

**THE HIGH COURT
JUDICIAL REVIEW**

[2024] IEHC 353

Record No. 2023/939 JR

Between:

J.S.

Applicant

-and-

M.K.

-and-

THE JUDGES OF THE NORTHERN CIRCUIT

Respondents

JUDGMENT of Ms. Justice Nuala Jackson delivered on the 29th day of May 2024.

1. The background to the application being considered by me is long and protracted and has been considered in detail in two separate judgments, one in the Court of Appeal [2021] IECA 204 and one by this Court (Phelan J.)(Ex Tempore Judgement delivered on the 27th November 2023). It is not necessary for me to extensively recite the litigation history between the Applicant and the First Named Respondent for the purposes of the application being considered by me. I have done so to the extent that is necessary for the consideration of the issues before me.
2. By Order of the 27th November 2023, following an application made *ex parte*, the Applicant herein was given leave by this Court (Phelan J.) to apply by way of judicial review for the following reliefs (referred to as D(1), (10) and (13) and, in part only, D(12) in the Order of this Court of that date):

- i. (D(1)) – “I seek for an order of Certiorari quashing the decision of the Judge [of the Circuit Court] from order of 18.05.2023 with the date of issue on 21.06.2023 from the case DCA [REDACTED] Circuit Court regarding the refusal of me access to DAR and the refusal of access for persons dealing with my complaints and conducting investigations from the family court case number [REDACTED] from Circuit Court [LOCATION REDACTED] to all this case by refusing to provided data, recordings of transcripts from DAR’s, information and documentation from case DCA [REDACTED] for evidentiary, investigative purposes and to enable the resolution of complaints and investigations of 24.11.2022 conducted by Judge [of the Circuit Court] of 2.11.2922, 18.05.2022 conducted by Judge [of the Circuit Court].”
- ii. (D(10)) – “I seek for an order declaration for access to an appropriate legal remedy for excessive length of court proceedings, who are unwilling to resolve cases within a reasonable time, despite being submitted more than seven years ago and being reminded of the lengthiness of actions and decisions in order to meet EU legal requirements on victim protection and access to court, a fair trial, effective remedy and fair judicial procedure in accordance with art. 2, 19.1 TEU, Article 325 TFEU, Art 4, 5 , 47 of the Charter of Fundamental Rights and Article 1, 2(a)(i), b, c, d, art. 3, art 4.1a, b, c, d, e, f, 2, art. 5, article 7, article 8, art 9 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crim, art. 40 of the Constitution, Art 3, 6, 13, 17, 18 of the ECHR and counteracting the lack of systemic rule of law by implementing ECHR judgments such as Farlen [McFarlane] v Ireland and Kearney v Ireland and many others??”
- iii. (D(13)) – “I seek an order providing for costs in accordance with the judgments of F & Ors v O’Donnell & ors 2009_ IEHC_142 para 13.9-13.13, 13.14, 14-14.1 and B/ Kilty v Judge Cormac Dunne 2020_ IESC_ 65 para 56-57,62.”
- iv. (D(12) in part) – this relief in the Statement of Grounds sought damages on an expansive basis but the leave as granted was “limited to damages for breach

of rights occasioned by unlawful delay in the determination of the Applicant's Circuit Court Appeal limited to the grounds set out in Paragraph 55 of the aforementioned judgment outlined as follows:

“(I) the delay in obtained a report from a psychologist under s. 32 of the Guardianship of Infants Act, 1964 (as amended) which in turn impedes the determination of custody and access issues pending before the Circuit Court is unreasonable and thereby breaches the Applicant's rights to constitutional justice and/or rights to a hearing within a reasonable time protected under Article 40.3 of the Constitution and/or Articles 6 and/or 13 of the European Convention on Human Rights and/or Articles 7 and/or 24 and/or 47 of the Charter of Fundamental Rights of the European Union; and

(II) the refusals to release the DAR are inadequately reasoned in breach of the Applicant's rights to constitutional justice (under Article 40.3 of the Constitution) and/or an effective remedy (under Articles 6 and/or 13 of the European Convention of Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union); and

(III) the Applicant is entitled to damages for a breach of his rights to constitutional justice and/or rights under Articles 6 and/or 13 of the European Convention on Human Rights and/or 7 and/or 47 of the Charter of Fundamental Rights of the European Union arising from unreasonable delays in the determination of his Circuit Court appeals.”

3. There has been no appeal by the Applicant from the leave so granted. In this regard, I make reference to the submissions of the Applicant in the context of this application which appear, in part, to be seeking a review of the Orders made at the leave stage (in particular, at Paragraphs 9 and 21). Such a review is not something which is before me or which I can consider in the context of the motion the subject of my judgment. In this regard, I rely upon the decisions in **A.P. v. DPP** [2011] 1 IR 729 at page 732 and **Keegan v Garda Síochána Ombudsman Commission** [2015] IESC 68, at paragraph 42.

4. It is important to recite at this point that in the judgment of this Court in respect of the leave application, Phelan J. states:

“Delay

36. *The applicant complains of delay in appointment of child psychologist to consider the voices of the children and make welfare recommendations. On the 20th of October, 2021 a s. 32(1)(a) and (b) report was ordered on the basis that costs be paid on a 50/50 basis. Despite the nomination of several different child psychologists since then (as many as four), no psychologist has agreed to provide a report and no report has been obtained. This means that it is now more than two years since a psychologist was appointed. This complaint of delay arises in the context of a remitted application such that his Circuit Court appeals remain to be determined more than five years from the time they were initiated. In the lifespan of a child this is a long period of time.*

