



**THE COURT OF APPEAL**

**Record Number: 158/2023**

**Birmingham P.**

**Neutral Citation number [2024] IECA 149**

**Kennedy J.**

**Burns J.**

**BETWEEN/**

**FRANCIS McGUINNESS**

**APPELLANT**

**- AND -**

**A JUDGE OF THE CIRCUIT COURT, THE DIRECTOR OF PUBLIC  
PROSECUTIONS, THE COMMISSIONER OF AN GARDA SÍOCHÁNA  
AND THE COURTS SERVICE**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Tara Burns delivered on the 6<sup>th</sup> day  
of June, 2024**

1. This is an appeal against an *ex tempore* judgment of the High Court (Hyland J) ([2023] IEHC 370) refusing to grant the appellant leave to apply by way of judicial review for a range of reliefs relating to a decision of the first respondent wherein she refused to state a case to the Court of Appeal.
2. At the *ex parte* leave application, the High Court directed that the application be made on notice to the respondents. As a result, a number of affidavits were filed on behalf of the respondents. The

respondents opposed leave being granted to the appellant on the basis that an arguable case had not been established.

### **Background**

3. On 29 January 2018, the appellant was convicted at Swords District Court of driving without a licence and insurance on 2 March 2013. He was fined and disqualified from driving for three years.
4. The appellant appealed against these convictions to the Circuit Court. This resulted in the Disqualification Order being suspended pending the appeal. After a number of court dates, which are no significance to this application, the appeal was struck out on 1 March 2019 as a result of the appellant's non-appearance. The District Court Order was affirmed resulting in the suspension of the Disqualification Order being lifted. On 15 March 2019, the appellant applied to have his appeal reinstated which application was successful. This should have resulted in the re-suspension of the Disqualification Order, however there was a failure to upload this information by the fourth respondent onto the Criminal Case Tracking System ('CCTS') system which interacts with the Garda PULSE system.
5. The appeal came before Her Honour Judge McDonnell on 1, 9, 12 and 16 July 2019. Over the course of these dates, Judge McDonnell indicated that she was satisfied that the appellant was not insured and that she was going to convict him. However, an issue arose as to whether mandatory disqualification arose, in light of two similar convictions from 1985 and 1987 which the appellant had for driving with no insurance. The appellant sought that Judge McDonnell state a case to the Court of Appeal in relation to this matter. Judge McDonnell requested written submissions.

6. The appellant's appeal, and another similar matter, were listed on 23 November 2020. The appellant was not notified of this listing and accordingly, neither himself nor his legal team were present. Having heard from the parties in the other case, Judge McDonnell determined not to state a case. However, she noted that the imposition of sentence remained outstanding in the appellant's case and requested the State to inform the appellant's solicitors what she had decided. It is this decision which the appellant seeks leave to apply for an Order of *Certiorari*, principally on the basis that he was not present when a decision was made not to state a case. Other grounds of invalidity are asserted.
7. The matter remained in the Circuit Court list and was adjourned on a couple of occasions in the appellant's absence (as he had not been informed that the case was active again, although there is a dispute about this) until it came before Her Honour Judge Hutton on 19 April 2021. Judge Hutton indicated that the matter was already finalised, however she agreed to adjourn the matter back to Judge McDonnell. This did not occur. The matter was listed on 15 July 2021 and adjourned to 4 October 2021, as a result of the non-appearance of the appellant.
8. On 31 August 2021, the appellant opened this application before the High Court which application was adjourned to put the respondents on notice of the application.
9. On 26 April 2022, the appeal in the Circuit Court came before Her Honour Judge Berkeley who adjourned the matter to 28 April 2022. On that date, Judge Berkeley informed the parties that Judge McDonnell told her that the case was finalised. Two Orders were drawn up following that hearing: the first was an Order convicting the appellant of both offences and imposing a sentence of a specified fine

in relation to each offence and disqualification from driving for three years. The second was an Order of Judge Berkeley stating that she made no Order on the 28 April 2022. The parties are agreed that a sentence was not imposed on 28 April 2022. The Order recording a conviction and sentence have been rectified following an application to the Circuit Court under the slip rule.

10. At no stage did Judge McDonnell make any formal Order in relation to this matter. While she indicated that she was satisfied that the offences were made out, she never imposed sentence in the matter and put the matter back for finalisation of sentence after she determined not to state a case.
11. Judge McDonnell has now retired. As the appeal was not finalised before her retirement, it will have to be reheard *de novo* before another judge of the Circuit Court.
12. Despite the suspension of the Disqualification Order arising from the appellant's appeal, the appellant was arrested on 8 July, 9 August and 27 November 2021 in respect of driving offences. The first two arrests occurred because of the failure to record the re-imposition of the suspension of the Disqualification Order after the appellant's appeal was reinstated. No reference to any of these events is made at paragraph E of the Statement of Grounds under "Grounds upon which Relief is sought".

