THE SUPREME COURT
AN CHÚIRT UACHTARACH

Record No.: 2023/73

[2024] IESC 2

O'Malley J.

Baker J.

Hogan J.

BETWEEN

ALAN HARTE

Applicant

AND

THE SUPERIOR COURT RULES COMMITTEE, THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

Respondents

Judgment of Ms Justice O'Malley delivered electronically on the 9th of February 2024

Introduction

1. The applicant has applied for leave to appeal to this Court against the decision of Hyland J. delivered on the 17th April 2023 (*Harte v. Superior Court Rules Committee* [2023] IEHC 192). As summarised in that judgment, the case made by the applicant was that S.I. 691/2011 was *ultra vires* the rule making power of the Superior Court Rules Committee under s.36 of the Courts of Justice Act 1924 as amended (the "1924 Act"); that s.36 itself was in breach of Article 15.2.1º of the Constitution; and that the applicant's constitutional right of access to the courts was impermissibly restricted by S.I. 691/2011. The trial judge dismissed the challenge on all grounds.

2. This Court, having considered the application for leave to appeal, did not immediately determine the matter but directed that it be listed for oral hearing. In those circumstances, the Court's decision is delivered by way of judgment rather than determination.

Background

3. The issues raised in the application arise in the following context. The applicant was charged in November 2019 with serious offences in connection with the false imprisonment of and assault on a businessman in Co. Cavan. On the 26th March 2020 the Director of Public Prosecutions conveyed to the applicant and to the District Court that she had certified, pursuant to the provisions of the Offences against the State Act 1939, that in her opinion the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order in the case. The applicant was accordingly returned for trial to the Special Criminal Court. It

appears that he considered, but ultimately did not initiate, a judicial review challenge to the certificate.

4. On the 14th August 2020 the applicant was given leave to challenge the continuing constitutional validity of the Special Criminal Court by way of judicial review. His case, essentially, was that Part V of the Offences Against the State Act 1939 was intended to be used only for temporary, emergency purposes but had in fact been operating on a permanent basis since the Part V proclamation currently in place was made in 1972. Those proceedings will be referred to here as "the Part V judicial review". The primary reliefs sought were:

    (1) A declaration that any proclamation pursuant to s.35(2) of the Offences Against the State Act 1939 is only effective as a temporary measure.

    (2) A declaration that the circumstances giving rise to the proclamation made by the Oireachtas pursuant to s.35(2) in 1972 can no longer be described as temporary, having regard to the considerable elapse of time.

    (3) A declaration that the failure by the Oireachtas to enact anything other than temporary measures in respect of procedures for the trial of persons coming before special courts amounts to a breach of the right of the plaintiff under Article 38 of the Constitution.

    (4) A declaration that the legislation enacted by the Oireachtas fails to give adequate guidance or set out sufficient criteria to determine when ordinary courts are inadequate and which categories of cases are appropriately dealt with before non-jury courts.

5. The applicant also sought, if necessary, an extension of time within which to bring the proceedings. The Director of Public Prosecutions argued that the application was out of time, having regard to the provisions of O.84 r.21, and that no adequate reason had been given for an extension of time as required by that rule.

6. By judgment delivered on the 24th March 2021, Barr J. agreed with the Director and held, for the reasons set out in the judgment, that the applicant had not shown either that there were good and sufficient reasons for extending the time, or that the circumstances resulting in his failure to make the application within time were outside his control or could not have been reasonably anticipated by him (see *H. v. Director of Public Prosecutions* [2021] IEHC 215).

7. The applicant did not appeal that decision. He was convicted by the Special Criminal Court on the 8th November 2021, and sentenced to 30 years imprisonment on the 20th December 2021.

8. On the 9th November 2021 the applicant obtained leave to initiate the within proceedings. Separately, on the 24th May 2022 he instituted judicial review proceedings challenging the constitutionality of s.40 of the Offences Against the State Act 1939 (which makes provision for majority convictions in the Special Criminal Court). That latter challenge was dismissed in the High Court on the 22nd October 2023 (Bolger J. – see *Harte v. Special Criminal Court* [2023] IEHC 538). Leave to appeal directly to this Court from the High Court was refused (see [2023] IESCDET 146) and the matter is now pending before the Court of Appeal.

9. Meanwhile, on the 29th July 2022 this Court delivered judgment in *Dowdall v. Director of Public Prosecutions & ors*.; *Hutch v. Director of Public Prosecutions &*

ors. [2022] IESC 36. The appellants in those proceedings had sought declaratory reliefs in more or less identical terms to those set out above in relation to this applicant's unsuccessful Part V judicial review. This Court unanimously rejected the claims.

The proceedings

10. The statutory instrument under challenge, made by the Superior Courts Rules Committee in 2011, amended the provisions of O.84 r.21 of the Rules of the Superior Courts. The original version of the rule (not challenged in these proceedings) was made by the Committee in 1986. It provided for a six-month period in respect of applications for *certiorari*, and three months in respect of other judicial review reliefs. Where an applicant required an extension of time, they were obliged to show "good reason". The 2011 amendment has the effect of requiring applications for all judicial review reliefs to be commenced within three months, which time may be extended for "good and sufficient reason".

11. The case made by the applicant in this respect was that time limits restricting access to the courts are not matters of practice and procedure and can only be made by primary legislation. The case made in respect of s.36 of the Courts of Justice Act 1924 (which provides for the establishment of the Rules Committee and enables it to make rules in relation to pleadings, practice and procedure) was that it is in breach of Article 15.2.1° of the Constitution, on the basis that it lays down insufficient principles and policies to be applied by the rule-making body.