37. *Without knowing the reasons for the refusal or unavailability of each of the four psychologists to act in this case as communicated to the court or to the Applicant, it is difficult to assess the cause of delay in this case. Nonetheless, it seems to me that the low threshold of arguability is reached in respect of a delay of over two years in obtaining a report under s. 32(1)(a) and (b) of the Guardianship of Infants Act, 1964 (as amended) and a failure to vindicate the rights of the children in this regard. While the children are not joined as parties in these proceedings, the Applicant’s rights as a parent (under Articles 40 and 41 of the Constitution and/or Articles 6 and/or 8 and/or 13 of the European Convention on Human Rights and/or Articles 7 and/or 24 and/or 47 of the Charter of Fundamental Rights of the European Union) who seeks enhanced access arrangements are also affected by delay. This delay brings into fresh focus the Applicant’s complaint that he has been denied an effective remedy.”*

She further states:

“54. Although the Applicant claims compensation for damage caused to him and his children in respect of the maintenance he was ordered to pay and the conduct of the family law proceedings, the only basis I can identify for asserting a claim for damages lies in a claim for damages for breach of rights to constitutional justice and/or an effective remedy arising from delays in finally and lawfully determining the Circuit Court appeal in this matter contrary to rights protected under the Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights of the

European Union. I consider that it is arguable (noting the State's position in McFarlane v Ireland (Application no. 31333/06)(Judgment of the European Court of Human Rights of 10th of September, 2010) referenced by the Applicant and the decision of the Supreme Court in Nash v. DPP in a judgment of Clarke J. delivered on the 24th October, 2016, at least in principle, that damages lie for breach of rights arising from unreasonable delays in determining legal claims. In view of a delay of more than two years in obtaining a psychologist's report to permit the voice of the child to be heard and custody, access and maintenance to be determined on appeal against an existing background of delay in appeals which date to 2017/2018, an arguable basis for contending that such a breach has occurred is identified on the papers before me." (underlining added)

5. In the context of this present application, it is, in my view, also important to clearly state that assertions of *mala fides* and inappropriate conduct on the part of named judges which the Applicant had asserted was rejected by Phelan J. in the context of the leave application. At Paragraph 53 of her judgement, she states:

"53. The Applicant seeks to preclude three named judges of the Circuit Court from dealing with his pending remitted appeal asserting mala fides and inappropriate conduct. These allegations are not grounded in any coherent or logical statement of fact properly grounded in evidence on affidavit before me and are entirely lacking in the necessary foundation for such serious claims. As the Applicant has not demonstrated through evidence that his complaints in this regard are other than frivolous or vexatious, I refuse to grant leave to seek relief on this basis."

Having regard to the determinations in this unappealed judgment and the consequent leave, which was granted to the Applicant, it must be re-iterated that the submissions of the Applicant (at Paragraphs 8, 9, 14 and 21) are not matters for determination by me.

6. It should be stated that in his pleadings as originally drafted, the Applicant named three Circuit Court Judges as the Second to Fourth Respondents in the proceedings. In her Order at the leave stage, Phelan J. ordered *“that the title of these proceedings be amended by substituting Judges of the Northern Circuit in the title of the within proceedings to reflect the Second, Third and Fourth Named Respondents correct title.”*

Of course, it was so ordered at *ex parte* stage in the proceedings and it is, in consequence, open to the Respondents to seek to have the matter addressed on an *inter partes* basis.

7. Having obtained leave in the terms set out above, the Applicant, as directed, served an Amended Statement of Grounds. This Amended Statement is long and detailed and intricate in nature but, whatever the drafting/pleading style of this document, the fact remains that leave has only be given on the grounds referenced in the Order of Phelan J.. The Applicant then issued a Notice of Motion dated the 11th December 2023 returnable to the 16th January 2024 wherein he sought to progress his judicial review claim. Prior to the return date, a detailed letter dated the 11th January 2024 was sent to the Applicant by the Chief State Solicitor’s Office (“CSSO”) referencing asserted procedural irregularities, inviting the Applicant to reconstitute the proceedings, and indicating that these matters would be brought to the attention of the Court on the return date of the motion. In essence, it was asserted that the Second Named Respondent (“Judges of the Northern Circuit”) should be removed from the proceedings on the basis of the provisions of Order 84, rule 22(2A) of the Rules of the Superior Courts (‘RSC’). By Order of this Court (Hyland J.) of the 16th January 2024, the CSSO was permitted *“... to issue, file and serve any Notice of Motion and Affidavit seeking the necessary reliefs which they have made reference to in their letter of the 11th day of January 2024 and also deal with the directions and Orders set out in the Order of Ms Justice Siobhan Phelan dated the 27th day of November 2023 such motion if issued to be made returnable to the 13th day of February 2024 ...”*. Such motion issued on the 30th January 2024 and seeks the following reliefs:

“1. An Order pursuant to Order 15, Rule 13 and/or Order 84, Rule 22(2A) of the Rules of the Superior Courts striking the Judges of the Northern Circuit, the

Second Named Respondents out of the proceedings as having been improperly joined;

2. In the alternative, an Order pursuant to Order 19, Rule 28 of the Rules of the Superior Courts and/or the inherent jurisdiction striking out the proceedings as against the Judges of the Northern Circuit, the Second Named Respondents, on the grounds that the proceedings disclose no reasonable cause of action; ...”

It is this motion which is for determination by me.

