Neutral Citation Number: [2009] IEHC 497

THE HIGH COURT

JUDICIAL REVIEW

2008 1424 JR

BETWEEN:

S. F.

APPLICANT

AND

HER HONOUR JUDGE YVONNE MURPHY, THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered on the 18th day of November, 2009.

1. The Applicant appeared before the Dublin Circuit Criminal Court as a defendant in criminal proceedings entitled the Director of Public Prosecutions v Sean Foley – Bill Number 1043/2003. His acquittal was directed by the trial judge.

2. The first named Respondent is a judge of Dublin Circuit Court, who heard the aforesaid criminal proceedings in respect of the Applicant.

3. The second named Respondent is the authority responsible for the prosecution of criminal offences in Ireland. His statutory authority to carry out this function is derived from the Prosecution of Offences Act 1974.

4. The third named respondent is the State.

5. The fourth named respondent is a constitutional officer who is the legal adviser to the Government and the chief law officer of the State.

6. The Applicant seeks the following relief by way of judicial review:

(a) an order of *certiorari* quashing the order of the first named Respondent herein, refusing to grant the Applicant herein his costs in the aforesaid criminal proceedings, made on the 22nd October, 2008.

(b) a declaration that the first named Respondent's decision of 22nd October, 2008 refusing to grant the Applicant his costs in the aforesaid criminal proceedings is unlawful and of no legal effect in that it was an irrational and/or unreasonable exercise of her judicial power and discretion and/or was lacking in fundamental reason and common sense.

(c) a declaration that the first named Respondent acted in excess of her jurisdiction and/or without jurisdiction in refusing to grant the Applicant herein his costs in the aforesaid criminal proceedings.

(d) a declaration that the first named Respondent's decision to refuse to grant the Applicant herein his costs in the aforesaid criminal proceedings violated the Applicant's rights under the following headings:

(i) Article 38 of Bunreacht na hÉireann, including but not confined to the right to be presumed innocent of any criminal charge, the right of an accused person to defend themselves, the right of counsel and the right of an accused person to understand the case being made against them.

(ii) Article 40 of Bunreacht na hÉireann, including but not confined to the right to a good name, the right to earn a livelihood and the right to equality before the law.

(iii) Article 6 of the European Convention on Human Rights.

(e) If necessary, a declaration pursuant to section 5 of the European Convention on Human Rights Act, 2003, that the absence of any appeal from the aforesaid decision of the first named Respondent, insofar as same is effected by section 38 of the Courts of Justice Act 1936 and the provisions of the Courts of Justice Act 1924, is incompatible with the obligations of the State under the European Convention on Human Rights.

(f) If necessary, a declaration that the Courts of Justice Act 1924, insofar as it fails to provide for an appeal to the Court of Criminal Appeal from the decision of the first named Respondent, is invalid having regard to the provisions of Bunreacht na hÉireann.

Background

7. The relevant background to this case is as follows. The Applicant herein was charged with having knowingly possessed child pornography contained in the temporary internet files on the hard drive of a computer on 27th May, 2002 at his business premises, 1 Merrion Row, Dublin, contrary to section 6(1) of the Child Trafficking and Pornography Act 1998. Due to the nature of the allegation, expert assessments were conducted on the computer by both members of An Garda Síochána and experts engaged on behalf of the Applicant.

8. A chain of correspondence between the solicitors acting for the Applicant and the Chief Prosecution Solicitors in relation to the charge between 2nd September, 2003 and 9th November, 2004 was exhibited in the Grounding Affidavit of the Applicant. Of that correspondence, the letter of 2nd September, 2003 is of significance to the issues which now fall to be considered in this application for judicial review. In that letter, the Applicant's solicitors wrote to the Chief Prosecution Solicitors, stating, inter alia, that:-

> *"You will be aware that there are distinct differences between images that are in the Temporary Internet Files folder and those that are stored in normal folders on a computer's hard drive. These differences have very important implications for the legal concept of possession and are critical to this case. They are differences which have been recognised and acknowledged by your own technical expert Detective Garda Paul Johnstone when he said in Case 273/2002*
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> *"these images and banners……were located in folder C:/WINDOWS/Temporary Internet Files/Cache. Windows/Temporary Internet Files/Cache is a folder used to store images taken from Internet Web pages that have been accessed, or linked to those accessed by the user. This is an automated process over which the user has no control and it is possible that the user is unaware of the presence of these images/files on the computer. The presence of images in a Cache Folder does not imply guilty knowledge of their existence."*
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> *On foot of the said statement of Detective Garda Johnstone, the Director of Public Prosecutions decided to withdraw the charge against the accused in Case No. 110/2002. We are informed and believe that the evidence in Case No. 110/2002 was also contained in Temporary Internet Files and was for all practical purposes on a par with the evidence in Mr. Foley's case.*
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> *In the circumstances outlined, it is clear that to pursue the prosecution of my client on foot of the aforesaid evidence would, we contend, be unfair in that on foot of the said evidence my client could not possibly be convicted, but were the case to proceed, his good name and reputation would be irrevocably affected to his detriment."*

