THE HIGH COURT

JUDICIAL REVIEW

2017 No. 956 J.R.

BETWEEN

AUSTIN QUIGLEY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 15 March 2019

INTRODUCTION

1. These proceedings seek to invoke the High Court's jurisdiction to restrain a criminal prosecution on the basis of constitutional fairness. The criminal prosecution is predicated on an earlier order made by the District Court disqualifying the Applicant from driving for a period of four years ("*the disqualification order*"). Crucially, however, this disqualification order has since been set aside on appeal by the Circuit Court. The criminal prosecution now pending before the District Court is predicated on the fact that—for a period of eleven months prior to the Circuit Court order allowing the appeal—the disqualification order was in force.

2. In the ordinary course of events, the making of an appeal to the Circuit Court has the effect of imposing a stay on a District Court conviction. In the present case, however, the appeal to the Circuit Court was struck out for non-attendance. Notwithstanding the fact that the appeal was subsequently reinstated, the legal effect of the strike-out was that the stay on the disqualification order had lapsed.

3. The appeal to the Circuit Court was subsequently reinstated, and the appeal was ultimately successful. However, for a period of eleven months, the disqualification order was in force. It was during this period of time that the alleged offences are said to have occurred. There was confusion on both sides as to what the precise status of the Circuit Court appeal had been at the time the alleged offences are said to have occurred.

4. The principal issue in these judicial review proceedings is whether it would breach constitutional fairness to allow the Director of Public Prosecutions to rely on this happenstance to proceed with the criminal prosecution. This is especially so where, as explained presently, the misapprehension as to the status of the appeal was contributed to—in part at least—by the State Solicitor.

5. The Applicant maintains that it would be unfair for the prosecution to proceed, and cites the judgment of the Supreme Court in *Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260. The Director of Public Prosecutions ("*the DPP*") opposes the application for judicial review on three principal grounds. First, it is contended that the application for judicial review is inadmissible by reason of delay. It is said that the Applicant failed to comply with the three-month time-limit prescribed under Order 84, rule 21 of the Rules of the Superior Courts. Secondly, it is contended that the order of the Circuit Court striking out the appeal was made within jurisdiction and did not breach constitutional fairness. Thirdly, it is contended that—if and insofar as the Applicant wishes to advance an argument based on unfairness—this is something which must be canvassed before the District Court in the first instance.

6. For the reasons set out herein, I have concluded that this is one of those exceptional cases where the High Court should intervene to restrain the prosecution.

FACTUAL BACKGROUND

7. The Applicant is charged with two road traffic offences, namely driving without insurance and driving without a licence. The alleged offences are said to have occurred on 9 May 2017. Both of the alleged offences are predicated on *earlier* criminal proceedings which had resulted in the Applicant's conviction before the District Court for driving while under the influence of an intoxicant. More specifically, on 10 February 2016, the District Court had imposed a two-month suspended custodial sentence, and made an order disqualifying the Applicant from driving for four years ("*the disqualification order*"). The District Court conviction has since been set aside, on appeal, by the Circuit Court on 21 March 2018.

8. The criminal prosecution now pending before the District Court is predicated on the fact that—for a period of eleven months prior to the Circuit Court order allowing the appeal—the disqualification order was in force. More specifically, it is alleged that as a result of the existence of the disqualification order (i) the Applicant was guilty of driving without holding a driving licence, and (ii) the Applicant was guilty of driving without insurance in that his employer's policy of insurance for the vehicle (a school bus) was invalidated by his disqualification.

9. I pause here to note that the District Court Rules envisage that the bringing of an appeal to the Circuit Court in criminal cases will generally operate as a stay on the execution of the order appealed against. This is contingent on the convicted person entering recognisances within fourteen days. Order 101, rule 6 of the District Court Rules (as amended) provides as follows.

> "6. On the entering into of a recognisance in accordance with rule 4 of this Order, execution of the order appealed against shall be stayed and the appellant, if in custody, shall be released. In any case where a monetary penalty has been imposed on the appellant, or the appellant has been required to perform a condition, the Court may, not later than six months from the expiration of the time allowed by the order for payment of the penalty, or for performance of the condition, issue the warrant of committal in default of such payment, or in default of such performance, as the case may be, unless the appellant shall have entered into a recognisance."

10. The Applicant duly lodged an appeal and entered a recognisance, all within fourteen days as required under the District Court Rules. The legal effect of this was that the disqualification order was stayed. But for the events described below, it would have been lawful for the Applicant to continue to drive pending the determination of the appeal to the Circuit Court.

