THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 13 J.R.]

BETWEEN

LUKE BYRNE

APPLICANT

AND

JUDGE JAMES O'DONOHOE AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 9th day of December, 2016

1. By notice of motion dated 22 January, 2015, the applicant seeks, *inter alia*, an order of certiorari by way of an application for a judicial review quashing the convictions and penalty imposed upon him by the first named respondent at Dublin Circuit Court (District Court Appeals List) on 11th November, 2014.

2. The factual backdrop to the within proceedings can be summarised as follows: The applicant was born on 7th February, 1997. On 26th September, 2012, the applicant (then 15 years of age) handled stolen property (cosmetics vouchers) on the Naas Road. The property had been the subject of a violent robbery immediately prior to the applicant being found in possession of the property. A file was submitted to the second named respondent who directed the applicant be charged. On 4th June, 2013, the applicant was brought before the District Court for the first time and his case was adjourned to 18th June, 2013. On 18th June, 2013, the applicant who attended court with his mother, pleaded guilty to the charge. He was remanded on bail for sentence to 10th September, 2013, and a probation report was ordered. The probation report which was before the court on 10th September, 2013, referred to the applicant having previously being diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and to his borderline cognitive ability and to difficult family circumstances. The report suggested a three month adjournment on probation supervision and accordingly the case was adjourned to 3rd September, 2013. On that date, the applicant and his mother attended the District Court but the update from the probation service was "not very positive". In the circumstances, the District Judge imposed a deferred six month detention order on the applicant and further remanded the case to 4th June, 2014. However, on 21st February, 2014, the matter was relisted before the District Court by the probation service as the applicant had failed to engage with them. The applicant was not in attendance and the matter was adjourned to 26th February, 2014, and the attendance of the applicant was required under penalty of a bench warrant. The applicant attended with his mother on the due date and he was told of his requirement to liaise with the probation services. The case was adjourned to 4th June, 2014. According to the affidavit sworn in the within proceedings by Garda Gary O'Mahony, the prosecuting Garda, there was no appearance by the applicant or his mother on 4th June, 2014. However, the grounding affidavit sworn by Padraig O'Donovan, the applicant's solicitor, avers that the applicant's mother was in court on the said date. In my view, nothing much turns on this conflict. In any event, on 4th June, 2014, a bench warrant issued for the arrest of the applicant. There was a negative probation report before the District Court which suggested that the applicant had missed 12 out of 13 appointments with the probation service, while his mother had attended two. The report also noted that he had picked up further charges, had stopped attending an education programme, had not engaged with the mentoring service, and that both he and his mother had not attended the Lucena clinic in relation to his ADHD. He was therefore assessed as being at high risk of reoffending.

3. On 29th July, 2014, the applicant was before the court in relation to the matter and an unrelated charge. On that date, the District Judge imposed the six month sentence which had been deferred in December, 2013. He fixed recognisances in the event of an appeal.

4. On 7th August, 2014, the applicant signed a notice of appeal against severity of sentence and entered a recognisance in Wheatfield Prison. The recognisance contained a promise to turn up to prosecute the appeal. On entering his bond, the applicant was released. He was not then given a date for his appeal. He was however duly furnished with a notice informing him of his appeal date of 16th October, 2014.

5. The applicant's appeal was listed before the Dublin Circuit Court on 16th October, 2014. Neither he nor his mother attended. According to Mr. O'Donovan's affidavit, the applicant and his mother were of the belief that the appeal would not proceed on that date. In any event, counsel appeared on his behalf and obtained an adjournment to 11th November, 2014. The court directed that the Gardaí notify the applicant of the adjourned date and remarked that should he fail to attend "consequences flow". On 6th November, 2014, the prosecuting Garda personally cautioned the applicant of his requirement to attend court on 11th November, 2014.

6. On the due date neither the applicant nor his mother attended court. As averred to by Garda O'Mahony, in their absence, the first named respondent struck out the appeal and affirmed the order of the District Court.

7. On 19th January, 2015, leave was granted to seek judicial review by order of White J. with a stay on the operation of the sentence pending the determination of the within proceedings.

8. In summary, the grounds upon which relief is sought are:

> 1. The decision of the first named respondent to convict the applicant in his absence and/or to impose a custodial sanction and/or otherwise to affirm the penalty of six months detention imposed in the District Court was made in explicit disregard for the law including statutory law and was contrary to natural and constitutional justice and in all the circumstances of the case was unjust, unreasonable and or/unfair.
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> 2. In determining the case against the applicant and in proceeding to affirm a six month detention order the first named respondent acted without any or any adequate regard to the rights of the applicant and/or acted contrary to natural and constitutional justice and/or acted otherwise that in due course of law.

3. The applicant was denied an opportunity to be heard and/or was deprived of the opportunity to participate in his own case in person or through a parent or adult relative in circumstances where he was a child and where there was no valid determination that he himself had consciously absented himself from the court. In proceeding to hear and determine the matter the first named respondent perpetrated a fundamental unfairness, fell into error and/or acted *ultra vires*.

4. The decision to proceed to determine the applicant's appeal and or other wise to affirm the penalty in circumstance where the applicant was a child with ADHD and/or other identified issues surrounding his cognitive ability issues was particularly unfair.

