THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 303

Record No. 2016/88

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN/

MAUREEN ARNOLD

APPLICANT /

APPELLANT

- AND -

JUDGE AENEAS MCCARTHY OF FERMOY DISTRICT COURT

AND CHILD AND FAMILY AGENCY

RESPONDENTS /

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THE COURT OF APPEAL

Record No. 2016/89

BETWEEN/

DAN ARNOLD

APPLICANT /

APPELLANT

- AND -

JUDGE AENEAS MCCARTHY OF FERMOY DISTRICT COURT

AND CHILD AND FAMILY AGENCY

RESPONDENTS /

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JUDGMENT of Mr. Justice Gerard Hogan delivered on the 27th day of November 2017

1. The applicants in these judicial review proceedings are husband and wife who are litigants in person. They are the parents of Sorcha Arnold who was born on the 6th April 1999. While Sorcha has reached adulthood in recent months, she was a minor at the relevant dates giving rise to these proceedings. At the hearing of the appeal this Court was informed that Sorcha is now attending a third level institution.

2. The proceedings themselves arise out of a criminal prosecution brought by the Child and Family Agency ("CFA") pursuant to a s. 7(1) of the Education (Welfare) Act 2000 ("the 2000 Act") against Mr. and Ms. Arnold ("the parents") arising from their failure to secure the attendance of Sorcha at the nearest recognised school in their locality, namely, Cólaiste an Craoibhín, Duntaheen Road, Fermoy, Co. Cork or, indeed, any other school of the parents' choice for this purpose, contrary to s. 25(4) of the 2000 Act. The relevant education welfare officer (who had been appointed by the CFA for the purpose under s. 11(1) of the 2000 Act), Mr. Dan O'Shea, had previously served a school attendance notice on the parents pursuant to s. 25(1) of the 2000 Act on the 18th March 2014 requiring them to secure Sorcha's attendance at Cólaiste an Craoibhín.

3. When Sorcha did not attend school within the next week, the CFA duly applied for a summons under s. 7(1) of 2000 Act alleging a breach of the school attendance notice contrary to s. 25(4) of the 2000 Act. I may interpose here to say that given that the summons was applied for by a State agency, the summons was issued administratively by the relevant District Court office pursuant to s. 1 of the Courts (No.3) Act 1986, so that there was no question of any requirement for a book of evidence or anything of the sort in the manner suggested by the parents at that District Court hearing.

4. Following at least one adjournment, the prosecution took place in the District Court on the 10th April 2015. While I propose to return presently to what took place in that Court on that day, it is sufficient for present purposes to say that the parents were convicted of the offence in question. They were each fined €300 by the District Judge, with eight weeks to pay. The judge imposed a sentence of three days imprisonment in default of payment. It is not disputed that the parents did not pay the fine within the eight week period and nor did they appeal to the Circuit Court. It is also accepted that as a result both applicants face the immediate prospect of serving a three day prison sentence unless the convictions in question are quashed.

5. While there is some dispute as to what exactly transpired at the District Court, it is accepted at all times that Sorcha was not attending a recognised school within the meaning of the 2000 Act. It was further accepted that:

(i) following a consultation notice, the applicants were served with a School Attendance Notice within the meaning of that Act. (It is only fair to say, however, that the applicants have always disputed the validity of that notice);

(ii) that the said notice required the applicants to cause Sorcha to attend Cólaiste an Craoibhín;

(iii) the applicants failed to comply with that notice.

6. Following their convictions, the parents did, however, apply to the High Court for leave to apply for judicial review. On the 5th July 2015 Noonan J. made an order adjourning the application for leave, and directed pursuant to Ord. 84, r.24(1) that this application for leave be heard on notice to the CFA. That application was heard by Binchy J. on the 22nd January 2017 and, following an ex tempore ruling in the matter, he refused leave. The parents have now appealed to this Court against that refusal.

The nature of the appeal from the High Court decision

7. Perhaps the first thing to be considered is the nature of the appeal to this Court, the decision of the High Court and, specifically, the test to be applied in such cases.

