



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 290

Record Number: 2020 102

**Birmingham P.
McCarthy J.
Kennedy J.**

**IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS
EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND -

PHILIP O'BRIEN

RESPONDENT

JUDGMENT delivered on the 28th day of October 2021 by Ms. Justice Isobel Kennedy.

1. This is an appeal against the judgment and order of the High Court (Meenan J.) delivered on the 6th February 2020.
2. The matter came before the High Court by way of case stated by Judge Waters of the District Court pursuant to section 2 of the Summary Jurisdiction Act 1857 as extended by section 51 of the Courts (Supplemental Provisions) Act 1961.

Background

3. On the 30th May 2018 the respondent appeared before the District Court for summary trial to answer two complaints, the subject matter of the following summonses:-

- (i) The first summons alleged an offence of resisting and obstructing a peace officer, contrary to section 19 of the Criminal Justice (Public Order) Act 1994 ("the obstruction charge"); and
 - (ii) The second summons alleged an offence of simple assault contrary to section 2 of the Non-Fatal Offences Against The Person Act 1997 ("the assault charge").
4. A summary of the facts as found by the District Judge can be found at paras 3-5 of the High Court judgment ([2020] IEHC 110) and it is not necessary to repeat them here. The relevant facts can be simply stated. Members of An Garda Síochána entered the respondent's apartment in order to effect his arrest for the offence of breach of the peace, contrary to common law. The respondent resisted the attempts of the Gardaí to arrest him and the arrest was eventually effected in the kitchen of the apartment.
5. At the close of the prosecution case, an application of no case to answer was made where it was contended that the Gardaí had no right under common law to enter the respondent's apartment to effect an arrest for breach of the peace.
6. This application was refused, the judge finding that An Garda Síochána had a common law power to enter the respondent's apartment to effect an arrest for the offence of breach of the peace contrary to common law. The respondent was convicted of the obstruction charge and sought to appeal by way of Case Stated to the High Court. The opinion of the High Court was sought on the following questions:-
- (i) In light of the evidence heard before the District Court, did the Gardaí enjoy a common law power to enter the dwelling of the defendant to effect an arrest for the offence of breach of the peace, contrary to common law?
 - (ii) If the answer to question (i) is no, was the District Judge correct in holding that the defendant had a case to answer in relation to the obstruction charge?

Decision of the High Court

7. The High Court Judge came to a number of conclusions which led him to answer both questions in the negative. Firstly, he found that the English authorities on the issue before the Court were of limited assistance, given the provisions of Article 40.5 of the Constitution. These authorities include *Robson v. Hallett* [1967] 3 WLR 28 and *Rice v. Connolly* [1966] 2 QB 414. Secondly, he found that any permitted restriction of the constitutional right in question must be minimal and, save where life is in imminent danger, in which case other constitutional rights are engaged, the restrictions on the rights/guarantees enshrined in Article 40.5 are those set out in statute. In the instant case, the relevant statutory provision is section 6 of the Criminal Law Act 1997. Thirdly, the Gardaí did not rely on the provisions of section 6(2), therefore, the Gardaí did not enjoy a common law power to enter the dwelling of the defendant to effect an arrest for the offence of breach of the peace.

Grounds of appeal

8. The appellant puts forward the following three grounds of appeal:-

- (1) The learned judge erred in law by failing to consider whether the Gardaí had a right to enter the premises pursuant to section 6 of the Criminal Law Act 1997 and considering himself restricted to answering the specific questions posed in the case stated;
- (2) The learned judge erred in law by determining that, as section 6 had not been specifically relied on by the Gardaí, it did not apply;
- (3) The learned trial judge erred in law by finding that the Gardaí do not have a common law power of entry to effect an arrest for a breach of the peace contrary to common law.