5. Without prejudice to the foregoing, when the first named respondent had in mind to affirm the six months detention order, the failure to make some effort to secure the attendance of the applicant and/or to procure a probation report and/or hear him and/or a parent, guardian or adult relative represented a breach of fair procedures and a breach of the requirements of constitutional justice and a breach of statute.

6. The applicant was entitled to a de novo hearing before the Circuit Court and in that regard the first named respondent failed to comply with or adhere to the provisions of the Children Act 2001 prior to imposing / affirming a detention order. Accordingly the first named respondent acted *ultra vires* in failing to have regard to a probation report and/or the views of the applicant, a parent and/or adult/relative where same was essential for the proper discharge of his functions and as required by statute.

7. If he was considering affirming the detention order proposed by the District Court, it was incumbent on the first named respondent to consider a probation report and/or prior to the imposition of sentence he should have either adjourned the matter or issued a bench warrant to compel the presence of the applicant and/or a parent or guardian.

9. In the statement of opposition, the second named respondent objects to the present application on the grounds, *inter alia*, that:

- The order of the Circuit Court was the correct order to be made in circumstances where the applicant had failed to prosecute his own appeal.

- The applicant was afforded every opportunity to attend and prosecute his own appeal. He was represented in his absence by counsel who declined the opportunity to make any submissions on his behalf.

- There was no denial as suggested of the applicant's right to be heard or

make submissions. He had been cautioned to attend and did not do so.

- His counsel was present and elected to make no submission whatsoever on his behalf. There was no fundamental unfairness, warrant of jurisdiction or error.

- There was no unfairness visited upon the applicant having regard to his cognitive abilities. He entered a bond to promise to appear in court and was cautioned personally of the date. He failed to attend. There was no evidence to suggest that the applicant's continued failure to attend court or at meetings with the Probation Service is somehow related to any cognitive deficit.

- There was no requirement by the first named respondent to obtain a probation report. There were already probation reports prepared in relation to the applicant. There was no determination on the merits of the applicant's appeal. In the absence of the applicant, the appeal was simply struck out and the District Court order affirmed as is the appropriate order to make in such circumstances.

- There was no requirement to consider in detail the provisions of Part 9 of the Children Act 2001 as there was no consideration of the merits of the applicant's appeal which was simply struck out in his absence.

- In circumstances where the applicant has failed to attend to prosecute his appeal, the appropriate order is to strike out the appeal rather than issue a bench warrant.

The applicant's submissions

10. The complaint in this case is the manner in which the applicant's case was disposed of in the Circuit Court on 11th November, 2014. No issue is taken with the proceedings as they transpired in the District Court or with the Garda intervention with the applicant. The challenge lies solely with what transpired in the Circuit Court.

11. That the applicant was a child is a critical factor in this case and it is readily apparent that he was processed in the Circuit Court without proper regard to that fact. A parent or adult relative was not notified of his court date. While his counsel was present, the District Court detention order was affirmed in his absence and without inviting counsel to make any submission on his behalf either in mitigation of sentence or otherwise. Thus, in disposing of the appeal in the manner in which he did, the first named respondent failed to comply with the principles of natural and constitutional justice or with the prerequisites of the Children Act 2001. Further to the provisions of the Courts (Supplemental Provisions) Act 1961, the sole issue which was before the first named respondent was whether the six months detention order was appropriate in the particular circumstances of the applicant. It is submitted that the constitutional right of an accused person to fair procedures applies to all stages of the criminal process, including sentence. In this regard counsel cited *People (Attorney General) v. Messitt* [1972] I.R. 204; *Nevin v. Crowley* [1999] 1 I.L.R.M. 376; *The State (Healy) v. Donoghue* [1976] I.R. 325; and *Brennan v. Windle* [2003] 3 I.R. 494. Furthermore counsel relies on the "first principles" set out by Murphy J. in *Lawlor v. Hogan* [1993] I.L.R.M. 606 where he states:

"[1] An accused has a fundamental constitutional right to be present at and to follow the proceedings against him.

[2] In so far as the judicial process in criminal matters expressly requires matters to be dealt with by or in relation to the individual accused, clearly he must be present to enable these functions to be performed.

[3] If a trial judge is satisfied that the accused has consciously decided to absent himself for the trial (at a time when his presence is not essential to enable some particular procedure to be complied with) then the trial judge would be

entitled in his discretion to proceed with the trial notwithstanding the absence of the accused."

12. It is posited that academic opinion as set out in O'Malley "Sentencing Law and Practice" considers that the second proposition of Murphy J. to be a strong statement of the principle that there should be neither conviction nor sentence in the absence of the accused.

13. While there is a distinction in the case law between trial at first instance and appeal *R (M'Monagle) v. Justices of Donegal [*1905] 2 I.R. 644 and *Attorney General v. Mallen* [1957] I.R. 344 refers), and while on appeal the onus is on the accused to prosecute the appeal, that, counsel submits, is subject to two distinctions as far as the present case is concerned. Whereas the non-appearance by an adult to prosecute his appeal may be sufficient for the first named respondent to have acted in the manner he did, that cannot be the case in the case of a child, which was the applicant's status at the relevant time, and particularly so when, as here, the applicant had a diagnosis of ADHD, borderline cognitive ability and other issues as outlined in the probationary reports which were before the District Court.

