APPROVED **[2025] IEHC 8**

THE HIGH COURT
JUDICIAL REVIEW

2023 1398 JR

BETWEEN

BARTHOLOMEW ANTHONY O'NEILL

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF GARDA LIAM GALVIN)
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 January 2025

INTRODUCTION

1. These judicial review proceedings seek to set aside a conviction entered by the District Court. The Applicant has been convicted of the offence of holding a mobile phone while driving. One of the principal issues for determination in this judgment is whether the conduct of the criminal trial before the District Court was such that the Applicant received an unfair hearing which cannot be corrected by way of an appeal to the Circuit Court.

JUDICIAL REVIEW OR APPEAL

2. An application for judicial review will not normally be appropriate where an applicant has an adequate alternative remedy by way of an appeal. This is especially so in the context of a criminal conviction entered in the District Court or the Circuit Court. This is because an appeal to the Circuit Court or the Court of Appeal, respectively, will generally represent an adequate alternative remedy. Indeed, an appeal is almost always the *preferable* remedy from an accused's perspective because of the inherent limitations on the judicial review jurisdiction.

3. Judicial review is concerned principally with the legality of the decision-making process, and not with the underlying merits of the decision under challenge (save in cases of irrationality). Put otherwise, the function which the High Court exercises in determining judicial review proceedings is far more limited than that which the Circuit Court and the Court of Appeal, respectively, would exercise in determining an appeal against conviction and sentence.

4. The inherent limitations on the High Court's judicial review jurisdiction have been described, in more eloquent terms, by the Supreme Court (*per* Charleton J.) in *E.R. v. Director of Public Prosecutions* [2019] IESC 86 as follows (at paragraph 17):

> "[…] an accused in a criminal trial who is advised to forego an appeal and instead pursue a judicial review, faces a burden different to an argument as to right and wrong. Judicial review is not about the correctness of decision-making, nor is it the substitution by one court of a legal analysis or factual decision for that of the court under scrutiny. On judicial review, where successful, the High Court returns the administrative or judicial decision to the original source and, implicitly in the judgment overturning the impugned decision, requires that it be redone in accordance with

> jurisdiction or that fundamentally fair procedures be followed. If the decision-maker has no jurisdiction, that may be the end of the matter but the High Court never acts as if a Circuit Court case were being reconsidered through a rehearing, which is a circumstance where a court will be entitled to substitute its own decision. Judicial review is about process, jurisdiction and adherence to a basic level of sound procedures. It is not a reanalysis."

5. The Supreme Court judgment goes on, in the next paragraph, to emphasise that an applicant for judicial review in criminal proceedings has the "*substantial burden*" of showing the deprivation of a right. It is not enough to ground a successful application for judicial review that the trial judge might have made an error of fact, nor even an incorrect decision of law.

6. The circumstances in which judicial review may be appropriate, notwithstanding the availability of a right of appeal, have been summarised as follows by Clarke J. (as he then was) in *Sweeney v. District Judge Fahy* [2014] IESC 50 (at paragraphs 3.14 and 3.15):

> "Thus, it is clear that a court may refuse to consider a judicial review application where it is apparent that the complaint made is one which is more appropriately dealt with by means of a form of appeal which the law allows. There can, of course, be cases where the nature of the allegation made is such that, if it be true, the person concerned will have, in substance, been deprived of any real first instance hearing at all or at least one which broadly complies with the constitutional requirements of fairness. To say that someone, who has been deprived of a proper first instance hearing at all, has, as their remedy, an appeal is to miss the point. In such circumstances what the law allows is a first hearing and an appeal. If there has, in truth, been no proper first hearing at all, then the person will be deprived of what the law confers on them by being confined, as a remedy, to an appeal. In such a case, judicial review lies to ensure that the person at least gets a first instance hearing which is constitutionally proper and against which they can, if they wish, appeal on the merits in due course.
>
> Where, however, a person has had a constitutionally fair first instance hearing and where their complaint is that the decision maker was wrong, then there are strong grounds for

> suggesting that an appeal, if it be available, is the appropriate remedy."

