

APPROVED

[2023] IEHC 489



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 11 August 2023

INTRODUCTION

1. This judgment resolves a disagreement between the parties as to the conditions which should be imposed on an order remitting a matter to the District Court for reconsideration. The disagreement arises in the following circumstances. The applicant seeks to set aside an order of the District Court directing the destruction of a dog owned by him. The respondent has indicated that he does not intend to defend the procedural fairness of the order of the District Court. The respondent seeks, instead, to have the matter reconsidered by the District Court. The parties

NO REDACTION REQUIRED

are in dispute as to the conditions, if any, which should be attached to the High Court order remitting the matter to the District Court for reconsideration. The essence of the dispute is whether the High Court should direct that the animal, the subject-matter of the proceedings, should continue to be housed in kennels pending the reconsideration of the matter by the District Court.

PROCEDURAL HISTORY

2. These judicial review proceedings are directed to the procedural fairness of a hearing before the District Court on 21 January 2023. The events leading up to the hearing were as follows. The applicant had been arrested on 17 January 2023. The arrest had been made on foot of a bench warrant issued by the Dublin Circuit Criminal Court. On 20 January 2023, the applicant was sentenced by Dublin Circuit Criminal Court to a term of imprisonment of two and a half years.
3. It is alleged that, during the course of the applicant's arrest on 17 January 2023, a member of An Garda Síochána had been bitten by a dog owned by the applicant. The dog was seized at the time and has been detained in a professionally run kennels ever since. The dog is described as a "*Belgian Shepherd*".
4. A number of days after the applicant's arrest, a complaint was made by a member of An Garda Síochána to the District Court pursuant to Section 22 of the Control of Dogs Act 1986. This section provides, in relevant part, that upon a complaint being made to it by any interested person that a dog is dangerous and not kept under proper control, the District Court may make an order directing the destruction of the dog. A complainant is required, under Order 91 of the District Court Rules, to serve notice of intention to make such a complaint upon the

person in charge of the dog, and, where that person is not the owner of the dog, also upon such owner. Service must be effected at least seven days before the date of hearing of the complaint.

5. In the present case, these requirements in respect of service were not complied with. Instead, an email was sent to the applicant's solicitor on the morning of Saturday, 21 January 2023 indicating that it was intended to make an application to the District Court that very morning. The applicant's solicitor attended before the District Court and applied for an adjournment to allow the applicant to be present. To this end, the solicitor also sought an order directing that the applicant, who was in prison, be produced before the District Court at its next sitting: Monday, 23 January 2023. The District Court judge refused the application for an adjournment and proceeded to hear the complaint pursuant to Section 22 of the Control of Dogs Act 1986.
6. Sergeant Molloy gave evidence that he had seen the dog biting another member of An Garda Síochána on 17 January 2023. Sergeant Molloy also gave evidence that the dog was going to be put down on Monday, 23 January 2023. The District Court judge stated that he was accepting the Sergeant's evidence and made an order directing the destruction of the dog. This was done notwithstanding the objection made by the applicant's solicitor to the effect that the proceedings were being conducted in breach of fair procedures.
7. The operative part of the District Court order reads as follows:

“THE COURT being satisfied that notice of these proceedings was duly served upon the defendant and upon the owner of the dog,

having heard the evidence tendered by or on behalf of the complainant* (and the defendant, Kevin O'Keefe), and it appearing to the Court that the said dog is dangerous and not kept under proper control,

HEREBY ORDERS
that the dog be destroyed,

AND DIRECTS that the dog be delivered to Animal Control,
of Dublin City Council dog wardens to be destroyed.”

8. The District Court order did not specify a date by which the destruction of the dog was to have been carried out. However, the applicant’s solicitor apprehended from what had been said at the hearing that it was to be carried out two days later, on Monday, 23 January 2023.
9. It has been submitted on behalf of the applicant that an appeal to the Circuit Court did not represent an adequate alternative remedy to judicial review in circumstances where it appeared that the dog was to be destroyed on the next working day. There would not have been sufficient time to enter recognisances, file an appeal and apply for a stay on the order.
10. Accordingly, an *ex parte* application for leave to apply for judicial review was moved before the High Court on 21 January 2023, i.e. the same day that the District Court had made its order. The High Court (Creedon J.) granted leave to apply and imposed a stay restraining the destruction of the dog pending the determination of the judicial review proceedings.
11. The respondent has since indicated that he does not intend to defend the procedural fairness of the order of the District Court. This concession is sensibly made. Save in urgent cases, the owner of a dog is ordinarily entitled to seven days’ notice of an intended complaint pursuant to Section 22 of the Control of Dogs Act 1986. There is nothing in the papers before the High Court which indicates that there was any particular urgency in the present case. Here, the dog had already been seized and was being detained and there was no immediate risk to the public.

