



THE HIGH COURT

[2023 1268 JR]

[2024] IEHC 474

BETWEEN:

LINDA ROGERS

APPLICANT

AND

**LORCAN COWEN, SONIA BUGGY, ADRIAN O'REILLY, ADRIAN KILDEA,
DAVE FREEMAN, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
DISTRICT JUDGE JOHN HUGHES AND THE DIRECTOR OF PUBLIC
PROSECUTIONS**

RESPONDENTS

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 30th of July, 2024

1. Introduction

- 1.1 This Applicant was convicted in the District Court of public order offences arising out of an incident in Store Street Garda Station on 15th March 2023. The Applicant sought 126 separate High Court Orders in respect of these charges, some with sub-categories. The related applications to prohibit her criminal trial in the District Court, and for various injunctions, were refused by Hyland J.
- 1.2 The remaining matters came before me as a preliminary application for leave, on the 11th of July, 2024. The Applicant asked me to make all the Orders sought and submitted that she was entitled to a full hearing.

- 1.3 The reliefs sought, now that prohibition of the trial has failed, are declarations and mandamus in respect of the investigative and the trial process. In particular, the Applicant argued that insufficient disclosure had been made, including disclosure of the digital audio recordings (“DAR”) from hearings, existing custody records, all garda notebooks, CCTV evidence from inside and outside Store Street, and sworn statements from all garda Respondents.
- 1.4 The Respondents oppose the application for leave on the basis that: the application is too late and the Applicant made no application for an extension of time; her convictions are under appeal in the Circuit Court which is the appropriate venue; the issues are now moot as the trial has taken place.
- 1.5 The Applicant has appealed the refusal of the Orders of Prohibition to the Court of Appeal, which appeal is pending and, in that respect, invited me to find that I could not rely on the judgment of Hyland J. in this case, *Rogers v. DPP & Ors* [2024] IEHC 316. This is not the correct position but, as it happens, the decision of Hyland J. was not directly relevant on the issue before me so there was no need for me to consider her judgment, other than to the extent that it contained a detailed summary of the settled law which was also applicable in this case.
- 1.6 At the hearing, the Applicant objected to counsel handing in case law and rules of court, on the basis that she had not had time to read the material being handed in. I accepted copy rules of court, which bind me. Having confirmed that the Applicant had read the law set out by Hyland J. in her judgment refusing prohibition, I was able to confine myself to relying on that case.
- 1.7 This approach was taken to proceed with the hearing smoothly but the parties in any case must be taken to have read the relevant law. All that is required for fairness in a case is that there is evidence that pleadings and submissions have been sent to the other side. There was evidence that the book of authorities had been sent to this Applicant but returned to the sender. As the Applicant insisted that she had not received or read the book of authorities, and as I could make my decision on the facts before me, based on the settled law as set out by

Hyland J. in Ms. Roger's previous case, that is what I did. This was by no means required but was convenient in the circumstances.

2. Facts alleged to ground the right to relief

2.1 All events in this case occurred 15th March 2023 at Store Street. Many of the reliefs sought repeat the same claims, but are differently worded. For instance, declarations are sought that the Applicant is entitled to all DAR from court hearings and, separately, that she is using DAR as part of her vital evidence.

2.2 The Applicant has averred that one Garda Buggy took her passport and walked away. She averred that Garda Buggy put the Applicant's personal belongings at the entrance to the Garda Station as a trap for the Applicant. She complains that while she was given a precis of the evidence, it was not sworn. The Applicant argues that the failure of gardaí to preserve the evidence relevant to her case and to vindicate her rights means that she is entitled to the declarations sought. The Applicant told me that CCTV was edited in circumstances where she is confident that there must be more footage available, that garda notebooks have not been furnished to her and that the relevant gardaí have not made sworn statements of the evidence in her case.

2.3 The Applicant alleges that she and her co-accused were kept in Court without meals or water. She argues that the fact that a garda witness is also a DPP witness means that the gardaí are biased: they both investigate and prosecute. She emphasised that the gardaí involved have not sworn any affidavits. The main response, that she was out of time, was met by the Applicant's assurance that she was told in the District Court that disclosure would be forthcoming. She relied on this promise, as she described it, by Garda Cowan, made on 24th May, 2024 and urged me to order that the DAR from this hearing be produced, as one of the hearings in respect of which she required full transcripts.