8. The Motion is grounded upon the Affidavit of Sarah Sheehy, solicitor of the CSSO. The Applicant takes issue with the fact that Ms. Sheehy is not a party to the proceedings (Paragraph 10 Submissions). However, the Chief State Solicitor’s Office entered an Appearance on behalf of the Second Named Respondents on the 21st December 2023 and the Affidavit grounding the present motion is properly made by the solicitor on record for these parties on their behalves, with the deponent correctly so averring. It does not appear to me that any issue of lateness arises such as engages Order 40, rule 4 and Order 84, rule 22(4) relates to the Statement of Opposition and Affidavit in support thereof and not to circumstances such as the present which relate to a procedural motion and grounding affidavit in respect of same (in this regard, I refer to Paragraphs 11 and 12 of the Applicant’s Submissions).
9. This Affidavit, entirely correctly, states that leave to seek a judicial review was granted on several grounds “none of which involve allegations of *mala fides* or personal misconduct against the Second Named Respondents.” It avers that notwithstanding there being no such allegations, “The Applicant was nevertheless directed to join the Second Named Respondents and to serve the proceedings on the Chief State Solicitors Office (‘CSSO’) and the Circuit Court Office in [REDACTED].” The Applicant, by the letter of the 11th January 2024 referred to above, was asked to reconstitute the proceedings by removing the Second Named Respondents as parties on the basis that their joinder did not accord with Order 84, Rule 22(2A). The Applicant’s reply may be taken as a refusal to do so although the substance of the replies (an email of the 14th January 2024 and a letter of the 14th January 2024) is prolix and not entirely on point. In his submissions, at Paragraph 13 thereof, the Applicant takes issue with Paragraph 5 of the Affidavit of Ms Sheehy. However, while the paragraph is short, it exhibits the

responses of the Applicant to the request concerning reconstitution, being the email and the letter aforementioned. It is amply clear from these exhibits that the Applicant did not agree to the proposed course of action and this motion thus ensued.

10. A very lengthy replying Affidavit was sworn by the Applicant on the 2nd February 2024 (filed on the 6th February 2024). I have considered the motion and both Affidavits at length although it must be said that the Affidavit of the Applicant goes more to the substantive issues being raised in the judicial review than to the narrow issue for determination by me. I received submissions in writing from both the Second Named Respondents and from the Applicant in advance of the hearing herein which submissions I have fully considered. The First Named Respondent has taken no part in this application before me. It is argued on behalf of the Second Named Respondents that I should use the power to strike out improperly joined parties which I have pursuant to Order 15, rule 13 of the RSC (whether due to the breach of the provisions of Order 84, rule 22(2A) of the RSC which has occurred in this case or otherwise) or, in the alternative, based upon the inherent jurisdiction of this Court. In the motion as issued, it is claimed, in the alternative, that the proceedings against the Second Named Respondents should be struck out as disclosing no reasonable cause of action. Submissions were not made at hearing or in the initial written submissions in relation to this relief.
11. The initial submissions filed by the Applicant were not directed at the application of Order 84, rule 22(2A) and the invocation of Order 15, rule 13 of the RSC in consequence. These submissions focus mainly on the substantive issues being raised by the Applicant in the within proceedings and, to some degree, seek to revisit the decision of Phelan J. of the 27th November 2023.
12. Having considered the written submissions of both parties and the oral submissions of the 11th March 2024, I sought clarification from the parties in relation to the following:

“Having fully considered the oral and written submissions of the parties herein, prior to finalising my judgment in respect of the motion before me, I believe it is appropriate that the parties would have an opportunity to address the following points which have not previously been addressed:

1. *The meaning and correct interpretation of the following words in Order 84, Rule 22(2A):*

“... and the object of the application is either to compel that court or an officer of that court to do any act in relation to the proceedings or to quash them or any order made therein – “

and particularly the meaning and correct interpretation of these words having regard to the relief at Paragraph 3(I), (II) and (III) of the Order of Phelan J. of the 27th November 2023 in respect of which leave was granted;

2. *Any matters arising in consequence pertinent to the reliefs sought in Paragraphs 1 and/or 2 of the Notice of Motion of the 30th January 2024, currently before me.”*

13. Supplemental written submissions were received from both the Applicant and the Second Named Respondents in consequence. The Second Named Respondent submits that the entirety of the Applicant’s permitted judicial review application comes within the scope of Order 84, rule 22(2A) of the RSC on the basis that *certiorari* is a quashing order, and the object of the application was to seek this relief, even if there were other objects also. They submit that it would be inconsistent with the purpose of the rule if inclusion of reliefs other than *certiorari* and *mandamus* could remove a judicial review application from its ambit. They further argue that declaratory reliefs and relief by way of damages require actions to be taken and, as such, come within the ambit of the sub-rule. Alternatively, it is submitted that the authorities (both pre- and post the amendment of the RSC) on the non-joinder of judges in judicial review proceedings do not support this principle being dependent upon the nature of the relief sought and the 2015 amendment should not be construed in a manner which conflicts with the constitutionally protected principle of judicial independence. In this regard, the Second Named Respondents submit that striking out the proceedings as against them pursuant to Order 15, rule 13 of the RSC or the inherent jurisdiction of this Court is justified on the basis of improper joinder whether or pursuant to Order 84, rule 22(2A) of the RSC or the established legal principles in relation to judicial independence and judicial

review proceedings. The Second Named Respondents in these submissions confirm that they are not proceeding to seek relief under Order 19, rule 28 of the RSC on the basis that *“such relief would necessarily entail engaging with the merits of the Applicant’s case, something which respect for the principle of judicial independence makes impossible.”*

14. In his Supplemental written submissions, the Applicant asserts that the adding of the judges is correct and in accordance with domestic, EU, international law and judicial ethics. It is concerning that these submissions continue to reference loss of “immunity” and “mala fides and other misconduct” in circumstances in which leave was expressly refused in relation to such assertions, which leave application was not appealed.

THE LAW

15. Order 84, rule 22(2A) was introduced into the Rules of the Superior Courts by S.I. No. 345 of 2015 and it provides as follows:

‘(2A) Where the application for judicial review relates to any proceedings in or before a court and the object of the application is either to compel that court or an officer of that court to do any act in relation to the proceedings or to quash them or any order made therein—

(a) the judge of the court concerned shall not be named in the title of the proceedings by way of judicial review, either as a respondent or as a notice party, or served, unless the relief sought in those proceedings is grounded on an allegation of mala fides or other form of personal misconduct by that judge in the conduct of the proceedings the subject of the application for judicial review such as would deprive that judge of immunity from suit,

(b) the other party or parties to the proceedings in the court concerned shall be named as the respondent or respondents, and

(c) a copy of the notice of motion or summons must also be sent to the Clerk or Registrar of the court concerned.’