8. It is clear that, the special statutory schemes aside (such as, for example, applications for leave to apply for judicial review under s. 50 of the Planning and Development Act 2000 (as amended)), applicants to apply for judicial review heard on notice by the High Court are required simply to show that they have arguable grounds: see *DC v. Director of Public Prosecutions* [2005] 4 I.R. 281, 289 *per* Denham J. In other words, therefore, the Supreme Court confirmed in *DC* that the ordinary test for leave laid down in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374 applied in cases of this kind. As Clarke J. explained in *Potts v. Minister for Defence* [2005] 2 I.L.R.M. 517, 522:

> "Of equal importance it seems to me is a consideration of the statutory regime which has been introduced by both s. 50 of the Planning and Development Act 2000 and s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Both those provisions require that applications for judicial review in respect of certain planning matters and certain asylum type issues ("the statutory case") must be made by motion on notice to the appropriate respondents and impose a higher threshold than exists in respect of ordinary judicial review applications. Both the statutory cases require that the court, prior to granting leave, must be satisfied that three are substantial grounds for contending that the matter intended to be challenged is invalid or ought to be quashed.
>
> In the jurisprudence of the courts in relation to both the above sections it has been accepted that a higher threshold for the grant of leave is required in such cases. That threshold has variously been described as being equivalent to "reasonable" "arguable" and "weighty" but not "frivolous" or "tenuous". See for example *VZ v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 135. It seems to me that the existence of such an established statutory regime in respect of matters where the Oireachtas has determined that leave should only be granted where a more onerous threshold is passed is a matter that needs to be considered in a case such as this. It would be a strange result if a yet higher standard still was required to be met by an applicant who, though not the subject of a statutory requirement to give notice and to meet a higher threshold but who nonetheless, on a discretionary basis, was required to give notice by the court hearing an *ex parte* application."

9. It follows, therefore, that leave should be granted by the High Court in a case of this kind if the applicants can show not only that the facts averred on affidavit "would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review", but that they have also presented "arguable grounds" for this purpose: *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374, 378, *per* Finlay C.J.

10. One complication, however, relates to the nature of the appeal to this Court from the decision of the High Court. Prior to the establishment of this Court in October 2014, appeals from decisions of the High Court made ex parte were governed by the provisions of Ord. 58, r.13 which provided:

> "Where an *ex parte* application has been refused in whole or in part by the High Court *an application for a similar purpose* may be made to the Supreme Court ex parte within four days from the date of such refusal, or within such enlarged time as the Supreme Court may allow." (emphasis supplied)

11. These provisions of Ord 58, r. 13 were understood in practice to enable the party who suffered an *ex parte* refusal of an application in the High Court to renew that application *de novo* to the Supreme Court. In the case of judicial review applications, this meant that the Supreme Court could grant leave if it thought that the case presented arguable grounds rather than examining – as it would normally do if it were hearing an appeal in an *inter partes* matter – whether the High Court judge was correct.

12. These provisions of the old Ord. 58, r. 13 have not, however, been replicated in either Ord. 86 or Ord. 86A. It is, however, unnecessary to decide for present purposes whether the former practice of the Supreme Court with regard to *ex parte* appeals continues to apply in respect of this Court because the decision of the High Court in this case was not given *ex parte*, but was delivered following an *inter partes* hearing. In these circumstances, it seems that the essential question which this Court must ask itself is whether the High Court was correct to hold that the applicants had not demonstrated the existence of arguable grounds on the evidence adduced on affidavit on which to apply for leave to apply for judicial review.

13. I now turn to consider the grounds actually advanced by the applicants in the High Court. I propose first to examine the three grounds which had been advanced in support of the application for leave, before then proceeding to consider as further argument that the hearing in the High Court was itself procedurally unfair. I will then examine the question of whether this Court should consider the new constitutional argument which the parents are now seeking to advance in this Court and, if so, whether leave should be granted on this ground.

First argument: two separate prosecutions

14. The first argument is that the applicants were both prosecuted individually, contrary to the family rights conferred on the applicants qua parents by Article 41.1.1 of the Constitution. The applicants appear to maintain that there ought, accordingly, to have been just one single prosecution against them as a family unit *qua* parents of Sorcha.

15. In my view, this argument is misconceived. The whole basis of the criminal law is that of personal and individual liability for criminal offences. One can, of course, have multiple defendants in a criminal prosecution, but even in that situation it is clear that any prosecution must stand or fall against each defendant individually. There is no basis at all in law for the prosecution of two or more persons as some form of group entity. I would therefore uphold the findings of Binchy J. in this respect.