Submissions of the appellant

9. The appellant submits that the judge erred in concluding that the Gardaí did not enjoy a common law power to enter the dwelling of the respondent to effect an arrest for the offence of breach of the peace. The appellant contends that in doing so, the judge conflated the fact that section 6(2) of the 1997 Act was not specifically relied upon to conclude that a common law power of entry did not exist. A common law power of entry can co-exist with a statutory power of entry, unless specifically excluded. It is further submitted that a finding that a common law power of entry to effect an arrest for breach of the peace exists does not dilute the inviolability of the dwelling as enshrined in the Constitution.
10. The appellant accepts that section 3 of the Criminal Law Act 1997 abolished the distinction between a felony and a misdemeanour and replaced the common law power of arrest with a statutory power. However, the appellant contends that it does not follow that section 6(2) is the only basis upon which entry could have been effected in the circumstances of the instant case.
11. The appellant submits that the English authorities make clear that the common law power of entry for breach of the peace goes no further than the statutory powers and as such, the trial judge was incorrect in his assessment that the English authorities were of limited assistance due to the provisions of Article 40.5 of the Constitution.
12. The appellant submits that the trial judge erred in determining that section 6 did not apply and that the decision in *The People (DPP) v. Laide* [2005] 1 IR 209 prevented reliance on section 6 in the instant case.
13. *Thorpe v. DPP* [2007] 1 IR 502 clarifies that breach of the peace, contrary to common law, is an arrestable offence, and therefore amenable to the provisions of section 6 of the 1997 Act. Accordingly, the Gardaí had a right of entry in order to effect the arrest. Whilst the arresting garda may not have specifically stated the relevant power at the time, it is submitted that the existence of the power is sufficient to allow him entry, even if he mistakenly entered on the basis of another power he believed he had.

14. Although the District Judge was not asked to rule on this issue, the authorities make clear that the High Court Judge was entitled to consider this issue. The appellant refers to the following passage from *Attorney General (Fahy) v. Bruen (No. 2)* [1937] IR 125:-

“An appeal by way of Case Stated under this statute is left entirely at large so far as concerns questions of law, and not alone may questions be raised on appeal to which the statement of the Case was not directed, but also questions which were not raised at all before the District Justice, provided that they are questions of law.”

15. The appellant submits that the Case Stated asks the High Court whether, in light of the evidence, the Gardaí enjoyed a common law power to enter the dwelling of the respondent to effect an arrest. Accordingly, the High Court Judge should have addressed this question by also fully considering the power of arrest and entry under Section 6 of the Act of 1997. Notwithstanding that the issue was not pressed before the High Court, it is submitted that simply stating that it does not apply is insufficient and finding that *The People (DPP) v. Laide* [2005] 1 IR 209 was dispositive of the issue was incorrect in point of law.
16. The appellant submits that in *Laide*, the Gardaí entered the dwelling for the sole purpose of executing a search warrant to find a specific item. The Gardaí had never informed the occupiers that they had another purpose in mind, namely arrest, and, therefore, could not rely on section 6 of the 1997 Act to fill the void caused by the warrant's invalidity.

Submissions of the respondent

17. The respondent submits that while there is a common law power to effect an arrest for breach of the peace contrary to common law, this does not contain a power to enter a dwelling without a warrant.
18. The respondent further submits that the power of Gardaí to enter a dwelling to effect an arrest without a warrant is provided for by statute. Those statutory provisions do not apply to the circumstances of this case and in the absence of either a statutory power, permission, a common law power or a belief of imminent danger to life, the Gardaí did not enjoy any power to enter the respondent's dwelling.
19. As regards the issue of section 6, it was conceded by counsel for the appellant in the court below that section 6 was not utilised by the Gardaí and it did not form a part of the case. In those circumstances, the respondent takes issue with the introduction of this new point on appeal. The respondent refers to the following passage from *Lough Swilly Shell Fish Growers Co-Operative Society Limited & Anor. v. Bradley and Anor.* [2013] 1 IR 227 at para. 28:-

“There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in *K.D. (otherwise C.) v. M.C.* [1985] I.R. 697 for example); or where a party seeks to make an argument which was actually abandoned in the

High Court (as in *Movie News Ltd. v. Galway County Council* (Unreported, Supreme Court, 25th July, 1977)); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the Court nevertheless retains the power in appropriate cases to permit the argument to be made.”