11. The hearing of the Circuit Court appeal was initially fixed for 15 December 2016. The Applicant was notified in writing of this date

personally by Trim Circuit Court Office. However, in circumstances where the Applicant's child was sick and in hospital, the Applicant instructed his solicitor to seek an adjournment. The Applicant's solicitor, in turn, contacted the State Solicitor for County Meath, who consented to an adjournment, and, in fact, moved the adjournment application. The hearing of the appeal was rescheduled for 6 April 2017. For reasons which remain unclear, however, the rescheduled date does not appear to have been communicated by the State Solicitor to the Applicant's solicitor.

12. The Applicant's solicitor has averred that he contacted the office of the State Solicitor during the first week of May 2017, and that he was told that the hearing of the appeal would take place at Trim Circuit Court in July 2017. This was so notwithstanding that the appeal had, in fact, already been struck out on 6 April 2017 for non-attendance.

13. The State Solicitor has filed his own short affidavit. It is not denied that there was communication with his office in or about the first week of May 2017. It was suggested at the hearing before me that the Applicant's solicitor may have spoken to the State Solicitor's secretary on that occasion.

14. The State Solicitor, Mr Vincent M. O'Reilly, avers as follows in his affidavit of 10 May 2018.

> "3. I believe the Applicant's appeal was first listed for hearing on the 15th December 2016 and not 10th December 2016 as stated by him in his pleadings. Prior to that date I received a phone call from his solicitor requesting an adjournment. I agreed to this and the matter was then adjourned to the next District Court Appeals list as is normal in such circumstances. I have no record of confirming this to the solicitor nor was any enquiry made of me by him. In any event the Court Office in Trim would have been in a position to inform the Applicant or his solicitor of the adjourned date had either of them enquired.
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> 4. When the matter came before the District Court Appeals list on the 6th April 2017, which was the next appeals list, there was no appearance by or on behalf of the Applicant and his appeal was struck out and the order of the District Court affirmed. The appeal was reinstated by consent on 28th July 2017 and on 21st March 2018, it was allowed."

15. The Applicant was arrested by An Garda Síochána on 9 May 2017. It appears from the affidavit filed by Garda Stephen McLoughlin that An Garda Síochána had previously been informed that the appeal had been struck out, and that, accordingly, the disqualification order was now effective.

16. The Applicant's solicitor then took steps to reinstate the appeal in the Circuit Court. The State Solicitor consented to its reinstatement, and the appeal was reinstated by order of the Circuit Court dated 28 July 2017. It is common case that the reinstatement did not have the effect of reactivating the stay on the disqualification order. In this regard, counsel for the DPP, Mr Kieran Kelly, BL, helpfully referred me to the judgments in *Waldron v. Early* [2004] IEHC 227 (stay not automatic where appeal made on basis of an extension of time) and *Kennelly v. Cronin* [2002] 4 I.R. 292 (order striking out charge had legal effect of discharging bail recognisances, and same were not revived by reinstatement of the original charge within the same day).

17. The criminal prosecution last came before the District Court on 13 September 2017. Given that there is some dispute as to whether the three-month time-limit for judicial review proceedings should be calculated from this date, it is necessary to set out the affidavit evidence, such as it is, as to what occurred on that occasion.

18. The Applicant's solicitor avers as follows in his affidavit of 6 December 2017.

> "12. On the 13th September 2017 the offences prosecuted on charge sheets […] were last before the Carrickmacross District Court. Judge Denis McLoughlin presided. The case was in for hearing on that date. On that date Counsel on behalf of the Applicant sought that the matter be adjourned given the history of the offences as averred to ante. Your Deponent's affidavit from the Circuit Court Application was also handed in to the presiding Judge and a copy of the Affidavit was also handed to Inspector Gavigan who represented the Respondent. Following submissions Judge McLoughlin remanded the charge sheets to 10th January 2018 for mention. It was indicated to the District Court that an application to the High Court may need to be made to resolve the matter."

19. Thereafter, the Applicant's solicitor sought to engage with the prosecuting authorities by way of correspondence. More specifically, a letter setting out the history of the case, and seeking confirmation in writing that the charges would be withdrawn was sent to Inspector Gavigan on 20 September 2017. Inspector Gavigan wrote on 26 September 2017 to advise that he had forwarded the correspondence to the State Solicitor, County Monaghan and had asked him to submit a reply.