Second argument: challenges to the validity of the School Attendance Notices
16. The applicants seek to challenge the validity of the school attendance notices which had been served on them on the 18th March 2014 requiring them to arrange for Sorcha's attendance at Cólaiste an Craoibín. (An earlier school attendance notice had been served on the parents on 28th February 2014, but this was later withdrawn.) The argument advanced here is that these notices failed to comply with the requirements of the School Attendance Act 1926 ("the 1926 Act") and that they are invalid on this account.

17. The first thing to note is that the 1926 Act was itself repealed in its entirety by s. 8 of the 2000 Act. The 2000 Act was commenced in its entirety on 5th July 2002 by virtue of the operation of s. 1(3) of that Act. It is therefore beyond argument that the provisions of the 1926 Act could have no relevance or application to the issuing of a school attendance notice in 2014, precisely because that enactment is no longer in force. Any questions regarding the legality of that notice must accordingly be judged by reference to the 2000 Act itself, irrespective of what may have been contained in the earlier 1926 Act. This is so as a matter of first principles governing the effect of statutory law, but if authority is required for this proposition, it is sufficient to refer to what O'Flaherty J. said in *The People (Director of Public Prosecutions) v. Gilligan* [1993] 1 I.R. 92, 100 (quoting Bennion, *Statutory Interpretation*): "To 'repeal' an Act or enactment is to cause it to cease to be a part of the *corpus juris* or body of law."

18. It is clear, therefore, that this argument is entirely without substance. I would uphold this aspect of the decision of Binchy J. and I therefore refuse the applicants leave to challenge the validity of these notices on this ground.

Third argument: there was lack of evidence to support a conviction before the District Court
19. While neither the High Court nor this Court had a transcript record of what occurred before the District Court, the solicitor for the CFA, Mr. Peter Groarke, did file an affidavit in which he exhibited a detailed attendance note of what had occurred before the District Court. It is true that this affidavit was filed very belatedly before the High Court and this prompted Binchy J. to offer the applicants an adjournment, having given them time to consider the note. The applicants nonetheless elected not to seek an adjournment and the High Court was accordingly entitled to proceed on the basis that this note was accurate. As it happens, the applicants do not ever appear to have disputed the accuracy of this note.

20. The applicants were convicted of an offence under s. 25(4) of the 2000 Act. It may be helpful to set out the entirety of the section, which provides as follows:

> "(1) Subject to section 17 (2), the Board shall, if of opinion that a parent is failing or neglecting to cause his or her child to attend a recognised school in accordance with this Act, serve a notice (hereafter in this section referred to as a "school attendance notice") on such parent -
>
> (a) requiring him or her on the expiration of such period as is specified in the notice, to cause his or her child named in the notice to attend such recognised school as is specified in the notice, and there to attend on each school day that the notice is in force, and
>
> (b) informing him or her that if he or she fails to comply with a requirement under paragraph (a) he or she shall be guilty of an offence.
>
> (2) A school attendance notice under this section shall remain in force for such period as may be specified in the notice or until it is revoked by the Board.
>
> (3) Before making a school attendance notice the Board shall, in such manner as it considers appropriate, make all reasonable efforts to consult with -
>
> (a) the parents of the child concerned, and
>
> (b) the principal of the recognised school that the Board proposes to specify in such notice,
>
> and shall, when so specifying a recognised school, have regard, as far as is practicable, to the preference (if any) expressed by the said parents.
>
> (4) A person who contravenes a requirement in a school attendance notice shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding [€1000], or to imprisonment for a term not exceeding one month, or to both such fine and imprisonment."

21. In the District Court the prosecution called two witnesses. The first witness, Mr. Dan O'Shea, who is an education welfare officer attached to the CFA, gave evidence as follows:

> (i) Sorcha Arnold was a child within the meaning of s. 2 of the 2000 Act;
>
> (ii) Mr. O'Shea consulted the relevant school register and ascertained that Sorcha was not attending a recognised school;
>
> (iii) Having formed the opinion that Sorcha was not attending a recognised school, Mr. O'Shea then sought to engage in consultation with the applicants;
>
> (iv) The school attendance notices served on the applicants were issued only after such consultation.
>
> (v) Separate school attendance notices were sent to the applicants on 18th March 2015.

22. Judged by the attendance note, the applicants never disputed these facts before the District Court nor did they cross-examine Mr. O'Shea. The second prosecution witness, Ms. Emer Farrell, gave evidence that the parents were not registered with the CFA under s. 14 of the 2000 Act as parents who had arranged for Sorcha to have been educated at a place other than a recognised school, such as at home. Ms. Farrell was not cross-examined.