12. The parties are broadly agreed that the matter should now be remitted to the District Court for reconsideration. The only outstanding dispute between the parties is as to what should happen to the dog in the interim.
13. As matters currently stand, the dog is being housed in professionally run kennels. The operator of the kennels has provided a report which makes worrying reading as follows:

“[The dog] has been housed at Hollygrove Kennels since mid-January. From the outset the animal has exhibited extremely aggressive behaviour. The dog has attempted to attack and bite all of its carers on a daily basis. Her behaviour has deteriorated steadily since its incarceration to an extent that it is now what can be characterized as food guarding/aggressive.

We need a safe environment for our staff to work and [the dog’s] behaviour threatens that environment. Even our most senior staff, with more than 30 years of experience in the handling of aggressive dogs finds it difficult to feed and clean up after [the dog], the care of this animal has become so fraught that we can no longer put our staff in contact with [the dog] as we have no doubt she will attack.

[The vet] has performed an assessment to gauge the well-being of the animal. He has found that the dog’s behaviour has deteriorated to such an extent that she is too dangerous to approach without medication and in his opinion, there is no possibility that she will improve. See attached report.

It is with enormous regret that we at Hollygrove can no longer care for this dog and request that she be euthanized or removed from this facility.”

14. The report of the veterinary surgeon, referred to above, reads as follows in relevant part:

“[The dog] was extremely aggressive, lunging at the kennel gate, stripping her teeth with intent to harm.

On subsequent visits her behaviour has steadily disimproved she is challenging kennel staff and is proving very dangerous in the vicinity of other housed animals.

[The dog] is a fit athletic dog and confinement is certainly adding to her stress, kennel guarding, frenzied barking and snarling.

She has an unpredictable nature and coupled with her agility and swiftness of foot she is in my opinion a dangerous dog.

Prolonged confinement for [the dog] will not be advantageous to her and in my opinion on animal welfare grounds this dog should be euthanised.”

15. As appears, both the operator of the kennels and the veterinary surgeon have offered the opinion that the dog is dangerous and a cause of concern to its handlers. In the circumstances, the respondent submits that, on public safety grounds, the High Court should make a consequential order which ensures that the dog is kept in professional care pending the reconsideration of the complaint by the District Court. The applicant, conversely, contends that the dog should be immediately released into the care of his cousin, Mr. Ciaran Kinahan.
16. The parties exchanged written legal submissions and the matter was heard before me on 31 July 2023. Judgment was reserved until today’s date.

HIGH COURT’S JUDICIAL REVIEW JURISDICTION

17. It may assist the reader in better understanding the dispute between the parties to pause here and to examine the nature of the High Court’s judicial review jurisdiction. This exercise is appropriate in circumstances where there was much debate at the hearing before me as to whether the High Court enjoys an inherent jurisdiction to impose conditions on an order for remittal. The implication of some of the submissions being that, once the High Court makes an order of *certiorari*, it has only a very limited jurisdiction thereafter to regulate affairs in the interregnum between the making of the order for remittal and the reconsideration of the matter by the District Court.

18. With respect, these submissions tend to miss the point that the High Court's judicial review jurisdiction is quintessentially an inherent jurisdiction, rather than one conferred by statute or rules. The High Court exercises a supervisory role over lower courts as part of its full original jurisdiction under Article 34.3.1° of the Constitution of Ireland. Whereas certain aspects of the procedural steps required of the parties are regulated by Order 84 of the Rules of the Superior Courts, the rules neither create nor delimit the substance of the High Court's judicial review jurisdiction.
19. The nature of the High Court's judicial review jurisdiction has been described as follows by the Supreme Court in *State (Abenglen Properties) v. Dublin Corporation* [1984] I.R. 381, [1982] I.L.R.M. 590 (at 392/596):
- “From this emergence three centuries ago of the means by which the Court of King's Bench controlled the judicial process of lower courts, the remedy of *certiorari* has been developed and extended to reach far beyond the mere control of judicial process in courts as such. Today it is the great remedy available to citizens, on application to the High Court, when any body or tribunal (be it a court or otherwise), having legal authority to affect their rights and having a duty to act judicially in accordance with the law and the Constitution, acts in excess of legal authority or contrary to its duty. Despite this development and extension, however, *certiorari* still retains its essential features. Its purpose is to supervise the exercise of jurisdiction by such bodies or tribunals and to control any usurpation or action in excess of jurisdiction. It is not available to correct errors or to review decisions or to make the High Court a court of appeal from the decisions complained of. In addition it remains a discretionary remedy.”
20. Counsel on behalf of the applicant referred to the judgment of the Supreme Court in *Tormey v. Ireland* [1985] I.R. 289, [1985] I.L.R.M. 375. It was submitted that this judgment stands as authority for the proposition that where jurisdiction over a particular matter has been conferred on the District Court, the High Court's jurisdiction is ousted. With respect, the position in respect of the allocation of