14. It is submitted that the appellate nature of the proceedings before the Circuit Court did not absolve the first named respondent from adherence to the provisions of the Children Act 2001. The first named respondent in the exercise of his jurisdiction pursuant to s. 50 of the Courts (Supplemental Provisions) Act 1961 was bound by the provisions of the Children Act 2001. Counsel acknowledges the seminal judgment in relation to District Court appeals and their nature is *R (M'Monagle).* However, he submits that, as is clear from the affidavit sworn on behalf of the respondents, the first named respondent affirmed the District Court order. Thus, in such circumstance the first named respondent embarked upon a consideration of the appeal insofar as he considered that the District Court order should be affirmed. Furthermore, if the presence of counsel was a condition precedent to entertaining the appeal, it can be gleaned that the first named respondent did give consideration as to whether the District Court order should be affirmed or not. There was, therefore, not merely a striking out of the applicant's appeal. In this regard counsel relied on *Hourigan v. Neilan & Ors* [2000] IEHC 85. Counsel submits that while the applicant had not turned up, his counsel was in attendance on 11th November, 2014, and thus the first named respondent could have entertained the appeal against sentence. Furthermore, it is not accepted that there had to be a special provision in the Children Act 2001, to make it relevant to District Court appeals. Part 9 of the Act is clear, in particular the reference in s. 96 to "*any court*" dealing with children in criminal proceedings. This, counsel submits, includes a District Court appeal. Accordingly, the first named respondent was obliged to consider the appeal in the context of Part 9 of the Children Act 2001. While ultimately the strikeout procedure may have been open to the first named respondent, it could not be done without regard to the said Act.

15. It is submitted that where criminal sanction such as detention is contemplated, s. 99(1)(b) of the Children Act 2001 mandates a court to obtain a probation report. It is clear from the provisions of s. 96 that the legislature imposes on a court special responsibility to ensure that a period of detention is imposed only as a measure of last resort.

16. On 11th November, 2011, there was no adult in court to speak for the applicant. It is clear that the first named respondent affirmed the District Court order in a perfunctory manner and without in the first instance considering whether the applicant had consciously absented himself from the proceedings and without seeking or awaiting submissions from his counsel on the sentence, or otherwise examining the background facts with particular regard to the applicant's age, personal circumstances and his level of understanding. Furthermore, there is no indication from the record of any judicial inquiry as to whether or not the applicant's mother or other adult relative had been advised of the new court date or any consideration given or determined as to why the applicant was not in attendance on the said date. It is submitted that for whatever reason the applicant did not or could not engage with the probation services, as is clear from the reports which were before the District Court. However, it could be the case that the shock of a six month sentence having been imposed on him in the District Court might have led the applicant to re-engage with those services had the first named respondent dealt with the appeal otherwise than the manner in which he did.

17. It is submitted that it cannot be the case that the first named respondent who is hearing an appeal *de novo* from the District Court can disregard Part 9 of the Children Act, 2001 where a child does not attend and/or is not brought to court. For that to be the case, it would have to be provided for in the legislation.

18. Counsel submits that the *dictum* of Murphy J. in *Hourigan* is authority for the proposition that it was open to the first named respondent to entertain the applicant's appeal in circumstances where his counsel was present.

19. The crux of this case is that the Circuit Court's jurisdiction was conditional on adherence to Part 9 of the Children Act 2001. In not so doing the first named respondent acted *ultra vires* which warrants *certiorari* of the order made in the Circuit Court.

The respondents' submissions

20. It is submitted by counsel for the respondent that what occurred on 11th November, 2014, was an entirely normal process given the applicant's failure to turn up to prosecute his appeal. In the applicant's absence, the first named respondent made the only order he could make. The Children Act 2001, had no applicability in light of the applicant's failure to prosecute his appeal. Thus, there was no requirement on the first named respondent to ascertain if the District Court order was the appropriate order.

21. In support of the proposition that the first named respondent adopted the correct approach, counsel relies on *R (M'Monagle).* Furthermore, insofar as it was suggested by counsel for the applicant, there is no merit in the submission that it was incumbent on the first named respondent to issue a bench warrant for the applicant. There was no such requirement when the applicant was the moving party in the appeal. In this regard, counsel relied on the dictum of McDermott J. in *Phelan v. Delahunt* [2014] IEHC 142.

22. Citing *Allen v. Governor of St. Patrick's Institution* [2012] IEHC 571, counsel accepts that s. 99 of the Children Act 2001 imposes a mandatory obligation on a court to obtain a probation report in respect of a child prior to imposing a sentence and that in the absence of a probation report, a court does not have jurisdiction to impose a sentence. However, the present case concerns an appeal by the applicant which was not prosecuted and not a determination on sentence by the first named respondent.

23. Ultimately, in the present case, as the appeal was not prosecuted and the matter simply struck out, there was no adjudication on the merits of the applicant's sentence such as would have required the procurement of a probation report. Had there been, the Children Act 2001 and all its attendant safeguards would have come into play but the applicant did not turn up to prosecute his appeal which would have triggered the mandatory requirements of that Act.

24. The applicant's contention that the Children Act 2001 changed the law on District Court appeals is misconceived. The Act is entirely silent on the issue and there is no provision in that legislation which amends the provisions of s. 18 of the Courts of Justice Act 1928.