20. Here, the new issue was expressly disavowed by the DPP in the High Court as having no applicability to the case. There was no reliance on the statutory power by the Gardaí. There was no reliance upon it in the District Court and it was expressly stated as being of no application in the High Court. It is therefore submitted by the respondent that the case lies at the extreme end of the continuum described in *Lough Swilly* and should not be permitted.

Issues

21. The District Judge stated a case at the request of the defendant/respondent in respect of which the opinion of the High Court was sought on the two questions set out above. However, the statement of the case before the High Court, and now under appeal, is primarily directed towards a single and important issue: whether members of An Garda Síochána enjoy a power at common law to enter a dwelling for the purpose of arrest for a breach of the peace.
22. Moreover, the appellant seeks to litigate an argument which was not advanced in the court below which concerns section 6(2) of the Criminal Law Act 1997 and the powers of entry for arrest thereunder.

Discussion

23. There is a common law power to arrest for breach of the peace, which does not require further interrogation for the purposes of this appeal, save to say that members of An Garda Síochána and citizens have a common law power to arrest for a breach of the peace which has been committed or which is being committed. See *R v. Howell* [1981] 3 All E.R. 383. Moreover, in *Thorpe v. Director of Public Prosecutions*, Murphy J., on the basis of the dicta in *AG v. Cunningham* [1932] IR 28, found that the offence of breach of the peace contrary to common law is an offence known to the law, moreover, that it was not abolished by the Criminal Justice (Public Order) Act 1994. Whilst it must be recalled that the 1994 Act concerns public places, Murphy J. found that the offence could arise in a private premises. Professor Walsh, in the second edition of Walsh on Criminal Procedure at para. 4-32, states that:-

“Both the citizen and a member of the Garda Síochána enjoy a common law power of arrest for breach of the peace. Either may arrest any person who has committed or who is committing a breach of the peace in his presence. Equally, either may arrest any person whom he reasonably believes is going to commit a breach of the peace in the immediate future. Normally, arrest would not be an option if the breach has terminated. However, the citizen or the member may arrest if he reasonably believes that a renewal of the breach is threatened.”

24. Interestingly, Professor Walsh queries whether a breach of the peace or an anticipated breach can arise where the only people present are members of An Garda Síochána, who do not anticipate violence from an individual. Whether that type of situation can give rise to a breach of the peace arises as the only persons who could be provoked into violence are the Gardaí, and they are sworn to keep the peace. If assaulted by that individual, then of course the Gardaí may arrest for that offence.
25. The Gardaí have very wide powers under the Criminal Justice (Public Order) Act 1994 (as amended). However, that act of course applies to anticipated breaches of the peace in a public place pursuant to section 6 of the 1994 Act, which makes it an offence for an individual to engage in any threatening, abusive, insulting words or behaviour with intent to provoke a breach of the peace, or being reckless as to whether any such breach might occur. The penalty for this summary offence is a maximum period of three months’ imprisonment and/or a fine not exceeding €1000.
26. However, I am primarily concerned for the moment with the power of entry at common law to effect an arrest for a breach of the peace.

Power to enter a dwelling at common law

27. As this case centres around the respondent’s dwelling the obvious starting point is Article 40.5 of the Constitution, which provides:-

“The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law”.

An individual’s home is their sanctuary where one is entitled to feel safe and secure and free from unauthorised intrusion. As stated eloquently by Hardiman J. in *The People (DPP) v. O’Brien* [2012] IECCA 68 at p. 7 and referred to by Hogan J. in *Omar v. Governor of Clover Hill Prison* [2013] IEHC 579 at para 32:-

“This constitutional guarantee presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and re-inforces other constitutional guarantees and values, such as assuring the dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby assures the citizen that his or her privacy, person and security will be protected

against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee.”