jurisdiction is more nuanced. The Supreme Court in *Tormey v. Ireland* emphasised that the High Court retains jurisdiction by way of judicial review:

“If, in exercise of its powers under Article 34, s. 3, sub-s. 4, Parliament commits certain matters or questions to the jurisdiction of the District Court or of the Circuit Court, the functions of hearing and determining those matters and questions may, expressly or by necessary implication, be given exclusively to those courts. But that does not mean that those matters and questions are put outside the original jurisdiction of the High Court. The inter-relation of Article 34, s. 3, sub-s. 1 and Article 34, s. 3, sub-s. 4 has the effect that, while the District Court or the Circuit Court may be given sole jurisdiction to hear and determine a particular matter or question, the full original jurisdiction of the High Court can be invoked so as to ensure that justice will be done in that matter or question. In this context the original jurisdiction of the High Court is exercisable in one or other of two ways. If there has not been a statutory devolution of jurisdiction on a local and limited basis to a court such as the District Court or the Circuit Court, the High Court will hear and determine the matter or question, without any qualitative or quantitative limitation of jurisdiction. On the other hand, if there has been such a devolution on an exclusive basis, the High Court will not hear and determine the matter or question, but its full jurisdiction is there to be invoked – in proceedings such as habeas corpus, certiorari, prohibition, mandamus, quo warranto, injunction or a declaratory action – so as to ensure that the hearing and determination will be in accordance with law. Save to the extent required by the terms of the Constitution itself, no justiciable matter or question may be excluded from the range of the original jurisdiction of the High Court.”

21. It is well established that the High Court has jurisdiction to make such consequential orders as may be necessary to ensure that its judicial review jurisdiction is effective. For example, the High Court has jurisdiction to impose a stay on the proceedings of a public body even in advance of its having granted leave to apply for judicial review. See, for example, *Harding v. Cork County Council* [2006] 1 I.R. 294 where Kelly J. held that the High Court had inherent jurisdiction to grant a stay in advance of leave, lest the judicial review proceedings be overtaken by events and rendered futile. In a subsequent

judgment in the same litigation, Clarke J. confirmed that the High Court's inherent jurisdiction extends to the grant of a stay pending an appeal, even in circumstances where the High Court had dismissed the application for judicial review: *Harding v. Cork County Council* [2007] IEHC 31.

22. The High Court also has jurisdiction to stay an order of *certiorari* or to postpone making such an order. This has been confirmed by the Supreme Court in its recent judgment in *Balz v. An Bord Pleanála* [2020] IESC 22 (at paragraphs 28 and 29):

“It is now accepted that the court has jurisdiction to stay an order or to postpone the making of any order (which may have the same effect). That indeed is an important element in the court's capacity to do justice in any individual case. Otherwise, the court would be unable to distinguish between cases of flagrant, deliberate, and serious breach on the one hand, and perhaps innocent and limited error for which the party indeed may not themselves be responsible, but where, nevertheless, serious and disproportionate consequences could ensue if effect was given to an order of the court immediately.

The question, however, of whether it is appropriate to make an order with immediate effect arises with particular force where there is, moreover, a jurisdiction to cure the error. This may occur in the context of judicial review where perhaps an order may be found to be invalid because of procedural error or failure, which does not reflect in any way on the merits of the case. Where a substantive decision may be made which may have the same effect as the impugned decision, a question arises as to what the position should be in the meantime.”