7. These, then, are the principles to be followed in deciding whether to grant judicial review in this case.

NATURE OF THE OFFENCE ALLEGED

8. It may assist the reader in a better understanding of the course of the criminal trial before the District Court to pause here and to outline the nature of the offence alleged. This is relevant to any assessment of the fairness of the approach adopted by the District Court.

9. The Applicant had been charged, by way of summons, with an offence contrary to section 3 of the Road Traffic Act 2006. The statutory offence is described as follows: a person shall not hold a mobile phone while driving a mechanically propelled vehicle in a public place.

10. The term "*mobile phone*" is defined as follows:

> "'mobile phone' means a portable communication device, other than a two-way radio, with which a person is capable of making or receiving a call or performing an interactive communication function, but for the purposes of subsection (1) does not include a hands-free device;"

11. The term "*hands-free device*" is defined as follows:

> "'hands-free device' means a device designed so that when used in conjunction with a mobile phone there is no need for the user to hold the phone by hand;"

12. The Applicant had admitted in evidence before the District Court that he had been holding a mobile phone at the relevant time. The Applicant also admitted that he had received a telephone call using a pair of headphones which were connected to the mobile phone by way of Bluetooth wireless technology. The Applicant contends that it is lawful *to hold* a mobile phone while driving

provided that it is being used in conjunction with a hands-free device. The essence of the argument seems to be that provided that it is not actually *necessary* to do so, a driver is permitted to hold a mobile phone while driving. On the Applicant's argument, the mobile phone represents one half of a hands-free system. The difficulty with the argument is that it tends to ignore the fact that a "*mobile phone*" and a "*hands-free device*" are each defined as a separate "*device*"; there is no omnibus definition of a hands-free system.

13. At all events, the Applicant requested the District Court to refer a consultative case stated to the High Court to address this issue of statutory interpretation (and a second issue in respect of the *mens rea* requirement). The District Court was obliged to consider this request and to determine whether or not it was "*frivolous*" within the meaning of section 52 of the Courts (Supplemental Provisions) Act 1961.

PROCEEDINGS BEFORE THE DISTRICT COURT

14. As the narrative which follows pertains to events before the District Court, the Applicant will be referred to as "*the Accused*" to reflect his status in the criminal proceedings before the District Court rather than as the applicant in these judicial review proceedings.

15. The criminal proceedings first came before the District Court (Judge McNulty) on 6 September 2023. The matter had been adjourned for hearing on 20 September 2023, i.e. two weeks later. This adjournment was not objected to by the Accused. Rather, the Accused had requested to be allowed to call evidence from a witness on his behalf on 6 September 2023, with a view to that evidence being admissible at the subsequent trial. The intended witness is

ordinarily resident in Canada and had been scheduled to return there by the adjourned date. The District Court acceded to this request. The overseas witness was sworn in and gave short testimony to the effect that he had been the person talking to the Accused on the mobile phone on the date of the alleged offence. The criminal prosecution was then adjourned for a period of two weeks.

16. The criminal prosecution duly came on for hearing on 20 September 2023. The Accused, as is his right, chose to represent himself. The Accused had previously explained to the District Court on 6 September 2023 that he was a qualified barrister but had not yet practiced as such.

17. The case was called on with a time estimate of fifteen minutes. In the event, the hearing took much longer (approximately forty-five minutes).

18. The only evidence called in support of the prosecution was that of a garda witness. The guard gave evidence to the effect that he had observed the Accused holding a mobile phone while driving. The Accused cross-examined the guard briefly. The essence of the cross-examination had been that the Accused had informed the guard, on the occasion of his having been stopped, that he (the Accused) had been using the mobile phone in conjunction with Bluetooth headphones.