28. Hogan J. in *Omar v. The Governor of Cloverhill Prison* had cause to consider Article 40.5 where the issue involved a deportation order in respect of the applicant and his family, resulting in the Gardaí calling to the applicant’s dwelling late at night. The applicant invited the Gardaí onto the property, following which the Gardaí escorted the family to the airport for deportation. When the applicant informed the Gardaí that he did not wish to be deported, he was arrested under section 5(1) of the Immigration Act 1999, and an inquiry into the legality of his detention pursuant to Article 40.4.2 ensued. Whilst the applicant’s arrest in Dublin Airport grounded the inquiry, the issue could not be considered in isolation and, consequently, Hogan J. considered Article 40.5 with reference to the Criminal Law Act 1997. That Act altered the landscape regarding arrest without warrant and the power to enter to effect such an arrest, and also abolished the distinction between a felony and a misdemeanour. Previously, members of An Garda Síochána were permitted to enter a dwelling at common law to arrest a person whom they suspected had committed a felony, colloquially known as “in hot pursuit”(see *The People (AG) v. Hogan* (1972) 1 Frewen 360). The 1997 Act placed the power of arrest and the power to enter to effect an arrest on a statutory footing.

29. As succinctly stated by Hogan J. at para. 12:-

“Section 6(2) empowers a garda, subject to certain conditions, to enter a dwelling without a warrant for the purpose of effecting an arrest in respect of an arrestable offence (which itself is defined by s. 2 of the Act of 1997 as embracing any offence carrying punishment of imprisonment of at least five years or more) and to search the premises.”

I find it significant that at para. 32 of the judgment Hogan J. said:-

“Absent a search warrant or express statutory authority or an acute emergency which immediately threatened life and limb (such as was at issue in *Director of Public Prosecutions v. Michael Delaney* [1997] 3 I.R. 453), such conduct entirely compromised the substance of the Article 40.5 guarantee in respect of the inviolability of the dwelling.”

This observation was made by Hogan J. having found that the Gardaí instructed the Omar family to pack their bags and were given to understand that they were required to accompany the Gardaí to the airport.

30. That brings me to the *Delaney* decision, where Article 40.5 of the Constitution was centre stage but with very different circumstances to those in *Omar*. Members of An Garda Síochána arrived at the scene of a disturbance where a crowd armed with sticks had gathered on a street and were displaying hostility to persons in a flat. The five persons accused in that case had barricaded themselves inside the flat and were armed. Two women at the scene informed the Gardaí that there were young children in the flat.

Consequently, a garda entered, believing that he had a common law power to do so “on the basis of the safety of the children in the flat and in the interests of the persons inside the flat, having regard to the attitude of the mob outside.” The accused were ultimately arrested and charged with various offences including using words with intent to provoke a breach of the peace.

31. At trial before the District Court, an application was made in similar terms to the present case, for a direction on the basis that the entry by the Gardaí into the flat breached one of the accused’s constitutional rights. The judge stated a case of the opinion of the High Court pursuant to section 52 of the Courts (Supplemental Provisions) Act 1961. Morris J. concluded that where an actual danger to life existed, the hierarchy of rights should be weighed, and concluded that the constitutional right to life trumped other rights; specifically that of the inviolability of the dwelling. I am in full agreement with Morris J. where he said:-

“Secondly, it is clear that where an actual danger to life exists a garda is entitled to weigh in the balance the hierarchy of constitutional rights, namely, on the one hand the right to life as against the inviolability of the dwelling. If the garda came to the conclusion that a human life on the premises was in danger, then he is required to give priority to that constitutional right to life over and above all other constitutional rights.”

Delaney is authority for the proposition that the Gardaí have a power to enter a dwelling at common law in order to protect the life or lives of persons within the dwelling, the constitutional right to life prevailing in the hierarchy of rights.

