Neutral Citation: [2017] IEHC 182

THE HIGH COURT

[2016 No. 742 J.R.]

BETWEEN

MICHAEL O'BRIEN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 21st day of March, 2017.

1. The applicant seeks an order of *certiorari* by way of judicial review, quashing the order of District Judge Coughlan dated 9th May 2013, at Naas District Court as altered and/or affected by order of the Court of Appeal dated 10th November 2015, whereby the applicant was convicted of certain offences under the Road Traffic Acts. The background to the application is, to say the least, unusual.

2. The applicant was charged with two offences at Naas District Court. Firstly, he was charged with driving while deemed disqualified contrary to s. 38 of the Road Traffic Act, 1961 (as substituted by s. 12 of the Road Traffic Act, 2006) and, secondly, he was charged with the offence of driving without insurance on the same occasion. The applicant pleaded guilty to both charges. Accordingly, the District Judge convicted the applicant of both offences and sentenced him to four months' imprisonment and disqualified him from driving for a period of forty years in respect of the first offence. He took the second conviction of driving without insurance into consideration and imposed no penalty in respect of the same. At the time of these convictions, the applicant had 14 previous convictions for road traffic offences, including two for driving while disqualified and five for driving without insurance.

3. The applicant appealed his conviction to the Circuit Court and also initiated proceedings by way of judicial review (the "first judicial review proceedings") seeking an order to quash the decision of the District Judge on a number of grounds:

> (i) that the District Judge failed to consider making a community service order in lieu of a custodial sentence;
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> (ii) that the District Judge failed to conduct a proper enquiry into whether or not the applicant was entitled to legal aid;
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> (iii) that the disqualification from driving for a period of forty years is wholly unreasonable and contrary to law; and
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> (iv) that the order of the District Court as subsequently drawn up following upon his conviction contained in error on the face of the record, the latter in failing to describe the offence of which he was convicted properly.

4. The applicant took no steps to progress his appeal to the Circuit Court pending the outcome of his judicial review proceedings. The latter came on for hearing before Kearns P. who delivered a decision on 19th September 2014, in which he found against the applicant on all grounds. The applicant then appealed that decision to the Court of Appeal, which delivered its decision on 10th November 2015. The Court of Appeal upheld the decision of Kearns P. in all respects bar one; it considered the imposition of the forty-year disqualification to be unjustifiable and "*outside the zone of what might be considered reasonable by any standard*". The Court of Appeal considered that it would have been within the jurisdiction of the District Court to impose a disqualification for a substantial period having regard to the applicant's previous record. It stated however that the court (the Court of Appeal) could not do so and therefore that the disqualification order must be quashed. It then went on to say:

> *"That does not mean that the whole conviction is erased, however, because it is an ancillary disqualification that is severable from the sentence which was imposed within jurisdiction. There follows also a period of mandatory disqualification under the Road Traffic Acts. The Court will allow the appeal on this point. If Mr. O'Brien appeals his sentence of imprisonment, it will be open to the judge to consider the ancillary disqualification issue afresh and to impose a more appropriate disqualification, if so minded."*

5. The applicant subsequently sought leave to appeal to the Supreme Court. On 28th June 2016, the Supreme Court determined that the applicant had not demonstrated that he met the constitutional criteria for an appeal to that Court. It concluded that none of the issues on which the applicant relied, could be regarded as matters of general public importance, and that no benefit to the public at large or to the administration of justice could be derived from a further appeal.