Hogan, Morgan and Daly, *Administrative Law in Ireland*, (2019, 5th Ed, Round Hall) states:

“18-103

The result of this change is that the old practice of naming the judge as the respondent has by and large disappeared, so that the case is then defended by the true respondent, which is generally—but by no means invariably—either a State entity such as the Director of Public Prosecutions or the Attorney General. The exception, of course, is where it is alleged that the judge has acted mala fides or there has been an allegation of some other form of personal misconduct “by that judge in the conduct of the proceedings ... such as would deprive that judge of immunity from suit.” The requirement contained in Ord.84 r.22(2A)(c) that copies of the proceedings be nonetheless served on either the District Court clerk or the County Registrar (as the case may be) is nonetheless “mandatory” since it is only “by service of copies of the proceedings that a judge may determine whether they ought, by reason of the nature of the claim advanced, to have been added as a respondent to the proceedings.”

BACKGROUND

16. Prior to the introduction of the 2015 statutory instrument, the joinder of judges in proceedings was discussed in a number of decisions. In **O’Connor v Carroll** [1999] 2 IR 160, where the issue of costs in a successful judicial review (*certiorari*) of a Circuit Court order on appeal from the then Employment Appeals Tribunal was being considered, the Supreme Court (Murphy J.) stated:

“A claim for costs against a trial judge is anomalous but then so too are proceedings in which a judge is joined for the purpose of condemning the order made by him. It was understandable that the actions of lay or temporary magistrates might be subject to review in that way. It is questionable whether such a procedure is an appropriate method of reviewing the decisions of any of the Courts created by or established pursuant to the Constitution. That the decisions of every court - other than this, the final court of appeal, - should be subject to some appellate procedure is clearly desirable in the public interest. It would seem unnecessary for that purpose to have recourse to procedures in which the Judge must be joined as a party. Indeed such a procedure has little merit in practice as the judge whose decision is being impugned has no any

interest or function in supporting it. Furthermore, as has been pointed out by this Court, it would be inappropriate for any judge to swear an affidavit in any such proceedings as that would leave him open to cross-examination in relation to the judicial process. That would be contrary to the public interest. These problems might properly be the subject matter of law reform or, alternatively, review by the full court in an appropriate case.”

17. The matter was further considered in some detail by this Court in **O.F. v. O'Donnell and Others** [2010] 1 ILRM 198. Once again, the case concerned the issue of costs in the context of successful applications for *certiorari* in respect of District Court orders. On the issue of joinder, O'Neill J. stated:

[11.12] In the ten years or so that have elapsed since the decision of the Supreme Court in O' Connor v. Carroll [1999] 2 I.R. 160, the invariable practice in this court, where the decisions of a Circuit Court Judge or a District Court Judge are challenged by way of judicial review, is to join the judge as a respondent and the other contesting party either as a co-respondent or more frequently as a notice party. This practice follows the dictum, per curiam, of Finlay C.J. quoted above in McIlwraith v. His Honour Judge Fawsitt [1990] 1 I.R. 343. The dictum, also per curiam, of Murphy J. in O'Connor v. Carroll with which Hamilton C.J. and Barron J. agreed, to the effect that unless mala fides or impropriety is alleged the judge should not be joined, has not in practice been followed. If the dictum of Murphy J. is a correct statement of the law, then it should be rigorously applied and this Court should, on the granting of leave for judicial review, refuse to direct service on the judge and indeed should strike the judge from the proceedings.

[11.13] The reason for such a rule is succinctly explained in the judgment of Murphy J. in the passage quoted above. In addition, it should be mentioned, if not stressed, that where a judge intervenes in a judicial review application to defend his or her order, necessarily the judge must engage in dispute on issues of law and/or fact with one or more of the parties to the litigation heard by the judge. The immediate and unavoidable consequence of this is that the judge abandons his or her stance as an independent impartial adjudicator to become

a combatant in the dispute. In my opinion, such an outcome damages the paramount public interest in the independence of the judiciary expressed with clear constitutional force in Article 35.2 of the Constitution as follows:-

"All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law."

[11.14] The primary protectors of the independence and impartiality of judges are the judges themselves, who by their conduct both in the discharge of judicial office and in their private lives must avoid actions or omissions which damage judicial independence or impair public confidence in it. When confronted with a judicial review challenge to a decision made, a judge of the District Court or the Circuit Court should not enter the proceedings to defend their order, as to do so will invariably be inconsistent with the independent role of the judge. It is to be noted that this forbearance is almost universally observed by judges of the Circuit Court and District Court. In this respect it can be said that there is a material difference between the constitutional position of judges and the position of the wide variety of statutory tribunals who, of course, are obliged to act judicially.

[11.15] If it is the case that there cannot be an order for costs against a judge who is not guilty of any impropriety or mala fides, and if it is wrong for a judge of the Circuit Court or District Court to engage as a combatant in the proceedings, the question which necessarily arises is, what is the point in joining the judge in the proceedings at all? Where it is open to the other party to the litigation to be a legitimus contradictor, in my opinion, there is no point in joining the judge. No useful purpose is served by so doing and indeed as said above, in practice, the judge invariably does not participate in the proceedings and is invariably a superfluous or unnecessary party to the proceeding. On this basis alone, judges should not be joined. It is right that this is so. Were it otherwise, i.e. that judges were expected to defend their orders in judicial review proceedings, inevitably a great deal of the time of judges of the Circuit Court and District Court would be taken up dealing with judicial review litigation brought by litigants who were disappointed by rulings made in, or the final outcome of, the litigation before the judge. It might be said that for the purpose

of the enforcement of any order made it is necessary to join the judge. In my view this is not the case. In the extraordinary circumstance that a judge refused compliance with the order made by the High Court, the judge could be joined to the proceedings at that stage. This could only arise where the order was an order of mandamus. The enforcement of orders of certiorari do not require any compliance from the affected judge and the effect of orders of prohibition can be achieved by an order restraining the prosecuting party to the proceedings.'