32. Reliance is placed by the appellant on the judgment of Clark J. in *DPP (Garda O’Higgins) v. Farrell* [2009] IEHC 368 where the decisions of *DPP (Stratford) v. Fagan* [1994] 3 IR 265 was quoted with approval. However, this was in the context of the powers of the Gardaí to detect and prevent crime and did not specifically involve entry onto a person’s private residence.
33. *Thorpe v. DPP and Brady v. DPP* [2010] IEHC 231 make it quite clear that there is a common law offence of breach of the peace which was not abolished by the statutory offence of causing a breach of the peace contrary to section 6 of the 1994 Act. In *Clifford v. DPP* [2008] IEHC 322, Charleton J., in considering the statutory offence, made obiter observations regarding the common law offence of breach of the peace where he stated at para. 8:-

“[b]reach of the peace, that it occurs where a person finds himself, or herself, in a situation where they reasonably fear that if they do not withdraw from it quite promptly, they may either be assaulted or that the disturbance in respect of which the accused stands charged may create the risk of a response which is disorderly and in consequence potentially violent whereby, through direct or indirect means, bystanders may be caught up in violence...”

The appellant makes the argument that the Gardaí have a primary duty to keep the peace and to prevent breaches of the peace. Consequently, it is said that that duty must encompass the ability to enter a private dwelling in order to effect an arrest where such a breach is taking place.

34. There is no doubt that members of An Garda Síochána are under a duty to keep the peace and to prevent breaches of the peace. I would make the observation in passing as to whether the situation in which the Gardaí found themselves in the present case actually amounted to a breach of the peace. The offence of assault was properly charged, concerning the spitting incident, on which the respondent was convicted and which is not part of this Case Stated. Regardless of the duty of the Gardaí to keep the peace, the real question is whether the Gardaí had the power to enter the dwelling at common law in order to arrest for the common law offence of breach of the peace.
35. It seems to me that in no circumstances could it be said that the present case involves such a situation of acute emergency of risk to life and limb, such as in *Delaney*, which would have enabled the Gardaí to exercise a right to enter at common law. Here it must be recalled the Gardaí were not operating under a search warrant and nor were they invited onto the premises. In fact, as found by the District Judge, the respondent spat in Garda Coffey's face whilst he was trying to speak with him in the doorway of his apartment, following which the garda entered the apartment with his three colleagues. The District Judge found as a fact that the Gardaí entered the respondent's dwelling in order to effect an arrest for the offence of breach of the peace contrary to common law.
36. The Gardaí may enter a dwelling at common law in order to prevent an affray or where the exigencies of the circumstances require such entry as in the type of situation envisaged in *Delaney*; there is no general power to enter a person's dwelling at common law.
37. Reliance was placed by counsel for the appellant on the decision of *Thomas v. Sawkins* [1935] 2 KB 249 where the Court of King's Bench was satisfied that a police constable was entitled to enter a premises to prevent a breach of the peace without a warrant. The premises in question was a private premises where a meeting was being held and where there was a belief that seditious speeches in the course of a meeting would be made, thereby giving rise to potential breaches of the peace. This decision was considered by Morris J. in *Delaney* and he expressed the view, albeit *obiter*, that Irish courts would not have decided the decision in the same manner due to our Constitutional protections. I would add that Avory J. in *Sawkins* expressed the view that the meeting in question was described as a public meeting and that the public were invited to attend. Of course, that invitation could have been withdrawn from any particular person, but nonetheless the fact that it was a public meeting was part of the factual matrix of that case, which may well have had a bearing on the outcome. I draw support for this view from the words of Lawrence J. where he specifically states that the judgments proceed on the particular facts of the case.