12. The matter was heard in the High Court on the 1st and 2nd of December 2022. The trial judge was informed about the judgments in *Dowdall* and *Hutch*, but it appears to have been considered by all concerned that the decision did not directly affect the issues in this case. The respondent did not argue that the applicant's proceedings were moot.

13. As noted above, Hyland J. delivered judgment on the 17th April 2023. She dismissed the claim by reference to the following principles (set out in paragraph 4 of the judgment) that she considered to be established by the relevant case law.

> • The Oireachtas may regulate by law, including by way of secondary legislation, procedural remedies before the courts provided constitutional rights are not infringed;
> • (In the context of a challenge to primary legislation), a leave requirement for judicial review, with a time limit and an entitlement to seek an extension of time for good and sufficient reason, enhances access to the Court;
> • The 1924 Act required that the procedure of the courts be regulated by a set of rules but left to the defined rule-making body the obligation of setting out those detailed rules to achieve the objective of permitting justice to be administered;
> • Broad ranging policy decisions are likely to lie within the function of the Oireachtas under Article 15.2.1º;
> • Section 36 permits the regulation of an existing power or jurisdiction of the Court in relation to practice and procedure;

• It does not exceed the power of the Rules Committee nor is it, *per se*, an unconstitutional restriction on access to Court to set out general grounds for an extension of a time limit itself fixed by the rules;

• The provisions of Order 84, rule 21(3) are within the general powers of the Superior Court Rules Committee to regulate matters of practice and procedure;

• The Rules Committee does not have the power to adopt an absolute limitation period for the initiation of a leave application;

• Time limits concerning the initiation of judicial review applications outside of which an applicant must seek an extension of time are not limitation periods but Rules of Court; and

• The jurisdiction to extend time is a discretionary one which must be exercised in accordance with the relevant principles in the interests of justice.

Submissions in this application for leave

14. The application for leave was filed on the 15th June 2023. The notices filed by the parties are available in association with this judgment, and will not be summarised here beyond saying that they are concerned with the legal merits of the decision of Hyland J. The applicant has also lodged an appeal in the Court of Appeal, which is, presumably, awaiting the determination of this Court before the matter can progress there.

15. The main concern of this Court, having regard to the foregoing history and, in particular, having regard to the decision in *Dowdall* and *Hutch*, was that the case was

moot, and, indeed, had been moot when it was heard by the High Court. Accordingly, the parties were asked to address that issue in written and oral submissions.

16. The applicant candidly accepts that he did not form an intention to initiate the Part V judicial review within three months of the Director's announcement as to her certificate. In those circumstances, he further accepts that the unappealed decision of Barr J., holding that he had not shown good and sufficient grounds for an extension of time, was a decision that was open on the evidence and not one that he could appeal. However, the applicant contends that this does not affect his right to maintain the current proceedings. For that reason, he does not wish to argue that Barr J. applied the rule incorrectly.

17. The case sought to be made is that the applicant's right of access to the courts was curtailed by a provision that he says unlawfully deprived him of the opportunity to argue the case. He submits that the right of access is not confined to "winning" cases and that therefore the result in *Dowdall* and *Hutch* is of limited relevance. It would, he accepts, affect any remedy available to him in that, should he succeed in this appeal, he could not proceed any further with a collateral attack on his conviction by way of an attack on the legality of the existence of the court of trial. He argues that he would, however, gain a declaration to the effect that his rights were breached by Rule 21 and would be entitled to his costs. It is further argued that he would be entitled to damages, although it is accepted that the level of any award would be reduced by reason of the fact that, because of *Dowdall* and *Hutch*, he could not have succeeded in the Part V judicial review.

18. The respondent accepts that it was not contended in the High Court that the case was moot. It is said that this was in circumstances where the case was listed for hearing and there was a reluctance to spend a day arguing mootness. The issue having been raised by this Court, the respondent's position now is that while a litigant does not have to demonstrate that they have a "winning" case, this applicant is unable to demonstrate that he has suffered any injustice by reason of the operation of Rule 21 in his case. It is submitted that as an applicant in judicial review proceedings he must show that he can obtain some benefit from them. This applicant is said to have no remaining interest in the proceedings, since the Part V judicial review would, if it had been permitted to progress, have been bound to fail. Under the principles analysed in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 I.R. 274 the possibility of costs is insufficient to defeat the general principle that the court will not hear a moot case.

Decision

19. As is often noted in the determinations of this Court on applications for leave to appeal, the issue to be determined is whether the facts and legal issues meet the constitutional criteria to enable the Court to hear an appeal. Under the regime applicable since the 33rd Amendment to the Constitution, the default position is that appeals from the High Court should go to the Court of Appeal. In the case of a "leapfrog" appeal, an applicant must establish that there are "exceptional circumstances" warranting a direct appeal, in order for this Court to grant leave for a direct appeal.

20. The Court does not consider that these criteria have been met in this case. As has been made clear, the Court is of the view that there is a real question here as to whether the decision in *Dowdall* and *Hutch* rendered these proceedings moot. However, the Court is conscious of the fact that this issue was not debated in the High Court at all. It is undesirable that it should be addressed for the first time here, whether in the context of a leave application or in a substantive appeal. Against that backdrop, the applicant has not shown that the circumstances warrant a direct appeal. It is more appropriate that the appeal lodged in the Court of Appeal should proceed.

21. Leave to appeal to this Court from the High Court is accordingly refused.