19. The Accused then went into evidence. In brief, the Accused gave evidence to the effect that his uncle from Canada had called him. The Accused’s mobile phone had been connected by Bluetooth to a headphone device. The Accused had pressed the button on the side of the headphones to take the call. There had been no need for him to touch the mobile phone. The Accused stated that when the mobile phone is connected by Bluetooth to the headphones, it is a hands-free device and no longer a phone.

20. The Accused was then subject to cross-examination. In the event, the court presenter/prosecutor asked only three questions as follows:

> "Q. Mr O'Neill, you heard the evidence of Garda Galvin that he observed you in ... at the time in question driving your vehicle and that in your right hand he observed that you were holding a mobile phone?
>
> A. I heard his evidence.
>
> Q. And you didn't contradict him or cross-examine him in relation to that fact. Do you accept that you were holding it in your hand?
>
> A. I -- what I said to him, and I was very clear in my evidence, I said to him that my phone was connected to my headset at the time and I showed him the blue light showing that it was on.
>
> Q. JUDGE:* Now, Mr O'Neill, if you could answer the question? Do you accept that you were holding the mobile phone in your right hand whilst driving the car as described by Garda Galvin in his evidence?
>
> A. WITNESS: No. I accept that I was holding a part of a hands-free device. The two things combined are something different."
>
> **The transcript mistakenly attributes this third question to the trial judge; in fact, it was asked by the court presenter/prosecutor.*

21. The trial judge then intervened and effectively took over the remainder of the cross-examination:

> "Q. JUDGE: [Can I ask you]* What were you holding in your hand?
>
> **Correction to transcript.*
>
> A. WITNESS: But my evidence is that it was half a hands-free device. So, the two things combined together --
>
> Q. JUDGE: No, no. Don't mind what you say it was --
>
> A. WITNESS: -- Yes.

Q. JUDGE: -- or what it constituted ... Can you tell me precisely what were you holding in your hand when he observed you driving?

A. WITNESS: The part of the hands-free device was the mobile phone that I was holding.

Q. JUDGE: I've asked you twice now

A. WITNESS: Yes.

Q. JUDGE: I've been very patient with you?

A. WITNESS: I --

Q. JUDGE: And I really can't abide evasive answers?

A. WITNESS: -- No. Fine.

Q. JUDGE: And you're being evasive now. Would you be so good as to go down and sit in the far end and we'll come back to the trial and continue it later? All right.

A. WITNESS: Perfect. Yes.

Q. JUDGE: I just don't think you're giving me straight, honest answers?

A. WITNESS: Okay.

Q. JUDGE: No, no, stop now?

A. WITNESS: Fine. Yes. Yes.

Q. JUDGE: I'll tell you now I'm very direct, very blunt, frequently too direct, and too blunt?

A. WITNESS: Yes.

Q. JUDGE: But in your case I'm getting a little tired at this hour of the evening of answers which are not straight. So, would you like to go and sit down and we'll come back to your case later?"

22. The trial judge then objected to the Accused drinking water from a water bottle containing ice cubes because of the noise of the rattle of the ice. The trial judge

directed the witness that he would have to leave the courtroom if he wished to continue drinking.

23. The hearing resumed at approximately 6.23 pm as follows:

> “Q. JUDGE: I’ll be back to the bench in a moment. Now, so we’re back to the evidence and the evidence that you were giving as to what you were doing at the time that the garda observed you. Would you like to give your evidence in a plain English, understandable, manner?
>
> A. WITNESS: -- Yes. So, my evidence is that I was using my phone along with my headset to take a call from my uncle and –
>
> Q. JUDGE: Can I stop you there? I’m a very nice guy most of the time --
>
> A. WITNESS: -- I’m not trying to annoy you.
>
> Q. JUDGE: No, no --
>
> A. WITNESS: -- I am not.
>
> Q. JUDGE: -- I’m in the habit of asking straight questions and I require straight answers?
>
> A. WITNESS: Yes.
>
> Q. JUDGE: And I think I’ve asked you twice what you were doing?
>
> A. WITNESS: Yes.
>
> Q. JUDGE: So, if I could be more specific, did you have anything in your hand?
>
> A. WITNESS: Yes, I had the phone in my hand.
>
> Q. JUDGE: Oh, right. Would you show me what you mean by a phone? You had that in your hand?
>
> A. WITNESS: And it was connected to my headset.”