23. In these circumstances, there clearly was evidence by reference to which the District Court judge was entitled to convict the

applicants of the offence under s. 25(4) of the 2000 Act with which they had been charged, namely, contravening a requirement in a school attendance notice requiring them to arrange for Sorcha's attendance at a recognised school. It follows, therefore, that the applicants have not established any arguable case in support of this contention and I would therefore affirm the decision of Binchy J. to refuse to grant leave to the applicants in respect of this ground.

Fourth argument: Was the hearing before the District Court procedurally deficient or otherwise unfair?
24. The fourth argument is that the hearing before the District Court was procedurally deficient or otherwise somehow unfair. The note of Mr. Groarke records that at the commencement of the hearing the judge explained the procedure to both applicants. The prosecution then called two witnesses from the CFA, Mr. O'Shea and Ms. Emer Farrell. I have already summarised the evidence given by Ms. O'Shea and Ms. Farrell gave evidence to the effect that neither applicant was registered with the CFA under s. 14 of the 2000 Act. (Section 14 provides for the registration of parents who wish have a child educated at a place other than a recognised school, which includes home schooling.) Neither witness was cross-examined by the applicants.

25. The applicants then made a submission to the District Judge that there was no case to answer. That submission appears to have been founded on two objections, namely, that there ought to have been one single prosecution against the parents as a family unit and, second, that the school attendance notice was invalid. These submissions were rejected by the judge who held that there was a case to answer.

26. Mr. Arnold then went into the witness box and read from a pre-prepared sworn statement. It was then clarified that he was also giving evidence on behalf of Ms. Arnold.

27. Mr. Arnold was then cross-examined by the solicitor for the prosecution. He accepted in cross-examination that Sorcha was not registered with a recognised school. He further accepted that he was not registered under s. 14 of the 2000 Act, although he said that he had attempted to do so but had difficulties completing the form. He further acknowledged that the CFA's solicitor had offered to assist him in that regard, but that he had not contacted them.

28. Mr. Arnold also agreed in cross-examination that Sorcha was not being educated outside of the State and that there was no health reason preventing her from attending school. When it was also put to him that the 1926 Act had been repealed by s. 8 of the 2000 Act, Mr. Arnold agreed that this was so, save that he did not agree with this change.

29. At the conclusion of the evidence both parties made submissions. Mr. Arnold's submissions were to the effect that the summons and the school attendance notices were invalid.

30. The note of the judge's ruling convicting the applicants is as follows:

> "I have listened to the witnesses for the CFA whose evidence was unchallenged. The accused had a right to cross-examine, but did not do so. The 1926 Act has been repealed and I am satisfied that the child is not attending a recognised school."

31. It is clear from this summary of what transpired in the District Court that the applicants' procedural rights were fully protected and had not been infringed. In particular, the procedure was explained to them; they were afforded the right to cross-examine prosecution witnesses; to give evidence in their own right and to make submissions at every stage. There is therefore nothing at all to suggest that the hearing before the District Court was procedurally deficient. I would therefore affirm the decision of Binchy J. in this respect and refuse to grant the applicants leave to challenge the convictions on these grounds.

Fifth ground: The hearing in the High Court was procedurally unfair
32. The applicants also maintain that the hearing before the High Court was procedurally unfair by reason of the very late filing of an affidavit on behalf of the CFA exhibiting Mr. Groarke's note of the District Court hearing. It is true that the late filing of this affidavit was unsatisfactory. Viewed from the applicants' perspective, an urgency attached to the application for leave, yet if they wanted to challenge the accuracy of the note they would have been forced to apply for an adjournment, thus entailing yet further delay. The onus was, of course, on the applicant to provide relevant evidence in their grounding affidavits of what had transpired at the District Court. As they had not done, Binchy J. was entitled to decide that this affidavit – even if tendered late – should be admitted in evidence before the application was heard. It has to be accepted that the High Court could not meaningfully have considered this application for leave without a record of what had actually happened in the District Court.

33. Binchy J. did rise shortly before lunch on that day and gave the applicants an opportunity to consider whether to apply for an adjournment. In the end the applicants did not dispute the validity of the note and elected to proceed with the hearing. In these circumstances I cannot see that the applicants have any grounds to object to the fairness of the hearing before the High Court.