20. By further letters date 8 November 2017, the Applicant's solicitor wrote to both the Garda Inspector and the State Solicitor. An email was sent on behalf of Inspector Gavigan on 13 November 2017 which indicated that the correspondence dated 8 November 2017 had been forwarded to the State Solicitor, County Monaghan for urgent reply. No substantive response was ever received from the State Solicitor to those letters.

21. The within judicial review proceedings were instituted on 11 December 2017, and the High Court (Noonan J.) granted *ex parte* leave to apply for judicial review on that date.

22. The next significant event was on 21 March 2018. On that date, the Applicant's appeal to the Circuit Court was listed for hearing. The appeal was allowed in circumstances where the prosecution, having applied unsuccessfully for an adjournment, did not adduce evidence and/or oppose the appeal.

23. The legal effect of the Circuit Court order is that the disqualification order which had been made by the District Court in February 2016 was set aside.

24. A further affidavit was sworn on behalf of the DPP by Mr Hal McGuckin, Solicitor, on 15 February 2019.

> "9. I can say that the Courts Services Website contains detailed information pertaining to Circuit Court sittings throughout the State including the weeks when criminal sessions are scheduled. That information is published well in advance. I am also aware that telephone callers to Trim Circuit Court are automatically directed to and advised of the detail in the website and that the court staff will also happily deal with queries. In that regard I note that they provided information to the Applicant when he contacted the court office some days after his arrest. By way of example I beg to refer to the Circuit Court diary for County Meath for the present calendar year upon which marked with the letter 'A' I have signed my name prior to the swearing hereof.

10. I believe it is incumbent upon appellants to prosecute their own appeals and to familiarise themselves with their court dates and I don't believe Gardaí should be expected to track cases on behalf of appellants. I am advised and I believe that any such requirement would expend precious Garda time and resources. In any event I note that the Applicant subsequently succeeded in his re-entered drink driving appeal due to the unavailability of a prosecution witness."

ORDER 84 TIME-LIMIT

25. The DPP has raised an objection that the application for judicial review was not made within the three-month period allowed under Order 84 of the Rules of the Superior Courts.

26. Order 84, rule 21 (as inserted in 2011) provides as follows.

> "(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.
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> (2) Where the relief sought is an order of *certiorari* in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding."

27. It may be useful at this point to summarise the chronology of events.

6 April 2017	Circuit Court appeal struck out
9 May 2017	Circuit Court appeal struck out
24 May 2017	Applicant charged before the District Court
28 July 2017	Circuit Court appeal reinstated on consent
13 September 2017	Matter before District Court
20 September 2017	Applicant's solicitor writes to Garda Inspector
26 September 2017	Garda Inspector's reply
8 November 2017	Applicant's solicitor writes to Garda Inspector and State Solicitor
13 November 2017	Garda Inspector's reply
11 December 2017	*Ex parte* application for leave to apply for judicial review
21 March 2018	Circuit Court allows appeal
15 February 2019	High Court hearing

28. Counsel on behalf of the DPP, Mr Kieran Kelly, BL, argues that the very latest date from which time should be reckoned to run is from the date of the Applicant's arrest. This is the date upon which the Applicant says he first became aware that his appeal to the Circuit Court had been struck out. On this argument, the Applicant had allowed more than seven months to elapse before seeking leave to apply for judicial review in December 2017.

29. Counsel on behalf of the Applicant, Mr Micheál P. O'Higgins, SC, submits that an applicant is required to attempt to resolve the matter at the local level before having recourse to the High Court by way of an application for judicial review. It is suggested, therefore, that it was appropriate for the Applicant (i) to await the outcome of the hearing before the District Court on 13 September 2018, and (ii) to engage in correspondence with the prosecuting Garda Inspector, on behalf of the DPP, before moving for leave to apply for judicial review. As noted above, the application for leave was made on 11 December 2018. Accordingly, if time only began to run from the listing before the District Court on 13 September 2017, the application was, in fact, made within time.

30. Neither party has provided detailed evidence as to what precisely occurred before the District Court on 13 September 2018. In particular, it is not clear from the affidavit evidence as to whether a submission was made to the District Court judge that he should dismiss the prosecution in the unusual circumstances of the case, or, alternatively, whether the matter was simply adjourned to allow an application for judicial review to be made to the High Court. In the absence of more detailed evidence, this court cannot safely attach much significance to the hearing before the District Court on 13 September 2018.