23. The judgment states as follows at paragraph 32:

“However, a real difficulty does arise in the context of judicial review, particularly in the nature of *certiorari*. The proposition that any decision if found to be invalid in any respect is therefore void *ab initio* means that once a judgment is given to that effect, parties may be entitled to treat the order or decision (although not necessarily steps taken under it) as a nullity, in which case it may be doubted that a stay on a formal order has any real effect in law. I do not think a court should shrink from the fact that in some cases it may

even be necessary to conclude that the effect of the stay is to give temporary validity to the decision or order which the judgment has found to be invalid, but the very difficulty of such a concept illustrates the fact that the exercise of any such jurisdiction must be exceptional. The normal sequence is, and must be, that once a judgment is given, the formal order should follow as a matter of course, and there is a significant and heavy onus upon a party which would seek to invite the court to distinguish between the terms of its judgment and the giving effect to that judgment by a formal order.”

24. The proceedings in *Balz* involved a challenge to a grant of planning permission in respect of a wind farm project. The Supreme Court, in its principal judgment on the appeal, had held that the planning permission was invalid and proposed to make an order of *certiorari*. The appeal proceedings were adjourned to allow the parties to make submissions on the form of order. In the interim, the notice party developer had made an application for an alternative form of development consent. (It should be explained that this involved a different administrative process than that impugned in the proceedings and the developer had not sought an order for remittal). The developer then invited the Supreme Court to impose a stay on its order setting aside the planning permission. The developer wished to avoid a situation whereby—in any interregnum between the making of an order of *certiorari* and the grant of a new development consent—the project would be rendered “*unauthorised development*”.
25. The factors in favour of imposing a stay on the order of *certiorari* included the following. First, the making of an immediate order of *certiorari* might have resulted in the loss to the developer of a form of government subsidy. Such loss would have been seriously financially damaging to the developer. Moreover, any such financial damage would be an unfortunate consequence of the proceedings rather than their object. Secondly, the Supreme Court was prepared

to accept that the developer had a real prospect of obtaining an alternative form of development consent.

26. The primary factor which weighed against imposing a stay was that the developer had continued to carry out completion works on the site *after* the delivery of the Supreme Court's earlier judgment on the substance of the appeal.
27. The Supreme Court ultimately imposed a limited form of stay on the order of *certiorari* but made the stay conditional on the developer undertaking not to operate the wind farm pending a decision on the alternative development consent.
28. It follows as a corollary of the fact that the High Court has jurisdiction to postpone making an order of *certiorari* that it must also have jurisdiction to take the less drastic step of making such an order contingent on the matter being remitted for reconsideration by the original decision-maker on specified conditions.
29. Order 84, rule 27(4) of the Rules of the Superior Courts (as amended in 2011) provides as follows:

“Where the relief sought is an order of *certiorari* and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court.”

30. The principles governing the exercise of the power to make an order for remittal have been set out authoritatively in two judgments of the former Chief Justice delivered when he was a judge of the High Court. In *Tristor Ltd v An Bord Pleanála (No. 2)* [2010] IEHC 454, Clarke J. (as he then was) emphasised that the overriding principle behind any remedy in civil proceedings should be to attempt,

in as clinical a way as is possible, to undo the consequences of any wrongful or invalid act. The court should not seek to do more than that, but equally the court should not seek to do less than that. Clarke J. went on to say that the extent to which it may be possible to do so will depend on the facts and the legal framework within which any invalid decision may have taken place. On the facts of *Tristor Ltd*, the court ruled that the development plan process should be taken up from the point immediately prior to the invalid Ministerial direction.

31. Clarke J. returned to discuss the remittal jurisdiction in *Christian v. Dublin City Council (No. 2)* [2012] IEHC 309.

“It is not necessary for a court which quashes an order or measure made or taken at the end of a lengthy process to necessarily require that the process go back to the beginning. Where the process is conducted in a regular and lawful way up to a certain point in time, then the court should give consideration as to whether there is any good reason to start the process again. Active consideration should be given to the possibility of remitting the matter back to the decision-maker or decision-makers to continue the process from the point in time where it can be said to have gone wrong. [...]”

32. Clarke J. also indicated that the court’s inherent jurisdiction allows it to give directions as to the process to be followed by that decision-maker in reconsidering the matter.

