Neutral Citation Number: [2007] IEHC 232

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2005 No. 845 J.R.]**

**BETWEEN**

**SEAN FOLEY**

**APPLICANT**

**AND**
**HER HONOUR JUDGE YVONNE MURPHY**

**FIRST NAMED RESPONDENT**

**AND**
**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**SECOND NAMED RESPONDENT**

**Judgment of Mr. Justice McCarthy delivered on 2nd day of July, 2007.**

**1. The proceedings**

1. 1 By order of this court of the 29th July, 2005, leave was given by Quirke J. to the applicant to seek judicial review of an order of the Circuit Court (Her Honour Judge Murphy) made on 2nd February, 2005 at the conclusion of the applicant's criminal trial, whereby he was refused an order for costs in his favour consequent upon his acquittal by direction of the learned trial judge. He did not have the benefit of a certificate for legal aid issued under the Criminal Justice (Legal Aid) Act, 1962.

1. 2 The relief sought is, firstly, an order of *certiorari* quashing that decision and, secondly, two declarations, the first of which seeks to condemn the substantive decision itself to refuse costs as a breach of the applicant's constitutional right to a trial in due course of law or those under the European Convention on Human Rights and Fundamental Freedoms and further to condemn it on the basis that no or no adequate reasons were given by the learned Circuit Judge, in breach of natural and constitutional justice, and otherwise then in accordance with law.

1. 3 Apart from the Notice of Motion a Statement of Grounds for Judicial Review and a Statement of Opposition on behalf of the second and third named respondents were issued and filed and there are four affidavits, namely, that of the applicant sworn on 29th July, 2005 (being in substance a summary history of the criminal proceedings), a replying affidavit of Jane Farrell of 10th November, 2005 (which not only supplements that of the applicant as to the history but also comments on the evidence), a supplemental affidavit of the applicant (which deals with his loss of employment and liability for costs) and, finally, an affidavit of one Malachy Murphy sworn on 16th May, 2006 (in the course of which he purports to give expert evidence concerning telecommunications and the internet – but being in my view irrelevant since it constitutes a commentary upon the evidence).

1. 4 Apart from setting out the reliefs sought (contained, of course, also in the Notice of Motion) the Statement of Grounds, by definition sets out the grounds upon which the orders are sought as follows:-

> 1. The first named Respondent failed to have any or any adequate regard to the constitutional rights of the Applicant herein in reaching her decision to refuse to award the Applicant his costs at the conclusion of the criminal proceedings against him.
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> 2. The first named Respondent has acted otherwise than in accordance with law and in violation of fair procedures by failing to give any or any adequate reasons for reaching the decision to refuse to award the Applicant his costs.
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> 3. The first named Respondent has acted otherwise than in accordance with law and/or in excess of jurisdiction in failing to accede to the application on behalf of the Applicant herein for his costs at the conclusion of the criminal proceedings taken against him. In particular the first named Respondent has failed to have any or any adequate regard to the right of the Applicant to defend himself in relation to serious criminal charges in circumstances where the Applicant herein was not covered by the Criminal Justice (Legal Aid) Act of 1962.
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> 4. The first named Respondent herein has acted otherwise than in accordance with law and in excess of jurisdiction and has further acted irrationally and/or unreasonably in failing to accede to the application on behalf of the Applicant herein for his costs at the conclusion of the criminal proceedings taken against him in circumstances where the first named Respondent had concluded as a matter of law that the jury should be directed to acquit the Defendant at the close of the prosecution case.
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> 5. In circumstances where the Applicant herein was not covered by the Criminal Justice Legal Aid Scheme and where the prosecution case was withdrawn from the jury by the first named Respondent, the first named Respondent has acted irrationally and/or unreasonably and unfairly and/or otherwise than in accordance with law in exercising a discretion not to award the Applicant herein his costs.
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> 6. The first named Respondent has failed to protect and vindicate the constitutional rights of the Applicant herein.
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> 7. The first named Respondent has failed to have any or any adequate regard to the matters proved in evidence before her and the legal conclusions made in relation thereto in reaching the decision not to award the Applicant his costs.
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> 8. All the evidence before the first named learned Respondent was known to the Second Named Respondent and its legal consequences prior to the Trial.