2.4 The Applicant also alleges a breach of the Equal Status Acts as, she claims, she has been treated less favourably than a man who appeared in the District Court

and made an application for his support cat. The Applicant maintains that she had 3 humans in the District Court and was not allowed to sit with them. She carries a special card to let others know she may need time and certain assistance and confirms that she suffers from a disability, although no medical report was offered, or sought, in this regard. The Applicant made no complaint about her treatment at this hearing. She was invited to sit with the two people who accompanied her and was offered the assistance of a senior member of staff from the Courts Services before the hearing began.

3. Test for Leave to Apply and Judicial Review Rules

3.1 Order 84 of the Rules of the Superior Courts provides that an application for judicial review must be made within 3 months of the decision under review.

3.2 The first stage in any judicial review is that the High Court determines whether or not the applicant should be given permission to make her case in court, on notice to the respondents, with a full hearing before a High Court Judge. That was the application before me, as I explained to Ms. Rogers, who appeared to think that the entire case would be heard on the assigned date. She understood when I explained, comparing this situation to triage in a hospital: claims are assessed in the first instance to see if they are matters which require further examination, in other words, a full High Court hearing.

3.3 Ms. Rogers submitted that, as her constitutional rights had been violated, this was a serious matter which should go to full hearing. This was a case, she told me, during which the various gardaí had, on her version of events, entrapped her, failed to investigate properly and failed to make material disclosure to her of all the material that should be available to her. This is just a very broad summary of many claims which are set out in much more detail in her papers.

3.4 The test applied in cases such as this one was explained to the Applicant: she must show that she has an arguable case, with a prospect of success, in a judicial review hearing: *G v. DPP* [1994] 1 I.R. 374. The same case provides that judicial

review must be the only effective remedy, in other words, if an applicant has a full appeal against a decision, this may be sufficient. Here, the Applicant states that the violation of her rights is such that an appeal will not be sufficient.

3.5 As Hyland J. noted in *Rogers v the DPP* [2024] IEHC 316, according to the Supreme Court in *Sweeney v. District Judge Brophy and the Director of Public Prosecutions* [1993] 2 I.R. 202: if “proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law” then certiorari is appropriate. One might add that declaratory relief may also be appropriate in those circumstances. However, unless there are such fundamental flaws, the trial judge is trusted to make decisions in respect of the evidence at trial and, if there is an incorrect decision, an appeal usually cures this. Only the fundamentally flawed process cannot be cured by a full appeal and requires a review and appropriate relief such as certiorari or declaratory relief, if appropriate.

3.6 These are the tests that were applied in this Applicant’s earlier case, and they apply in this application for leave to review the investigative and trial process.

4. Preliminary Issue - Delay

4.1 One of the matters raised by the Respondents is a full answer to the claim and addresses an issue that appeared to be most significant for this Applicant. She raised concerns about the fact that none of the gardaí named in these proceedings have sworn affidavits and this meant that she had no opportunity to cross-examine them. The Respondents replied that the issues raised by the Applicant were moot and that her application was out of time, so none of the individual garda respondents had sworn an affidavit of fact as it could not be required. As a matter of fact, the Respondents submitted, no decision was made which was capable of judicial review in the three months before this case began.

4.2 The application was made on 6th November 2023. The charges relate to offences on 15th March 2023 and there was a 3-day hearing on the 29th and 30th January and 1st February 2024 after the application to prohibit that trial had failed.

4.3 The Respondents submitted that the last date on which any decision was made was in July of 2023 and, if this was the correct date, the application was out of time. The Applicant relies on Order 122 of the Rules of the Superior Courts to the effect that the month of August does not count when calculating time in such cases and the Respondents rely, in response, on O.125.

4.4 Order 122 states:

“1. Where by these Rules, or by any order, time for doing any act or taking any proceeding is limited by months, such time shall be computed by calendar months, unless otherwise expressed.

2. Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Saturday, Sunday, Christmas Day and Good Friday shall not be reckoned in the computation of such limited time.

3. Where the time for doing any act or taking any proceeding expires on a Saturday, Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

4. [1] Subject to rule 5, a party may deliver or amend a pleading during the Long vacation.