31. The correspondence between the Applicant's solicitor and the prosecuting authorities is more relevant. As appears, the Garda Inspector, very properly, referred the matter onwards to the State Solicitor. However, for reasons which are unclear, the State Solicitor never provided any substantive response to this correspondence.

32. The three-month time-limit under Order 84, rule 21(1) runs from "*the date when grounds for the application first arose".* I am satisfied that it was a necessary ingredient for the application in this case for the Applicant to seek to establish that the DPP intended to pursue the prosecution. It would have been premature to institute judicial review proceedings without first establishing this. This is because if the DPP had decided not to pursue the matter further, then an application for judicial review would have been unnecessary.

33. It was appropriate for the Applicant, through his solicitor, to seek to engage with the prosecuting authorities before having recourse to the High Court. The application for judicial review was made within three months of the date of the first letter. In circumstances where no substantive response was ever made to this correspondence by the State Solicitor, it does not lie in the mouth of the DPP to make an allegation of delay as against the Applicant.

34. For the reasons explained above, I am satisfied that the application for judicial review was made within time. This is sufficient to dispose of the DPP's objection that the proceedings are inadmissible by reason of delay. For the sake of completeness, however, I should record that the making of the order of the Circuit Court on 21 March 2018 allowing the appeal was such a significant event that it would have reset the clock for the purposes of the three-month time-limit. The claim at paragraph (d)(4) of the Statement of Grounds for a declaration that the further prosecution of the Applicant pursuant to the aforesaid charges would be fundamentally unfair and a breach of the Applicant's right to a fair trial and constitutional right to fair procedures, is greatly strengthened by the fact that the disqualification order has since been set aside by the Circuit Court. As stated in the Applicant's written legal submissions

of 15 February 2019, the factual and legal basis for the charges is now largely non-existent. As I understand the Applicant's case, the gravamen of his complaint is that the proposed criminal prosecution is predicated entirely on the fact that a disqualification order was in force for a period of some eleven months between the date of the striking out of the appeal for non-attendance and the ultimate determination of the appeal by the Circuit Court on 21 March 2018. It is this confluence of events, and, in particular, the fact that both sides were labouring under a misapprehension as to the status of the appeal as of the date of the alleged offences on 9 May 2018 that is said to give rise to the constitutional unfairness.

35. Against this background, it occurs to me that time did not, in truth, begin to run against the Applicant until 21 March 2018. It was only at that stage that the last critical ingredient of the case was in place.

APPLICATION FOR EXTENSION OF TIME

36. Lest I am incorrect in my finding (under the previous heading) to the effect that the application for judicial review was made within time, I propose to consider whether this is an appropriate case to grant an extension of time.

37. Order 84, rule 21(3) and (4) (as amended in 2011) provides as follows.

> "(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—
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> (a) there is good and sufficient reason for doing so, and
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> (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—
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> (i) were outside the control of, or
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> (ii) could not reasonably have been anticipated by the applicant for such extension.
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> (4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party."

38. The interpretation of Order 84, rule 21(3) has been considered in detail by the Supreme Court in its very recent judgment in *M.O'S. v. Residential Institutions Redress Board* [2018] IESC 61.

39. The majority judgment was delivered by Finlay Geoghegan J. It emphasises the discretion which a court retains even following the amendments made to Order 84 in 2011.

> "60. I have concluded that the case law cited above, insofar as it applies to the extension of the time specified under O. 84 for the bringing of judicial review proceedings, makes clear that the jurisdiction which the Court is to exercise on an application to extend time is a discretionary jurisdiction which must be exercised in accordance with the relevant principles in the interests of justice. It clearly requires an applicant to satisfy the Court of the reasons for which the application was not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought. It also requires the Court to consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified and any subsequent period prior to the application and are sufficient to justify the Court exercising its discretion to extend time. The inclusion of sub-rule (4) indicates expressly that the Court may have regard to the impact of an extension of time on any respondent or notice party. The case law makes clear that the Court must also have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted. The decision may require the Court to balance rights of an applicant with those of a respondent or notice party. The judgments cited do not, in my view, admit of a bright line principle which precludes a court taking into account a relevant change in the jurisprudence of the courts when deciding whether an applicant has established a good and sufficient reason for an extension of time. Further, the judgments cited above do not envisage any absolute rule in relation to what may or may not be taken into account or constitute a good reason or a good and sufficient reason. The Court, in an application for an extension of time, is exercising a discretionary jurisdiction and in the words of Denham J. in *de Roiste*, '[t]here are no absolutes in the e exercise of a discretion. An absolute rule is the antithesis of discretion. The exercise of a discretion is the balancing of factors - a judgment.'."

