Neutral Citation: [2017] IEHC 632

THE HIGH COURT

[2017 No. 305 J.R.]

IN THE MATTER OF AN INQUIRY PURSUANT TO PART 8 OF THE MEDICAL PRACTITIONERS ACT 2007

BETWEEN

DR. SAMUEL VAN EEDEN

APPLICANT

AND

FITNESS TO PRACTICE COMMITTEE AND MEDICAL COUNCIL

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 11th day of October, 2017

1. This is an application for leave to seek judicial review by way of certiorari and declaratory relief in respect of a decision rendered by the first named respondent on 31st March, 2017.

Background

2. On 12th June, 2012, luggage owned by the applicant's wife was detained by a Customs Officer at Dublin Airport. The luggage contained eight medicinal products that had been purchased in Bangladesh. The applicant clarified in an interview under caution on 24th July, 2012, that he had ordered the medicinal products from an entity called "Prescription Point" in Dakar, Bangladesh. He had arranged for his wife to call and collect and pay for the products and transport them in her luggage back to Ireland. In the course of an interview, under caution, the respondent indicated that he had purchased other medicinal products from Prescription Point in Dakar, Bangladesh in February, 2012.

3. On 2nd April, 2014, the Health Product Regulatory Authority (HPRA), or the Irish Medicines Board, as it then was, issued a summons out of the District Court Office requesting the attendance of the applicant at the District Court in Swords on 26th May, 2014, to answer sixteen charges in total, namely two charges of importing and procuring each of the eight medicinal products that had been seized, in contravention of a specific statutory code regulating medicinal products within the State.

4. The fact of the prosecution by the HPRA was reported by the Irish Times on 8th July, 2014, and came to the attention of the second named respondent. In the course of a meeting of 10th July, 2014, the second named respondent decided to make a complaint to the Preliminary Proceedings Committee ("PPC") for consideration as to whether the matter warranted further action.

5. On 14th October, 2014, the District Court acquitted the applicant of all charges.

6. On 6th October, 2015, the PPC formed the opinion that there was a prima facie case to warrant further action being taken in relation to the complaint against the applicant and referred the matter to the first named respondent. The PPC directed that a full sworn inquiry should be held addressing the issue of whether the applicant had engaged in conduct constituting professional misconduct or poor professional performance.

7. On 4th August, 2016, the solicitors for the second named respondent furnished the applicant's solicitors with a request for the voluntary production of certain documents.

8. On 22nd September, 2016, the notice of inquiry under Part 8 of the Medical Practitioners Act 2007 ("the 2007 Act") was furnished to the applicant's solicitors, setting out the precise allegations against the applicant.

9. In the course of a hearing before the first named respondent on 30th September, 2016, to address the question of whether a production summons should be issued against the applicant, his counsel raised an objection that the notice of inquiry was flawed and, in particular, that the issues raised in the notice of inquiry were *res judicata* having regard to the acquittal of the applicant before the District Court in relation to certain charges arising from the factual matters the subject of the inquiry.

10. The application for a production summons was adjourned to facilitate the applicant raising a request for access to certain documents and for written submissions to be filed on his behalf outlining the reasons why the issues raised in the notice of inquiry were *res judicata*.

11. By letter dated 21st December, 2016, the applicant requested certain documents from the second named respondent. This was responded to on 3rd January, 2017.

12. Written submissions on the issue of *res judicata* and other matters were filed on behalf of the applicant on 20th March, 2017. The second named respondent's submissions were furnished on 24th March, 2017.

13. In his submissions, counsel for the applicant addressed the judgment of O'Caoimh J. in *A.A. v. Medical Council* [2002] 3 I.R. 1. A.A. concerned the applicability of the doctrine of *res judicata* in circumstances where the applicant in that case, a qualified doctor, had been charged and acquitted on two counts of sexual assault and was subsequently the subject of an inquiry under the then Medical Practitioners Act, 1978. O'Caoimh J. was not satisfied that the issue of *res judicata* arose. At this juncture, and in order to put the leave application in context, it is apt to set out the ruling of the learned Judge. He stated:

> *"With regard to the principle of res judicata , I am satisfied that there is not the same identity of parties between the criminal process and the proposed hearing before the Fitness to Practise Committee to give rise to the application of the principle of res judicata, even if one was to consider that the issues are the same. However, I am further of the opinion that the issues themselves are not the same. The proceedings to be taken are to ensure that no person unfit because of his conduct should be allowed to continue in practice in the particular calling which is in medical practice. I am also influenced by the decision in Health Care Complaints Commission v. Litchfield ,(Unreported, Supreme Court of New South Wales, Court of Appeal, 8th August, 1997), which shows that in a case such as this the plea of autrefois acquit is not available and that furthermore by reason of the absence of a common identity between the parties in the criminal proceedings and in the proceedings before the Fitness of Practise Committee that there is no identity of parties to establish a res judicata . Further there is a different onus in the proceedings before the Fitness to Practise Committee*

and criminal proceedings insofar as the law is concerned. It is unclear as to what is the proposed onus or standard of proof proposed in the proceedings before the Fitness to Practise Committee in the instant case. I am further satisfied that the purpose of the proceedings before the Fitness to Practise Committee is protective as no element of punishment is involved.

I am further influenced by the decision in Saeed v. Inner London Education Authority [1985] I.C.R. 637, in holding that the rule against double jeopardy does not apply to the facts of the instant case. I am satisfied that it is competent for the respondent to have regard to the same factual matter as was before the Circuit Criminal Court in assessment of the issues before it in the contemplated proceedings.

The essential issue that remains is whether in light of the nature of the complaints to be investigated by the Fitness to Practise Committee it can be said to amount to an unfair or oppressive procedure to investigate in particular the charges of sexual or indecent assault alleged to have been perpetrated by the applicant on the two patients concerned. I am satisfied on the facts of this case that no assault other than those the subject matter of the criminal charges are sought to be inquired into. In other words what is at issue is whether the proposed inquiry into items one and two referred to should be precluded, whatever about the conduct of inquiry into the allegations of professional misconduct contained in items three to ten previously referred to in this judgment. In this regard what remains is not an issue as to whether the principles of double jeopardy have any application or whether the principle of autrefois acquit has any application to the facts of the instant case. I am satisfied that the issue is whether it would be manifestly unfair to permit the proposed inquiry or any part of it to proceed in light of the acquittal of the applicant on the charges preferred against him and tried by the Circuit Criminal Court. In conclusion, I am of the opinion that there is no reason why the Fitness to Practise Committee should not hear the proposed evidence and consider it in relation to the conduct of the applicant. I am of the opinion nevertheless that it would be essentially unfair were the respondent to enter upon a hearing to determine that the applicant was guilty of an assault of which he has been acquitted by the Circuit Criminal Court. This is not to say that the committee should not hear all of the evidence proposed to be given in assessment of whether the conduct alleged against the applicant is conduct which it considers to have been established and to determine whether in the light of this fact he is a person who may have been guilty of inappropriate behaviour in the context of the complaints set out at paragraphs three to ten inclusive in relation to each of the complainants who were allegedly examined by him when in hospital.

With regard to the submission that the applicant has been premature in bringing this application and in not allowing the matters raised by him to be canvassed before the committee or the respondent itself, I am satisfied that there is some force in this. Nevertheless, having been given leave by this court to bring the within proceedings, I am satisfied that he is not in a formal sense precluded from seeking the assistance of this court in the relief which he seeks.

In all of the circumstances, while I am satisfied that the principle, of double jeopardy and res judicata do not apply to the facts of this case, I am of the opinion that principles of fairness suggest that the proposed inquiry should be limited to the complaints at items three to ten inclusive and to paras. (a) and (b) of the notice of intention to hold an inquiry under Part V of the Act of 1978, dated the 21st February, 2000, and signed by the registrar and addressed to the applicant."

14. In the course of his written submissions to the first named respondent, counsel for the applicant contended that the commentary and findings of Ó Caoimh J. in *A.A.* raised a number of anomalies. Counsel's submissions in this regard are not germane to the present application and accordingly, the Court does not intend to comment on them.