“It seems to me that where a matter is referred back to a decision-maker, the inherent jurisdiction of the court entitles the court to give directions as to the process to be followed by that decision-maker in reconsidering the matter. However, the court should, in giving such directions, attempt to replicate, insofar as it may be practicable, the legal requirements that would apply, whether under statute, rules or the like, to the making of decisions of that type. It will not always be possible to ensure exact compliance with the relevant regime, for it is in the nature of a decision having already been made and having been subsequently quashed, that some variation on the normal procedure may be necessitated.”

33. In determining whether or not to make an order for remittal, the High Court must first identify the point in time at which the earlier decision-making process is said to have gone awry. This is because the objective of remittal is to reset the clock, and insofar as is practicable to allow the decision-making process to resume from a point in time prior to the happening of the error of law which ultimately led to the setting aside of the original decision.

DETAILED DISCUSSION

34. The respondent has indicated that he does not intend to defend the procedural fairness of the hearing before the District Court. The respondent is, however, anxious to ensure, for reasons of public safety, that the dog is not released pending a further hearing before the District Court. The respondent has put forward a number of options in this regard. The first of which is that the High Court should, in effect, stay the making of an order of *certiorari* pending the reconsideration of the matter by the District Court.
35. With respect, this first option presents an unnecessary jurisdictional complication. In particular, it raises the question as to whether it would be open to the District Court to make a *second* order under Section 22 of the Control of Dogs Act 1986 in respect of the same animal in circumstances where the order of 21 January 2023 remains extant. Whereas there is nothing to preclude a series of consecutive applications being made under Section 22 where, for example, there has been a change in circumstances, it is a different matter where there is an extant order. It is at least arguable that it would represent an abuse of process to seek an order from the District Court when an order, in materially identical terms, is already in existence.

36. It seems preferable, therefore, that the High Court should make an order of *certiorari* accompanied by an order for remittal pursuant to Order 84, rule 27 of the Rules of the Superior Courts. The complaint under Section 22 of the Control of Dogs Act 1986 would be remitted to the District Court with a direction to reconsider it and reach a decision in accordance with the findings of the High Court. The question of what is to happen to the dog in the interim could be dealt with by way of condition attached to the order for remittal, as appropriate.
37. The applicant objects to the imposition of any conditions on the order for remittal. It is submitted that the dog should simply be released into the care of the family member nominated by the applicant. This objection is advanced by reference to two related arguments. First, it is said that there is no legislative basis for holding a dog pending the hearing of a complaint before the District Court and that the respondent is, in effect, inviting the High Court to fill a lacuna in the Control of Dogs Act 1986. Secondly, it is said that the High Court should restore the *status quo ante* by directing the release of the dog.
38. The flaw in these arguments is that the legality of the seizure and subsequent detention of the dog has never been challenged in these judicial review proceedings. Rather, the proceedings are directed exclusively to the fairness of the District Court hearing. It will be recalled that the dog had been seized at the time of the applicant's arrest, and thus was already detained as of the date of the District Court hearing. Had the applicant wished to contend that the seizure and subsequent detention of the dog were unlawful, then he should have included pleas to this effect in his statement of grounds. The applicant did not do so. It is not now open to the applicant, at the conclusion of the proceedings, to advance a case which is not pleaded. The parameters of the case are fixed by the order

granting leave to apply for judicial review. The applicant has identified the District Court hearing as the point in time at which the procedure went wrong. Accordingly, this is the point in time to which the clock should be rewound.

39. For similar reasons, the applicant's argument that the release of the dog would restore the *status quo ante* is also misplaced. The factual position as of the date of the institution of these judicial review proceedings had been that the dog had already been seized and detained. This, then, represented the *status quo ante*. It is to be reiterated that the legality of the seizure and detention of the dog have never been challenged by the applicant.
40. More generally, the restoration of the *status quo ante* is not a decisive consideration in the assessment of the balance of justice. As recently reiterated by the Court of Appeal in *Ryanair DAC v. Skyscanner Ltd* [2022] IECA 64, there is no hard and fast rule easing the burden on a plaintiff who seeks interlocutory relief directed to the maintenance of the *status quo ante*.
41. The ultimate objective of the court in assessing the balance of justice, in the context of an order for remittal, is to arrange affairs pending the reconsideration of the matter by the decision-maker so as to minimise the risk of injustice. The restoration of the *status quo ante* is not an objective to be desired for its own sake: rather, it may be relevant in deciding how best to balance the rival legal rights asserted by the parties pending the reconsideration of the matter by the decision-maker. The court is not concerned with the protection of an existing state of factual affairs *per se* but rather with the protection of legal rights, and, more generally, the protection of the public interest.
42. It should also be observed that the *status quo ante* may turn on the happenstance of the timing of the institution of the judicial review proceedings relative to the

timing of the impugned act or decision. In the case of a late start, the *status quo ante* may already have changed prior to the institution of the proceedings. The form of an order for remittal should be determined on a principled basis and not by reference to arbitrary issues of timing.