9. By letter dated 11th September, 2003, the Office of the Chief Prosecution Solicitor replied stating, *inter alia*, that:-

> *"The prosecution in this case is based on the temporary Internet files, the admissions made by your client and the reports/statements of D. Garda Cathal Delaney. For the avoidance of doubt your attention is drawn to the words "it is possible" in the paragraph you attribute to D. Garda Paul Johnston as set out in the second page of your letter. Obviously the evidence as to possession may differ from one case to another. Consequently it is considered that the prosecution should proceed."*

10. The Applicant's trial commenced on 7th December, 2004. On 16th December 2004, an application for directed verdict was made on behalf of the Applicant at the conclusion of the prosecution case. On 20th December, 2004, the first named Respondent herein gave judgment in relation to that application and directed the jury to find the Applicant not guilty of the offence charged. In the course of her judgment, the first named Respondent referred to the decision of the Court of Appeal in *Aikens v. DPP* [2001] WLR 1427 as authority for the proposition that knowledge is an essential element in the offence of possession of child pornography. She continued:-

> *"The height of the prosecution's case on the issue is the evidence of Detective Sergeant Finan. He established that materials had been deleted into the recycle bin from the cache or temporary internet files before 27 May, 2002. Based on that, he said the defendant would be aware of their existence, and that shows knowledge. There is no evidence that these acts of deletion implied that the images were accessible on the dates of the deletion: That may be so, but there was no evidence of it, nor is there evidence that the deletion was the work of the defendant. More significantly, however, there is a lack of prima facie evidence that the defendant was aware of or in a position to access any relevant material on 27 May, 2002.*
>
> *Now it would be wrong to conclude from this analysis that the defendant would inevitably have been convicted if the indictment had been drawn so as to include dates other than 27 May, 2002. There might have been a number of factual issues which could have exonerated him, but on this application I am solely concerned with the indictment as it is.*
>
> *On that basis I must conclude that there is not sufficient prima facie proof of the existence of the images of 27 May, 2002 which to the defendant's knowledge were accessible by him, and I therefore will have to direct the jury to acquit the defendant."*

11. On 2nd February, 2005, the first named Respondent made a ruling on the Applicant's application for costs. She stated that having carefully reviewed the evidence in the case, the correspondence and the arguments made by both sides, she considered it appropriate to refuse the application for costs. This ruling was the subject of an application for judicial review by the Applicant. On 2nd July, 2007, judgment was given by McCarthy J., quashing the decision of the first named Respondent to refuse the Applicant's application for costs and remitting the matter back to be determined by the first named Respondent (*Foley v. Judge Murphy and the Director of Public Prosecutions* [2007] IEHC 232). In the course of his judgment, McCarthy J. set out the two substantive issues raised by the judicial review application (at para. 1.5):-

> *"firstly, whether or not the reasons given by the learned Circuit Judge were adequate or sufficiently comprehensive and, secondly, whether or not the decision of the learned Circuit Judge is irrational or unreasonable in the circumstances of the case."*

12. McCarthy J. set out the relevant authorities on the giving of reasons. He also stated (at para. 2.11), in a passage much relied upon by the Applicant in the current judicial review proceedings,:-

"On 19th January, 2005 (at the hearing as to costs) it appears from the transcript that Counsel on behalf of the applicant referred to certain correspondence sent by his instructing solicitors to the Chief Prosecution Solicitor, dated 2nd September, 2002 and the reply thereto opened to the court was a letter of the 11th September, 2002. This correspondence was relied upon in support of the proposition that the prosecution had been placed on notice of certain infirmities in the prosecution case pertaining to temporary internet files, in circumstances where the prosecution case was based upon the possession of child pornography on such temporary internet files. It appears to me that these letters are relevant to the question of costs in as much as the issue of guilty knowledge pertaining to the location of the child pornography was raised."

