

THE HIGH COURT

FAMILY LAW

[2013 No. 48 CAF]

BETWEEN

R. MCG.

APPLICANT

AND

S. MCG.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 24th day of July, 2015.

1. This application is grounded upon the notice of motion issued by the respondent to the above mentioned proceedings, sworn on the 15th June, 2015, wherein he seeks the following reliefs:-

"1. An order releasing to the respondent the digital audio recordings or transcripts of the hearing in the above case heard by this Honourable Court on 7th May, 2014, (Ms Justice O'Hanlon) and on 27th February, 2015, (Mr Justice Abbott).

2. Such further or other reliefs as this Honourable Court deems suitable"

2. The respondent furnished to this Court an affidavit wherein he made clear the purposes for which the digital audio recording was sought and were contained at paragraph 2 of the said affidavit in the following terms:-

"I require the D.A.R. and/or transcripts of the hearings in my case on 7th May, 2014, (Ms Justice O'Hanlon) and on 27th February, 2015, (Mr Justice Abbott) as I intend to seek a judicial review of the decisions made on both dates. I urgently require the D.A.R.s and/or transcripts to be in a position to fairly prosecute my application for judicial review."[sic]

3. The court has jurisdiction to make directions so to release any extract from the digital audio recording database in the form of transcripts to either or all parties to proceedings under Order 123 contained within the Rules of the Superior Courts. Order 123, implemented by S.I. No. 325 of 2008 and amended by S.I. No. 101 of 2013 and S.I. No. 485 of 2014 is cited for the convenience of the parties as follows:-

"2. At the trial or hearing of any cause or matter, any party may, with the Court's permission and subject to and in accordance with any direction of the Court, make or cause to be made a record of the proceedings, which record shall (subject, in the case of criminal proceedings, to rule 14(2) of Order 86) include:-

(a) the oral evidence;

(b) in the case of an action tried by a Judge and jury, the Judge's charge and directions to the jury, and the submissions and requisitions made to the judge and his ruling thereon;

(c) in any case tried by a Judge without a jury, the Judge's judgment (unless it be a written judgment).

3. At the hearing of any inquiry as to damages or other proceedings by the Master, any party may, with the Master's permission and subject to any order or direction of the Master, make or cause to be made a record of the proceedings in such case, which record shall include:-

(a) any oral evidence;

(b) any speech or submissions by counsel or solicitor;

(c) the Master's judgment (unless it be a written judgment), and Order 36, rule 44 shall not apply in any such case.

4. The party making or causing to be made a record in a case referred to in rule 2 or rule 3 shall pay the cost of the production of the record and, where any transcript is required, the cost of the production of such transcript and the said payment shall be borne by the said party unless the Judge or the Master (as the case may be) shall after the trial or hearing certify that in his opinion it was expedient that the proceedings or any part thereof should have been so recorded, or, as the case may be, a transcript produced. If such certificate is given, the cost occasioned by the making of the record (and, where certified, any cost arising from the production of a transcript of or from the record) to which the certificate relates shall be part of the costs in the cause.

5. The Judge shall have power during the course or at the conclusion of the trial or hearing, to direct that a transcript of the record or any part thereof be furnished to him at the public expense or be furnished to any party applying therefore at the expense of that party.

6. (1) In case of an appeal, only such part of the record of the proceedings as the parties agree to be relevant shall be transcribed and included in the books of appeal to be lodged by the appellant pursuant to Order 58 or, as the case may be, Order 86. Any party may, however, cause any additional part of the record to be transcribed and included in the books of appeal but shall not be allowed the expenses of such additional part of the transcript (or of making copies thereof) as part of any costs awarded to him unless the Supreme Court or Court of Appeal shall immediately after the appeal certify that in its opinion it was expedient or desirable that the transcript of such additional part of the record

should have been lodged with the books of appeal.

(2) The Supreme Court or Court of Appeal shall have power, on the application of any party or without any such application, before or during the hearing of an appeal, to direct that any part of the record of the proceedings which has not been included in the books of appeal be transcribed and included therewith.

7. The Supreme Court, Court of Appeal or the Court may require the production to it of a record in such manner as it requires.

8. Unless:-

(a) otherwise permitted by and in accordance with this Order, or

(b) otherwise permitted by the Supreme Court, the Court of Appeal or the Court and, in that event, subject to and in accordance with any direction of such court,

no person, other than the Courts Service or a person authorised by it on its behalf, shall make any record of proceedings otherwise than by written or shorthand notes.