Whether the applicants should be permitted to challenge the constitutionality of the 2000 Act, despite not having done so before the High Court
34. As I have already indicated, no challenge had been brought in the High Court to the constitutionality of the 2000 Act. It is true that the applicants did, of course, raise constitutional arguments by contending, for example, that the respondent District Judge did not take into account that which they had averred on affidavit before that Court or that the provisions of Article 41 of the Constitution required that the parents be prosecuted as a single entity, but this is a very different matter from raising a direct challenge to the constitutionality of the 2000 Act. The claim now advanced in the notice of appeal is as follows:

> "The Education (Welfare) Act 2000 is unconstitutional if it forces the applicant to act unilaterally or penalises her if she fails to act unilaterally on decisions regarding the educational welfare of a child of the Family. The burden of proof that the appellant had committed the alleged offence rests with the prosecution and the prosecution failed to provide any complaint that the appellant had failed to send her child to a school where the child had never been enrolled."

35. The Attorney General was not even a party to the proceedings in the High Court, but the applicants have since served papers on him in both sets of appeals in which they indicate that they wish to challenge the constitutionality of the 2000 Act. The Attorney General then issued a motion seeking to have so much of the appeal as contended that the 2000 Act was unconstitutional should be struck out.

36. This Court is endowed only with appellate jurisdiction by Article 34.4.1 of the Constitution and it enjoys no first instance jurisdiction whatever. Of course, this does not necessarily mean that there is some *ex ante* rule which by definition automatically excludes the admission of new grounds of appeal of this kind: see generally the comments of O'Donnell J. in *Lough Swilly Shellfish Growers Co-Op Society Ltd. v. Bradley* [2013] 1 I.R. 227, 245-246. In *Lough Swilly* O'Donnell J. noted that prior to 1922 "it was

possible to seek leave to appeal to argue a fresh ground of appeal before the [pre-1922] Court of Appeal, but only on strict conditions" and that:

> "Nothing in the 1922 Constitution or 1937 Constitution suggests any different understanding of the concept of an appeal from the High Court in performance of the administration of justice."

37. O'Donnell J. accepted that in this matter there existed a spectrum of possibilities, ranging from a new argument which would have necessitated the admission of new evidence on the one hand, to those cases where a simple refinement of an argument already made in the High Court was sought to be made. In that case the Court would not permit the appellants to advance a new argument to the effect that a particular statutory provision had not been commenced.

38. A similar approach was subsequently taken by the Supreme Court in *Westlink Toll Bridge Ltd. v. Commissioner of Valuation* [2013] IESC 42 where the Court would not permit the respondent to advance an entirely new argument to the effect that the costs associated with motorway maintenance were deductible for rating valuation purposes. As MacMenamin J. pointed out, this conclusion was the "polar opposite" of the evidence which had actually been led in the High Court.

39. In view of these authorities, the general practice of appellate courts in this jurisdiction – be it the Court of Appeal or the Supreme Court – is to lean heavily against the admission of new grounds of appeal. This is especially so in the case of a ground as potentially weighty or far-reaching as a challenge to the constitutionality of the 2000 Act.

40. There are, however, three countervailing factors in this case which must be considered. First, the applicants are litigants in person. Second, the applicants stand convicted of a criminal offence and they face the prospect of (an admittedly very short) prison sentence if they persist in not paying the fine unless the constitutionality of the law is successfully challenged. Third, while the hearing in the High Court was inter partes, it was nonetheless only an application for leave.

41. I do not consider that the first factor carries much weight. There are nowadays many, many litigants in person. While some indulgence must be afforded to such persons, the orderly administration of justice would breakdown if such a far-reaching departure from ordinary norms of civil procedure were to be permitted simply because the applicants were litigants in person who maintained that they were unaware of these rules and requirements.

42. The second factor is admittedly a somewhat weightier one, if only because the courts will lean, where they can, *in favorem libertatis*. At the same time, this factor *in itself* could rarely justify the courts departing from established procedures absent some special factor.

43. The third ground is, however, by far the most pressing one, namely, that the proceedings are still at the preliminary stage involved in application for leave. Critically, therefore, there has been no final determination of the merits of the application by the High Court. The considerations which weighed so heavily in cases such as *Lough Swilly* and *Westlink Toll* have lesser application in the present circumstances: to date there has been no full hearing on the merits before the High Court and if leave were to be granted in respect of this issue, the Attorney General and the other State respondents would all have an opportunity to meet the case on its merits at a full hearing the High Court.