ORDER 84, RULE 22(2A)

18. This provision has been considered in a number of judgments and there has not been unanimity in relation to its application.

19. Order 84, r. 22(2A) was considered in **Hall v Stepstone Mortgage Funding Ltd** [2015] IEHC 737. The Applicant sought to challenge a Circuit Court order for possession of his family home in favour of the Respondent. The Respondent argued that the Circuit Court judge was the appropriate respondent, but this Court (Humphreys J.) disagreed, holding that this was precluded by O.84, rule 22(2A) RSC:

"9. While the naming of a purely private entity as a respondent in a judicial review proceeding might be hitherto unfamiliar, that is precisely what the 2015 rules require, in the event that such an entity is the other party to judicial proceedings which are being challenged in the judicial review. Order 84, rule 22(2A)(b) requires that: "The other party or parties to the proceedings in the court concerned shall be named as the respondent or respondents."

10. This rule applies in a case where: "the application for judicial review relates to any proceedings in or before a court and the object of the application is either to compel that court or an officer of that court to do any act in relation to the proceedings or to quash them or any order made therein".

11. A judicial review action must relate to an underlying public law function being carried out by somebody, but not necessarily by the respondent. It is not the law that the respondent must itself be a public law entity. In the present case, the action clearly relates to a public law function, namely an order made by a

judge of the Circuit Court. Order 84, r. 22(2A)(a) says expressly that “the judge of the court concerned shall not be named in the title of the proceedings”. However some entity should normally be a legitimus contradictor, and in a case where the action relates to a challenge to a judicial proceeding, that entity is the other party to the underlying proceeding. The onus falls on such a party to defend the decision made by the court, if it wishes to do so, and that is what Mr. Hall is giving Stepstone Mortgage Funding Limited the opportunity to do. In doing so, he is acting entirely within the rules. The preliminary objection is, for that reason, misconceived. Such a respondent can adopt the stance that it does not wish to defend the decision, in which case the question becomes a matter between the applicant and the court, whereby the applicant must satisfy the court to the appropriate standard that the underlying decision was flawed. If, on the contrary, the other party does wish to defend the underlying decision, then it is entirely at liberty to do so, with all of the rights and liabilities that attach to any respondent.”

20. The provision was, yet again, considered in **T.D. v Judge Ni Chulachain, Ireland and the Attorney General [2016] IEHC 741** where this Court (Humphreys J.) stated:

“7. The Central Office appears to have sought to have the applicant amend the title, on filing, so as to refer to “A Judge of the Circuit Court”. While understandable, this does not appear to be the correct procedure because O. 84 r. 22(2A)(b) states that in such circumstances, “the other party or parties to the proceedings in the court concerned shall be named as the respondent or respondents”. The judge should not be a respondent, either by name or indirectly in the ghostly form of “a Judge of the Circuit Court”. The judge should just be struck out, either upon filing of the papers or when the matter comes before a court.”

21. In **M v M [2019] 2 IR 402**, the Court of Appeal (per Irvine J.) considered the provisions of the new sub-rule. At Paragraph 19 of the decision, the Court stated:

“19. The general rule in relation to who needs to be included in the proceedings as respondent in judicial review is that any party against whom relief is sought or whose decision is to be reviewed should be included in the proceedings as such.”

The Court then proceeded to consider the exception to the general rule contained within Order 84, rule 22(2A):

“21. Therefore, it is clear that in circumstances where a determination of the Circuit or District Court is to be judicially reviewed, the judge must not be named, either by name or anonymised, as respondent and that in its place, as substitute for the judge, the other party of parties in the Circuit or District Court should be joined as respondents – unless allegations of mala fides or other misconduct against the presiding judge form part of the grounds of review.

22. What must follow is that the other party is the legitimus contradictor, and it is up to them to decide whether or not they wish to support the correctness of the decision sought to be challenged. This is so in spite of the fact that they are not the party against whom relief is sought or who made the decision which is sought to be reviewed. This is an exception to the original rule.”

22. The Court of Appeal then continued to approve the dictum of Humphreys J. in **Hall**, above recited, at Paragraph 11. The exception which arises in the case of mala fides or other misconduct was recognised with Irvine J. stating:

“23. The rationale for this is that if such an allegation is made against a judge, they must be named as a respondent and served with the proceedings so that they can participate in the proceedings to defend their good name.”

23. As has been stated above, no such issue arises in this instance and this Court has so found in the judgment of Phelan J. of the 27th November 2023. The complaints of the Applicant in this regard were determined to be *“not grounded in any coherent or logical statement of fact properly grounded in evidence”* and *“frivolous or vexatious”* (Paragraph 53).

24. The underlying rationale of O.84, r. 22(2A) RSC is to protect judicial independence. In this regard, I reference the judgment of O’Neill J. in **O.F. v Judge O’Donnell [2009] IEHC 142** at paragraphs 11.12 – 11.15.

25. The Court of Appeal adopted a different approach to the interpretation of O.84, r. 22(2A) RSC in **Brady v. Revenue Commissioners [2021] IECA 8**, per Edwards J.. There the Applicant appealed against the refusal of leave to seek judicial review of his conviction by the Circuit Court for a revenue offence prosecuted by the Revenue Commissioners. Although it had not been an issue in the High Court, the Court of Appeal criticised counsel for Mr. Brady for not including the Circuit Court as respondent (at [49]-[52]):

“49. The first thing to be said about the application made to the High Court for leave to apply for judicial review is that it doesn’t purport to name the Circuit Court for the County of Monaghan as a respondent. That court is a court of record, and it is that court that has convicted him. If he wants to undo his conviction, in circumstances where he has no further right of appeal, he needs to seek on stateable grounds to quash his conviction him. While his draft statement of grounds does claim an Order of Certiorari quashing that order (as well as various declaration, stays on further action on foot of that order, and damages for alleged breaches of rights and the tort of detinue), that relief is sought not against the court that convicted him but against the presently name respondents none of whom were the legal entity that made the order in question. As a matter of first principles, a court cannot be asked in judicial review proceedings to quash the order or decision of a party that is not before the court.