40. Applying these principles to the facts of the present case, I am satisfied that if—contrary to my finding under the previous heading—time formally began to run against the Applicant from the date of his arrest (9 May 2017), an extension of time should be granted. The Applicant's attempts to establish the attitude of the prosecuting authorities represents a good and sufficient reason for any delay, and the failure of the prosecuting authorities to make a substantive response represents a factor outside the control of the Applicant. The *absence* of any asserted prejudice on the part of the DPP is also a factor to which I have had regard, in accordance with Order 84, rule 21(4).

CONSTITUTIONAL UNFAIRNESS

41. Counsel on behalf of the DPP submitted that there is ample precedent which confirms that the Circuit Court has jurisdiction to strike out an appeal in circumstances where an appellant does not appear to prosecute his or her appeal.

42. Reliance was placed in this regard on the very recent judgment of the Supreme Court in *Brennan v. The Governor of Castlerea Prison* [2019] IESC 5 (unreported 8 February 2019).

> "43. It is clear that the longstanding practice of the Circuit Court in circumstances where the appellant does not turn up to prosecute his or her appeal is to strike out the appeal and to affirm the order of the District Court. The appellants have argued that the statutory provisions now applicable to such appeals can be contrasted with those which were applicable under the Act of 1851. There is no doubt that there is a less prescriptive form of wording used in the legislation now applicable to such appeals. However, that fact alone does not seem to me to be decisive. There are a large number of decisions which have been referred to above which make it clear that the position in law remains consistent notwithstanding the changes in the legislative provisions applicable to the courts established as long ago as 1924. I can

> find nothing in any of the authorities opened to this Court to suggest that the Circuit Court on an appeal from the District Court has no jurisdiction, when the same is not prosecuted, to make an order striking out and affirming the District Court order without a hearing. The argument that there is no statutory provision which divests the Circuit Court of jurisdiction cannot, in my view, be discerned from the legislation now applicable. A person convicted of an offence in the District Court is entitled to bring an appeal. The appeal operates as a stay of execution. In circumstances where, the appellant for whatever reason chooses not to prosecute the appeal, then in those circumstances, I can see no basis upon which it can be suggested that the Circuit Court is then obliged, notwithstanding the fact that the appellant has not prosecuted his/her appeal, to embark on a hearing of the prosecution evidence again. The Circuit Court is simply providing for the fact that once the appeal is not prosecuted, the District Court order stands. This is reflected in Order 41(5) of the Rules of the Circuit Court. In effect, the stay provided for in rule 101(6) of the Rules of the District Court comes to an end. In those circumstances, as is clear from the provisions of s. 23 of the Act of 1946, it is then open to either the Circuit Court or the District Court to issue the instrument necessary to enforce its decision. The idea that the Circuit Court would be obliged in circumstances where an appeal has been brought to it from a decision of the District Court to sit and hear an appeal not being prosecuted by the appellant is something that simply flies in the face of common sense. Indeed, if the appellants were correct this would require the Circuit Court (in the words of the respondents) 'to engage in an unnecessary and empty ceremony of hearing the appeal in the absence of the appellant'. As pointed out, the appellants' solicitor or counsel might not have appropriate instructions to engage with such hearing. Further, if the facts of the offence were heard, in the absence of the appellant, assuming the Court was satisfied to affirm a conviction in circumstances where the sentence and conviction was under appeal, there would be no evidence as to mitigation to put before the court and presumably the appellant would be at risk of a higher sentence. Clearly, if the appellants were correct in their arguments, such an outcome would certainly not be in the interests of appellants generally. It is a matter for an appellant to prosecute an appeal they have instigated. If they do not do so, the order made against them stands. There is no need for the appellate court in circumstances such as this to embark on a process of hearing the appeal with the associated waste of court time and resources, not to mention the time of the Garda Síochána who would be required to deal with the matter. If such a hearing were necessary, the resources of the Probation and Welfare Service could also be required. Such a course is not, in my view, required by the legislation setting out the appellate jurisdiction of the Circuit Court in appeals from the District Court.
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> 44. Accordingly I am satisfied that the Court of Appeal, in concluding that a Circuit Court judge was empowered to strike out an appeal from the District Court against conviction or sentence and to affirm the decision of the District Court in circumstances where the appellant fails to turn up in court, was correct."