44. It may be noted that this very point was acknowledged by Clarke J. in *Moylist Construction Ltd. v. Moylan* [2016] IESC 9, [2016] 2 I.R. 283. In *Moylan* the defendants sought to dismiss the proceedings as being bound to fail. On appeal the plaintiffs sought to advance a new argument before the Supreme Court which had not been advanced before the trial judge. On this point Clarke J. commented ([2016] 2 I.R. 283, 293):

> "It is clear that some additional leeway may properly be given on appeal to a party who is faced with being deprived of what might otherwise be their entitlement to a full trial…the fact that a plaintiff may be deprived of a full hearing should any appeal result in a decision that the proceedings should be dismissed means that the court may in some circumstances be prepared to give greater latitude to such a plaintiff to argue further grounds on appeal."

45. Much the same can be said, at least by analogy, so far as the present case is concerned. If the applicants are denied leave, they may well be denied an opportunity of having their case determined on its full merits. The denial of leave in judicial review is, in many respects, akin to striking out plenary proceedings as being bound to fail. In both instances the litigant seeking leave or resisting a strike out motion (as the case may be) is obliged to show that their case is arguable. This, therefore, suggests that while the courts should not indulge the negligent or the casual or the indifferent litigant by blithely permitting them to introduce new arguments on appeal, nevertheless, as Moylist Construction illustrates, the fact that the applicants might otherwise be faced with the prospect of being denied an entitlement to a full trial on the merits at first instance is a factor to be taken into account in deciding whether to admit a new ground on appeal to this Court.

46. In these somewhat unusual circumstances, I would be prepared to admit this ground as a new ground of appeal if it could be shown (i) that the applicants would obtain a practical benefit thereby if they were ultimately to succeed on this ground and (ii) this new ground was at least arguable. I propose now to consider these issues in turn.

Whether any challenge brought by the applicants to the constitutionality of the 2000 Act is arguable

47. As to (i), it is clear that if the applicants succeeded in establishing that the relevant provisions (such as, e.g. , s. 17(1) or s. 25(1)) of the 2000 Act were unconstitutional, this would enable them to prevail on the principal relief claimed, namely, an order quashing the conviction of the 10th April 2015 under s. 25(4) of the 2000 Act. (For all the reasons set out elsewhere in this judgment, the parents do not have standing to challenge the constitutionality of the *entirety* of the 2000 Act, but simply those relevant provisions of that Act which bear on their own personal circumstances) This first condition is accordingly satisfied.

48. As to (ii), it is clear from the provisions of Article 42.3.1 of the Constitution that while the State cannot oblige parents in violation of their conscience and lawful preference to send their children to schools established by or designated by the State, the State is nonetheless obliged by the provisions of Article 42.3.2 to ensure that:

> "The State *shall*, however, as guardian of the common good, *require in view of actual conditions* that the children receive a certain minimum education, moral, intellectual and social." (emphasis supplied)

49. The "actual conditions" referred to Article 42.3.2 are, of course, those of the actual conditions which currently prevail in this State: see the comments to this effect of Denham and Keane JJ. in *Director of Public Prosecutions v. Best* [1999] IESC 90, [2000] 2 I.R. 17, 46, 61 respectively. So far as this case is concerned, it means the actual conditions which prevailed in 2014/2015 at the time

of the prosecution of the parents under the 2000 Act rather than those which prevailed in 1937. At the time of the adoption of the Constitution in 1937 Ireland was still a largely agricultural country with a weak and undeveloped industrial base. Secondary education of pupils to Leaving Certificate level was far from the norm and university education was the preserve of the few.

50. All of this has changed dramatically in the intervening eighty years or so. While in 1937 a significant portion of the population left school shortly after primary education - a fact itself tacitly acknowledged by s. 2 of the School Attendance Act 1926 which had prescribed a minimum school leaving age of 14 years and which elsewhere in that Act had provided certain exemptions from school attendance for school children engaged in harvesting work on their parents' farm – the actual conditions which obtain today are very different, with the vast majority of pupils attending school right to up to Leaving Certificate level. The actuality of present conditions is such that pupils who did not have at least some secondary education would find many facets of modern life a challenge and they would face a host of difficulties in finding employment or, even if they did, they would be singularly ill-equipped to meet the demands of that workplace. That is why Article 42.3.2 states that as ultimate guardian of the common good the State must insist that each child receive a minimum education apposite to the "actual conditions" of the era in which the child is growing up.