5. [2] Save on consent of the parties or by direction of the Court, the month of August shall not be reckoned in the computation of the times appointed or allowed by these Rules for amending, or delivering a pleading.

7. (1) Subject to sub-rule (2) and to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed....” [my emphasis]

O.125 provides:

“...‘pleading’ includes an originating summons, statement of claim, defence, counter-claim, reply, petition or answer...”

4.5 Clearly, therefore, a pleading may be delivered or amended without taking the month of August into consideration, but this does not apply to the statement of grounds which initiates a judicial review, which must be within three months of the decision sought to be reviewed, unless the Court extends the time for the application. The definition of pleading, set out in O.125, does not include the statement required to ground an action for judicial review and the filing of a claim is not the same as delivering pleadings.

4.6 The Applicant states that she made multiple applications for disclosure and for various asserted rights to be vindicated, any one of which should be considered as the date from which time began to run. In particular, she alleged that on the 24th of May, 2023 a hearing took place before Judge Brian Smyth at which she was promised full disclosure, including notebooks, CCTV footage and statements from individual gardaí. Referring to that hearing, she noted that time could not run until after that date, due to the promises made then.

4.7 The burden of proof is on the Applicant and she must establish that her application is within time and was made within three months of the decisions complained of. The Applicant made no application for an extension of time as, she insists, she was within time because she was entitled to wait for all the material promised to her in May of 2023.

4.8 The Applicant submitted to me that, if she had access to the DAR, she could prove that the garda who attended court on the 24th of May, 2023 in Court 1 in the CCJ, had promised her that all of the material she requested would be made available to her. If this was the case, there would have been evidence of a process in which existing material was promised and then withheld. It is impossible for a court, in review proceedings, to review the actual hearing of every case which is put in issue. In this case, a specific assertion was made and a submission on foot of that assertion, to the effect that this application was

within time due to the clear assurances given to the Applicant. There was no averment from any Respondent dealing with this allegation. The net point was clearly capable of resolving the issue of delay, if not all issues in the case.

4.9 In those exceptional circumstances, the DAR from the relevant court hearing has been retrieved and examined and my note of its contents, insofar as the contents are relevant to the issue here, is set out below. It is clear that, on that day, the relevant garda said exactly the opposite of what this Applicant now maintains was said. She was not told she would get more garda notebooks, she was advised that not all gardaí present made a note. She was not told she would get more CCTV but that there was no more CCTV. She was advised that there was no audio. In every particular, what the Applicant said to me about the hearing on the 24th of May was the opposite of what is recorded on the DAR.

4.10 The speakers are not identified on the DAR but, from the Applicant's submissions, she claims it was Garda Cowan who promised disclosure on 24th May before Judge Smyth and the Applicant's voice is identifiable. The clerk called the case by name: Linda Rogers. This is my note of what was said, it is not a complete transcript, but it is presented in the order in which these things were said, it contains the exchanges that are most relevant to the assurances described at the hearing before me and it is an accurate reflection of what occurred in Court 1 of the CCJ on the 24th of May, 2023:

"J: How many cameras are there?"

Garda: Judge there's only one camera relevant to Linda and it has been disclosed"

LR: I submitted 8 locations, today I have been provided with only one. Why does the prosecution fail to provide more?"

Garda: in relation to this case she was arrested in the public office. No incident happened elsewhere so she is not entitled to it.

LR: Where is the audio recordings? I was humiliated, the prosecution deliberately failed to deliver vital evidence and audio. Where are the statements of Buckley and O'Reilly?

Judge: The State is not obliged to give statements, it's at the discretion of the court. I can say that it would not be usual. Ms Rogers you will have to leave if you keep speaking over me.

LR: The Irish legal system is common law, precedent, former cases ... Well known cases [they must] seek out and preserve evidence. Dunne, McGuinness... [Judge: I'm well aware.] LR: the duty to preserve evidence, the case of Braddish. There is a constitutional duty, ECHR, equality of arms. I want to prohibit my trial on the grounds that CCTV which is materially relevant has not been made available I need the order from you.