6. The applicant then sought the leave of this Court to seek judicial review of the decision of the District Court dated 9th May 2013, as altered and/or affected by the decision of the Court of Appeal dated 10th November 2015, which application was heard by Moriarty J. on 27th September 2016 (the "second judicial review proceedings"). Moriarty J. granted leave to the applicant to apply by way of judicial review for the reliefs set out in his statement of grounds, and on the grounds at para. (e) of the statement of grounds which may be summarised as follows:

> (i) the effect of the order of the Court of Appeal is that a conviction is now recorded against the applicant, but without the imposition of a consequential disqualification order. The order, which is an order of the District Court (albeit one that has been amended by the Court of Appeal) therefore lacks jurisdiction;
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> (ii) The applicant was also charged with the offence of driving without insurance and the District Judge was required, by virtue of s. 26(5) of the Road Traffic Act 1961 (as amended) to impose an order of disqualification. The respondent District Court Judge failed to make impose any penalty at all in relation to this offence, instead taking it into account when imposing sentence for the offence of driving without a driver's licence.
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> (iii) The order convicting and sentencing the applicant contains an error on the face of the record as it does not contain a consequential order of disqualification as required by statute.

Submissions of Applicant
7. It is the applicant's case that the effect of the order of the Court of Appeal is to render the District Court order bad for want of jurisdiction since both a conviction for the offence of driving without a driving licence (where the person is at the time of the offence disqualified from driving) and a conviction for the offence of driving while uninsured, both carry a consequential minimum period of disqualification from driving. The arguments now advanced on behalf of the applicant are it is submitted quite distinct from any argument advanced at the hearing before the High Court and the Court of Appeal. The issues arising on this appeal did not arise during the course of the proceedings before the Court of Appeal and there was no discussion at that hearing about whether a disqualification order in the circumstances of the offences was consequential or ancillary in nature. It was not anticipated that the Court of Appeal would decide the disqualification was unlawful, but then decline to quash the order in its entirety.

8. It is submitted that it is well established that an order of the District Court must show jurisdiction. Reliance was placed on a range of authorities including the *State (O'Reilly) v. DeLap* (unreported, High Court, 20th December, 1985) where Gannon J. stated:-

> *"The orders of the District Court as a matter of record should be seen to be in accordance with the jurisdiction of the court. If one of the limitations of jurisdiction relates to the range of punishment within limits prescribed by statute the order of the Court prescribing a punishment must be seen to be within such limits."*

The order of the District Court recording a conviction of an offence created by statute must not only show the offence was a statutory offence but also that the punishment of conviction is within the limitation imposed by statute. While the use of the phase "contrary to the statute in such case made and provided" might be sufficient when the wording of the statute is followed, an inaccurate or incorrect designation of the statute would constitute a bad or erroneous record.

9. In that case, Gannon J. granted an order of certiorari quashing the order stating that:-

> *"the conviction and sentence are matters of record and consequently if wrong an order of certiorari should follow as a matter of course, there being no room for the exercise of judicial discretion in relation to certiorari."*

10. In the much earlier case of *Tangney v. Kerry District Justice* [1928] I.R. 358 the Supreme Court granted an order of *certiorari* quashing a conviction because the District Judge, having convicted the applicant of an offence under s. 2(2) of the Fisheries Act 1924, had failed to impose a mandatory order requiring forfeiture of salmon illegally caught by the applicant. Kennedy C.J. stated:

> *"In the present case, as shown by the certificate of the 27th May, 1927, the District Justice omitted to order a forfeiture of the salmon, as required by the statute, and there is copious authority for holding such an omission to invalidate the whole order."*

11. Other cases in the same vein include the *State (Carr) v. District Justice for Youghal* [1945] I.R. 43 and the *State (Michael Leahy) v. District Justice for Cork* [1945] I.R. 426. In the latter, Mr. Leahy had been convicted and fined in the District Court for unlawfully having in his possession a number of salmon which had been caught unlawfully. The act under which he was convicted required the District Judge to set out to whom the fine was to be paid, and in what proportions. It did not do so. O'Sullivan C.J. stated (at p. 432):

> *"In view of these provisions it is clear that in order to ascertain the person to whom the fine is payable it is necessary in the first instance to know whether or not a member of the Gárda Síochána was the means of bringing the offender to justice. This is a matter to be determined, in such a case as the present, by the District Justice, and I have no doubt that the conviction should state how the matter was determined. As the conviction in this case does not do so, it is in my opinion bad on its face."*

Similarly, in *Carr*, Gavan Duffy J. quashed a conviction which failed to specify the parties to whom the fine was to be paid, as required by statute holding that this resulted in the conviction being defective in a material particular.