15. A substantial part of the submissions was devoted to the decision of the Supreme Court in *DPP v. JC* [2015] IESC 31 and to the argument that the decision in *A.A.* had now to be read in light of *DPP v. JC*. Counsel posed the following question:

> "Does the decision in *J.C.* affect the doctrine of *res judicata*?? In my respectful submission it does and I will shortly refer and identify some of the language as used by Mr. Justice Hardiman in support of that assertion but in simple terms, and lest there be any doubt, the reality of JC is that Ireland now stands alone as the only country in the common law world who have (sic) dispatched the centuries held doctrine of double jeopardy..."

In aid of his argument, counsel outlined, in summary form, the dissenting judgment of Hardiman J. in *DPP v. JC.*

16. The position adopted by counsel for the CEO in his written submissions was that the decision in *J.C. v. DPP* did not address, or have any bearing on, the principles of law governing the issue of *res judicata* as articulated by Ó Caoimh J. in *A.A.* and that the applicant's circumstances were required to be considered by reference to the principles set out in *A.A.*

The proceedings before the first named respondent of 31st March, 2017

17. In the course of the hearing on 31st March, 2017, counsel for the applicant reprised his argument that when addressing the question of whether the issues raised in the notice of inquiry were *res judicata*, the first named respondent was obliged to interpret the decision in *A.A.* in light of the decision of the Supreme Court in DPP v. JC.

18. In response to a query posed by the first named respondent's Legal Assessor as to whether, based on *DPP v. JC*, the applicant's acquittal in the District Court prevented the first named respondent's inquiry, counsel for the applicant opined that "given the language and the strength of the language that was used in JC" that may well be the case. Counsel also confirmed that he was asking the first named respondent to imply into the minority decisions in *DPP v. JC* a change in the principles to be applied on the question of *res judicata* as had been articulated by O'Caoimh J. in *A.A.* It was further submitted that whilst up to the time of the decision in *DPP v. JC* it might well have been the case that issue of *res judicata* could be dealt with on the basis of the *ratio* in *A.A.*, it was now subject to another *ratio*.

19. In urging the first named respondent that *A.A.* should be interpreted in light of *J.C. v. DPP*, counsel for the applicant contended that the issue should be the subject of a case stated to the High Court.

20. The legal advice provided to the first named respondent by its Legal Assessor was that although the standard of proof in the inquiry was beyond reasonable doubt, the inquiry was not a criminal case and that it concerned allegations of misconduct against the applicant and not criminal charges. She further advised that a disciplinary inquiry was a different creature to a criminal case, a point that was made in all of the legal authorities dealing with *res judicata* in disciplinary matters. Referring to *DPP v. J.C.,* the Legal Assessor advised that that was a decision that had as its focus, inter alia, the question whether or not the long established rule

relating to the exclusion of evidence as set out in *DPP v. Kenny* [1990] 2 I.R. 110 should be continued. She acknowledged that in the background of *DPP v. J.C.* there was "the whole issue of double jeopardy" but went on to advise that nowhere in *DPP v. JC* was there any suggestion that the principles set out in the case law relevant to disciplinary proceedings had been altered or changed as a result of the interpretation of a statutory exception to the law of double jeopardy insofar as it applied to criminal trials. Her advice to the first named respondent was that the decision in *DPP v. JC*, while of huge importance and while delivered against a background of a consideration of double jeopardy, had not altered the principles that apply to double jeopardy in so far as that concept applies to disciplinary proceedings. She further advised that the first named respondent had no power to state a case to the High Court and that, if the first named respondent were satisfied to follow her advice, it should proceed to examine whether or not *res judicata*, within the parameters of *A.A.*, had any application in the inquiry before the first named respondent.

21. The Legal Assessor commented with regard to the applicant's constitutional rights, as follows:-

> "[T]he present position of the law on *res judicata* in so far as it applies to Disciplinary Inquiries,… provides that if an argument can successfully be made to a [Fitness to Practice Committee] that it would be unfair or oppressive on a doctor to have to deal again with the same charges,…that is something that the Committee can take into account in deciding whether or not they would proceed with hearing particular allegations."