43. For completeness, it should be observed that the argument underpinning the applicant's submissions, i.e. that the Control of Dogs Act 1986 does not allow for the seizure and detention of a dog in the absence of an order of the District Court, is incorrect. A dog warden is expressly empowered, under Section 16, to seize any dog and detain it in order to ascertain whether an offence under the Control of Dogs Act 1986 is being or has been committed.
44. Having disposed of the applicant's threshold objection to the imposition of any conditions on the order for remittal, it is necessary next to determine what conditions should be imposed. In this regard, it is salutary to recall the objective underlying the making of an order for remittal, namely, to allow the decision-making process to resume from a point in time prior to the happening of the error of law which ultimately led to the setting aside of the original decision. This is subject to the caveat that it may not always be practicable to replicate the procedure precisely.
45. The primary issue to be addressed in the present case is as to what is to happen to the dog pending the reconsideration of the complaint by the District Court. The dog is currently being detained in professionally run kennels. The High Court must decide whether or not to direct the release of the dog into the care of the family member nominated by the applicant. This decision, by definition, falls to be made in circumstances where the High Court cannot know what the ultimate outcome of the proceedings before the District Court will be. It is this

uncertainty which creates the risk of injustice. If the dog is released, only for the District Court subsequently to find that the dog is dangerous and not kept under proper control, then members of the public will have been placed at risk unnecessarily. Conversely, if the dog is not released, only for the District Court subsequently to dismiss the complaint and to order its release, then the dog will have been detained longer than necessary.

46. For the reasons which follow, the balance of justice weighs heavily in favour of the dog remaining in professional care pending the reconsideration of the complaint by the District Court. The two reports which have been put before the High Court indicate that the dog has exhibited extremely aggressive behaviour. The dog is recorded as attempting to attack and bite all of its carers on a daily basis.
47. The applicant's side has not sought, at this stage, to challenge the correctness of the reports. It will, of course, be open to the applicant to challenge the correctness of this characterisation of the dog's temperament before the District Court. It may well be that the applicant is able to persuade the District Court that the dog is not dangerous. For the purpose of the present interlocutory application, however, the High Court is entitled to rely on these reports in assessing the balance of justice.
48. The applicant's side have failed to put any evidence at all before the High Court as to the ability of the nominated family member to care for and control the dog. The court has no details as to that person's competence in handling dogs. The explanation offered, by counsel for the applicant, for the failure to provide such details is that the respondent had not asked for details of the competence of the person nominated to take care of the dog. With respect, this explanation is

unsatisfactory. It should have been obvious to the applicant that the High Court would want to know about the competence of the person into whose care the dog was to be released. The failure on the part of the applicant to provide such details is a cause of grave concern. It suggests that the applicant has no appreciation of the potential seriousness of the situation. Certainly, it provides the High Court with no assurance that the dog will be kept under proper control if released into the care of the nominated person.

49. On the other side of the scales is the prejudice, if any, which would be suffered by the applicant if the dog is not released. In this regard, it is to be reiterated that the applicant is currently serving a sentence of imprisonment. Therefore, even if the dog were to be released pending the determination by the District Court, there is no question of the dog being returned to the possession of the applicant. Put otherwise, the applicant would not suffer any direct prejudice were it to be a condition of the remittal that the dog remain in the kennels.
50. It is submitted on behalf of the applicant that it is the dog's "*incarceration*" which is responsible for her current presentation. The implication being that if only the dog were to be released, then the various dangerous behaviours recorded by both the operator of the kennels and the veterinary surgeon would resolve. With respect, this submission is predicated on a misreading of the reports. The opinion is expressed in both reports that the dog is dangerous, and the veterinary surgeon states, in terms, that the dog should be euthanised. This is the context in which the remarks about continued detention are made, i.e. the point being that the prolonged detention of a dangerous dog, which requires to be euthanised, is not recommended on animal welfare grounds. Certainly, there is nothing in either report which suggests that the dog might be rehabilitated. There is no

suggestion that the only matter causing difficulty for the dog is its current detention, rather it is the character and the temperament of the dog which requires particular measures. Moreover, as already noted, there is no evidence before the High Court that the family member nominated to take care of the dog has the necessary competence to control the animal.