24. At some (undefined) point thereafter, the trial judge appears to have regarded the proceedings as having shifted from the hearing of evidence to the hearing of legal submissions. This took the form of a dialogue between the trial judge and

the Accused. Unfortunately, the trial judge's interventions were so extensive that they prevented the Accused from developing his submissions in full. In particular, the Accused was not permitted to pursue his submission that the trial judge should refer two questions of law to the High Court for determination by way of a consultative case stated under section 52 of the Courts (Supplemental Provisions) Act 1961.

25. The trial judge's ruling on both the substance of the criminal prosecution and the request for a consultative case stated had been as follows:

> "JUDGE: No, I don't agree with you. That submission is respectfully declined. You researched it and your submissions are learned but I respectfully reject them.
>
> MR O'NEILL: -- Well, would it be possible to get a case stated on a letter --
>
> JUDGE: No. You're -- an appeal if you wish. You always get a better class of Judge in the Circuit Court. Intellectually superb -- or superior is what I mean. You'll always get a brighter, better judge in the Circuit Court and if you're unhappy with my decision I would encourage you to appeal. So --
>
> MR O'NEILL: -- And the submissions I made, like, just so that I -- the case stated that it goes over and I had submissions --
>
> JUDGE: -- No, I'm not prepared to proceed on a case stated basis.
>
> MR O'NEILL: I had some issues with the constitutionality of the section itself and there is an ECHR issue as well.
>
> JUDGE: No, if you don't mind, I'm not going to go there. No, I'm not going to entertain that. If you want to test the point of law the Appeal Court is the place to do it.
>
> MR O'NEILL: From here?
>
> JUDGE: From here.
>
> MR O'NEILL: To the Circuit Court is it?

> JUDGE: And can I ask you, when you were a barrister, like --
>
> MR O'NEILL: I'm not ... I'm a ... I just qualified, I never practised.
>
> JUDGE: -- And did you go to any classes, did you receive any lectures?
>
> MR O'NEILL: Yes.
>
> JUDGE: No, I'm just -- you just don't seem to be acquainted with where an unsatisfactory decision in the District Court goes. The appeal is to the Circuit Court.
>
> MR O'NEILL: Well, I appreciate that, yes, yes.
>
> JUDGE: I'm not being facetious or smart with you but, you know, it's the second or third time today that I was surprised that you weren't clear about procedures and decorum."

26. A discussion then ensued as to whether the trial judge would be prepared to deal with the conviction by way of a monetary fine only as distinct from penalty points. The trial judge said that he had no discretion in relation to the imposition of penalty points. The trial judge entered a conviction and imposed a fine of €120. The trial judge explained to the Accused that he had a right of appeal to the Circuit Court and fixed recognisances in the sum of €200. The trial judge further explained that the court officer would not take any step to apply penalty points or notify anyone until the appeal period had expired.

27. A number of weeks later, the Accused applied to the trial judge to take up a transcript of the digital audio recording ("*DAR*"). The trial judge reserved judgment on the application. The trial judge delivered an oral ruling on 22 November 2023 refusing the application. Notwithstanding that the trial judge had indicated that he would provide a written version of the ruling, same has never been provided.

28. For completeness, it should be explained that, at the instance of the Respondents, the High Court (Owens J.) made an order on 13 February 2024, pursuant to Order 123 RSC, allowing the parties to take up the transcripts of the various hearings before the District Court. A subsequent application, at the instance of the Applicant/Accused, to take up the original audio recording was refused by the High Court (Hyland J.) on 11 June 2024.