43. The judgment of the Supreme Court also suggests that where there is a valid reason for non-attendance, the appropriate remedy is for the appellant to seek to have their appeal reinstated. See paragraph [5].

> "It might be said at this point it is unfortunate, given that Ms. Maguire was in hospital at the relevant time, that no application was made to re-instate her appeal as soon as that fact became known. Such an application might well have been open to favourable consideration by the Circuit Court although such an application would necessarily depend on the circumstances in any given case. (See *Richards v O'Donohoe* 2017 2 I.R. 157.)"

44. The submission on behalf of the DPP is well made. I accept that the Circuit Court acted within jurisdiction when it struck out the Applicant's appeal on 6 April 2017. The appeal was subsequently reinstated, on consent, on 28 July 2017. The difficulty for the Applicant, of course, is that the stay on the execution of the District Court order had lapsed as a consequence of the striking out of the appeal. The reinstatement of the appeal did not operate to revive the stay.

45. In truth, the dispute between the parties is not so much directed to the jurisdiction of the Circuit Court, as to the implications of these events for the DPP in terms of the further prosecution of the offences. The key feature of this case is that the misapprehension as to the status of the appeal was contributed to—in part at least—by the State Solicitor. First, the State Solicitor, notwithstanding that he had agreed to move the adjournment application in December 2016, does not appear to have notified the Applicant's solicitor of the adjourned date. Certainly, there is no evidence before this court that any attempt was made to notify him. Secondly, some person in the office of the State Solicitor had indicated to the Applicant's solicitor in the first week of May 2017 that the appeal was outstanding, and would likely be listed for hearing in July 2017.

46. Whereas it is correct to say that the case law establishes that the onus of prosecuting a criminal appeal lies with an appellant, those cases are distinguishable from the facts of the present case. In none of the cases cited had the prosecuting authorities done anything which might have contributed to a misapprehension as to the correct hearing dates for the appeals. This is a crucial distinction. For example, on the facts of *Phelan v. Delahunt* [2014] IEHC 142, the High Court held that the failure to attend at the appeal hearing was not the fault of anyone but the applicant because sufficient effort had been made to notify him of the appeal hearing date. In *McCann v. Groake* [2001] 3 I.R. 431, the applicant was present in court when his appeal was adjourned, at his request, to the next sittings of the court in Dundalk.

47. On the facts of the present case, the Applicant was arrested at a time when (i) he had understood that there was a stay on the District Court conviction; (ii) the District Court office had previously sent him written notice of the initial hearing date for the appeal; (iii) the State Solicitor had not informed the Applicant's solicitor of the rescheduled hearing date; and (iv) the Applicant's solicitor had been informed by the office of the State Solicitor, only days prior to the Applicant's arrest, that the appeal was listed in July 2017.

48. This sequence of events is compounded by the fact that the Circuit Court appeal was ultimately allowed, and the disqualification order set aside. Notwithstanding all of this, the DPP appears intent on pursuing a criminal prosecution which is predicated on the now defunct disqualification order. In effect, the Applicant is to be prosecuted by reference to an earlier offence of which he has since been acquitted by the Circuit Court.

49. Given this very unusual sequence of events, I have concluded that it would breach the requirement for constitutional fairness to allow the prosecution to proceed in the circumstances. The remaining issue to be addressed is whether the High Court should intervene at this stage to restrain the criminal prosecution, or, alternatively, whether these arguments should instead be made before the District Court. I address this under the next heading below.

SUPPLEMENTAL SUBMISSIONS:

ADEQUATE ALTERNATIVE REMEDY?

50. Counsel for the DPP submitted that the District Court is now seised of the criminal proceedings, and that any argument based on alleged unconstitutional unfairness should be made to the District Court. Counsel submits that an order restraining a criminal

prosecution is a remedy which ought only to be granted in exceptional circumstances. It is further submitted that it is in the trial court and through the trial judge that an accused's right to trial in due course of law is respected and vindicated.

51. This submission presents a difficult question of principle: does the District Court, when adjudicating on road traffic offences, retain a *residual discretion* to refuse to convict even when all of the ingredients of the statutory offences have been proved beyond a reasonable doubt?

52. Both sides prepared very helpful supplemental written legal submissions on this question of principle, and there was a short supplemental hearing before me on 26 February 2019.