Judge: I made an order for all relevant evidence. What I have been told by the garda is that there was only one relevant camera

Judge: I have been told that you have been furnished with the only relevant evidence

LR: I want to prohibit the trial

Judge: I can't ... Ms Rogers speak over me as much as you like it's not going to get you anywhere. I would appreciate if you showed the Court a bit of courtesy

Judge: It is not your right to be discourteous. I will vindicate your rights, but it can't be dealt with in a vacuum. I cannot prohibit this trial, that is in the High Court. If the state have withheld evidence, that is for the trial.

Judge: ... How long will audio take?

Garda: There is no sound recording, I have asked the gardaí. There is no audio relevant to this case.

LR: I am requesting again full disclosure – original charge sheets (already provided), Statements (None available), Statements of evidence, where are these gardaí where is the statement...

Judge: you're not listening Ms Rogers. These matters will be dealt with on oral evidence at the hearing. Relevant notebook evidence has been provided... I understand you got copy of notebook entries?

LR: I need all of 3

Judge: not every garda would necessarily take a note, I understand that that is the only note available. Just because they were there doesn't? means that they took a note.

LR: They witnessed my arrest, how can I defend myself with nothing provided, deliberate infringement of justice

Judge: this is a matter to raise at the hearing...

LR: Why did garda Buckley and O'Reilly not give statements

Garda: they were not involved in this incident

LR: Direct prevention of justice I need statements

Judge: you are entitled to assist if you are a McKenzie friend, you may not get involved per se – these people were not involved to your arrest?

LR: They were witness they were involved

Judge: There's no property in a witness suit you are entitled to call them if you wish. I will not order statements on the basis of what I have been told.

4.11 As appears, there were no promises of more disclosure to this Applicant, it was clear from 24th May 2023 that she would not receive any more material. She was even correctly told that only High Court could prohibit the trial and

that disclosure matters were for the trial judge. The timing of this application for judicial review of the District Judge and the Director of Public Prosecutions hinged on the many disclosure requests made, along with averments of ill-treatment. The Applicant defended her delay in issuing proceedings on the basis of alleged assurances given. The Applicant insisted that she made her application in good time as she was promised that all matters would be addressed before the trial. The DAR reveals that this is not true and that she had no such reassurances.

4.12 If the Applicant had any intention of judicially reviewing this process, it should have been done within three months of that hearing, at the very latest. The Respondents have submitted, correctly, that she is not entitled to renew an application, which has already been refused, repeatedly, in order to start the clock again. While the last recorded order in the District Court case was in July, 2023, even if that date was taken as the latest date on which a reviewable decision was made, this application was too late, having been delayed until November. Having reviewed the DAR evidence, it is clear that the more appropriate date is 24th May, 2023 when the Applicant assured me that she was promised disclosure. She was not, and if she had an issue with the process, she should have commenced her proceedings within three months of that decision.

5. Conclusions

5.1 This Applicant has already applied for leave to stay or prohibit the prosecution in the District Court, which application was refused by Hyland J. but that application was dedicated to the sole grounds of prohibition, injunctions and a stay of the trial. This hearing focused on all other claims made by the Applicant and the application was for leave to judicially review the relevant District Judge, the Director of Public Prosecutions and members of an Garda Síochána.

5.2 The application was made long after the three-month deadline. The Applicant repeatedly refused to apply for an extension of time on the basis that promises

of disclosure had been made and that she was entitled to wait until the trial in the hope that she would receive the documentation. As the DAR reveals, the Applicant threatened to institute review proceedings as long ago as last May and should have done so at that point if she had real concerns in respect of the process or the investigation. There being no application to extend time before me, I cannot extend the time for this Applicant. Furthermore, there is no evidence of a valid reason for such an extension. On the contrary, the Applicant has led me to consider evidence which suggests that she is not entitled to any relief. There is no need to comment further on the rules which require parties to judicial review to be honest with the court as it is a discretionary remedy. The delay issue alone is sufficient to determine the case.

5.3 In these circumstances, it is not necessary to determine if this Applicant can reach the standard of arguability such as to entitle her to leave to judicially review the decisions or actions of any of the Respondents. Her application is out of time and I have no discretion to extend the time as no such application has been made to me.

5.4 In those circumstances, the Court is obliged to refuse leave.

5.5 My provisional view is that costs must follow the event and the Applicant must be ordered to pay the costs of the Respondents in these proceedings.