29. There are two aspects of the transcript of the ruling of 22 November 2023 which have a potential relevance to the present judicial review proceedings. First, the trial judge incorrectly states that the Accused had declined several invitations from the trial judge to arrange legal representation. This never happened. The very fact that the trial judge in the present case had misremembered having invited the Accused to obtain legal representation illustrates the importance of having an objective record in the form of a transcript. Secondly, the trial judge states that he declined the invitation to refer a case stated to the High Court on the ground that there was "*no point of law which merited a case stated*", and that if the Accused was "*unhappy with*" the decision of the District Court, the "*correct course*" was for him to pursue an appeal to the Circuit Court.

30. Finally, at the request of the Applicant/Accused, I have listened to the digital audio recording of the cross-examination on 20 September 2023. Other than the two minor corrections indicated by asterisks in the extracts above, the transcript is broadly accurate.

DISCUSSION

FAIRNESS OF CRIMINAL TRIAL

31. There is no doubt but that judicial review of a criminal trial is a remedy of last resort. Generally, a person who is dissatisfied with the outcome of criminal proceedings is expected to exercise their right of appeal against that conviction rather than move by way of judicial review. The complaint made in these judicial review proceedings is that the conduct of the criminal trial before the District Court had been fundamentally unfair. For the reasons which follow, this complaint is well founded.

(i). Trial judge embarked upon cross-examination of the Accused

32. It is an essential feature of a trial in due course of law that the trial judge must remain above the fray. An accused person is entitled to an impartial adjudication of the offences alleged against them. It is a matter for the prosecuting authorities to establish their case, subject to such evidential presumptions, if any, as might be prescribed in relation to the particular offence. In the event that an accused person elects to give evidence, it is for the prosecution to cross-examine the accused person: it is certainly not the role of the trial judge to do so. (See, for example, *Director of Public Prosecutions v. A.H.* [2022] IECA 156 (at paragraph 33)).

33. Regrettably, these principles were not observed by the District Court in the present case. The trial judge, by taking over the cross-examination of the Accused, descended into the arena. The court presenter/prosecutor had only asked three questions prior to the trial judge conducting the remainder of the cross-examination himself. Nothing further was heard from the court presenter/prosecutor, whether by way of questions in cross-examination or by

way of submission. Moreover, the trial judge exhibited hostility to the Accused, implying that the Accused was giving answers which were not "*honest*" or "*straight*". The trial judge temporarily suspended the hearing for no apparent reason and banished the Accused to the back of the courtroom for a period of time. The trial judge's description of himself as being "*a very nice guy most of the time*" was open to misinterpretation as some sort of threat of sanction for what the trial judge perceived to be dishonest answers.

34. The conduct engaged in by the trial judge went far beyond a legitimate exercise of seeking clarification or elaboration of the evidence. Rather, it amounted instead to a hostile cross-examination of the Accused by the trial judge on one of the central factual issues in the case, namely, what, if anything, the Accused had been holding in his hands while driving.

35. It should be emphasised that there are certain circumstances in which it will be entirely proper for a judge to ask questions of a witness. A judge is, for example, entitled to seek clarification on a point to ensure that the judge fully understands the witness's evidence.

36. The proper approach in civil proceedings has been described as follows in the minority judgment in *Donnelly v. Timber Factors Ltd* [1991] 1 IR 553 (at 556):

> "The role of the judge of trial in maintaining an even balance will require that on occasion he must intervene in the questioning of witnesses with questions of his own – the purpose being to clarify the unclear, to complete the incomplete, to elaborate the inadequate and to truncate the long-winded. It is not to embellish, to emphasise or, save rarely, to criticise. That is the function of counsel. The casual by-stander on seeing and hearing repeated judicial intervention may well conclude that issues in the case or the case itself are being decided before the evidence and the submissions are complete: if the casual by-stander may do so, how much more so the interested party, the litigant. This division of role between judge and advocate was always important in civil trials by jury; it is more important now that

> claims for damages for personal injuries are no longer tried by juries."