12. The applicant also relies on the decisions of the Supreme Court in the case of *G.E. v. Governor of Cloverhill Prison* (Unreported, Supreme Court, 28th October 2011) and *P.D. v. Clinical Director, Department of Psychiatry, Connolly Hospital* (Unreported, High Court 10th February 2014) in support of his argument that where there is a defect on the face of an order which forms the basis for a person's detention, the order will be quashed notwithstanding that there has otherwise been compliance with statutory requirements and applicable procedures. It is the defect on the face of the order that renders detention in such circumstances unlawful, and leads to the quashing of the impugned order. It is submitted that in this case there is no longer a disqualification imposed upon the applicant and none is recited in the order of conviction; all record of there ever having been such a disqualification has been erased from the record by order of the Court of Appeal as though no disqualification had ever been imposed. Since the mandatory requirement that a (lawful) consequential disqualification be ordered has not been complied with, the circumstances giving rise to these proceedings are akin to Tangney while also falling within the parameters of *G.E.* and *P.D.*

13. In *G.E.*, the Supreme Court held that a notice given to the applicant refusing him leave to land in the State for the purposes of s. 5(2) of the Immigration Act 2003, was invalid on its face, thus rendering the detention of the applicant unlawful. Denham C.J. set out the applicable principles in such circumstances as follows:-

> *"The appellant has invoked his right under the Constitution to habeas corpus. In inquiring under the Constitution as to his custody the court must examine the validity of the document of the 2nd August, 2011.*
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> *A document, such as in issue here, should contain clear information on its face as to the basis of its jurisdiction. This information is required so that it be available to, for example, (a) the person in custody such as the appellant;(b) the Governor of the Prison, or any other, who is holding a person in custody; and (c) the Court which is requested to enquire into the custody pursuant to Article 40 of the Constitution".*

14. In *P.D.* Hogan J. quashed an order authorising the detention of a person pursuant to the Mental Health Act 2001, which contained several errors on its face. He stated:-

> *"As the Supreme Court made clear in G.E., it is of vital importance that any order which provides the legal basis for any form of custody or detention should clearly recite the basis for this on its face. In that case the administrative notice reciting that the applicant had been refused leave to land and providing for his detention pending removal from the State failed to contain certain key recitals required by statute. … Given that the renewal order fails on its face to recite clearly either the proper legal basis for the detention or the correct date on which the renewal order will expire, I feel*

bound by the decision in G.E. to hold that the respondent has not clearly established the lawful basis for the detention in the manner required by Article 40.4.2.

15. In the more recent case of *Whelan v. Judge Brian Kirby* [2005] 2 I.R. 30 the solicitor for the applicant had been furnished with a copy of the order of the District Court which recorded no conviction, but nonetheless proceeded to set out penalties which had been imposed. In his judgment, Fennelly J. referred to s. 13 of the Courts Act 1971 which states that "*the District Court shall be a court of record*" and s. 14 of the same Act which requires the court to have regard only to orders drawn up by the District Court clerk and signed by the judge. He stated:

> *"I am satisfied that s. 14 of the Act of 1971 is the proper starting point for this analysis. The solicitor for the applicant acted properly in bespeaking a copy of the order to be exhibited in the affidavit grounding the application for leave to apply for judicial review. He was furnished with certified copies which recorded no conviction, but nonetheless proceeded to set out penalties which had been imposed. … In my view the applicant, in the present case, has satisfied the prima facia burden of showing that there was an error on the face of the record by producing a record of the District Court order to which s. 14 of the Act of 1971 applies. The second respondent has failed to produce any evidence to displace that record. Accordingly, if it were necessary, I would grant an order of certiorari on this additional ground …"*

