particular, the existence of a power to impose a condition that the dog continue to be detained in professionally run kennels. It is only the first of these intended grounds of appeal which is relevant to the question of the stay. This is because the applicant is not seeking the release of the dog pending the intended appeal to the Court of Appeal.

No stateable or arguable basis for appeal

17. The primary intended ground of appeal relates to the interpretation of Section 22 of the Control of Dogs Act 1986. The interpretation of the section arose for consideration in the principal judgment in the following circumstances. One of the bases upon which the applicant had, initially, sought to resist the complaint being remitted to the District Court had been that it would be “*futile*”. More

specifically, an argument had been advanced in the written submissions to the effect that the District Court, in determining an application for a destruction order, must consider the position of the dog as it stands as of the date of the hearing. On this interpretation, the statutory test of whether the dog is “*dangerous and not kept under proper control*” would have to be determined by reference to the fact that, as of the date of the rehearing before the District Court, the dog was being cared for in professionally run kennels. Put otherwise, the question of “*proper control*” would be determined by reference to the actions of the operator of the kennels, and not those of the owner of the dog. On the applicant’s analysis of the statutory provisions, it had been submitted that the remittal would be “*futile*” in that the respondent would not be in a position to demonstrate to the District Court that the dog is not being kept under proper control by the operator of the kennels.

18. At the hearing on 31 July 2023, this argument was not stood over. Instead, an alternative argument was advanced to the effect that, on remittal, the District Court would be confined to considering the factual circumstances of the dog as of January 2023. On this argument, any evidence as to the subsequent behaviour of the dog while housed in the kennels would have to be excluded.
19. Counsel reiterated, in the course of the application for a stay on 18 August 2023, that the premise underlying this argument is that the moving party, in a complaint under Section 22, would have to prove that the lack of proper control and the dog being a dangerous dog were matters which had occurred *concurrently*. It is said that anything which occurred *after* the dog had been taken out of the control of the applicant, including matters which went towards the dog being dangerous, would not be relevant.

20. It had been necessary for this court to address this issue of statutory interpretation in its principal judgment. The issue was dealt with as follows (at paragraph 56 of the principal judgment):

“[...] The purpose of remittal is to allow a fresh hearing of the complaint under Section 22 of the Control of Dogs Act 1986. The District Court must, therefore, consider whether the statutory test is met, namely, whether the dog is dangerous and not kept under proper control by its owner. Certainly insofar as the first limb of the test is concerned, the District Court is not confined to hearing evidence in respect of the behaviour of the dog prior to 21 January 2023. Rather, the District Court is entitled to receive any admissible evidence which is relevant to the statutory test, including, *inter alia*, any admissible evidence adduced in respect of the dog’s behaviour in the kennels. The behaviour and temperament of a dog may change over time and it would be artificial—and inconsistent with the purpose of the Act—to confine the evidence to the events prior to 21 January 2023.”

21. This finding is reflected in the proposed order for remittal by the inclusion of the following condition:

“(d). For the avoidance of doubt, the District Court is not confined to hearing evidence in respect of the behaviour of the dog prior to 21 January 2023. Rather, the District Court is entitled to receive any admissible evidence which is relevant to the statutory test under Section 22 of the Control of Dogs Act 1986, including, *inter alia*, any admissible evidence adduced in respect of the dog’s behaviour in the kennels.”

22. The applicant proposes to challenge this condition in his intended appeal. For the reasons which follow, I have concluded that the intended ground of appeal does not meet the threshold of arguability.

23. Section 22(1) of the Control of Dogs Act 1986 provides as follows:

“Where—

- (a) on a complaint being made to the District Court by any interested person that a dog is dangerous and not kept under proper control, or
- (b) on the conviction of any person for an offence under section 9 (2) of this Act,

it appears to the Court that the dog is dangerous and not kept under proper control, the Court may, in addition to any other penalty which it may impose, order that the dog be kept under proper control or be destroyed.”