37. This passage has since been approved of by the Supreme Court in *Murtagh v. Minister for Defence* [2018] IESC 37, [2021] 1 IR 630.

38. Any assessment of the appropriateness of questioning by a judge will be fact-specific and will depend on the nature of the proceedings. What might be an appropriate question in a civil trial, for example, might be inappropriate if it had been asked in front of a jury in the context of a criminal trial. This is because the jury might, mistakenly, infer from the question that the judge has a particular view of the veracity of the witness's testimony.

39. The *timing* of the questioning will also be a relevant consideration. A judge should be careful not to interrupt the flow of the cross-examination of a witness lest it undermine the effectiveness of the cross-examination. It is usually best to leave over any questions until the cross-examination has finished, or at least until a point at which the cross-examiner is moving on to another topic.

40. In cases of disputed fact, it may be necessary for a judge to make an express finding in respect of the veracity of a witness's testimony. This should only be done following the hearing of all of the evidence. It was inappropriate for the trial judge in the present case to imply, mid-hearing, that the Accused had been giving dishonest answers.

41. In summary, therefore, this is one of those truly exceptional cases where judicial review is the appropriate remedy. As emphasised by the Court of Appeal in *O'Keeffe v. District Judge Mangan* [2015] IECA 31 (at paragraph 43):

> "There will be circumstances where it would not be appropriate for a trial judge to intervene. The judge is not entitled to take up a position for one side or the other in a case and to pursue a line of questioning with witnesses that

> is designed or may be seen or understood to be designed to achieve a particular outcome. […]"

42. By undertaking a hostile cross-examination of the Accused, the trial judge denied the Accused the benefit of a trial in due course of law.

43. Although not necessary to the finding that the criminal trial had been fundamentally unfair, it should be observed that the approach adopted by the trial judge to the subsequent request to take up a transcript of the hearing is a further cause of concern. The transcript had been sought in circumstances where the Accused had indicated an intention to institute judicial review proceedings. Having regard to the procedural history, and, in particular, the fact that the Accused had sought to advance detailed legal argument on the nature of the offence described under the Road Traffic Act 2006, there was no reasonable basis for suggesting, as the trial judge did in his ruling on 22 November 2023, that the request for the transcript was some sort of "*fishing expedition*". In circumstances where a party to proceedings before the District Court has a *bona fide* intention to pursue judicial review proceedings, it will generally be in the interests of justice that they be allowed to take up a copy of the transcript. (Different considerations may apply if the proceedings under review had been heard *in camera*). This ensures that the court of judicial review has an accurate record of the events before the court of trial. See, generally, *Hudson v. Halpin* [2013] IEHC 4. This is especially important in circumstances where the District Court judge will not normally be a party to the judicial review proceedings and will not, therefore, be in a position to contradict any inaccuracies in the other side's recollection of events. (cf. *Farrelly v. Watkin* [2015] IEHC 117).

(ii). Request for a consultative case stated

44. The second aspect of the hearing before the District Court which was unsatisfactory relates to the request for a case stated.

45. The Accused had identified two questions of law which he wished to have referred to the High Court by way of a consultative case stated pursuant to section 52 of the Courts (Supplemental Provisions) Act 1961. The District Court enjoys a statutory discretion to refuse to refer a consultative case stated to the High Court only in circumstances where it considers the request to be "*frivolous*". It follows, therefore, that the trial judge had been obliged to consider the request and, in the event the request was to be refused, to state the reasons for such refusal. Every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing (*O'Mahoney v. Ballagh* [2001] IESC 99, [2002] 2 IR 410). The statement of reasons did not need to be extensive: the trial judge was required to explain briefly why he considered the request for a consultative case stated to be frivolous. This required the trial judge, at a minimum, to refer to the statutory definitions of a "*mobile phone*" and a "*hands-free device*", respectively, and to explain why the trial judge considered the argument that these amounted, in law, to a single system to be frivolous.