16. It is also argued on behalf of the applicant that the effect of the amended District Court order is to deprive the applicant of "two bites of the cherry" in relation to penalty. This is because there is no order of the District Court imposing upon the applicant a disqualification as required by statute, and the matter will for the first time be considered on the applicant's appeal. Accordingly, it is submitted that this is inconsistent with Article 34.3.4 of the Constitution which provides:

> *"The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law."*

17. Section 18(1) of the Courts of Justice Act 1928, as amended by the Criminal Justice Act 2006, makes provision for such appeals as follows:

> *"An appeal shall lie in criminal cases from a Justice of the District Court against any order (not being merely an order returning for trial or binding to the peace or good behaviour or to both the peace and good behaviour) for the payment of a penal or other sum or for the doing of anything at any expense or for the estreating of any recognizance or for the undergoing of any term of imprisonment by the person against whom the order shall have been made including an order under section 100(1) of the Criminal Justice Act 2006."*

In support of this argument, the applicant relies upon the decision of Hogan J. in the case of *Byrne (a minor) v. Director of Oberstown School* (Unreported, High Court 10th December 2013).

18. The applicant submits that cases such as: *the State (Richard White) v. Judge Martin* (Unreported, Supreme Court, 21st October 1976), *the State (Hunt) v. O'Donovan* [1975] I.R. 39, *McCabe v. Ireland* (Unreported, High Court, 30th September 2014), all support the proposition that the applicant has a right of appeal against whatever disqualification may be imposed, and it is submitted on behalf of the applicant that because there is no disqualification imposed by reason of the amended order of the District Court, the first imposition of the same will be in the Circuit Court from which there is no appeal, thereby depriving the applicant of his constitutional entitlement to an appeal from whatever disqualification order may be imposed in the first instance, in this case by the Circuit Court.

Submissions of the Respondent

19. The respondent submits that no matter how this application is presented or rationalised, it amounts to a challenge by way of judicial review to a decision of the Court of Appeal, and that is not legally permissible. It is well established that a decision of the Superior Courts is not amenable to a challenge by way of judicial review. The penalty to which the applicant is liable may now be based on an order of the District Court, as amended in light of the decision of the Court of Appeal, but it is with the Court of Appeal decision that the applicant takes issue in these proceedings. The respondent refers to the decision of the Supreme Court in *State (Abenglen Properties) v. Dublin Corporation* [1984] I.R. 381 where O'Higgins C.J. stated that the remedy of *certiorari* emerged originally as the means by which the Court of the Kings Bench controlled the judicial process of the lower courts. In *Blackall v. Grehan* [1995] 3 I.R. 208 at p. 211, the Supreme Court said: "*The applicants in this case are seeking judicial review in respect of an order of the High Court and this is something to which they are not entitled*." It is submitted that the same obviously applies to orders and decisions of all of the Superior Courts.

20. It is further submitted that the applicant is bound by the decision of the Court of Appeal under the doctrine of *res judicata*. The respondent contends that the issues the subject of this application have already been dealt with by a final order (in this case of the Court of Appeal) and it is not therefore open to the applicant to raise the issues again in fresh proceedings. The respondent relies upon the authorities of *Blair v. Curran* [1939] 62 CLR 464, *Belton v. Carlow County Council* [1997] 1 I.R. 172 and *Donoghue v. Browne* [1986] I.R. 90 where Gannon J. in this Court said: "*If both parties have previously been bound by a final order, repetitious proceedings for the determination of the same issue between them will be barred*."

21. While accepting that the quashing of a sentence by this Court ordinarily entails the quashing of the conviction as well, the respondent does not accept that this is so in all cases and submits that in cases where the conviction of certain offences attracts both primary and secondary penalties it is permissible to sever the secondary penalty from the conviction where the former is legally flawed and must be quashed by way of *certiorari*.