38. In *McLeod v. Metropolitan Police Commissioner* [1994] EWCA Civ 2, the police entered the house to enable an individual to recover furniture from his ex-wife's home on foot of a court order. The case concerned entry onto a private premises without a warrant and it was held that the police had power at common law to enter private premises without a warrant to prevent a breach of the peace if they reasonably believed that a breach was likely to occur.
39. I do not believe either decision is persuasive authority for the proposition that the Gardaí have the power to enter a dwelling at common law to effect an arrest for a breach of the peace. In *McLeod*, the power to enter private premises is expressly preserved by section 17(6) of the Police and Criminal Evidence Act 1984. Moreover, the inviolability of the dwelling is expressly protected in this jurisdiction by Article 40.5 of the Constitution. Entry may be effected in pursuance of statute in certain circumstances, specifically section 6 of the Criminal Law Act 1996 which I will now consider.

Section 6(2) of the Criminal Law Act 1997

40. Section 6(2) of the 1997 Act provides a statutory basis for the Gardaí to enter a dwelling without a warrant in order to arrest an individual for an arrestable offence. This power is not without its limitations. The Gardaí may not enter the dwelling unless he or she has the consent of the occupier to do so, or some other person who appears to be in charge of the dwelling, unless one of four circumstances exist. The provisions of section 6(2) and (3) are as follows: –

“6(2) For the purpose of arresting a person without a warrant for an arrestable offence a member of the Garda Síochána may enter (if need be, by use of reasonable force) and search any premises (including the dwelling) where that person is or where the member, with reasonable cause, suspects that person to be, and where the premises is a dwelling the member shall not, unless acting with the consent of an occupier of the dwelling or other person who appears to the member to be in charge of the dwelling, enter that dwelling unless –

- (a) he or she or another such member has observed the person within or entering the dwelling, or
- (b) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person will either abscond for the purpose of avoiding justice or will obstruct the course of justice, or
- (c) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person would commit an arrestable offence, or
- (d) the person ordinarily resides at that dwelling.

(3) Without prejudice to any express amendment or repeal made by this Act, this section shall not affect the operation of any enactment or rule of law relating to powers of search or powers of arrest.”

41. Clearly, the exercise of the power conferred by section 6 of the 1997 Act must be strictly applied in order to respect the rights guaranteed by the constitution, and specifically Article 40.5. As established in *The People (DPP) v. Laide and Ryan* [2005] IECCA 24, for

the entry and subsequent arrest to be lawful, it is necessary that the entry is for that specific purpose of arrest. In that case, the Gardaí entered the dwelling on foot of a search warrant which subsequently transpired to be unlawful. Whilst there, on foot of an unlawful warrant, one of the occupants was arrested. At trial, an effort was made to retrospectively validate the entry on the basis that the Gardaí had a lawful power to enter the premises in order to arrest on foot of section 6. The Court of Criminal Appeal was at pains to emphasise the importance of the inviolability of a citizen's dwelling. Whilst section 6 of the 1997 act certainly empowers the Gardaí to enter a dwelling where one of the four specified statutory conditions are met, nonetheless the Court stated that given the particular circumstances of that case, it would have been necessary for the Gardaí to have informed the occupants that they wish to gain entry for the purpose of search and arrest.

42. Before proceeding to consider whether section 6 of the 1997 Act applies to the common law offence of breach of the peace, (and that, in my view, would be dependent on whether it is an arrestable offence as defined in section 3 of the Act), it is necessary to determine whether the appellant should be permitted to canvass an argument which was not canvassed before the District Judge, did not form part of the case stated, was not litigated before the High Court and, in fact, was not relied upon before that court and was expressly so stated.

New argument on appeal

43. In essence, the appellant now seeks to argue that the existence of the power conferred by section 6 was sufficient to enable the Gardaí to enter the respondent's dwelling even if An Garda Síochána entered on the basis of common law. The power existed and therefore the entry was lawful.