46. In the event, the trial judge signally failed to engage with the request for a consultative case stated. The trial judge prevented the Accused from advancing his arguments in support of this request. The trial judge declined to consider the written text of the two proposed questions of law. No proper reasons were ever provided for the refusal to refer a consultative case stated. As appears from the extract of the transcript cited earlier, the trial judge baldly stated that he was not

prepared to proceed on a case stated basis. The closest one comes to an explanation for this refusal was the (legally mistaken) suggestion that the only appropriate procedure was to make an appeal to the Circuit Court.

47. The trial judge then went on to insult the Accused personally, asking sarcastically whether the Accused, a qualified barrister, had gone to any classes or received any lectures. In truth, it was the trial judge, not the Accused, who exhibited ignorance of the procedural requirements governing a request to refer a consultative case stated to the High Court.

48. The approach of the trial judge to the request for a case stated has to be viewed in the context of the trial judge having earlier embarked upon a hostile cross-examination of the Accused and the trial judge's failure to provide any reasons for his substantive decision to reject the Accused's contended-for interpretation of the offence under section 3 of the Road Traffic Act 2006. Any objective observer, informed of all of the foregoing, would be left with the impression that the trial judge had not approached the hearing with an open mind.

49. The statement of grounds does not seek an order directing the District Court to refer any questions of law to the High Court for determination by way of a consultative case stated. It is unnecessary, therefore, to consider whether—in the absence of a mechanism similar to that provided for under section 5 of the Summary Jurisdiction Act 1857—the High Court may make a mandatory order directing the District Court to refer a consultative case stated under section 52 of the Courts (Supplemental Provisions) Act 1961. It is at least arguable that the appropriate remedy would, instead, be for the aggrieved party to pursue an appeal by way of case stated.

INITIAL ADJOURNMENT OF DISTRICT COURT PROCEEDINGS

50. The Applicant has also sought to challenge the initial adjournment of the criminal proceedings. The summons had first been returnable before the District Court on 6 September 2023. It has been explained on affidavit that the matter had been listed for mention only on that occasion, with a view to fixing a hearing date. At all events, the matter had been adjourned for hearing on 20 September 2023, i.e. two weeks later. The Applicant made no objection to this short adjournment. Rather, as explained in more detail at paragraph 15 above, the Applicant was permitted to call evidence from a witness on his behalf out of turn, with a view to that evidence being admissible at the subsequent trial.

51. The Applicant now seeks, belatedly, to challenge the validity of the adjournment by reference to Order 38, rule 4 of the District Court Rules (as amended). The rule provides as follows:

> "Where the Court is of opinion that the complaint before it discloses no offence at law, or if neither the prosecutor nor accused appears, it may if it thinks fit strike out the complaint with or without awarding costs."

52. The Applicant contends that the District Court judge should have given the Applicant notice that he was, supposedly, going to exercise his discretion not to strike out the proceedings owing to the non-attendance of the prosecuting guard.

53. With respect, this contention is not well founded. The events before the District Court on 6 September 2023 do not come within the scope of Order 38, rule 4 of the District Court Rules. This is not a case where there had been *no appearance* on behalf of the prosecutor, such as might trigger the discretion to strike out the criminal prosecution. Rather, the prosecution had been represented by a garda sergeant acting as court presenter as provided for under section 8 of the Garda

Síochána Act 2005. See, generally, *Director of Public Prosecutions (Varley) v. Davitt* [2023] IESC 17, [2023] 2 ILRM 117.

54. Moreover, and in any event, the Applicant made no objection to the proposed adjournment but had instead sought to call a witness out of turn. This request was acceded to by the District Court. The Applicant cannot approbate and reprobate.