13. As the substance of the current judicial review application relates to the manner in which the trial judge dealt with the application for costs following its remittal from this Court by McCarthy J., it is worth setting out at some length the conclusions he reached on the substantive issues raised in that first application for judicial review (at paras. 2.13 and 2.14):-

"The authorities go to show that there is no need in making an order for costs to address each argument advanced on the issue and that the extent to which reasons may be offered will differ from case to case. However, I am of the view that in the present case where the matter is being dealt with at the more considered or leisurely pace appropriate for a criminal trial (where as a practicality, the exigencies of the pressure of business or the nature of minor offences which confront the District Court daily do not arise), as well as the engagement with the evidence by counsel for the prosecution (including the submission that it was necessary to place the evidence, on a prosecution, before the court due to the somewhat novel nature of the evidence to which the concept of possession in law had to be applied) and, finally, the correspondence (which was a further exceptional feature of the case) it was appropriate for her to afford more detailed reasons than she did. Of course the evidence, the correspondence and the submissions were the only relevant matters upon which the learned Circuit judge could (and obviously did) base her decision but I think that the level of generality of the reasons which she gave were too high such that one does not know to what extent evidence or any particular piece of evidence or the correspondence or the submissions or the legal issues as to costs or otherwise raised gave rise to her conclusion; no doubt she was influenced to a greater or lesser degree by different elements of such evidence, correspondence or submissions. To put the matter another way, the process of reasoning should in my view have been more explicitly spelt out. Of course no one would suggest that she did not take all relevant matters into account. As a matter of reality, however, it is not possible for the applicant accused, or this court, by implication or inference from such material, to see the basis of the decision. There was insufficient engagement in the judgment with the material before here. The applicant cannot know whether or not the trial judge misdirected herself such that he might have a good ground on which to seek judicial review either on the basis of an error of law which took her outside jurisdiction or that the decision was irrational or unreasonable. She was not dealing with a "straightforward factual dispute", but rather "something in the nature of an intellectual exchange with, reasons and, analysis advanced, on either side" (see Henry L.J., in Flannery, quoted in Emery, as set out above).

It seems to me that in the light of what I regard as the absence of reasons of sufficient particularity or specificity the decision is a nullity as being a breach of the constitutional entitlement to fair procedures. Of course it would be wholly wrong for me to enter into the issue of whether or not the decision was irrational or unreasonable since, as I have said, the learned Circuit Court judge rightly decided the matter within the ambit of the evidence, correspondence and submissions but we cannot know whether or not it might be irrational or unreasonable unless the more specific reasons are given. Of course, in any event, it would not have been necessary for me to decide this question having regard to the view I have taken."

14. In accordance with the decision of McCarthy J. cited above, the matter was remitted to the first named respondent to hear and consider the application for costs again. Written submissions were made by the Applicant and the second named Respondent on this second application for costs. Judgment was given by the first named Respondent on 22nd October, 2008. She again refused the Applicant's application for costs. The salient parts of this decision, for the purposes of determining the current judicial review application, are as follows:-

"I regard the grounds of the direction [for acquittal] as being technical in nature and turning on an excess of specificity in the indictment. There is no doubt that the applicant had accessed child pornography on the internet. He admitted this to the gardaí, describing the material as fairly disgusting….I do not accept that the applicant had, in pre-trial correspondence, drawn the attention of the prosecutor to the specific deficiency which led ultimately to the direction. Indeed, it would have been foolish for him to have done so because it would have alerted the prosecution to a deficiency which was capable of being cured. I believe that the provisions and authorities relevant to an application of this kind are Order 99 Rule 1 of the Rules of the Superior Court [sic], there being no specific rule in the Circuit Court Rules, and The People v. Bell [1969] 1 I.R. 24. Accordingly, the question of costs is at the discretion of the Court.

As to the factors influencing the exercise of that discretion, I've derived assistance from the 10 factors set out in the decision of Charleton J in DPP v. Anthony Kelly, delivered on the 19th of December, 2007. I am conscious of the fact that this judgment was delivered, subsequent to my judgment, but as both sides have referred to it in their submissions, I've taken cognisance of it, but have not relied on it.