24. As appears, there are two limbs to the statutory test: the dangerous character of the dog and the control exerted by the owner. Both limbs of the test must be satisfied. The test requires that there be some consideration of the likely future behaviour of the dog: the District Court must consider whether, as an alternative to the destruction of the dog, an order might be made instead that it be kept under proper control. This will require consideration of whether the owner is competent to keep the dog under proper control.
25. There is nothing in the section which confines the assessment of whether the dog is dangerous to behaviour which occurred concurrently with the dog being in the control of its owner. There is no temporal limitation which restricts admission of evidence to a particular point in time. Rather, the District Court is entitled to consider any evidence which is probative of the character and temperament of the dog. It is important to recall that this section is civil rather than criminal in nature. Unlike in the case of a criminal offence, the District Court is not confined to consideration of a single incident which may have prompted the making of a complaint under Section 22. It is incorrect, therefore, to seek to exclude evidence of events which occurred subsequent to the dog being seized and detained on 17 January 2023.
26. Here, the behaviour of the dog over the course of the seven month period in which it has been detained in the professionally run kennels is relevant to the first limb of the statutory test. If, for example, the District Court were to be satisfied, on the basis of the evidence adduced before it, that the dog had

exhibited extremely aggressive behaviour and had attempted to attack its carers, then this would be directly relevant to the determination of whether the dog is dangerous. Of course, the rules in relation to the admissibility of evidence apply and the applicant will be entitled to test the complainant's evidence by cross-examination. It will also be open to the applicant to make such submissions as he wishes on whether he is capable of exerting proper control.

27. Evidence of the dog's behaviour in the kennels may also be relevant for the purposes of Section 22(5) of the Control of Dogs Act 1986. This subsection provides that where a dog is proved to have caused damage in an attack on any person the dog may be dealt with under Section 22 as a dangerous dog which has not been kept under proper control. The subsection represents a form of deeming provision, whereby the criteria for the making of a destruction order are deemed to be fulfilled upon proof of an attack on any person. It follows, therefore, that if there is evidence that the dog attacked one or more of the kennel staff, then this would be relevant for the purposes of Section 22(5).
28. In summary, the intended ground of appeal is predicated on an interpretation of Section 22 of the Control of Dogs Act 1986 which is demonstrably incorrect. There is nothing in the Act which is capable of supporting an argument that any evidence as to the behaviour of the dog in the kennels must be excluded. It follows, therefore, that there is no stateable or arguable basis for the intended ground of appeal.
29. For completeness, it should be recorded that not only does the approach adopted in the principal judgment go no further than reflecting the statutory language of the Control of Dogs Act 1986, it also chimes with the interpretation given to the

equivalent provision under English law. Section 2 of the Dogs Act 1871 provides, in relevant part, as follows:

“Any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous, and not kept under proper control, and if it appears to the court having cognisance of such complaint that such dog is dangerous, the court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed [...]”.

30. The Court of Appeal of England and Wales has described the purpose of the section as follows in *Briscoe v. Shattock* [1999] 1 WLR 432:

“The purpose of section 2 is not, as it is in section 1(3) of the Dangerous Dogs Act 1991, to make it an offence to have a dangerous dog. Section 2 is not a penal section. It bites only where a dog is shown to have been both dangerous and not under proper control. The justices’ powers are correspondingly limited to directing the owner to keep the dog under proper control, or where they conclude that it cannot be realistically controlled by the owner, to having it destroyed. Many dogs which are ordinarily docile may be dangerous in the relevant sense that unless kept under control they may cause real harm. The statutory purpose is thus simply to require dog owners, by exercising suitable control, to prevent such harm from occurring, and if they cannot, to have the dog put down.”