22. Such an order was made in the English case of *R. v. Arundel Justices, ex parte Jackson* [1959] 2 Q.B. 89 in which the factual background bore certain similarities to that given rise to this application. The defendant had been convicted of a road traffic offence for which he was fined and disqualified from driving for twelve months. However, under the relevant statute as a first time offender he should not have been disqualified for more than one month. He sought an order of *certiorari* quashing the entire conviction but the Court of Appeal refused the application holding that the disqualification order was separate or supplemental to the remainder of the order. The court referred to an earlier decision of Lord Goddard C.J. (without giving a citation) who said:-

> *"The court therefore quashes the order of disqualification. We do not quash the conviction or the penalty because section 6(2) of the Road Traffic Act, 1930, points out that the order for disqualification is different from the conviction, and it expressly gives power to a disqualified person to appeal against the order of disqualification as if it were a conviction. That shows that it is something separate, and it is perfectly easy to sever that part of the order which deals with disqualification from that part of the justices' adjudication which deals with the penalty. We cannot, in quashing the*

order for disqualification, substitute the right period, but there is no reason why we should quash that part of the order which deals with the penalty."

23. The respondent also relies on the decision of the Supreme Court in *Conroy v. Attorney General* [1965] 1 I.R. 411 where the Supreme Court drew a distinction between the primary punishment for the offence (sentence of imprisonment) and a disqualification order, which it said was a secondary penalty.

24. The respondent also argues that a disqualification order in this case is a result of the appeal which the applicant himself brought to the Court of Appeal. Having asked the Court of Appeal to quash the disqualification order made by the District Judge on the grounds it was excessive, the applicant can hardly now complain that he has obtained just such an order. Moreover, it was for the applicant to draw to the attention of the Court of Appeal if he considered that the court could only achieve this end by quashing the entirety of the conviction and not, as the court did, by quashing that part of the order imposing the disqualification from driving. As far as the respondent was concerned, the question of severance did not arise because the respondent was arguing that the disqualification was not unreasonable and that any grievance that the applicant had with that part of the order could be addressed on appeal to the Circuit Court. Accordingly, the applicant, not having alerted the Court of Appeal to any difficulties which he claims arise from the quashing of the disqualification order alone, must be taken to have acquiesced in any consequences flowing from the granting of the relief which he sought.

25. The respondent submits that this is quintessentially a case where relief should be refused because a more appropriate remedy is available in the form of an appeal. The applicant's complaint is an unusual one because he claims that the flaw in the conviction as it now stands is that he is not being subjected to a disqualification order. This can be rectified on appeal. As the Court of Appeal pointed out in its decision, it is open to the Circuit Court to consider the disqualification issue afresh and impose an order of a more reasonable duration than that originally imposed by the District Court. The respondent relies on the authorities of *G. v. DPP* [1994] 1 I.R. 374; *State (Abenglen Properties) v. Dublin Corporation* [1984] I.R. 381; and *McGoldrick v. An Bord Pleanála* [1997] I.R. 497, as being authorities for the proposition that in circumstances such as obtained in this case, the more appropriate remedy for the applicant to pursue in the first instance is the prosecution of his appeal before the Circuit Court rather than judicial review. The respondent cites the following passage from the decision of Barron J. in *McGoldrick*:-

"The true question is which is the more appropriate remedy considered in the context of commonsense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind."

Discussion and Decision

26. As observed in the opening paragraph of this judgment, the background to this application is most unusual. In the first instance, it is necessary to consider the nature of the order that the applicant seeks to review and, in particular, whether it is an order of the District Court or the Court of Appeal.