22. The first named respondent, having considered the advice of the Legal Assessor, concluded that they did not enjoy a power to state a case to the High Court. It also concluded, accepting the advice provided by the Legal Assessor, that the decision of *DPP v. JC* concerned a criminal trial and not a disciplinary process and accordingly had no consequences for the principles outlined in *A.A.* The first named respondent thus ruled that it intended to apply the law as outlined in *A.A.* to the question of whether the issues raised in the notice of inquiry were *res judicata*. Specifically, the first named respondent stated:-

> "Nowhere in the judgments is it suggested by the Supreme Court that the decision in *A.A. v. Medical Council* and the subsequent jurisprudence has been altered.
>
> …
>
> The principles that apply to Disciplinary Inquires post acquittals in courts are set out in *A.A. v. The Medical Council* and subsequent cases and incorporate an obligation on the Fitness to Practice Committee to act fairly and to be satisfied that the proposed inquiry is not unfair to the doctor."

23. Counsel for the applicant then requested that the proceedings should be adjourned to enable him to apply for leave to seek judicial review to quash the first named respondent's finding that the decision in *JC v. DPP* did not have any consequences for the principles governing the law of *res judicata*, as outlined in *A.A.*

24. Opposing the application, counsel for the CEO contended before the first named respondent that an application for leave would be premature in circumstances where the first named respondent had not yet decided whether in fact the issues raised in the notice of inquiry were *res judicata*. Counsel made the following submission:

> "The position of the CEO is that the appropriate way to proceed … would be for the Council to adjudicate on whether the Notice of Inquiry … was *res judicata* by reference to the principles of law established by *A.A.* and other judgments. To deal with the question as to whether any amendments should be allowed. And to deal with the question as to whether a Production Summons should be ordered in the matter.
>
> At that juncture Mr. Toal,[counsel for the applicant] insofar as the Council has been successful in resisting an application that the matter is *res judicata* by reference to *A.A. v. the Medical Council*, Mr. Toal will have a decision that he can go to the High Court to judicially review.
>
> In my submission on behalf of the CEO is that a break at this point would give rise to a premature process before the High Court which would have a High Court Judge asking the question: What substantive decision are you reviewing?"

25. Counsel also contended that the first named respondent having concluded, as it had, that the applicable legal principles to be applied to the application to have the Notice of Inquiry struck out were those set out in *A.A.*, was required to address the Notice of Inquiry in light of those principles. He further contended that if the first named respondent were to apply the principles in *A.A.* in the applicant's favour then there would be no need for the applicant to seek relief in the High Court. It was also submitted that if the first named respondent, in applying the law in *A.A.* to the factual situation which presented in the applicant's case, arrived at a decision adverse to him, the applicant would "have a ripe position" for an application for leave and to make the case that the ratio *A.A.* "had been disturbed" by *DPP v. JC*.

26. The Legal Assessor gave advice in similar terms, stating that in order to challenge the first named respondent's decision to apply *A.A.* and to disregard *DPP v. JC*, counsel for the applicant required a decision that affected the applicant.

27. Ultimately, the first named respondent acceded to the applicant's request that the proceedings be adjourned to allow him to apply for leave to pursue judicial review. The first named respondent ruled as follows:-

> "The Committee is satisfied that it could proceed to hear today the substantive *res judicata* application applying the current applicable law. Mr. Toal seeks an opportunity to challenge the decision already made by this Committee and requests the Committee not to deal with the substantive application.
>
> …
>
> The Committee is minded to consider acceding to Mr. Toal's application in view of the serious issues raised…The Committee accepts that the point raised by Mr. Toal is a 'novel' point."

The leave application

28. On 7th April, 2017, the applicant applied for leave to seek judicial review. By Order of this Court on 7th April, 2017, he was directed to bring the application on notice to the respondents.

29. In summary, the relief, in respect of which the applicant seeks leave for judicial review is for:-

(i) An order of prohibition preventing the first named respondent from proceeding to hear the matters alleged against the applicant until such time as it is determined whether the case *DPP v. JC* has significantly and materially affected or altered the pre-existing test as generally applied since the case of *A.A. v. Medical Council*;

(ii) An order of *certiorari* of the decision of the first named respondent taken on 31st March, 2017, wherein they determined that they would not accept the authority of *DPP v. JC* as having any bearing and/or applicability to the facts of the applicant's case which fell to be decided in relation to the doctrine of *res judicata*; and

(iii) A declaration that in light of the decision in *DPP v. JC* the ratio of *A.A.* must be read together with the ratio of *DPP v. JC*