1. 5 On the basis of the pleadings and, oral submissions of Counsel it appears to me that there are two substantive issues raised by these grounds namely, firstly, whether or not the reasons given by the learned Circuit Judge were adequate or sufficiently comprehensive and, secondly, whether or not the decision of the learned Circuit Judge is irrational or unreasonable in the circumstances of the case.

1. 6 The legal consequences of any decision that the reasons were inadequate or insufficient, or of irrationality or unreasonableness would then fall to be considered. I think that I can fairly summarize the issues in this way because there is an overlap in the Grounds.

**2. Reasons.**

2. 1 The leading English authority as to reasons is *English v. Emery Reimbold and Strick Limited, DJ and C Withers (Farms) Limited v. Ambic Equipment Limited and Verrechia v. Commissioner of Police of the Metropolis* [2002] 1. W.L.R. 240. These three cases were dealt with together and were appeals on the footing that the right to a fair trial as guaranteed by Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms was breached by the failure of the relevant courts to give adequate reasons for their decisions. The court considered *Flannery v. Halifax Estate Agents Limited* [2000] 1 W.L.R. 377 and it is a useful statement of the common law as to costs. Verrechia concerned an appeal on the ground that there were inadequate reasons given by the trial judge for the order as to costs which he made, namely, that each party should bear its own costs. Lord Phillips of Worth Matravers M.R., giving the judgment of the court, quoted with approval from the judgment of Henry L.J. in Flannery (at p. 381) as follows:

> "(1) The duty is a function of due process, and therefore of justice. It rationale has two principal aspects. The first is that fairness surely requires that the parties, especially the losing party, should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know…whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
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> (2) The first of these aspects implies that want of reasons may be a good self standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.
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> (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on what witnesses telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes x rather than y; indeed, there may be nothing else to say. But where the dispute involves something of the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence, but it is not necessarily limited to such cases.
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> (4) This is not to suggest that there is one rule for cases concerning the witnesses truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watch word."

2. 2 Lord Phillips (at p. 241, para. 21) stated *inter alia* that:

> "The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunals readily to analyse the reasoning that was essential to the judge's decision."

And he quoted with approval (at para. 27) an extract from a judgment of Swinton Thomas Lord Justice L.J. in *Brent London Borough Council v. Aniedobe* (Unreported, 23rd November, 1999, Court of Appeal) as follows:

> "This Court must be slow to interfere with the exercise of a judge's discretion, when the judge has heard the evidence and this court has not. It is also, in my view, important not to increase the burden on overworked judges in the County Court by requiring them in every case to give reasons for their orders as to costs. In the great majority of cases in all probability the costs will follow the event, and the reason for the judge's order are plain, in which case, there is no need for a judge to give reasons for his orders. However, having said that, if a judge does depart from the ordinary order (that is in this case the costs following the event), it is, in my judgment, incumbent upon him to give reasons, albeit short reasons, for taking that unusual course.

And himself stated (at para. 30, p. 242) that:

> "Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making the order. This has always been the practice of the courts…thus, in practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons against an order that relates only to costs."

2. 3 However, Lord Phillips had also quoted from and made reference (earlier in the judgment) to The European Court of Human Rights decisions "The Strasbourg Jurisprudence" and at para. 8 to 14 inclusive. Amongst the authorities opened to me were *Ruiz Torija v. Spain* [1994] 19 E.H.R.R. 553. Lord Phillips quoted from the report of that judgment (at p. 562, para. 29) to exemplify the approach of the European Court of Human Rights to issues of this kind, as follows:

> "The court reiterates that Article 6(1) (right to a fair trial) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the contracting states with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case."

(See para. 26 of the judgment of the court).