31. As appears, the Court of Appeal has interpreted the statutory language as introducing a two limb test.

Balance of justice

32. In the absence of the applicant having identified an arguable ground of appeal, it is not strictly speaking necessary to go further and consider the balance of justice. For completeness, however, it should be recorded that the balance of justice weighs heavily against the imposition of a stay on the remittal. It is in the interests of all that the question of the future of this dog be determined as expeditiously as possible, consistent with the proper administration of justice and fair procedures. This is best achieved by the order for remittal taking effect.

The conditions to be attached to the order for remittal ensure that the applicant will now have a proper opportunity to defend the application to have the dog destroyed. The applicant will be permitted to attend the hearing before the District Court; to test evidence by way of cross-examination; and to adduce evidence on his own behalf.

33. By contrast, the imposition of a stay on the order for remittal would result in the dog having to remain in the kennels for a prolonged period of time in circumstances where the evidence, which had been adduced before the High Court for the purposes of the remittal application, indicates that this is causing distress to the dog and creating health and safety issues for the staff.

CONCLUSION AND FORM OF ORDER

34. For the reasons explained in this judgment and in the principal judgment, the following orders will now be made.
35. An order of *certiorari* setting aside the order purportedly made by the District Court pursuant to Section 22 of the Control of Dogs Act 1986.
36. A consequential order will be made, pursuant to Order 84, rule 27 of the Rules of the Superior Courts, remitting the complaint to the District Court with a direction to reconsider it and reach a decision in accordance with the findings of the High Court. The order for remittal is subject to the following conditions:
 - (a). The dog, the subject of these proceedings, is to be detained in a professionally run kennels pending the hearing and determination of the remitted complaint.
 - (b). The applicant is to be given at least seven days' notice of the date of the hearing of the complaint before the District Court. This fresh notice

supercedes the impugned notice of 20 January 2023. The notice should be in like form to that prescribed under Order 91 of the District Court Rules. Notice may be served by way of email and/or ordinary pre-paid post directed to the applicant's solicitors. The applicant's solicitors are to nominate an email address for this purpose. The respondent has liberty to name either Sergeant Molloy or Garda McCarthy as the complainant.

- (c). The applicant is entitled to attend at the hearing of the complaint before the District Court. Accordingly, once the hearing date has been fixed, a production order should be issued to the prison where the applicant is imprisoned.
 - (d). For the avoidance of doubt, the District Court is not confined to hearing evidence in respect of the behaviour of the dog prior to 21 January 2023. Rather, the District Court is entitled to receive any admissible evidence which is relevant to the statutory test under Section 22 of the Control of Dogs Act 1986, including, *inter alia*, any admissible evidence adduced in respect of the dog's behaviour in the kennels.
 - (e). The District Court should endeavour to list the complaint for hearing as expeditiously as possible, consistent with the proper administration of justice and fair procedures.
 - (f). The parties have liberty to apply to the High Court in the event any issue arises.
37. As to the legal costs associated with these judicial review proceedings, there will be no order. Instead, each party must bear their own legal costs of these proceedings. For the avoidance of any doubt, this order extends to the costs of the hearing on 18 August 2023.

38. The application for a stay on the order for remittal pending the hearing and determination of an intended appeal to the Court of Appeal is refused. The intended ground of appeal is predicated on an interpretation of Section 22 of the Control of Dogs Act 1986 which is demonstrably incorrect. There is nothing in the Act which is capable of supporting an argument that any evidence as to the behaviour of the dog in the kennels must be excluded. It follows, therefore, that there is no stateable or arguable basis for the intended ground of appeal.
39. Finally, the question of the future of this dog should be determined by the District Court as expeditiously as possible, consistent with the proper administration of justice and fair procedures. It is undesirable that a dog, which may ultimately have to be destroyed, should remain in the kennels for a prolonged period of time in circumstances where the evidence, to date, indicates that this is causing distress to the dog and creating health and safety issues for the staff.

Appearances

Colman Fitzgerald, SC and Karl Monahan for the applicant instructed by John M Quinn & Co
Frank Kennedy for the respondent instructed by the Chief State Solicitor

Approved
Gemma S. Mans