53. Mr O'Higgins, SC, on behalf of the Applicant commenced his submission by emphasising three particular features of the charges, as follows. First, the offences are created by statute. That is said to be potentially important because the flexibility associated with the common law has no application.

54. Secondly, it appears to be common case that both offences are strict liability offences. It is not necessary, therefore, for the prosecution to prove any mental element such as intent, recklessness or knowledge of the absence of valid insurance or licence.

55. Thirdly, the offence of driving without insurance is a "penalty point" offence, i.e. it attracts the imposition of penalty points on a mandatory basis. In this connection, counsel cites the judgment in *Kennedy v. Gibbons* [2014] IEHC 67. The High Court (Hogan J.) held that the imposition by the Oireachtas of a statutory scheme of mandatory penalties, i.e. penalty points, following conviction for certain road traffic offences supplanted the common law, and in the process had greatly restricted the District Court's sentencing options in respect of those offences.

56. More generally, counsel cites *Director of Public Prosecutions v. Maughan* [2003] IEHC 117. On the facts of that case, an accused had pleaded guilty to a charge of drunk driving but had made submissions to the effect that he was driving to visit his father in hospital, having received an urgent call at home informing him that his father was seriously ill in hospital and that he should attend there immediately. The District Court ultimately struck out the charges. The DPP then brought judicial review proceedings.

57. The High Court (Ó Caoimh J.) set aside the District Court order.

> "[…] I am furthermore satisfied that the order made by the respondent was made in excess of jurisdiction as he was obliged at the time to determine the case before him and to proceed in accordance with law to enter a conviction and to impose a penalty as required by law. He was not entitled to strike out the charge, notwithstanding the circumstances outlined to him by the notice party's solicitor at the time. While these indicate that the notice party might not have driven but for the fact that he was requested to visit his father in hospital, it is clear that such circumstances do not and cannot afford a defence to the offence as charged against the notice party, which having regard to the interest of public safety on the roads is a relatively serious offence, although triable in the District Court. The District Court judge was clearly entitled to take the factors outlined into consideration provided he did not exceed his jurisdiction in the circumstances."

58. It is submitted that the logic of these two judgments is that the District Court must proceed to conviction where the prosecution's proofs are made out, and where the facts and the law so warrant it. The District Court, when adjudicating on a strict liability penalty point offence, does not have an overarching jurisdiction to depart from the statutory framework.

59. Mr O'Higgins, SC, very properly concluded his submission by saying that—notwithstanding this case law—there might be a conceptual difficulty in suggesting that an accused's lawyers are never entitled to submit to a trial judge that he or she would be offending the accused's rights to constitutional fairness unless they stopped the trial.

60. In response, Mr Kelly, BL, on behalf of the DPP, placed some emphasis on Order 23, rule 3 of the District Court Rules, as follows.

> "3. Where the accused, personally or by solicitor or counsel appears and admits the truth of the complaint made against him or her, the Court *may if it sees no sufficient reason to the contrary,** convict or make an order against him or her accordingly, but if the accused does not admit the truth of the complaint, the Court shall, subject to the provisions of rule 4, proceed to hear and determine the complaint."
>
> *Emphasis (italics) added.

61. It is suggested that this rule recognises the District Court's entitlement not to convict even where the truth of the complaint is admitted. Counsel relies on a line of case law which confirms that the District Court has jurisdiction to dismiss a charge even where a strike-out might be the appropriate order. Particular emphasis was placed on Director of Public Prosecutions v. Ní Chondúin [2008] 3 I.R. 498.

62. It is submitted more generally that the District Court is obliged to comply with fair procedures. Counsel cites *State (Healy) v. Donoghue* [1976] I.R. 325; *People (DPP) v. Lynch* [1982] I.R. 64; *Eilis v. O'Dea* [1989] I.R. 530; *Director of Public Prosecutions v. O'Neill* [1998] 2 I.R. 383; and Whelan v. Kirby [2005] 2 I.R. 30.

63. Counsel submits that a judge of the District Court has the duty in all cases to ensure constitutional fairness, and is entitled to invoke such remedy as is appropriate to accomplish that end in the given circumstances of a particular case. Where the facts are proven, but where constitutional fairness is not in issue, then provided it is not otherwise circumscribed by the legislature (such as a "penalty point" offence), a judge of the District Court, acting judicially, can still decide not to proceed to a conviction. In appropriate circumstances, a judge of the District Court is entitled to strike out or dismiss a charge *simpliciter* or conditionally.