Considerations

25. The Children Act 2001, with the interests of children at its very core, sets out mandatory requirements for the processing of cases involving children in the criminal courts. The principles relating to the exercise of criminal jurisdiction over children are set out in Part 9 of the Act. For the purposes of these proceedings, the relevant provisions are:

> "91.—(1) The parents or guardian of a child shall, subject to subsection (5), be required to attend at all stages of any proceedings—
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> (a) against the child for an offence,
>
> (b) relating to a family conference in respect of the child, or
>
> (c) relating to any failure by the child to comply with a community sanction or any condition to which the sanction is subject.
>
> (2) Where the parents or guardian fail or neglect, without reasonable excuse, to attend any proceedings to which subsection (1) applies, the Court may adjourn the proceedings and issue a warrant for the arrest of the parents or guardian, and the warrant shall command the person to whom it is addressed to produce the parents or guardian before the Court at the time appointed for resuming the proceedings.
>
> (3) Failure by the parents or guardian, without reasonable excuse, to attend any such proceedings shall, subject to subsection (5), be treated for all purposes as if it were a contempt in the face of the court.
>
> (4) At the hearing of any proceedings in respect of the offence with which the child is charged, any parent or guardian who is required to attend the proceedings may be examined in respect of any relevant matters.
>
> (5) The Court may, at any stage of proceedings to which subsection (1) applies, excuse the parents or a parent or the guardian of the child concerned from attendance at all or any part of the proceedings in any case where the Court, either of its own motion or at the request of any of the parties to the proceedings, is of opinion that the interests of justice would not be served by such attendance.
>
> (6) If in any such proceedings the whereabouts of the parents or guardian of the child concerned are unknown, or neither a parent nor a guardian attends the proceedings for any reason, the child may be accompanied during the proceedings by an adult relative or other adult.
>
> (7) This section does not apply to the parents of a child who is married.
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> …
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> "96.—(1) Any court when dealing with children charged with offences shall have regard to—
>
> (a) the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in particular, a right to be heard and to participate in any proceedings of the court that can affect them, and
>
> (b) the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child.
>
> (2) Because it is desirable wherever possible—
>
> (a) to allow the education, training or employment of children to proceed without interruption,
>
> (b) to preserve and strengthen the relationship between children and their parents and other family members,
>
> (c) to foster the ability of families to develop their own means of dealing with offending by their children, and
>
> (d) to allow children reside in their own homes, any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort.
>
> (3) A court may take into consideration as mitigating factors a child's age and level of maturity in determining the nature of any penalty imposed, unless the penalty is fixed by law.
>
> (4) The penalty imposed on a child for an offence should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind and may be less, where so provided for in this Part.
>
> (5) Any measures for dealing with offending by children shall have due regard to the interests of any victims of their offending.
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> …
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> 98.—Where a court is satisfied of the guilt of a child charged with an offence it may, without prejudice to its general powers and in accordance with this Part, reprimand the child or deal with the case by making one or more than one of the following orders:

(a) a conditional discharge order,

(b) an order that the child pay a fine or costs,

(c) an order that the parent or guardian be bound over,

(d) a compensation order,

(e) a parental supervision order,

(f) an order that the parent or guardian pay compensation,

(g) an order imposing a community sanction,

(h) an order (the making of which may be deferred pursuant to section 144) that the child be detained in a children detention school or children detention centre, including an order under section 155 (1),

(i) a detention and supervision order."

26. As accepted by both sides, there is a mandatory obligation on a court to obtain a probation report prior to imposing a sentence which involves a period of detention:

"99.—(1) Subject to subsections (2) and (3), where a court is satisfied of the guilt of a child, it—

(a) may in any case, and

(b) shall, where it is of opinion that the appropriate decision would be to impose a community sanction, detention (whether or not deferred under section 144) or detention and supervision, adjourn the proceedings, remand the child and request a probation and welfare officer to prepare a report in writing (a "probation officer's report") which —

(i) would assist the court in determining a suitable community sanction (if any) or another way of dealing with the child, and

(ii) would contain information on such matters as may be prescribed, including any information specifically requested by the court.

(2) The probation officer's report shall, at the request of the court, indicate whether, and if so how, in his or her opinion any lack of care or control by the parents or guardian of the child concerned contributed to the behaviour which resulted in the child being found guilty of an offence.

(3) The court may, in addition, request that a victim impact report be furnished to it in respect of any victim of the child where it considers that such a report would assist it in dealing with the case.

(4) The court may decide not to request a probation officer's report where—

(a) the penalty for the offence of which the child is guilty is fixed by law, or

(b) (i) the child was the subject of a probation officer's report prepared not more than 2 years previously,

(ii) the attitude of the child to, and the circumstances of, the offence or offences to which that report relates are similar to his or her attitude to, and the circumstances of, the offence of which the child has been found guilty, and

(iii) the previous report is available to the court and the court is satisfied that the material in it is sufficient to enable it to deal with the case.

(5) Where a court requests a report under this section, it may at any time summon as a witness any person whose evidence in its opinion would assist it in dealing with the case."

27. S. 106 of the Act provides:

"(1) Where the court has considered any report requested pursuant to this Part, it shall deal with the case in accordance with *section 98* .

(2) Before the court reaches a decision on the case, it may hear evidence from any person who prepared the report and from any person required under *section 99* (5) to attend the proceedings.

(3) The court shall also give a parent or guardian of the child concerned (or, if the child is married, his or her spouse), if present in court for the proceedings, or in his or her absence an adult relative or other adult accompanying the child, an opportunity to give evidence.