50. Counsel for the appellant has sought to justify before us his framing of the intended proceedings in this way, on the basis that he understood that the appellant was precluded from joining the court that had convicted him by the terms of Order 84(2A) of the Rules of the Superior Courts.

...

52. Counsel has misinterpreted the rule. What is precluded [by O.84 r. 22 RSC] is identifying by name in the title to proceedings of a judicial office holder whose

actions are the subject of complaint, save in the circumstances permitted by the rule. There is no prohibition, nor could there be, on naming generically any institution or legal entity represented on the occasion in question by, or comprised by, a judicial office holder. Thus, while the appellant was precluded from naming “Her Honour Judge Berkley” as a respondent, there was nothing to preclude him from naming “The Circuit Court for the County of Monaghan” as a respondent, that being the court of record that convicted him.”

26. The contradiction between the **M Case** and the **Brady Case** was considered by the High Court (Phelan J.) in **Tallon v DPP** [2022] IEHC 322, in which the DPP argued, relying on the **Brady** decision, that the failure to include the District Court judge who had convicted Mr. Tallon of breaching a civil order under the Criminal Justice Act 2006 meant that the proceeding was improperly constituted. Phelan J. found against the argument on the basis that **M** was more in line with earlier jurisprudence (including the principles set out in **O.F.**) and that it had not been opened to the Court in **Brady**:

“70. For my own part, I favour the reasoning of the Court of Appeal in M v. M to that of the same Court (differently constituted) in Brady. It seems to me that the interpretation adopted in M v. M is more consistent with the language used in the Rule itself and also with the rationale for the rule change as expressed in O.F. In this case there is no allegation of mala fides or misconduct against a judge. It is clear that the Applicant’s grievances are not directed at the manner in which the proceedings were held but go to the substantive issues raised in the orders. The complaints advanced in these proceedings are not grounded in the judge’s conduct. Accordingly, on one interpretation of the rules and I believe the better one, there was no requirement to include the Judge in some way in the title to the proceedings.”

27. Subsequently, in **A.G. v A Judge of the District Court** [2023] IECA 311, the Court of Appeal (per Haughton J.) approved the **Hall** decision but referred to neither **M** nor **Brady**. Although leave to appeal to the Supreme Court was granted in **Brady**, it would appear that the appeal was not pursued.

28. The issue has been considered, albeit *obiter*, by the Supreme Court in **Ballyboden Tidy Towns Group v. An Bord Pleanala** [2024] IESC 4 (Donnelly J.) where it is stated at paragraph 8:

“In 2015, the Rules were amended to say that a judge whose order or jurisdiction is being challenged shall not be named in the title of the proceedings as a respondent or as a notice party. The import of this new rule was clarified by the Court of Appeal in M v M [2019] IECA 124, [2019] 2 IR 402. It is clear from the judgment of Irvine J. in M. that at least in these particular types of cases the burden of defending the validity of the decision under challenge will normally fall on a party other than the actual decision-maker.”

APPLICATION OF THE LAW

29. Having regard to the wording of the provision itself and the caselaw aforementioned, it seems to me that the following must be considered:

- (a) Is this an application for judicial review which “relates to any proceedings in or before a court”? It does not appear to me that there can be any argument that it is.

- (b) Sub-rule (2A) requires that *“the object of the application is either to compel that court or an officer of that court to do any act in relation to the proceedings or to quash them or any order made therein”*. What is the object of this application for judicial review? In relation to the relief being pursued herein by way of *certiorari*, I do not consider that there is any doubt that this is clearly within the ambit of the sub-rule. It is my view, based upon the clear language of the rule and the authorities, that where the challenge by way of judicial review is to the action or inaction of the court in respect of which review is sought, the exclusion of such judge or judges from the proceedings is mandated by Order 84, rule 22(2A). This provision causes not a little difficulty in the context of the other reliefs included in the leave granted in this application, being relief in the form of declarations, damages and costs. I will consider this further below.

- (c) The judge of the court is not to be named either as a respondent or as a notice party, nor are they to be served. Is this a direction for anonymisation or non-joinder? The preponderance of authorities seems to support the latter. In particular in this regard, I refer to **M v. M** [2019] 2 IR 411 at paragraph 21.
- (d) Is there any exception to this provision and does it arise in the present case? The only exception referenced in the RSC or the authorities is where the relief is grounded on an allegation of *mala fides* or other form of personal misconduct by the judge in the conduct of the proceedings. This exception clearly does not arise in the present case, it having been expressly considered by the Judge at the leave stage and expressly excluded (ref. Paragraph 5 above).
- (e) What is the relevance of the requirement to send copies of the proceedings to the Clerk or Registrar of the court concerned? The importance of this provision was amplified by Irvine J. in **M v M** [2019] 2 IR 402 at Paragraph 24:

“24. It is nonetheless mandatory that in all proceedings wherein it is sought to challenge an order made by a judge of the Circuit Court or District Court the proceedings be served in accordance with o/ 84, r. 22 RSC regardless of whether or not any allegation of mala fides or misconduct is made. This provision is particularly important having regard to the rules change in 2015 which removed the requirement to join as a respondent to the proceedings the judge who made the order under challenge. It is only by service of copies of the proceedings that a judge may determine whether they ought, by reason of the nature of the claim advance, to have been added as a respondent to the proceedings.”