Principles governing new point on appeal generally

44. The Court of Appeal will not generally entertain a legal issue which was not addressed by the High Court. However, both the Court of Appeal and the Supreme Court retain a discretion to enable a point not argued at trial to be considered on appeal. This was made clear in relation to the Supreme Court by O'Donnell J. in *Lough Swilly Shellfish Growers v. Bradley* [2013] IESC 16.
45. O'Donnell J. stressed that there was a spectrum of cases in which a new issue is sought to be argued on appeal. At one end of that spectrum lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given, or where a party seeks to make an argument which was actually abandoned in the High Court, or where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases, O'Donnell J. considered that leave would not be granted to argue a new point of appeal.
46. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were

submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, or which arises and which was not in any way dependent upon the evidence adduced, or in interlocutory appeals where the fact that the plaintiff may be deprived of a full hearing should any appeal "result in a decision that the proceedings should be dismissed means that the court may in some circumstances be prepared to give greater latitude to such a plaintiff to argue further grounds on appeal." The Court may also be prepared to entertain fresh grounds if it arises from an important jurisdictional issue.

Principles governing an appeal by way of case stated

47. It is accepted by the appellant that the District Judge was not asked to determine this issue but the appellant relies on *Attorney General (Fahy) v. Bruen (No. 2)* [1937] IR 125 as authority for the proposition that on appeal by way of case stated, a court is not confined to the questions raised by the District Court judge in the case stated, but can look at other points of law which were not raised before the District Court:-

"The Case was stated and came before the Court pursuant to 20 & 21 Vict. c. 43. An appeal by way of Case Stated under this statute is left entirely at large so far as concerns questions of law, and not alone may questions be raised on appeal to which the statement of the Case was not directed, but also questions which were not raised at all before the District Justice, provided that they are questions of law. Dowse B. commented on the inconvenience of this practice in *Guardians of Enniskillen Union v. Hilliard* 14 L. R. Ir. 214 : 'These cases come before us not upon the points argued below, but upon points that are completely different from those that were raised before the Justices. The course adopted is very inconvenient, but it is clear that the appellant is not confined to his objections below, and full advantage has been taken of the law in this respect' (p. 220). There is, therefore, no doubt that Mr. Justice Hanna was entitled to turn aside from the one question upon which the argument before the District Justice turned, and devote his consideration entirely to what he calls the 'wider issues' raised by the facts stated."

48. In *National Transport Authority v. Granaghan* [2020] IEHC 224 the Court accepted Bruen as authority for the following at para. 21:-

"The Court accepts the submission made by Mr. McDonagh SC on behalf of the respondent that on an appeal by way of case stated, the Court is not confined to the questions raised by the District Court judge in the case stated, but can look at other points of law raised in the case, so as to give a comprehensive ruling in the matter"

While *Bruen* might suggest that there is scope for a court to consider issues of law that weren't brought up before the District Court, it must be noted that this case was decided before the *Lough Swilly* line of reasoning. It is therefore necessary to determine whether the nature of an appeal by way of case stated influences the principles governing a new point on appeal.