64. Insofar as the offences charged in this case are concerned, counsel submits that driving without a driving licence is not a penalty point offence, and, therefore, whether or not the District Court judge finds the facts proven against the Applicant, the judge will still be entitled to strike out that charge or to dismiss it. The no insurance charge is a penalty point offence, and in the absence of a finding of unfairness, it cannot be struck out if the facts are proven. However, the District Court judge retains the power to strike out the prosecution if he or she determines that constitutional fairness warrants that course.

65. In conclusion, counsel for the DPP submits that the Applicant should exhaust the procedures before the District Court before seeking relief from the High Court by way of judicial review. The District Court is said to be vested with the power and responsibility to act judicially, and to take such action and/or make such rulings as are appropriate in all of the circumstances of the case.

CONCLUSION

66. As appears from the above summary of the careful submissions of both parties, the question of the extent, if any, to which the District Court enjoys a residual discretion to refuse to convict—even when all of the ingredients of the statutory offences have been proven beyond a reasonable doubt—is a difficult one. This is especially so in the context of a "penalty point" offence such as driving without insurance. The judgment in *Kennedy v. Gibbons* [2014] IEHC 67 suggests that the introduction of a statutory scheme of mandatory penalties has greatly restricted the District Court's sentencing options in respect of those offences

67. For the purpose of deciding these judicial review proceedings, however, the question resolves itself to one of whether a hearing before the District Court is the more appropriate remedy? See, by analogy, *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 at 509 (cited by counsel for the Applicant).

> "[…] The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, 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. Analysis of the authorities referred to shows that this is in effect the real consideration."

68. I have concluded that in circumstances where the existence of a jurisdiction on the part of the District Court to refuse to convict on the basis of a *residual discretion* is not clear-cut, then an application for judicial review is the more appropriate procedural route. I hasten to add that this is not in any sense intended to diminish the vital role which the District Court plays in vindicating constitutional rights. Rather, the only issue I am deciding is whether—in the peculiar circumstances of this case—an application for judicial review is appropriate.

69. In this regard, it may be useful to recall the precise nature of the unfairness alleged in this case. It is the conduct of the DPP in pursuing the prosecution that is said to be unfair. In effect, the Applicant is to be prosecuted by reference to an earlier offence of which he has since been acquitted by the Circuit Court. It is not alleged that the procedures before the District Court will be unfair, rather the case involves an allegation of *substantive unfairness.* This is a crucial distinction. Much of the case law on alternative remedies, and the presumption in favour of leaving matters over to the court of trial, is predicated on the assumption that the trial judge, having heard the run of the evidence, is best placed to assess whether a fair trial can be achieved. The trial judge will also be in a position to take procedural steps—such as the giving of warnings to the jury or ruling that certain evidence is inadmissible—which will mitigate the risk of an unfair trial.

70. Neither of these two considerations are applicable here. First, the High Court is as well-placed as the court of trial to assess the alleged substantive unfairness. The circumstances relied upon as constituting the unfairness have *already crystallised*, and will not be affected by the run of evidence at the trial. Secondly, there is no procedural step which the trial judge can take to remove the alleged unfairness.

71. In conclusion, the appropriate forum to ventilate a complaint of substantive unfairness is before the High Court, by way of judicial review. The High Court has an—admittedly exceptional—jurisdiction to supervise the Director of Public Prosecutions. This is a jurisdiction which is not shared with the District Court.

72. The nature of the High Court's jurisdiction has been stated as follows in *Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260 at page 290.

> "Undoubtedly, the [Director of Public Prosecutions] remains subject to the Constitution and the law in the exercise of his functions and it has been made clear in decisions of this court that, while the nature of his role renders him immune to the judicial review process to a greater extent than is normally the case with quasi-judicial tribunals properly so described, he will be restrained by the courts where he acts otherwise than in accordance with the Constitution and the law."

73. The facts of *Eviston* are, admittedly, very different from those of the instant case, in that they involved a decision by the then DPP to review an earlier decision not to prosecute. Here, the unfairness alleged is of a different type. However, for the reasons set out in detail above—especially at paragraphs 44 to 49—I have concluded that this is one of those exceptional cases where the High Court should intervene to restrain a prosecution.

74. I propose to make an order in terms of paragraphs (d)(1) and (d)(4) of the Statement of Grounds.

75. If and insofar as it is necessary to do so, I also make an order pursuant to Order 84, rule 21(3) extending the time for bringing an application for judicial review to 11 December 2017.