30. I now return to (b) above being the matter in respect of which supplemental submissions were sought and received. It was submitted by the Second Named Respondents that relief by way of declaration and damages come within the wording of sub-rule (2A) on the basis that such reliefs “*are compulsory in that they would require the Second Named Respondents to do acts in relation to the proceedings below.*” It seems to me that while declaratory relief may (and arguably in this case does) have the object of compelling a court to a course of action or of quashing an order made, it is difficult to construe a claim for damages or costs as so doing.

31. In the event that there are relief(s) being sought, the object of which is not within the terms of sub-rule (2A), is there nonetheless an issue of improper joinder arising? It is clear that there is a long line of authority supporting the inappropriateness of naming judges as respondents in judicial review proceedings, absent allegations of mala fides or personal misconduct, although the practice in this regard is far from uniform. In **Feeney v Judge Clifford** [1989] IR 668, McCarthy J. referenced as “*undesirable*” that a district judge should play an active role in judicial review proceedings. In the context of a costs application, Murphy J. in **O’Connor v. Carroll** [1999] 2 IR 160 at page 166 stated, in relation to the joinder of the judge as a party, that “... *such a procedure has little merit in practice as the judge whose decision is being impugned has no interest or function in supporting it*” with Barron J. in the same case stating “..., *there is no need for him or her to be a party particularly where it is inappropriate that he or she should enter the arena by swearing an affidavit.*” Referencing “*the furtherance of public confidence in the general administration of justice*”, McKechnie J. in **Stephens v. Connellan** [2002] 4 IR 321 at page 341 stated:

“In the vast majority of cases it should be no part of one’s judicial activity to engage, as would a litigant, on an appeal or a review, when that person’s decision is directly in challenge. In such cases it will be for the parties to advance the arguments and make the submissions for and against the points at issue.”

The *dicta* of O’Neill J. in **O’F v. Judge O’Donnell and Others** [2010] ILRM 198 have been recited previously herein, linking the inappropriateness of joinder of judges with the principle of judicial independence. This is a decision which has been cited with approval in the context of the protection of the principle of judicial independence in post-2015 decisions also (**Tallon v. DPP and Ors** [2022] IEHC 322; **O’Donovan v. County Registrar for Cork City** [2021] IEHC 307; **Kilty v. Judge Cormac Dunne** [2018] IECA 80).

32. In **M v. M** [2019] 2 IR 411, having confirmed the exception, the Court of Appeal referenced the limits of such exception as being “*where allegations of mala fides or other misconduct against the presiding judge underpin the application for judicial*

review”, a situation which does not arise here. Likewise, in **A.G. v. A Judge of the District Court** [2023] IECA 311, Haughton J. in the Court of Appeal referenced with approval dicta of Humphreys J. in **Hall v. Stepstone Mortgage Funding Limited** [2015] IEHC 737 where, at paragraph 17, he stated:

“Merely because it is suggested that a particular hearing did not in some way of for some reason, whether outside the control of the court of otherwise, fully observe all of the stipulations of fair procedures does not, in any way, make it appropriate to name the judge as a respondent. Something much more flagrant and deliberate would be required to reach the level required to sustain an allegation of mala fides and the applicants here have made no such allegation in their amended papers. I, therefore, find that the learned Circuit Court judge in the present case was quite properly excluded from the title of the proceedings by the applicants.”

33. It was urged upon me by Counsel for the Second Named Respondents that I should rely upon the presumption against radical amendments in the context of interpreting the 2015 amendments. In this regard, I was referred to **Heather Hill v. An Bord Pleanala** [2022] 2 ILRM 313. At page 390 of that decision, in relation to statutory interpretation, Murray J. states:

214. The words of the section are the first port of call in its interpretation, and while the court must construe those words having regard to the context of the section, of the Act in which the section appears, the pre-existing relevant legal framework and the object of the legislation insofar as discernible, the onus is on those contending that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the legislature to establish this

34. The Second Named Applicants herein, in seeking to discharge this onus in the present context, refer to page 372 of the **Heather Hill** decision where Murray J. states:

“159. In both McCallig and the Court of Appeal judgment in this case, reference was made to ‘ the presumption against radical amendments’. In this jurisdiction, that principle is generally related to the decision of a Divisional High Court in Minister for Industry and Commerce v. Hales [1967] IR

50. *There, it was determined that the provisions of s. 3(3) of the Holidays (Employees) Act 1961 (which enabled the making of Regulations providing that any class of worker would be entitled to avail of various rights under the Act) did not empower the making of a statutory instrument covering insurance salesmen (who were contractors, not employees). Henchy J. approved a statement from p. 78 of Maxwell on 'Interpretation of Statutes':*

'Presumption against Implicit Alteration of Law. One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters, outside those limits, the law remains undisturbed. It is in the last degree improbable the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intentions with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act.'

160. *I cannot but think that this principle is sometimes now applied beyond its proper limits. One would expect that every statute 'changes' the law, and the limitations of language are such that it often happens that it can be said a law lacks clarity. Few statutes do not in some shape or form impinge upon rights (and in particular property rights) or effect alterations to the general law that cannot be described from someone's perspective as significantly departing from the pre-existing legal assumptions. There is no presumption against any of this. What there is, as the quoted passage shows, is a presumption that imprecise language will not be interpreted so as to impose significant changes to the pre-existing law particularly 'where the change is contrary to the actual*

objects of the Act'. To that might be added a related presumption that legislation will be strictly construed when it interferes with vested rights.'"

35. It is undoubtedly the case that this judicial review application comes within the scope of Order 84, rule 22 (2A) insofar as it relates to the relief of *certiorari*. I am of the view that there is clear merit in the argument that it would be inconsistent with the purpose of the rule as enunciated in the authorities if framing the relief being sought otherwise than in the context of *certiorari* or *mandamus* could remove a case from the ambit of it. It is further more clear that the authorities in relation to the joinder issue and the rationale for non-joinder enunciated therein do not suggest that this is dependent upon the relief being sought. The exception to non-joinder is repeatedly and consistently stated to be linked to assertions of *mala fides* and impropriety.