(4) The court may, on consideration of a probation officer's report, request such other report or reports in writing, including medical, psychiatric or psychological reports, as would in its opinion assist it in dealing with the case.

(5) The principal probation and welfare officer shall arrange for the preparation of any such other report or reports, which shall contain information on such matters as may be prescribed and on any matter that may be specifically requested by the court."

28. In *Allen v. Governor of St. Patrick's Institution*, Finlay-Geoghegan J. opined, with regard to s. 99:

> "*Section 99, in my judgment, mandates the requesting of a report irrespective of the attitude or wishes of a child or his solicitor.*" (at para. 29)

29. It is not in dispute but that in the District Court all of the appropriate procedures as required by the Children Act 2001, were engaged in and, as acknowledged by the applicant's counsel in these proceedings, there is no criticism of the manner in which the applicant was dealt with in the District Court.

30. It is common case that the applicant's appeal to the Circuit Court was scheduled for 16th October, 2014, and then adjourned (upon the application of his counsel) to 11th November, 2014, with the Gardaí directed by the Circuit Court Judge to caution the applicant of the adjourned date, which was duly done on 6th November, 2014. In the course of these proceedings, counsel for the applicant submits that the applicant's failure to attend on the 11th November, 2014, may have been a consequence of the fact that the prosecuting Guard spoke to him only on 6th November, 2014 (the suggestion being that a date more proximate to the court date might have been appropriate), and contends that the failure to notify an adult relative of the 11th November, 2014, date may in some way explain the applicant's absence on that date, taking into account his impaired cognitive abilities. The applicant is not challenging the Garda procedures in this case and insofar as there is criticism of the failure to apprise the applicant's mother or other adult of the appeal date, I am not persuaded that any such failing would be grounds to vitiate the order of the first named respondent given that the applicant's legal representative was present in court on 16th October, 2015, and therefore aware of the adjourned date and was thus in a position to advise the applicant and his mother of the adjourned date. I am not satisfied on the evidence that the applicant was unaware of his appeal. In any event, the applicant was apprised of the date on 6th November, 2015, as averred to by Garda O' Mahony and which is not challenged in these proceedings.

31. It is also common case that on 11th November, 2014, neither the applicant or his mother or other adult relative attended. However, the applicant was represented in the Circuit Court by counsel.

32. In his grounding affidavit the applicant's solicitor avers, *inter alia*, as follows:

> "11. The Applicant appealed to the Circuit Court. That appeal first came before the Circuit Court (District Court Appeals) list on 16th October 2014. Neither the Applicant nor his mother attended that day as I believe he understood that the case was not to proceed that day. I instructed counsel to appear and I believe the matter was adjourned to 11th November 2014 and the prosecuting Garda was to notify the Applicant.
>
> 12. I believe that neither the Applicant nor his mother was in attendance when the case was called first in the District Court Appeals list on 11th November, where upon... the First Named Respondent struck out the appeal and affirmed the Order of the District Court requiring the applicant to be detained for six months. A warrant subsequently issued the applicant was arrested and he is now in custody.
>
> 13. I am advised and I so believe that the Learned Respondent Judge erred and acted in excess of jurisdiction when he affirmed the Order of the District Court without proper regard to the fact that the applicant was a child, without seeking the preparation of a probation report or satisfying himself as to the Applicant's attitude to the offence and/or in failing to ensure that a parent or guardian, other adult/relative was in attendance and afford him an opportunity to be heard. I further believe the judge erred when he affirmed a substantial custodial sanction against a child despite the fact that neither he nor his mother or other adult relative was present."

33. As regards what transpired in the Circuit Court on 11th November, 2014, in the affidavit sworn by Garda Gary O'Mahony, he avers, *inter alia*, as follows:

> "17. On November 11th 2014 there was again no appearance by the applicant. The first named respondent accordingly struck out the appeal and affirmed the order of the District Court…
>
> 18. On listening to the DAR, counsel for the applicant informed the court that the applicant was not present on the previous occasion and had been remanded in his absence. Garda Deirdre Conway was standing in for me that day in court. She said to the court *'He was cautioned Judge'*. The first named respondent asked had (sic) been cautioned the previous night to which Garda Conway relied (sic) *'No, he was cautioned on the sixth of November by Garda O'Mahony at his home'*. The court asked what the applicant's address was. Garda Conway told the court the applicant's address at [ ], Tallaght. The first named respondent then said *'Ok, affirm District Court order'.*
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> 19. There was no objection from counsel for the applicant to this order being made. There was no attempt by counsel for the applicant to contradict what the court was being told. There was no attempt by counsel for the applicant to provide an explanation for the non attendance of the applicant or seek a further adjournment in his absence. Counsel for the applicant simply remained silent."

34. On behalf of the applicant it is submitted that in dealing with the matter as he did, the first named respondent breached the principles of natural and constitutional justice and/or failed to comply with or adhere to the mandatory provisions of the Children Act 2001. The respondent's contentions in these proceedings are that the applicant was someone who stood convicted in the District Court and was duly sentenced. Following upon the entering of his appeal and the entering of recognisances his sentence was suspended pending the determination of the appeal. He was at liberty only on foot of a bail bond for the purposes of the appeal. The onus was on him to prosecute his appeal. The respondent contends that the applicant's appeal never got off the starting blocks because he did not turn up in court to prosecute it. Accordingly, it is argued that there was no unfairness and that since the appeal was not prosecuted there was no obligation on the first named respondent to comply the provisions of the Children Act 2001.