30. The grounds on which relief is sought are as follows:-

(i) The first named respondents, having invited oral and written submissions on the doctrine of res judicata and its applicability to the facts of the applicant's case failed, refused and/or neglected to apply the appropriate principles appropriately or at all;

(ii) Having invited such submissions, the first named respondent failed, refused and neglected to apply the relevant law appropriately or at all;

(iii) The first named respondent erred in fact and in law in terms of the manner in which it sought to apply the existing law to the exclusion of all else and specifically in relation to the manner in which it failed and specifically refused to accede to the applicant's submission to have the *ratio* of the *JC* case articulated and debated in order to determine its potential relevance and applicability and as to the manner in which it might have affected the applicant's position bearing in mind the doctrine of *res judicata*;

(iv) Erred in law in applying the existing tests in relation to the doctrine of *res judicata*;

(v) Erred in fact and in law in arriving at the decision to exclude *DPP v. JC* from its immediate or other consideration; and

(vi) Failed, refused and neglected to consider the application of *DPP v. JC* notwithstanding that it accepted, after considerable exchanges and guidance from and by the first named respondent's legal adviser and others, that it raised serious issues and that the point raised by the applicant was "novel". In those circumstances, the first named respondent's decision to exclude the ratio of *DPP v. JC* from its deliberations and/or considerations of the matters alleged against the applicant is unreasonable, unfair, oppressive and seeks to sprint the matters alleged against the applicant to a finish irrespective of matters which have been canvassed as something which might assist him in establishing the argument he seeks to make;

(vii) The first named respondent while attempting to afford the applicant his legal and constitutional rights fundamentally failed to do so in acting in the manner in which it did.

31. In an affidavit sworn 8th May, 2017, Mr. William Prasifika, CEO of the second named respondent, avers as follows:

"31. The Respondents are opposed to granting of leave in this matter on two grounds. First, the Respondents submit that in the absence of determination by the Committee as to whether the issues raised in the notice of enquiry are *res judicata* there is at present no substantive decision determining rights on (sic) liabilities and therefore capable of review. Rather, the Committee has merely drawn a conclusion as to the legal framework that should be applied to the facts of the application before the inquiry. In such circumstances, the Respondents argue that the application for review is entirely premature.

32. Secondly, the Respondents argue that even if there were a substantive decision capable of review at this juncture, there is no arguable basis on which the decision of the Committee should be quashed…

33. I say and am advised that no argument can be advanced that the Applicant was deprived of the opportunity to ventilate his views that the decision of *JC v. DPP*… affected the principles governing the concept of *res judicata*, as outlined by the High Court in *A.A*…. As can be seen from the history of the matter, the Applicant was afforded four separate occasions to file written submissions on the matter and an oral hearing on the subject took place on 31st March, 2017. In such circumstances I do not understand on what basis the Applicant can contend that he was constrained in arguing this point before the Committee.

34. In relation to the substantive complaint, the Applicant has never articulated, whether in written or oral submission, or in his pleadings before this Court, the basis upon which it is contended that the decision of *JC v. DPP*… disturbs the principles governing the issue of *res judicata* as outlined in *A.A.* … the ratio of which the Committee has indicated it wishes to apply to the facts of the matter before it. Put simply, the Applicant has never pointed to any portion of the judgments in the decision of *JC v. DPP* in support of his argument that the decision affects the law of *res judicata* as interpreted in the decision of *A.A.*"

Considerations

32. The test for whether an applicant should secure leave for judicial review is well established. In *G. v. DPP* [1994] 1 I.R. 374, Finlay C.J. clarified that in order to secure leave:

"An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:—

(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).

(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of

relief sought by way of judicial review.

(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.

(d) That the application has been made promptly and in any event within the three months or six months time limits provided for in O. 84, r. 21 (1), or that the Court is satisfied that there is a good reason for extending the time limit. The Court, in my view, in considering this particular aspect of an application for liberty to institute proceedings by way of judicial review should, if possible, on the ex parte application, satisfy itself as to whether the requirement of promptness and of the time limit have been complied with, and if they have not been complied with, unless it is satisfied that it should extend the time, should refuse the application. If, however, an order refusing the application would not be appropriate unless the facts relied on to prove compliance with r. 21 (1) were subsequently not established, the Court should grant liberty to institute the proceedings if all other conditions are complied with, but should leave as a specific issue to the hearing, upon notice to the respondent, the question of compliance with the requirements of promptness and of the time limits.