2. 4 I have also been referred to the case of *Hadjianastassiou v. Greece* [1992] (Case 16 12 1992). I mention this for the sake of completeness because I believe that the principles applicable under the Convention and the common law of England have been adequately stated above; to put the matter shortly the applicant was convicted of certain offences against military law by court martial and appealed to the Greek Courts Martial Appeal Court; the judgment did not address certain issues which appeared from the

record of the hearing in the lower court and he sought written reasons; when he ultimately received those written reasons (notwithstanding repeated requests) he was barred from expanding upon his appeal on points of law whereby it was held there was violation of Articles 6(1) and 3(b). This does not assist us as to the extent to which reasons should be given in the present case since all cases depend on their own circumstances and one would have thought that the breach was so clear in that case as to be of little use here.

2. 5 Before I pass to the Irish decisions I refer to two further English decisions first of which has been of assistance. The first of these is *(Cunningham) v. Exeter Crown Court*, T.L.R. 30/01/2003 which concerned the question of costs. Apart from the fact that it was held that reasons for the refusal of costs were required in criminal as well as in civil cases and in particular the reasons must be "apparent", it was stated (by Clarke L.J.) that "the Court had to give reasons for its decision, even if those reasons were brief. The reason should indicate to the parties and to a court of review why the decision was made." Of relevance also is the fact that it was held that "a court of review would interfere only if no reasons were given and there was no obvious reason for the decision made." I refer to the second only for completeness, namely, *Central Criminal Court (ex parte) Propend Finance Property Limited and Another*, [1996] 2 C. A. r. pp. R 26 which is a clear case in as much as no reasons were given in the context of the issue of certain warrants and it was held *inter alia* that:-

> "The learned Judge then proceeded to order the warrants. She gave no reasons for her decision. With respect to her she should have done so. That is not only because generally judges should always give reasons for what they do, but in particular, because she was here exercising a draconian jurisdiction".

2. 6 The two Irish cases opened to me were *O'Malley v. Ballagh*, [2002] 2 I.R. 410 and *Lyndon v. District Judge Mary Collins and The D.P.P.* [unreported] , 21st January, 2007, Charleton J. In the first of these it was sought to exclude evidence in circumstances where it was contended that the accused had been unlawfully arrested. In *Christe v. Leachinsky* [1947], A.C. 573, and in *The People (Director of Public Prosecutions) v. Walsh* [1980] I.R. 294, it was held, *inter alia*, that policemen who arrest without warrant must ordinarily inform the arrested person of the true ground of arrest subject to the fact that where the arrested person must know the general nature of the alleged offence, there is no reason to so inform him. An application for a directed verdict was determined by the District Judge when he said "he was drunk, wasn't he", whereby it might have been inferred that he had concluded that it must have been obvious to the accused why he was being arrested whereby there was no need to inform him of the reason; it had further been contended that in as much as the accused had been arrested or re-arrested by a colleague of the Garda who had first apprehended him (to put the matter shortly) the "second arrest" was unlawful. In the Supreme Court, Murphy J. held that even if the words "he was drunk, wasn't he", constituted a reason for the rejection of the submission that "the original" arrest was bad, it failed to deal with the second proposition concerning the "second arrest". It was insufficient "if it was simply a general rejection of all strands of the argument presented on behalf of the applicant…". Murphy J. stated (at p. 416) that:-

> "On the other hand, it does seem, and in my view, this case illustrates that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as practicable in the time available, his reasons for so doing".

2. 7 In *Lyndon v. District Judge Mary Collins*, the offence for which the accused was prosecuted does not appear from the report but it is obvious that he was prosecuted pursuant to provisions of s. 49 of the Road Traffic Act, in as much Charleton J. at p. 4 of the judgment refers to the fact that "the dispute is, was he in charge of the car, or was he using it in effect as a bed"; Counsel for the accused apparently made three submissions which were explicitly dealt with and a third was rejected by the judge with the words "I am satisfied that the State has proved its case". Charleton J. was satisfied that it was "clearly implied in what the learned District Justice said that she was convicting the accused because of the fact that she completely rejected his testimony and accepted instead the testimony of the prosecution" and such an approach is in accordance with authority. It is of assistance, however, in highlighting the fact that reasons may be implied or expressed or, indeed, capable of being deducted from the evidence or submissions.

2.8 As to whether or not a costs ruling falls into the category of substantive rights, I believe that it does; given the great financial burden which an accused person faces when he is not legally aided, it appears to me that the reasons must be apparent whether expressly or by implication or indeed by deduction.