35. Before addressing the respective arguments in this case, it is perhaps apposite to set out the applicable legislative provisions regarding appeals to the Circuit Court in criminal matters.

36. The right of appeal of a person convicted in the District Court is conferred by s. 18 of the Court of Justice Act, 1928. It provides that any person who has been convicted of a criminal offence in the District Court may appeal against conviction or sentence or both to the Circuit Court.

37. S.50 of the Court (Supplemental Provisions) Act 1961 provides:

> "—Where—

(a) an order is made in a criminal case by a justice of the District Court convicting a person and sentencing him to pay a penal or other sum or to do anything at any expense or to undergo a term of imprisonment or to be detained in Saint Patrick's Institution, and

(b) an appeal is taken against the order, and

(c) either—

(i) the notice of appeal states that the appeal is against so much only of the order as relates to the sentence, or

(ii) the appellant, on the hearing of the appeal, indicates that he desires to appeal against so much only of the order as relates to the sentence,then, notwithstanding any rule of law, the Circuit Court shall not, on the hearing of the appeal, re-hear the case except to such extent as shall be necessary to enable the court to adjudicate on the question of sentence."

The Circuit Court on appeal has full jurisdiction to hear the case *de novo*.

38. S. 265 of the Children Act, 2001 states:

> "An appeal shall lie to the Circuit Court from an order of the Children Court or the District Court committing a child to a children detention school or a place of detention designated under *section 150* ."

The Children 2001 Act does not otherwise make reference to appeals to the Circuit Court.

39. By and large, an appeal from the Children's Court takes the form of a complete hearing, generally in the same manner (and using the same forms with the necessary modifications) as appeals from the District Court.

40. Having considered the relevant statutory provisions and the arguments canvassed by the parties in the within proceedings, I do not find anything in the applicant's submissions which persuades me that the passing of the Children Act 2001, has in any way altered the legislative measures which pertain to an appeal to the Circuit Court from an order of the District Court, or that the provisions of the Children Act 2001, important and all as they are, have displaced the onus which is on an appellant to prosecute his or her appeal from a conviction/sentence in the District Court.

41. It is well established that a District Court appeal is not a re-run of proceedings in the District Court. Before the Circuit Court, an appellant challenges the conviction and/or sentence in the District Court and is not pleading to the charges. In *Attorney General v. Mallen*, the nature of an appeal was explained in the following terms:

> *"The appeal is a true appeal though by way of re-hearing and is not a re-trial except in form. The defendant appealing comes before the Circuit Court as a convicted person. He does not rid himself of the conviction by serving notice of appeal. He is not called on to plead and his task is to show, if he can, that the conviction was wrong in whole or in part. This situation is not altered by the circumstance that there is a re-hearing."*

42. It is also the case that where an appellant has failed to appear to prosecute his appeal, the proper procedure is to strike out the appeal. In *R. (M'Monagle),* O'Brien LCJ. stated:

> *"How can the Court "entertain" the appeal unless the appellant, or some one representing him, is there to bring the facts before the Court, and to say, "I am here to prosecute the appeal"? If there is no one there to prosecute, the Court cannot entertain the appeal, and the entertaining the appeal is a condition precedent to confirming, varying, or reversing it. If no one attends to prosecute the appeal, clause 6 proceeds to point out the course to be pursued: " And whenever any such appeal shall not have been duly prosecuted, the Clerk of the Peace … shall so certify upon such recognizance and return the same to the justices of the Petty Sessions from which the same shall have been transmitted … within seven days after the termination of the Sessions at which such appeal ought to have been prosecuted." That is to say, in such case the Court does not entertain the appeal; no order is made confirming, varying, or reversing the order below, but the recognizance is returned with a certificate by the proper officer that the appeal has not been prosecuted."* (at pp. 646-647)

43. In *The State (Dunne) v. Martin* [1982] 1 I.R. 229, the Supreme Court determined that a District Court appeal had been "validly and finally" struck out by the Circuit Court on 1st December, 1980, by reason of there being no appearance by or on behalf of the prosecutor of the appeal and that in respect of all actions thereafter on the part of the Circuit Court, namely permission to the prosecutor to re-enter the appeal, the refusal to then grant the prosecutor an adjournment, and the purported order to affirm the order made by the District Justice, the Circuit Court Judge was *functus officio* in respect of the prosecutor's plea.

44. In *McCann v. Groarke* [2001] 3 I.R. 431, the applicant's District Court appeal was struck out as he failed to appear on an adjourned date. The applicant sought *certiorari* on the basis that there was a practice whereby out of town solicitors were informed of hearing dates. Herbert J. refused relief and held that it was for an appellant to apprise himself of the hearing date. He stated:

> *"I totally reject this submission. In my judgment it was at all times the duty of the applicant and therefore of his solicitors, to prosecute this appeal and to take active measures to appraise themselves of the adjourned date for hearing in March 2000 and to be present on that date and on any other date to which the court might have occasion to further adjourn the appeal. The Circuit Court office in Dundalk was under no duty whatsoever to assume the function of a watchdog for the applicant or his solicitors as regards the date of the appeal.*
>
> *In my judgment, an informal general practice of notification of this nature to what are termed "out-of-town solicitors" of the "for mention", "call over" or hearing dates of matters listed before the Circuit Court sitting in Dundalk does not justify a legitimate expectation in such persons that such notice will always be given and in time and to the correct party so as to render any vigilance on their part unnecessary. In my judgment, a voluntary laudable practice of this nature, even if its sole purpose and object was to allow for the effective and efficient administration of justice by the court could not in itself reverse the role of the applicant as the person whose obligation it was to do all things necessary to prosecute his appeal and for this purpose to take active steps to ascertain the hearing date and to ensure his presence before the court on that date.*

> *In my judgment there was no failure to afford fair procedures in this case. The first respondent was acting intra vires his powers in striking out this appeal, if that is in fact what he did, in default of appearance: The King (McMonagle) v. Justices of Donegal [1905] 2 I.R. 644; The State (Dunne) v. Martin [1982] I.R. 229 (Supreme Court, per Henchy J.). If the applicant was not heard on this occasion it was entirely due to his own failure to attend before the court, or alternatively or additionally, due to his solicitors' failure to notify him of the adjourned date or to appear before the court. In the absence of some compelling evidence which would establish that the decision of the first respondent was in the circumstances irrational, unreasonable or tainted with bias - and there is no such evidence to be found in this case - the proper administration of justice must require that the court has and utilises the power to strike out or to dismiss an appeal for default of appearance on the part of the applicant or anyone on his behalf."*

45. In *Phelan*, McDermott J. found there was no obligation on the Circuit Court judge to ascertain why the applicant had not attended to prosecute his appeal either by way of issuing a bench warrant or otherwise, stating:

> *"21. I am also satisfied that this is not a case in which it was appropriate to issue a warrant. The matter is entirely distinguishable from the Brennan decision in which following conviction in the course of a hearing in the District Court, the trial judge when contemplating the imposition of a sentence of imprisonment, failed to take steps to procure the attendance of the accused before proceeding to impose the sentence. In this case the appeal was struck out and the court did not embark on any hearing of the merits of the case which the applicant showed very little interest in pursuing."*

46. The present case concerns an appeal against the detention order imposed on the applicant in the Children's Court on 29th July, 2014. The questions to be determined are whether in striking out the appeal and affirming the order of the District Court, the first named respondent failed to have regard to the principles of natural and constitutional justice and/or failed to adhere to the mandatory provisions of the Children Act 2001. It is not in dispute that the applicant was a child at the time of the Circuit Court hearing on 11th November, 2014.

47. It is contended on the applicant's behalf that he was deprived of the opportunity to participate in his own case and that in proceeding to determine the appeal in the manner he did, the first named respondent perpetrated a fundamental unfairness, in particular in circumstances where there was no valid determination that the applicant had consciously absented himself, and in circumstances where the applicant was a child with ADHD and had cognitive ability issues.

48. The first observation that I would make is that the applicant was represented in the Circuit Court on 11th November, 2014, a fact which is not in dispute. It is also the case that counsel was present on 16th October, 2014, when the matter was previously adjourned and when a direction was given to the prosecuting Garda to caution the applicant about the adjourned date. I have set out above what is averred to in Garda O'Mahony's affidavit as to what occurred on 11th November, 2014, namely that other than apprise the first named respondent that the applicant had not appeared on the previous date and had been remanded in his absence to appear on 11th November, 2014, counsel for the applicant did not otherwise make any intervention on his behalf, including seeking an adjournment on his behalf or objecting to the order made by the first named respondent. Nor does there seem to have been any attempt to apprise the first named respondent of the applicant's ADHD or borderline cognitive ability. In the within proceedings, there is no replying affidavit by way of contradiction of what is contained in Garda O'Mahony's affidavit. In the course of his submissions in the within proceedings, counsel for the applicant referred to *Hourigan* in support of his argument that the first named respondent had power to entertain the appeal where the applicant was represented. In *Hourigan*, a District Court appeal was embarked on notwithstanding the absence of the appellant. In that case, the appellant had been convicted in the District Court and a period of detention was imposed in addition to fines. The appellant appealed but did not attend the Circuit Court appeal hearing. The Circuit Court Judge dismissed the appeal, affirmed the conviction and order of the District Court and further ordered the destruction of animals which were the subject of the convictions in the District Court. In the course of judicial review proceedings, the case was made that the correct course for the Circuit Court judge was to strike out the appeal when the appellant did not appear in court and reliance was placed on *R (M'Monagle).* However, Murphy J. rejected that argument as "*it is clear he was represented by his solicitor… and that there was a hearing*" in the Circuit Court. He noted that the solicitor for the appellant "*made submissions in addition to cross-examining witnesses for the prosecution."* On that basis Murphy J. found that *M'Monagle* had no application and that "*clearly the Circuit Court had power to 'entertain' the appeal where the applicant was represented."*

49. In his submissions to this court, counsel for the applicant submits that the very presence of the applicant's counsel in court was sufficient to distinguish his case from the circumstances which prevailed in *R (M'Monagle)* and *McCann*.