9. (1) Any party or person who seeks access to any part of a record of proceedings (in this rule referred to as the "relevant record") which is held by or for the Supreme Court, the Court of Appeal or the Court, as the case may be (in this rule referred to as the "relevant court") may apply to the relevant court by motion in the proceedings concerned on notice to the other party or the parties to those proceedings, grounded upon an affidavit.

(2) On the date first fixed for the hearing of the motion, the relevant court may:-

(a) direct that copies of the notice of motion and affidavit be served on any other person who the relevant court considers has a sufficient interest in or may be affected by the application;

(b) fix time limits for the delivery of any replying affidavit.

(3) The relevant court may, for the purposes of considering any such application, review privately the contents of the relevant record.

(4) Subject to sub-rule (5), the relevant court may, where it considers it necessary in the interests of justice so to do, permit the applicant to have such access to all or such part of the relevant record concerned as is specified in the order made on the application, by such means and at such time or times as may be specified in that order and on such terms and under such conditions (including terms restraining the publication, dissemination or further disclosure of all or any part of the relevant record by the applicant, and the giving of an undertaking to such effect) as the relevant court may direct.

(5) Unless the relevant court otherwise directs, access to the relevant record concerned shall, where permitted under sub-rule (4), be afforded solely by the provision to the applicant of a transcript of all or any part of that record, on payment by the applicant to the transcript writer of the transcript writer's fee for producing the transcript."

4. Of particular applicability in the present circumstance is rule 9(4) of the aforementioned Order which enables the court to grant access to the moving party "to all or such part of the relevant record concerned as is specified in the order made in the application" in circumstances where the court "considers it necessary in the interests of justice so to do."

5. The moving party to this motion, the respondent to the above mentioned proceedings, has indicated to the court that he requires access to the relevant record so to pursue a judicial review of the decisions of both this Court and of Ms Justice O'Hanlon. In the interests of clarity it can be noted that both decisions pertain to High Court proceedings and were made by members of the High Court.

6. The High Court, as a court of full and original jurisdiction, has the inherent authority to judicially review the decisions of the inferior courts, tribunals and other bodies which might exercise public functions to ensure that they do not exceed their jurisdiction; as such, decisions of the High Court and the other Superior Courts cannot be the subject of judicial review. This was made clear by the Supreme Court in the decision of *The People (D.P.P.) v Quilligan (No. 2)* [1989] 1 I.R. 46 wherein Henchy J., stated at 57 as follows:-

"The High Court, whether sitting as the Central Criminal Court or otherwise, is not an inferior court subject to corrective orders such as mandamus. The Constitution has identified it as a court invested with full original jurisdiction in and power to determine all matters and questions of law or fact, civil or criminal."

This was further emphasised by the Supreme Court in *Blackall v Grehan* [1995] 3 I.R. 208 where Egan J. held that the applicants in that case were not entitled to seek judicial review in respect of an order of the High Court. Both authorities have been recently cited by Keane J., during the course of family law proceedings, in the decision of *A.B. v. C.D.* [2013] IEHC 578 where he stated at para. 11:-

"...there is clear and incontrovertible authority that Judicial Review cannot lie against an Order of the High Court."

7. This Court is satisfied, relying upon the authorities herein laid out and accordingly bound by them, that the respondent to these proceedings cannot obtain a judicial review of an order of the High Court. It is accepted that the motion upon which the respondent advanced his claim was not one which sought the leave of the court to initiate judicial review; however, it was necessary for this Court to address issues pertaining to the jurisdiction of the High Court to grant judicial review of an order of Superior Court so to examine whether it was necessary for the respondent to succeed in his application for access to the digital audio recordings of the court where "necessary in the interests of justice so to do". On the basis that the respondent cannot pursue the relief which he has

sought, contained within his affidavit; namely, to “prosecute [his] application for judicial review”, his application is moot and cannot possibly succeed.

8. Therefore, having considered the documents available to the court and the views of the parties, this Court refuses the relief sought by the respondent and does not release to the respondent the digital audio recordings or transcripts of the hearings in the above case heard on the 7th May, 2014, by Ms Justice O’Hanlon and on the 27th February, 2015, by this Court for the above mentioned reasons.