36. It is important to note that in none of the decisions referenced herein concerning Order 84, rule 22(2A) was the issue of a claim for damages being actively considered by the courts although declaratory relief and relief by way of costs do arise in certain of these authorities. However, there is ample support in the authorities both pre- and post-2015 that judges ought not to be joined where issues of *mala fides* or impropriety do not arise. The rationale behind the exclusion of the judge from proceedings in the context of Convention rights was also addressed by O'Neill J. in **O'F v. O'Donnell** [2010] ILRM 198:

"13.20 Next this court must consider the reason for or the legitimate aim for the rule excluding the judge from the proceedings and/or the prohibition on making a costs order in these cases. The reason for these rules is to protect and preserve the independence of the judiciary. It must be borne in mind that these rules do not apply where there is an allegation of male fides or impropriety. If a judge, who had not acted with male fides or impropriety could be sued and a costs order made against him or her, in my opinion that would be gross attack on the independence of the judiciary. In effect, a judge would be exposed to being sued and a costs order merely for error, albeit error as to jurisdiction, or error in the conduct of the proceedings. I see little or no difference between error of this kind and error which otherwise would be the subject matter of appeal. In both instances the judge falls into error but without male fides or impropriety.

13.21 It need hardly be said that a judiciary could not function if exposed to that kind of risk. Hence, I have no doubt that not only are these rules proportionate to the aim of protecting the independence of the judiciary, they, or to be more specific, the rule prohibiting costs is essential to maintain a functioning independent judiciary.

13.22 The rule excluding a judge from being sued in these circumstances, prevents the judge being drawn into dispute with one or more of the parties whose case he or she has heard and may have judged, and hence it preserves, protects and enhances the independence of the judiciary and, in particular, the public perception of that independence and impartiality. As no advantage whatsoever accrues to an applicant who seeks judicial review of a judge's order if the judge is joined in the judicial review, in the sense that the impugned order may be judicially reviewed but no order for costs may be made against the judge, conversely there is no disadvantage to that applicant if the judge is excluded from the proceedings because the order can still be judicially reviewed and there cannot be an order for costs against the judge.

13.23 Accordingly, in my opinion, these rules, in the limited circumstances in which they operate, amply satisfy the proportionality test and hence do not breach Article 6.1 or Article 13 of the Convention. This conclusion alone would be sufficient to dispose of the issue as to whether there has been a breach of Article 6.1 or Article 13.”

37. Of particular relevance in the present instance is, however, the *dictum* of O’Neill J. in at Paragraph 11.16:

‘[11.16] Can it be said that the exclusion of judges from judicial review proceedings where there is no allegation of mala fides or impropriety goes so far as to entitle judges in these circumstances to the benefit of the ancient common law principle of immunity from suit? Where it is wrong or inappropriate for a judge to participate in judicial review proceedings to defend his or her order, it necessarily follows, in my view, that it is wrong for an applicant for judicial review to seek to join the judge in the proceedings, when there is another potential legitimus contradictor available, thus enabling the

impugned order to be judicially reviewed. This, however, is a very different situation to that addressed by the immunity from suit. The immunity from suit is there to protect judges from actions for damages in respect of the acts done or things said in the discharge of judicial duties. If a claim for damages was to be pursued in judicial review proceedings, which is possible under O. 84 of the Rules of the Superior Court 1986, then the immunity would arise. Apart from this, the normal range of relief available in judicial review, namely orders of certiorari, prohibition or mandamus and associated declarations would not expose the judge to the risk or potential loss covered by the immunity and hence, in my view, the immunity does not apply in those circumstances.'

38. The *dictum* of Donnelly J. in **Ballyboden Tidy Towns Group v. An Bord Pleanala** [2024] IESC 4 at paragraph 35 is also instructive:

"... Usually, the correct respondent to judicial review proceedings is the decision-maker. A notable exception concerns judicial review relating to proceedings before a court. In that situation the judge is not to be named in the title to the proceedings unless an allegation of mala fides is made. The correct respondent is the party or parties to the proceedings (r. 22(2A)(b)).... In a family or civil law case, it is the other party to those proceedings who is the respondent and legitimus contradictor."

39. Having regard to these authorities, I am of the view that the 2015 amendment to the court rules should not be viewed as narrowing the broader rule that judges should not be parties in judicial review proceedings involving their decisions absent *mala fides* or impropriety. Given that no leave has been given in respect of allegations of *mala fides* or impropriety and such allegations have been definitively rejected by the Court at the leave stage and having regard to the authorities relating to the joinder of judges in judicial review proceedings and the rationale for non-joinder, it is my view that an Order pursuant to Order 15, rule 13 striking out the name of the Second Named Respondents is appropriate on the basis that they have been improperly joined as respondents in the proceedings whether pursuant to Order 84, rule 22(2A) or on the basis of the authorities referenced.

40. As relief pursuant to Order 19, rule 28 of the RSC was not pursued by the Second Named Respondents it is not necessary for me to address this relief in the motion under consideration.

41. It must, however, be remembered that leave has been granted herein on the terms previously set out herein and it is for the Applicant to consider whether all necessary parties have been included by him in the proceedings. Order 15, rule 13 is clear that a cause or matter should not be defeated by reason of the misjoinder or non-joinder of parties and makes broad and ample provision for application to be made in this regard. Additionally, the provisions of Order 84, rule 22(2A)(c) makes mandatory provision for a copy of the notice of motion or summons to be sent to the Clerk or Registrar of the court concerned.

42. In all of the circumstances of this application including the public interest and novelty of it, I would not propose to make any order for costs but I will give liberty to apply to both parties in this regard.