50. It is clear that in *Hourigan* there was an active hearing of the appeal on the relevant date in which the appellant's legal representative participated. In the present case, can it be said that there was a duty on the first named respondent to embark upon a merits hearing simply because the applicant's counsel was present but in circumstances where there was no representation made on the applicant's behalf that the appeal was to be prosecuted and/or no entreaty made on the applicant's behalf that the Circuit Court should embark upon a hearing of the appeal, albeit in his absence? Equally, was there an obligation on the first named respondent to adjourn the proceedings in the absence of any application for an adjournment made on behalf of the applicant? In the present case, I would answer these questions in the negative.

51. In the first instance, I am not satisfied that there is evidence before the court that representations were made on the applicant's behalf on 11th November, 2014, either before or after the order of the first named respondent to the effect that counsel attempted to prosecute the appeal, or that there was any attempt to apply for an adjournment, either of short duration or otherwise, to secure the applicant's attendance on that date or another date, or in order to ascertain the reasons for his non attendance on 11th November, 2014. Had there been such an intervention on the applicant's behalf and had the first named respondent failed to entertain such representations or submissions then, to my mind, that would be a fundamental unfairness which would warrant the intervention of this court. However, in the absence of any such intervention on behalf of the applicant I cannot accept, without more, what appears to be implicit in the applicant's written submissions, namely that the applicant's counsel was denied an opportunity to be heard on the relevant date. There is no sense from the available evidence that the applicant's counsel informed the court the appeal was to be "*prosecuted*" on 11th November, 2014 in the sense referred to in *R (M'Monagle).* Nor, as I have said, is there evidence that there was any other active step taken to intervene on the applicant's behalf. In all the circumstances of this case, I am not satisfied that the applicant suffered a failure of procedural justice in the sense articulated by O'Sullivan J. in *Nevin v. Crowley* [1999] I.L.R.M. 376 and which is relied on by the applicant.

52. The next question to be determined is whether by his statement "*OK affirm District Court order*", the first named respondent effectively embarked upon a merits-based consideration of the case. If the respondent is found to have embarked upon the hearing on the merits, then it goes without saying that he was mandated by the Children Act 2001 to procure a probation report or at least have regard to existing probation reports. A consideration of the merits of the appeal in the absence of recourse to the provisions of

the Children Act 2001 would render the first named respondent's order *ultra vires*, leading to its quashing, given the mandatory nature of the provisions of s. 99 (1) and s. 106 (3).

53. Counsel for the applicant stresses the fact that the first named respondent "affirmed" the District Court order. It is thus submitted that by dint of so doing, the first named respondent was obliged to apply the provisions of the Children Act 2001 before affirming. Before addressing this point, it is worth noting that both the applicant's solicitor's affidavit and that sworn by Garda O'Mahony refer to the first named respondent having "struck out the appeal and affirmed the order of the District Court", although the words of the first named respondent striking out the appeal are not quoted in either affidavit.

54. The case made on behalf of the applicant is given that the first named respondent affirmed the District Court order he effectively embarked upon a consideration of the appeal. It is thus submitted that in simply affirming the District Court order without regard to the statutory requirements, the first named respondent did not give the applicant's appeal the degree of attention it required in circumstances where the first named respondent had full *de novo* power to consider six months sentence which had been imposed on the applicant in the court below. Counsel contends that insofar as the first named respondent affirmed the six month sentence imposed by the District Court, it was incumbent on him to procure a probation report or at the very least have regard to the reports which were before the District Court.

As set out above, consideration of a probation report is required by statute prior to the court making any order consequent upon a finding or a plea of guilt. It is also asserted that the first named respondent failed in his duty to give the applicant's mother or other adult relative an opportunity to give evidence in relation to the probation report, contrary to s. 106(3). Counsel for the applicant relies, in particular, on s. 96(1) of the Act, which sets out the obligations on "any court" when dealing with children charged with offences.

55. In "affirming" the District Court order the first named respondent could be said to have agreed with and confirmed the lower court's sentence. Was that sufficient to necessitate the exercise by the first named respondent of the mandatory jurisdiction under the Children Act 2001 such that he was obliged to have regard to a probation report and afford the applicant's mother or other relative or adult an opportunity to be heard? It seems to me that this question comes back to whether it can be truly said that the first named respondent had entered upon a consideration of the merits of the appeal. In *R (M'Monagle),* O'Brien LCJ opined that "*the entertaining the appeal is a condition precedent to confirming, varying, or reversing it.*" I am not persuaded that what transpired on 11th November, 2014 can be said to have been an "*entertaining*" of the applicant's appeal by the first named respondent in any real sense of the word, in the absence of any active intervention on the part of the applicant's representative as discussed above, and in the absence of any other evidence that the first named respondent, of his own volition, instigated a consideration of what the District Court had had regard to in coming to its conclusion on sentence, or otherwise prosecuted the appeal. In the absence of any substantive challenge, on the appeal date, to the sentence imposed in the District Court or any application for an adjournment, and given that the applicant failed to attend to prosecute his appeal, it cannot be said that the first named respondent heard the facts of the case or received any plea in mitigation such as would mandate the procurement of a probation report or the consideration of existing reports or the attendance of an adult relative, pursuant to the Children Act 2001. In those circumstances, I am not persuaded that the first named respondent acted *ultra vires* in failing to have regard to the provisions of the Children Act, 2001. The first named respondent acted within jurisdiction in affirming the order of the District Court because the applicant failed to appear in accordance with the recognisances he had entered on 7th August, 2014 or otherwise prosecute his appeal.

56. Accordingly, for the reasons set out, the reliefs claimed in the Notice of motion are denied.