51. This changing environment is in its own way reflected by s. 2(1) of the 2000 Act which defines a "child" as meaning:

> "….a person resident in the State who has reached the age of 6 years and who:
>
> (a) has not reached the age of 16 years, or
>
> (b) has not completed three years of post-primary education,
>
> whichever occurs later, but shall not include a person who has reached the age of 18 years."

52. It is true, of course, that the Arnolds were in principle entitled to educate Sorcha at home, provided, of course, that they could demonstrate that she was receiving the "minimum education" envisaged by Article 42.3.2. The parents were nonetheless required to register with the CFA under s. 14 of the 2000 Act if they wished to avail of this option – and which they admittedly did not – the critical fact remains that they tendered *no evidence whatever* before the District Court to the effect that Sorcha was receiving a minimum standard of education such as would (or, at least, might) meet these constitutional standards. In *Best* the Supreme Court indicated that parents who failed to demonstrate that they were providing such a standard of education to their children who were not attending at a recognised school could properly have been convicted of an offence under the School Attendance Act 1926. (The decision in *Best* pre-dated the repeal of the 1926 Act and the coming into force of the 2000 Act).

53. It is clear from the language of Article 42.3.2 that the State is obliged to ensure that pupils receive a certain minimum education. The parents advanced no evidence at all in the District Court to show that Sorcha was in fact receiving an education which met these constitutional standards. As it is only in circumstances where it had been demonstrated that Sorcha had been in fact receiving a minimum standard of education that the parents would have had the right to have had her educated otherwise than at a recognised school for the purposes of Article 42.3.1, it follows that, in the absence of such evidence, the parents have no standing in these judicial review proceedings to argue that the 2000 Act is unconstitutional inasmuch as it obliged them to send her to attend at a recognised school.

54. The parents cannot, of course, challenge the constitutionality of the 2000 Act in the abstract, but may do so only by reference to such arguments as bear on their own personal circumstances and which are "referable primarily and specifically to the challenger, thus giving concreteness and first-hand reality to what might otherwise be an abstract or hypothetical legal argument": see *Cahill v. Sutton* [1980] I.R. 269, 282, per Henchy J.. The key fact here is that no evidence was led by them in the District Court to demonstrate that Sorcha had been receiving a minimum standard of education such as would meet the requirements of Article 42.3.2.

55. All of this is to say that the parents cannot demonstrate that they have any arguable case to the effect that the 2000 Act is unconstitutional in view of the established or admitted facts of the present case. Specifically, therefore, they have no standing to make the argument that the 2000 Act is unconstitutional by interfering with a decision made by them as a parents that it was in Sorcha's best interests not to attend a recognised school, since in the light of Article 42.3.2 (and, for that matter, the Supreme Court's decision in Best), such a decision could only be exercised where they had demonstrated that Sorcha was, in fact, receiving a minimum education appropriate to contemporary "actual conditions" outside of the recognised school environment. I repeat that as the parents led no evidence to this effect before the District Court, they cannot in these judicial review proceedings be heard to argue that either the 2000 Act or specified sections of that Act are unconstitutional on this account.

56. In these circumstances, it must be concluded that as the applicants have not established any arguable case judged by reference to the facts of their own case before the District Court that the 2000 Act was unconstitutional, I would not grant them leave to amend their pleadings in order to advance this particular ground in these judicial review applications whose purpose is to quash their convictions.

Conclusions

57. For all the reasons stated in this judgment, I consider that the applicants cannot establish any arguable grounds, whether in the respect of the grounds advanced in the High Court or by reference to the new argument as to the constitutionality of the 2000 Act itself. I also consider that their submission that they were denied procedural fairness in the High Court is not well founded.

58. So far as the constitutional issue is concerned, I would not grant the applicants leave to amend their statements of grounds before this Court in order to raise the constitutionality of the 2000 Act (or any specified section thereof) in these judicial review applications. I reach this conclusion because I do not think that, having regard to the established or admitted facts of this case, the applicants have established any arguable ground by reference to which the constitutionality of the 2000 Act (or any specified section thereof) might be challenged by them.

59. In these circumstances, I would affirm the decision of Binchy J. to refuse leave to apply for judicial review in respect of the orders and convictions made by the District Court on the 10th April 2015.