CONSTITUTIONAL CHALLENGE

55. The statement of grounds advances, in the alternative, an argument that the provision made for the imposition of penalty points is contrary to the Constitution of Ireland. The Applicant has consistently maintained the position that the determination of these constitutional issues should be deferred until the High Court has ruled on the non-constitutional issues.

56. The principle of judicial self-restraint or the rule of avoidance indicates that a court will normally only entertain a claim challenging the validity of public general legislation where it is clearly necessary to do so in order to resolve the dispute between the parties. In the context of judicial review, this means that if the proceedings can be resolved on administrative law grounds, then a court will normally seek to dispose of the case on this narrower basis, rather than embark upon a determination of a challenge to the validity of the underlying legislation. The principle of judicial self-restraint is subject to the overriding consideration of doing justice between the parties.

57. There are several strands to the rationale underpinning the principle of judicial self-restraint, and these are discussed in detail in *Kelly: The Irish Constitution* (Hogan, Whyte, Kenny and Walsh, 5th edition, Bloomsbury Professional, 2018)

at §6.2.200 to §6.2.214. As the learned authors explain, the principle is informed by the presumption of constitutionality, and by the inherent limitations of the judicial process, i.e. the court only has jurisdiction to invalidate legislation; it cannot enact new legislation to fill the resultant gap in the law.

58. It is not necessary to address the constitutional issues in the present proceedings in circumstances where it has proved possible to resolve the proceedings on administrative law grounds. The District Court conviction is to be set aside. It follows that no penalty points will be applied to the Applicant's driving licence pursuant to that conviction. The constitutional challenge has been rendered moot (subject only to the outcome of any rehearing in the event that the matter were to be remitted to the District Court pursuant to Order 84, rule 27 of the Rules of the Superior Courts). Similar considerations apply to the Applicant's application for a declaration of incompatibility pursuant to the European Convention on Human Rights Act 2003.

CONCLUSION

59. These judicial review proceedings come before the High Court by way of a telescoped or rolled-up hearing of the leave application and the substantive application for judicial review. The Applicant has satisfied the leave threshold of arguability in respect of the grounds relating to the fairness of the criminal trial and the failure to provide reasons for the refusal to refer a consultative case stated to the High Court. The separate ground in respect of the initial adjournment of the criminal proceedings scarcely satisfies the leave threshold and does not succeed ultimately for the reasons explained at paragraphs 50 to 54 above.

60. The grounds in relation to the admissibility of involuntary statements and the privilege against self-incrimination do not satisfy the leave threshold. Having elected to give evidence in his own defence, the Applicant is taken as having submitted to answer questions in relation to the principal issues in the criminal proceedings. Section 1(e) of the Criminal Justice (Evidence) Act 1924 provides that a person charged with an offence, who elects to give evidence, may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged.

61. The grounds relating to the application to the District Court to allow the Applicant to take up a transcript of the digital audio recording have been overtaken by events in that the High Court made an equivalent order on 13 February 2024. These grounds are now moot.

62. Having regard to the finding that the criminal trial before the District Court had been fundamentally unfair, it is necessary to consider the form of relief which should be granted. The principal relief sought by the Applicant is an order of *certiorari* setting aside the conviction entered by the District Court. The Applicant has not sought any ancillary order directing that the District Court refer any questions of law to the High Court for determination by way of a consultative case stated under section 52 of the Courts (Supplemental Provisions) Act 1961. Rather, the Applicant's position is, as I understand it, that the conviction should be quashed *simpliciter*, with no order for remittal to the District Court.

63. At the conclusion of the hearing on 19 December 2024, I had indicated to the parties that—in the event the outcome of my reserved judgment were to be that the conviction is to be quashed—I would hear the parties further on the question

of whether there should be a remittal. These judicial review proceedings will be listed, for mention only, on 29 January 2025 at 10.45 am to give directions as to the exchange of written legal submissions in this regard.

Appearances

The applicant represented himself
Jane Horgan-Jones for the respondents instructed by the Chief State Solicitor