**Test to be met for leave to apply by way of Judicial Review**

13. In *O'Doherty v. Minister for Health* [2022] IESC 32, O'Donnell C.J. stated at paragraph 39:-

*"39. ...It is clear that the threshold of arguability in G. v. DPP is a relatively low bar, but, as Birmingham P. said in the Court*

*of Appeal it is not a non-existent threshold. It is worth recalling in this context the observation of Charleton J. in the course of his judgment in Esme v. Minister for Justice and Law Reform [2015] IESC 26...:-*

*"any issue of law can be argued: but that is not the test. The point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of rational preliminary analysis, ultimately have a prospect of success.*

*The threshold is a familiar one in the law. It is in essence, the same test which arises when proceedings are sought to be struck out on the grounds that they are bound to fail, or the test that is normally required in order to seek an interlocutory injunction. It must be a case that has a prospect of success (otherwise it would not be an arguable case) but does not require more than that."*

### **Submissions of the Parties**

14. In essence, the appellant sought to have the Order of 23 November 2020 quashed on the basis that the decision not to state a case was invalidly made, principally because of the absence of the appellant from that hearing. At the hearing of the contested leave application, the appellant also sought leave to apply for an Order of Prohibition against the further prosecution of the Circuit Court appeal on the grounds of an unfairness arising because of the delay in the matter.
15. The respondents' position is that as the Circuit Court appeal was never finalised and remained a live appeal, and as Judge McDonnell has now retired, the appeal has to be heard *de novo*. Accordingly, all arguments which the appellant wishes to pursue, to include stating

a case, remain open to him. Therefore, the decision of the 23 November 2020 has no legal binding effect and any justiciable issue arising is moot. In relation to the Order of Prohibition sought, it was argued that this was not a relief which had been sought or pleaded. Such an order would have the disproportionate effect of continuing the suspension of the Disqualification Order in perpetuity. Most significantly, no unfairness arose which required the trial to be halted. Accordingly, it was submitted, an arguable case for leave had not been established.

**Certiorari of the Decision of 23 November 2020**

16. The appellant seeks to apply for *Certiorari* of the decision of the Circuit Court of 23 November 2020. This is despite the fact that an Order does not exist in relation to the appellant on this date. What occurred on that date is that Judge MacDonnell refused to state a case to the Court of Appeal in this matter, and a related case, and adjourned the appellant's case for finalisation of sentence.
17. The High Court refused to grant the appellant leave to apply for *Certiorari* of this decision on the following basis:-

*"However, in this case the decision has no consequences because the failure to complete the appeal and make a decision on sentencing, and the subsequent retirement of the Circuit Court judge means that her decision of 23 November 2020 has no legal effect on the applicant. It would therefore be futile to grant Certiorari of the decision of 23 November since that decision has no legal effect. There is no Order in existence that might be quashed. Judicial review cannot lie in respect of a decision that has no legal effect. There is no unfairness visited upon the applicant in circumstances where he is entitled to a*

*fresh appeal and can raise all issues again including that in relation to whether there ought to be a case stated.”*

**Discussion and Determination**

18. The High Court did not err in its determination on this issue. There is no Order in existence in relation to the appellant with respect to this date which can be quashed. Judge McDonnell determined that she was not stating a case in this matter and a similar matter. However, she adjourned the appellant’s case for finalisation of sentence.
  
19. Judge McDonnell has now retired and the Circuit Court appeal remains a live appeal. Accordingly, to be finalised, the appeal must be heard *de novo* before another Circuit Court Judge. While there was an indication from Judge McDonnell that she was satisfied of the appellant’s guilt on the two charges before her, she never proceeded to sentence the appellant. The appellant argues that the fact that Judge McDonnell indicated she was going to convict the appellant has a legal significance. I do not agree. The appeal in the instant case was from the conviction and sentence imposed by the District Court. Judge McDonnell indicated that she was satisfied of his guilt on the charges preferred but she did not make any formal Order in the matter. The indication that Judge McDonnell was finding the appellant guilty of the offences had no binding effect in the absence of a formal Order in respect of same. There is no bar to another Circuit Court judge hearing the appeal *de novo*.
  