27. In his statement of grounds at para. d(i), the applicant seeks:-

"An order of certiorari by way of judicial review quashing the order of Judge Coughlan dated 9th May, 2013, in Naas District Court, as altered and/or affected by the order of Court of Appeal dated 10th November, 2015, convicting the applicant of the offence of:-

'Driving while deemed disqualified contrary to s. 38 of the Road Traffic Act, 1961 (as substituted by s. 12 of the Road Traffic Act 2006)…' "

28. Counsel for the respondent submits that the first part of this paragraph in relation to the order made by Judge Coughlan on 9th May 2013, has already been the subject of a judicial review and is *res judicata*. As to the second part of the paragraph, he submits that it is not permissible for the Court to review an order of the Court of Appeal. It is the applicant's contention, however, that *res judicata* does not arise because the issues before the Court on this application are different to those that were before this Court and the Court of Appeal on the first judicial review. Moreover, the applicant contends that what is under review here is an order of the District Court and the record of that order; in effect, what the applicant is saying is that it does not matter how that order came about.

29. In the first judicial review proceedings the applicant sought, *inter alia*, an order of *certiorari* quashing the order of conviction and sentence, or alternatively an order quashing the decision of the respondent in those proceedings (District Judge Coughlan) to disqualify the applicant from driving for a period of forty years. Ordinarily, applications of this kind have one of two outcomes: either the order of the District Judge is quashed or it is not. If it is not, then clearly what survives is an order of the District Court and not an order of the High Court, or the Court of Appeal, as the case may be.

30. In circumstances where the High Court or the Court of Appeal quashes part only of an order of the District Court, then what remains, while arguably an order of the District Court, is clearly not the order of the District Court as originally made. This is reflected in the relief sought by the applicant himself, in seeking an order quashing the order of the District Court *as altered or affected by the Court of Appeal.* While it was necessary for the applicant to put it this way in order to differentiate the relief now sought from that sought in the first judicial review proceedings, nonetheless the very relief sought by the applicant makes it clear that in part measure what he now seeks is an order quashing an order made by the Court of Appeal. To construe it any other way would be a legal fiction flying in the face of what has actually occurred.

31. It is abundantly clear that decisions of the Superior Courts are not open to judicial review. Indeed, I do not understand the applicant to argue otherwise, but if authority were needed for that proposition, it can be found in the decision of the Supreme Court in *Blackhall v. Grehan* to which the respondent has referred in the submissions made on his behalf.

32. Moreover, in the first judicial review proceedings, the Court of Appeal expressly declined to quash the conviction in its entirety. Insofar as the applicant seeks an order to quash what remains of the order of the District Court, the respondent argues that the issue is *res judicata* because the Court of Appeal has already declined to make such an order. The respondent argues however, that this is not so because the issue before the Court is a different one i.e. in the first application for judicial review the applicant was arguing that the disqualification from driving was excessive and unreasonable. In these proceedings however, the applicant is making a different argument i.e. that it is not open to the Court to sever the penalty from the conviction and, therefore, what remains of the District Court order should be quashed.

33. However, the applicant's argument in this regard must be considered in the context that one of the reliefs sought by the applicant in the first judicial review proceedings was the very relief granted by the Court of Appeal. It can hardly be open to the applicant, having obtained an order for which he applied, to come back to the Court by way of a new application for judicial review to seek an order quashing what remains of the order of the District Court, on the grounds that the very order that he obtained has now rendered the remainder of the order of the District Court invalid. If that is the case, the applicant should not have applied for such an order in the first place, or, at a minimum, should have canvassed the issue before the Court of Appeal.

34. It is well established that the doctrine of *res judicata* applies not just to matters that were aired before and decided upon by a court, but also to all issues that should have been raised but were not. This principle was established in *Henderson v. Henderson* (1843) 3 Hare 100 and approval by Hardiman J. in the decision of the Supreme Court in *A.A. v The Medical Council* [2003] 4 I.R. 302, at page 315. Accordingly, in my view the doctrine of *res judicata* does apply to the decision of the Court of Appeal in its refusal to grant an order quashing the entirety of the order made by the District Judge, and that issue cannot now be re-opened by the applicant. Even if I were not of this view however, the applicant should not in any event be granted the relief that he now seeks, having expressly sought the order made by the Court of Appeal in the first judicial review proceedings.

35. For these reasons, I dismiss the application. In view of my conclusions above, it is not necessary for me to address the other arguments made on behalf of the applicant.