(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."

In her judgment *G. v. DPP*, Denham J. opined:

> *"The burden of proof on an applicant to obtain liberty to apply for judicial review under the Rules of the Superior Courts O. 84, r. 20 is light. The applicant is required to establish that he has made out a statable case, an arguable case in law."*

33. Having regard to the parties' submissions, two issues arise for consideration in this case. The first is whether a decision has been made by the first named respondent which is amenable to an application for leave to apply for judicial review at this juncture? Secondly, even if there is a substantive decision capable of review at this stage, has the arguable grounds threshold been met on any ground advanced in the statement of grounds?

Has a decision been made that is amenable to judicial review?
34. Counsel for the applicant contends that the first named respondent made a clear decision wherein it refused to accept the applicant's argument that the principles set out in *A.A.* on the applicability of *res judicata* must now be considered in light of the decision of *DPP v. JC*.

35. The respondents' position is that there is no decision, as of yet, by the first named respondent such as affects the applicant's rights or determines his liabilities. It is contended that the first named respondent has only made an academic decision as to the approach it will take with regard to the applicant's application to have the notice of inquiry struck out, namely that it will assess this application having regard to the principles in *A.A.*, which is the applicable law. It is thus submitted that the application for leave is premature, in the absence of a substantive decision affecting the applicant's rights.

36. In the course of the hearing, counsel for the applicant queried the basis upon which the respondents could raise an objection that the leave application was premature. This, counsel submitted, was in circumstances where counsel for the second named respondent's CEO appeared to acquiesce in the decision made by the first named respondent to adjourn its proceedings so as to allow the applicant to seek leave.

37. I am satisfied that, as is clear from the transcript of the hearing on 31st March, 2017, that no question arises of any acquiescence on the part of the respondents such as would prohibit them from opposing the application for leave on the grounds that it is premature. Contrary to the applicant's argument, it is clear from the transcripts of the hearing of 31st March, 2017, that at all relevant times the position of counsel for the CEO was that any application by the applicant for leave to judicially review the first named respondent's decision was premature given that no substantive decision had been made as to whether the matters set out in the notice of inquiry were *res judicata*. The fact, once the first named respondent had ruled that it would adjourn to allow the applicant to go to the High Court, that counsel for the CEO accepted, as a *fait accompli*, that such a course of action would be taken by the applicant and then sought to clarify the parameters of the leave application in no way disentitles the respondents from pursuing the substantive argument they now pursue.

38. I turn now to the question of whether the leave application is premature. In my view, whilst a decision has been made by the first named respondent not to apply *DPP v. JC*, I agree with the respondents' submission that the first named respondent has, at this juncture, only set out that it intends to apply the law as it stands to the arguments canvassed by the applicant in relation to *res judicata* and that it has not made any substantive determination on the issue of *res judicata* in relation to the applicant's circumstances. The position was aptly summarised by the first named respondent's Legal Assessor on 31st March, 2017. She stated:

> "[A]t the moment the Committee is at a halfway stage in the process. The Committee has determined the applicable law is *AA* … And that the views of the minority decision in *JC*, which are advocated for by Mr. Toal, do not [affect] or seem to [affect] the decision in *AA* …"
>
> She further stated:
>
> "[I]n fairness it's completely understood by everybody that Mr. Toal and Dr. Van Eeden stand over their position that the principles of *res judicata* apply in this case and that [Dr. Van Eeden] is entitled … to a decision from the Committee that the District Court effectively is an acquittal, such that it prevents the disciplinary proceedings going ahead. What is not clear to me is why that can't take place today. I don't understand the argument that Mr. Toal is making that he wishes to bring the non-operative part of the Committee's decision to be challenged in the High Court, without bringing with it whatever decision the Committee makes on foot of [the *res judicata* argument]."

39. Lest the Court be in error in finding that the application for leave is premature on the basis that no substantive decision has been made which affects the applicant's interests or determines his liabilities, I now turn to the question of whether the applicant has in any event established any arguable basis that the decision of the first named respondent should be quashed.