Discussion

49. The principles concerning an appeal by way of case stated are clear as is the broad nature of the jurisdiction. The fact that the particular point now sought to be litigated was not raised before the District Court and does not form part of the statement of the case stated would not have prevented the High Court from considering and determining the application of section 6 of the 1997 Act to the present case.
50. I do not believe therefore that the nature of an appeal by way of case stated really is the central issue in determining whether the appellant now ought to be allowed to advance and receive a determination on this issue. The principles to be applied are those applicable in determining whether a new point ought to be permitted to be litigated on appeal and therefore I am guided by the principles in the *Lough Swilly* decision.
51. The consideration of the section 6 issue does not involve new evidence but does raise the issue of whether a party to a proceedings ought to be permitted to litigate an argument which had been disavowed in the court below. The appellant contends that the argument was not advanced in the court below and that there is a subtle distinction between an argument which is not advanced and an argument which is made but then abandoned. I find this distinction too subtle. In my mind if the argument is not advanced, then it amounts to a fresh argument to be litigated before this court.
52. This Court was provided with an extract from the DAR in court below where it was stated on behalf of the appellant that section 6 did not apply and that the court did not have to concern itself with it. It was properly accepted on the part of the DPP that section 6 was not utilised by the Gardaí and that the evidence was that the Gardaí entered to effect an arrest for breach of the peace contrary to common law.
53. O'Donnell J. makes it quite clear that there is a spectrum of cases where new issues are sought to be litigated on appeal. A discretion lies in every instance to determine whether or not to permit a new point to be argued on appeal which must be exercised judicially and on the facts of any given case.
54. The point now sought be argued was not advanced in the court below, and it was expressly indicated to the court that this was the position adopted by the appellant before the High Court. Having said that, two points arise. Firstly, the High Court Judge referred to section 6 in the judgment and in his ultimate conclusions and, secondly, the appellant contends, notwithstanding that the issue was not argued in the court below, the Judge did not fully address the issue by simply stating that section 6 did not apply. Moreover, it is said that finding that *Laidé* was dispositive of the issue was incorrect in point of law. It is said that the precedential value militates against any artificial treatment of the issue on appeal.
55. It is true that the High Court Judge referred to section 6 in the judgment and as part of his ultimate conclusions; that in itself does not open the door to permitting a point not argued in the court below to be argued on appeal. I do not accept the submission on the part of the appellant that the judge's finding that section 6 did not apply was insufficient

in the circumstances. This is a difficult argument for the appellant to make in circumstances where it was clearly indicated to the court below that the section did not apply and so equally this does not open the door to litigate a point not argued.

56. The appellant contends that this is an important point which has precedential value and which it is necessary to have determined. It is said that the High Court Judge erred in finding that, as the Gardaí did not rely on the provisions of section 6(2), it followed that the Gardaí did not enjoy a common law power to enter the dwelling to arrest for breach of the peace. Moreover, it is said that the High Court Judge erred in determining that section 6 did not apply, and that the decision in *Laide* prevented reliance on section 6 in the circumstances of the instant case.
57. I have already stated that I do not find any merit in the argument that the judge found that the provisions of section 6(2) did not apply given that this was the submission made on the part of the appellant. I have already determined that the Gardaí do not have a general power at common law to enter a dwelling for the purpose of effecting an arrest save in limited circumstances, such as those which arose in the *Delaney* case.
58. A court must engage in a balancing exercise in determining whether or not to permit an additional argument to be advanced on appeal. On the facts of this case, section 6 was not relied upon by the Gardaí in effecting entry to the respondent's property, section 6 was not relied upon before the District Judge, the questions posed in the appeal by way of case stated did not refer to section 6 but specifically referred to a common law power of entry to arrest for breach of the peace, and the point was not litigated before the High Court and indeed was expressly not advanced before that court.
59. As stated by Clarke J. (as he then was) in *Moylist Construction Ltd v Doheny & Ors* [2016] IESC 9 at p 11:-

“In addition, it is necessary for any court to take into account the fact that an excessive indulgence in favour of allowing parties to argue new cases on appeal can only be likely to lead to parties being less concerned to ensure that their full case is presented before the first instance court, thus, in turn, leading to a significant additional burden on court time and a risk of injustice across a whole range of cases. Except in the sort of cases identified by O'Donnell J. as being towards the appropriate end of the spectrum, that balance will lead to the exclusion of a new ground.”

60. In the circumstances, I am satisfied that the point now sought to be argued lies at the far end of the spectrum as identified by O'Donnell J. in *Lough Swilly* where it simply cannot be litigated on appeal.

Conclusions

61. In summary, therefore, I have concluded that there is a common law power vested in Gardaí and citizens for a breach of the peace at common law. This power does not extend to entering a dwelling at common law to effect an arrest for a breach of the peace. Gardaí

may enter a dwelling at common law where the exigencies of the situation demand it, such as where there is a risk to life and limb. Gardaí may also enter with express or implied consent of the occupier. As section 6 of the Criminal Law Act 1997 was expressly disavowed in the High Court, this point may not now be argued on appeal.

62. Accordingly, the appeal is dismissed.