2.9 The reasons given by the learned Circuit Judge in the present case on 2nd February, 2005 were as follows:-

> "This is an application for the costs of the trial *D.P.P. v. Sean Foley*, where I directed the jury to find Mr. Foley not guilty of the charge. It is common case from the report of *The People (The Attorney General) v. Nuala Bell and Others*, [1969] I.R. that the question of costs is a matter within the trial judges discretion. It is also common case that there is no authority as to how that discretion should be exercised.
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> I have carefully reviewed the evidence in this case, the correspondence and the arguments made by both sides and I am satisfied that it would not be appropriate to award costs in this case. I therefore refuse the application."

2.10 It was urged upon me by Counsel for the Director of Public Prosecutions that these reasons were sufficient because they should be read in accordance with the entirety of the evidence, the correspondence mentioned and the submissions such that the accused (or any third party such as this court), would know the basis upon which the decision was reached.

2. 11 On 19th January, 2005 (at the hearing as to costs) it appears from the transcript that Counsel on behalf of the applicant referred to certain correspondence sent by his instructing solicitors to the Chief Prosecution Solicitor, dated 2nd September, 2002 and the reply thereto opened to the court was a letter of the 11th September, 2002. This correspondence was relied upon in support of the proposition that the prosecution had been placed on notice of certain infirmities in the prosecution case pertaining to temporary internet files, in circumstances where the prosecution case was based upon the possession of child pornography on such temporary internet files. It appears to me that these letters are relevant to the question of costs in as much as the issue of guilty knowledge pertaining to the location of the child pornography was raised. The law pertaining to the existence of a discretion as to costs was opened and Ms. Ring, for the second named respondent, with a view to addressing how the discretion should be exercised, referred to the facts of *Bell*, *inter alia*, so as to distinguish Bell on the basis that the case was unique in that there was a concession on behalf of the prosecution in favour of one of the accused who obtained costs (Ms. Brady) that a certain statement which had been excluded from evidence was the sole evidence; it seems to me that this can only have been a proper concession made by the prosecution. No prosecutor would fail to assist the court and concede that there was no further evidence (or no evidence, as indeed, in strictness was the case) in such circumstances so nothing turns upon it.

2. 12 Ms. Ring went on, then, to submit to the court that inasmuch as the prosecution was commenced under "new legislation" the

court was asked to consider the issue of possession and of knowingly possessing matters that came within the meaning of child pornography under the Act. Miss Ring also dealt with or engaged with the evidence and the basis of the direction. The learned Circuit Judge in her decision on the application to direct an acquittal on the 20th December, 2004 relied upon *Aikens v. Director of Public Prosecutions* [2001] W.L.R. 1427, and held that the "legal meaning of possession" was the same in both Ireland and England and Wales. Ms. Ring went on to submit that there was evidence that child pornographic images were found on the applicant's computer and that there were admissions made to the Gardaí, and that in ruling on the application for an acquittal the learned trial judge referred to verbal admissions. The judge had referred explicitly to an interview with Gardaí on the 27th May, 2002 relating to access to a child pornographic site a number of years before the date upon which unlawful possession was alleged, that he had stated that he had cancelled his subscription to such site "out of the disgust", that he had stated that he took responsibility for "everything on his computer but that he had no child pornographic images on his computer, hard drive, floppy disc or CD Rom" (but) that he "had since viewed a child pornographic site that cropped up, but had not sought them or downloaded such images"; the learned trial judge further referred to the fact that on being shown certain images recovered from the hard drive of the computer the applicant had stated that he had not seen them before, had not downloaded them and could only surmise, having read up on the topic since an interview on the 27th May, 2002, "that a website had left a finger print on his computer"; in her ruling she also referred to the evidence of one Detective Sergeant Finan to the effect that inasmuch as certain unlawful images had been deleted from the temporary internet files (otherwise known as a cache) into a recycle bin, the State having contended that knowledge of their existence had been shown by fact of deletion this implied that the images were accessible on the dates of deletion or that the deletion was the work of the defendant; ultimately she held that there was a lack of prima facie evidence that the "defendant was aware of or in a position to access any relevant material on the 27th May, 2002". I might add that the learned trial judge had also referred to a decision relied upon by the defence as to the meaning of possession, namely, *The Minister for Posts and Telegraphs v. Campbell [*1966] I.R.