Have arguable grounds for leave been established based on the actual decision made on 31st March?
40. The applicant's principal contention is that since the first named respondent has decided that the applicable principles by which it

will determine the *res judicata* argument raised by the applicant are those set out in *A.A.*, the first named respondent may wrongly decide against the applicant on the issue of *res judicata* by virtue of its reliance solely on the principles set out in *A.A.* This is circumstances where the first named respondent has declined to consider whether *DPP v. JC* has affected the *ratio* in *A.A.* Counsel argues that if the decision of the first named respondent in the inquiry is ultimately adverse to the applicant, any findings that the first named respondent will make may have serious consequences for the applicant's right to earn a livelihood. It is argued that it is in those circumstances that the first named respondent's failure to advert to *DPP v. JC* constitutes unfairness for the applicant. This is particularly so when the first named respondent itself, in giving the applicant time to apply for leave for judicial review, agreed that the applicant had raised a "novel" point.

41. The respondents submit that the tenor of some of the applicant's grounds of challenge suggests that he was not afforded an opportunity to argue before the first named respondent that the decision of *DPP v. JC* materially impacted on *A.A.* The respondents say there is no merit in the applicant's complaint in this regard and submits that between September, 2016 and March, 2017, counsel for the applicant was afforded an opportunity to put in submissions and that hearings were adjourned to allow him to do so. It is further submitted that counsel was afforded the opportunity to made oral arguments on 31st March 2017, which was availed of.

42. I am not altogether convinced that the applicant is making a case of procedural unfairness. Rather, the thrust of his argument is that the first named respondent wrongly failed to accede to or accept his submission that the decision of O'Caoimh J. in *A.A.* had to be read in conjunction with *DPP v. JC*, or was otherwise affected by it. I will return to this shortly. As regards procedural unfairness, lest I have misunderstood the applicant's case, and that he is in fact contending that he was not given an adequate opportunity to articulate his arguments, I am satisfied, from the procedural history in this case and from a perusal of the transcripts of the hearings before the first named respondent, that counsel for the applicant was afforded ample opportunity to present his arguments in relation to the matter at issue.

43. As already stated, the principal argument made by the applicant in the within application is that the first named respondent's decision to apply only the principles in *A.A.* to the question as to whether *res judicata* applies in the applicant's case is wrong in light of the first named respondent's failure to accede to the applicant's contention that *A.A.* must now be read in conjunction with *DPP v. JC*.

44. In the written submissions which were before the first named respondent, counsel for the applicant, by and large, refers to the dissenting judgment of Hardiman J. in *DPP v. JC*, both summarising it and quoting from it on occasions. In their arguments before this Court, the respondents make the point that Hardiman J. did not, in any event, refer to *A.A.* It is further submitted on the respondents' behalf that counsel for the applicant has not identified to the Court how *DPP v. JC* affects the *ratio* in *A.A.* The respondents also contend that the reason the applicant cannot answer how the dissenting judgments in *DPP v. JC* affects the ratio in *A.A.* is because the truth of the matter is that *DPP v. JC* has no bearing on the principles enunciated in *A.A.* Accordingly, it is the respondents' contention that the applicant has manifestly not set out how *DPP v. JC* affects *A.A.* and, accordingly, no arguable case has been made out for leave.

45. In response to a question from the Court as to how the *ratio* of *DPP v. JC* impacts on *A.A.,* counsel for the applicant submitted that the issue is not solely concerned with the *ratio* of *A.A.* but with the fact that the statements and materials upon which the first named respondent will rely in the inquiry include physical materials (namely the drugs which the applicant had imported) which, counsel contends, were illegally and unconstitutionally obtained by the respondents from the HPRA. This, counsel asserted, occurred against a backdrop where the District Court at the conclusion of the criminal proceedings stated that the materials should be destroyed after the applicant, having been asked by the District Judge whether he wished to have them returned, had declined to take them back because they were at that stage out of date. Counsel submits that it is in this context that *DPP v. JC* may be relevant, as one of the issues which will be before the first named respondent is the admissibility of evidence. Accordingly, at the hearing before the first named respondent, counsel wants an opportunity to go through each of the judgments delivered in *DPP v. JC* in aid of such submissions he will make as to the admissibility of evidence before the first named respondent. It is also contended on behalf of the applicant that, as it is clear from the documentation before the Court, a considerable body of statements which the first named respondent proposes to address in the inquiry are the very same body of documentation which formed the basis of the prosecution of the applicant in the District Court. Counsel submits that any material which was used by the HPRA for the purpose of the criminal proceedings should not have been passed on to the second named respondent and that this is a central tenet in the case being made by the applicant to the first named respondent.