51. In summary, the balance of justice clearly lies in favour of the continued detention of the dog pending the reconsideration of the complaint by the District Court. This is in keeping with the purpose and intent of the Control of Dogs Act 1986, i.e. to ensure that members of the public are not put at risk by dangerous dogs. There is persuasive evidence before the court to the effect that this particular dog is dangerous and this poses a threat to the safety of any members of the public who might come into contact with the animal. It is in the public interest that the dog should remain in the control of the professionally run kennels pending the outcome of the District Court proceedings. There is no countervailing prejudice to the applicant which would justify directing the release of the dog.
52. It should be reiterated that this judgment is concerned only with the question of the form of remittal and has been reached on the basis of an interlocutory hearing. Ultimately, it is a matter for the District Court, having heard such evidence as is adduced by the parties, to reach a final conclusion on the complaint pursuant to Section 22 of the Control of Dogs Act 1986.

SECTION 22: “NOT KEPT UNDER PROPER CONTROL”

53. For completeness, it is necessary to address an argument, advanced in the written submissions filed on behalf of the applicant, in respect of the interpretation of

Section 22 of the Control of Dogs Act 1986. The argument appears to run 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 at 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 hearing 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 is 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.

54. With respect, such an interpretation of the legislation would be absurd. It would mean that a dog, no matter how dangerous and how out of control when in the care of its owner, could never be the subject of a destruction order if the dog had been seized by a dog warden *in advance* of the hearing before the District Court. Put otherwise, if the District Court, in assessing the question of control, is confined to considering the circumstances of the dog when in the charge of the dog warden, then the ability of the owner to control the dog would be irrelevant. This would defeat the legislative intent.
55. It should be acknowledged that counsel on behalf of the applicant indicated, at the hearing before me on 31 July 2023, that he was not standing over this aspect of the written submissions.

56. 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 the date of the original hearing, i.e. 21 January 2023. This argument is not well founded. 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.

CASE LAW ON HABEAS CORPUS

57. Both sides have referred the court to case law in respect of *habeas corpus*. I must admit to some unease in relying on case law in respect of the constitutional right to personal liberty in the context of a case about the detention of a dog at a kennels. Subject to this caveat, the case law confirms that the High Court enjoys an inherent jurisdiction to fashion an order which best meets the justice of the case. The Supreme Court in *F.X. v. Clinical Director of Central Mental Hospital* [2014] IESC 1, [2014] 1 I.R. 280 held that while there is no provision made for a stay in the context of an application under Article 40.4.2° of the

Constitution of Ireland, in special circumstances it might be inappropriate to make a simple order for release on foot of a successful application. It would, instead, be appropriate to make an order controlling the release of the person for the purpose of protecting such a person if he was incapable of protecting himself.

58. It should be emphasised that the decision in the present case is predicated on the case law discussed at paragraphs 17 to 33 above.

CONCLUSION AND PROPOSED FORM OF ORDER

59. The hearing before the District Court on 21 January 2023 was procedurally unfair in circumstances where the applicant had not been given adequate notice of the intended complaint and had not been afforded an opportunity to attend the hearing (whether physically or remotely). Accordingly, an order of *certiorari* will be made setting aside the order purportedly made pursuant to Section 22 of the Control of Dogs Act 1986.
60. 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.

61. As to legal costs, my *provisional* view is as follows. The default position under Section 169 of the Legal Services Regulation Act 2015 is that a party who has been "*entirely successful*" in proceedings will, normally, be entitled to recover its costs against the unsuccessful party. Here, the applicant succeeded in obtaining an order of *certiorari* but did not succeed in obtaining the immediate release of the dog. Most of the legal costs will have been incurred in respect of

this latter issue. The applicant did not avail of the pragmatic approach suggested by the High Court (Hyland J.) on 25 July 2023. In circumstances where both parties have been partially successful, my *provisional* view is that each party should bear its own costs of the judicial review proceedings. If either party wishes to contend for a different form of costs order than that proposed, they will have an opportunity to do so when these proceedings are next listed before me.

62. The proceedings will be listed before me, for final orders, on 18 August 2023 at 10.30 o'clock. This listing can be dispensed with if the parties are in a position to furnish an agreed form of order to the registrar.

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