20. As the appellant is entitled to a hearing *de novo*, all arguments and avenues are available to him at any future hearing, to include making an application for a case stated. Accordingly, any complaint which the appellant may have regarding the validity of Judge McDonnell’s

determination of 23 November 2020 not to state a case, is now rendered moot as the appeal must be heard *de novo*.

21. A justiciable issue capable of being resolved with a meaningful effect simply does not exist. Accordingly, an arguable case cannot be established to quash Judge McDonnell's determination on 23 November 2020 to include any of the reliefs sought with respect to that determination.

### **Prohibit the Prosecution of the Circuit Court Appeal**

22. In the Statement of Grounds filed, the appellant sought an Order of Prohibition against the third respondent from arresting and charging the appellant with an offence of driving without a licence or a certificate of insurance in the future. This is simply an unstateable relief to seek. At the hearing before the High Court, the appellant sought to amend this relief to instead prohibiting the further prosecution of the Circuit Court appeal. The High Court refused to permit the appellant to amend the Statement of Grounds to reflect this relief as the wording of an alternative relief had not been formulated nor had an application to amend the Statement of Grounds been brought or notified to the respondents. This was of particular significance in light of the fact that the respondents had been put on notice of the leave application. Permitting such an amendment would render futile the requirement of putting the respondents on notice of the application. Furthermore, the appellant failed to set out any evidential basis as to why a real risk of an unfair trial arose.
23. I am of the opinion that the High Court was correct to refuse the appellant permission to amend his Statement of Grounds to reflect a different relief, having put the respondents on notice of the



application. The very reason for putting the respondents on notice of the reliefs sought would be nullified had this permission been granted, in circumstances where the leave application was initially moved on 31 August 2021 but not heard until 23 May 2023.

24. I also agree that, in any event, an evidential basis for the assertion that a real risk of an unfair trial arose was simply not made out. The appellant relies on the stress the ongoing proceedings caused him together with the fact that the Disqualification Order would have been spent over Covid had the delay in prosecuting the matter not occurred. Not only does that submission fail to take account of the fact that it was the appellant who brought the appeal and sought the case stated, but those assertions do not in any way address the asserted issue of unfairness. Being discommoded in terms of when a Disqualification Order takes effect is quite a different matter to an asserted unfairness arising in the trial of the offences.

### **Damages**

25. The appellant submits that as he is pursuing a damages claim arising from the three arrests which occurred at a time when the Disqualification Order of the District Court was suspended, he has established an arguable case in relation to this issue. While a relief for damages is included in his Statement of Grounds, his "Grounds Upon which Relief is sought" fail to reflect any reference to these three arrests.
26. The High Court found that the arrests in July and August 2021 were because PULSE was not updated to reflect the reinstated appeal and was not because of any frailty in the appeal process or because of the decision of Judge McDonnell on 23 November 2020. While the arrest in November 2021 took place after the correction of the PULSE system, the Court was of the opinion that in relation to all three

arrests it was difficult to see how any of the issues relating to the conduct of his appeal could be relevant to any complaint which he wished to raise in relation to these arrests. The Court stated at paragraphs 48 and 49 of its judgment:-

*"48. In those circumstances, the desire to bring an action for damages for misfeasance against An Garda Siochana and possibly the other respondents cannot in my view justify me granting leave for judicial review, where the issues that the court will be required to determine if leave is granted are not material to any claim for damages. In those circumstances I refuse to grant leave in respect of the damages ground.*

*49. I equally reject the argument that leave should be granted in respect of the other reliefs simply to permit a damages claim to be brought in the context of these proceedings. Judicial review proceedings cannot be used as a vehicle to carry a damages claim where the proceedings do not otherwise meet the threshold for leave and/or are moot"*

27. The High Court did not err in this regard. If a legitimate complaint exists in relation to the three arrests referred to, it does not arise, or indeed is it alleged to have arisen, from the decision of 23 November 2020. It would be completely inappropriate that leave would be granted to pursue a damages claim when it is so far divorced from the principal decision at issue in the proceedings, and having regard to the fact that the arrests are not even referenced as "Grounds upon which Relief is sought" at paragraph E of the Statement of Grounds. Separate plenary proceedings are the appropriate manner to advance such a claim, if the appellant wishes to do so.

**Conclusion**

28. The appellant has failed to establish arguable grounds in respect of any of the reliefs which he seeks. The High Court did not err in refusing to grant leave. I therefore am of the opinion that the appeal against the High Court's refusal to grant leave to apply for judicial review should be dismissed.