46. Counsel for the respondents objected to the applicant's arguments on the issue of illegally and unconstitutionally obtained evidence on the ground that that issue was not the basis of the applicant's case on *res judicata* as made to the first named respondent on 31st March, 2017. It was thus contended that it was impermissible for the applicant to make such submissions before the Court when they were not raised before the first named respondent. The respondents acknowledge however that the applicant can advance such submissions before the first named respondent on the resumption of the inquiry.

47. I accept the point made by counsel for the respondents. As far as the Court is concerned, the applicant's submissions on the issues of alleged unconstitutionally and illegally obtained evidence is a matter for the substantive inquiry and not this Court in circumstances where the first named respondent has not made any ruling on this issue. It is for counsel for the applicant to advance such arguments as he deems appropriate when the matter resumes before the first named respondent.

48. Thus, to return to the question of whether the applicant has put before the Court an arguable ground upon which leave should be given to judicially review the first named respondent's decision that it will apply the principles set out in A.A. when considering the applicant's application to have the notice of inquiry struck out. Having considered the arguments advanced by counsel for the applicant, I am of the view (even taking, at its height, counsel's contention that the first named respondent was obliged to have regard to the dissenting judgments in *DPP v. JC* as impacting on *A.A.*, or indeed in so much as counsel's arguments placed reliance on the majority decision in *DPP v. JC*) that at no point in his submissions to the Court has he set out, with any semblance of clarity, how *DPP v. JC* impacts on the principles set out in *A.A.*, which presently comprise the law on *res judicata* as that doctrine is to be applied to disciplinary proceedings such as those in the present case. The height of the case made by counsel for the applicant is that *DPP v. JC* may be applicable or, on the other hand, it may be that it has no applicability to the *ratio* in *A.A.* Counsel says that the applicant's apprehension is that the first named respondent, having refused to consider *DPP v. JC*, will ultimately make a decision in the applicant's case in, effectively, a legal vacuum.

49. The Court must have some barometer against which to consider whether it is arguable that the first named respondent has erred in law, as is alleged here. However, counsel for the applicant has not identified which of the numerous judgments in *DPP v. JC* supports his thesis that the test set out in *A.A.* has been affected by *DPP v. JC*. To my mind, it is not sufficient merely to indicate, as counsel did, that *DPP v. JC* might affect the ratio in *A.A.*, or that all he is seeking is an opportunity to go through all of the judgments in *DPP v. JC* when the hearing before the first named respondent resumes in the hope, and these are my words, that some nugget

might be unearthed such as might impact on the law on *res judicata* as presently enunciated in A.A. Accordingly, as far as this application for leave is concerned, the applicant has not met the arguability threshold set by the Supreme Court in *G. v. DPP*.

50. In the course of her submissions, counsel for the respondents invited the Court to determine that the first named respondent was correct in determining that *A.A.* was the applicable test albeit, she conceded that, strictly speaking, the issue does not arise for determination since the first named respondent has not yet made a substantive decision on the issue of *res judicata* in the applicant's case. Counsel also contended, with regard the issue of *res judicata* itself, that the facts upon which the first named respondent relies for the purposes of the inquiry are different to those which formed the basis of the criminal prosecution in the District Court.

51. I am satisfied that neither of those two issues arises for determination by this Court in the absence of any substantive decision by the first named respondent on the issue of *res judicata* in the applicant's case. As, hopefully, is clear from this judgment, the finding of the Court is that counsel for the applicant did not succeed in getting past the starting block for leave to be granted because, firstly, no substantive decision at this moment in time has been made such as impacts on the applicant's interests and, secondly, in respect of the decision that was made, the applicant has not identified the legal principle or principles to which, he alleges, the first named respondent failed to accede or pay regard.

52. For the reasons set out herein, leave to apply for judicial review is refused.