In these circumstances it does not appear to me to be relevant that the legislation in Ireland was new as submitted by Ms. Ring. Ms. Ring further submitted that effectively the issue of possession could not be determined by precedent in this jurisdiction and that the issue had to be placed before the proper forum to be decided; she also made reference to a submission by Mr. Buckley by reference to the correspondence pertaining to the evidence of one Garda Johnston in another proceeding; Ms. Ring rightly said that this was irrelevant and in any event it is plain from the decision of the learned trial judge she had no regard to the latter in her approach to the direction application. Ms. Ring further sought to distinguish the prosecution from that in Bell, which was solely dependent on the issue of admissibility of a voluntary or other statement. Mr. Buckley responded by stressing that no prima facie case had been made out by the prosecution and he further referred to a decision of *McHugh v. McLoughlin, Ireland and the Attorney General* [1986] I.R. 228, but which I do not see as relevant.

2. 13 The authorities go to show that there is no need in making an order for costs to address each argument advanced on the issue and that the extent to which reasons may be offered will differ from case to case. However, I am of the view that in the present case where the matter is being dealt with at the more considered or leisurely pace appropriate for a criminal trial (where as a practicality, the exigencies of the pressure of business or the nature of minor offences which confront the District Court daily do not arise), as well as the engagement with the evidence by counsel for the prosecution (including the submission that it was necessary to place the evidence, on a prosecution, before the court due to the somewhat novel nature of the evidence to which the concept of possession in law had to be applied) and, finally, the correspondence (which was a further exceptional feature of the case) it was appropriate for her to afford more detailed reasons than she did. Of course the evidence, the correspondence and the submissions were the only relevant matters upon which the learned Circuit judge could (and obviously did) base her decision but I think that the level of generality of the reasons which she gave were too high such that one does not know to what extent evidence or any particular piece of evidence or the correspondence or the submissions or the legal issues as to costs or otherwise raised gave rise to her conclusion; no doubt she was influenced to a greater or lesser degree by different elements of such evidence, correspondence or submissions. To put the matter another way, the process of reasoning should in my view have been more explicitly spelt out. Of course no one would suggest that she did not take all relevant matters into account. As a matter of reality, however, it is not possible for the applicant accused, or this court, by implication or inference from such material, to see the basis of the decision. There was insufficient engagement in the judgment with the material before here. The applicant cannot know whether or not the trial judge misdirected herself such that he might have a good ground on which to seek judicial review either on the basis of an error of law which took her outside jurisdiction or what the decision was irrational or unreasonable. She was not dealing with a "straightforward factual dispute", but rather "something in the nature of an intellectual exchange with, reasons and, analysis advanced, on either side" (see Henry L.J., in Flannery, quoted in Emery, as set out above).

2. 14 It seems to me that in the light of what I regard as the absence of reasons of sufficient particularity or specificity the decision is a nullity as being a breach of the constitutional entitlement to fair procedures. Of course it would be wholly wrong for me to enter into the issue of whether or not the decision was irrational or unreasonable since, as I have said, the learned Circuit Court judge rightly decided the matter within the ambit of the evidence, correspondence and submissions but we cannot know whether or not it might be irrational or unreasonable unless the more specific reasons are given. Of course, in any event, it would not have been necessary for me to decide this question having regard to the view I have taken.

**3. Relief**

3. 1 In my view the appropriate relief is that given *in O'Mahoney v. Ballagh*, namely, an order quashing the decision with remittal to learned Circuit judge to hear and consider the application again. I should add for the sake of completeness that it has been submitted to me that certiorari is not the appropriate remedy here. Having regard to *O'Mahoney v. Ballagh*, I do not think this is so. It has also been submitted to me that enquiry should have been made to me as to the reasons given, if they were thought insufficient. To do this would be, rare, counsel knew of no precedent. What is lawful is to speak to an order to clarify its meaning but this is not so here.