There was nothing arising in the investigation or trial to suggest that the prosecution of the accused was unsustainable, but, as the trial proceeded, it emerged that there was a weakness in the proofs to support the particulars of the offence charged, and that led to the direction. Adopting the terms of Judge Charleton's fourth point, the direction arose from a failure in technical proofs, and not from an inherent weakness in evidence…

In short, the reasons I exercise my discretion not to award costs to the applicant was that this was a prosecution properly maintained and based inter alia on the applicant's own admission to accessing child pornography, which he described as fairly disgusting, though not on the date mentioned in the indictment; next, the purely technical nature of the direction; and finally, the insupportability of the applicant's assertions that he had put the

prosecution of notice of the flaw in the case that led to the direction."

Submissions of the Applicant
15. Mr. Conleth Bradley SC appeared on behalf of the Applicant. He submitted firstly that in her decision of 22nd October, 2008, the first named Respondent had failed to have due regard to the decision of McCarthy J. of 2nd July, 2007. Her decision that the applicant had not, in pre-trial correspondence, drawn the attention of the prosecutor to the deficiency leading ultimately to the direction for acquittal was entirely contrary to the findings of McCarthy J. regarding the relevance of this correspondence to the question of costs. Furthermore, her three stated reasons for exercising her discretion not to award costs flew in the face of the findings of this Court. It was further submitted that this decision could not have been reasonably reached on the basis of the material before this Court for consideration.

16. Mr. Bradley submitted that the first named Respondent had erred in determining that the direction to acquit arose from a failure in technical proofs, and not from an inherent weakness in evidence. The first named Respondent's direction related to a fundamental factual contention upon which the case was prosecuted, namely that the State could not prove knowing possession of the content of the temporary internet files on 27th May, 2002. In support of this argument, Mr. Bradley referred to the ruling on the direction to acquit, which twice made reference to the absence of sufficient *prima facie* evidence.

17. Mr. Bradley submitted that the first named Respondent had failed to have regard to the paramountcy of the normal rule that costs follow the event (Order 99, Rule 1 of the Rules of the Superior Courts). Instead, she had been of the mistaken view that her discretion regarding costs was somehow at large. Furthermore, the first named Respondent did not appear to have directed her mind to the consequences of an acquittal in the context of the Applicant's application for costs. In deeming the acquittal of the Applicant to be technical in nature, the first named Respondent had acted to the detriment of the Applicant on the basis that guilt still attached to him. This was in breach of the Applicant's rights under the Constitution and the European Convention on Human Rights.

18. Finally, Mr. Bradley submitted that the absence of a statutory right of appeal for the Applicant from the decision of the first named Respondent on costs was in breach of the Applicant's rights under the Constitution and the European Convention on Human Rights, in circumstances where he had been acquitted and enjoys the presumption of innocence and the right to his good name.

19. In the course of his submissions, Mr. Bradley referred to the following authorities: *Foley v. Judge Murphy and the Director of Public Prosecutions* [2007] IEHC 232; *USK v. An Bord Pleanála (No. 2)* [2009] IEHC 346; *Director of Public Prosecutions v. Kelly* [2007] IEHC 450; *Curtin v. Clerk of Dáil Éireann* (Unreported, Supreme Court, 6th April, 2006; *Dunne v. Minister for the Environment and Others* (Unreported, Supreme Court, 6th December, 2007); *Sekanina v. Austria* (Judgment of the European Court of Human Rights, 25th August, 1993); *Rushiti v. Austria* (Judgment of the European Court of Human Rights, 21st March, 2000); *Todd v. Murphy* [1999] 2 I.R. 1; and *Dillane v. The Attorney General* [1980] ILRM 167.

Submissions of the second, third and fourth named Respondents
20. Ms. Una Ní Raifeartaigh SC appeared on behalf of the second, third and fourth named Respondents. She submitted firstly that the point raised by the Applicant regarding the binding finding of fact in McCarthy J.'s judgment had not been raised by the Applicant in seeking leave for the current judicial review proceedings. She also submitted that there was no such finding of fact in McCarthy J.'s judgment. It was at most an expression of opinion. The decision was a narrow one relating to a failure to give reasons and left the trial judge to exercise her discretion *de novo* on the issue of costs. In this regard, she referred to the written submissions of the Applicant to the first named respondent on the second application of costs. These submissions made no reference to any finding of fact in McCarthy J.'s decision and stated that no view had been expressed by McCarthy J. regarding the correctness of the trial judge's initial decision.

21. Ms. Ní Raifeartaigh submitted that the rule that costs follow the event does not have the same weight in criminal proceedings as it does in civil cases. In criminal cases, a distinguishing factor is the public interest in the prosecution of crime. One would have to look at the full context of the Applicant's trial to assess the first named respondent's decision that the prosecution was properly brought and maintained. Much of the trial had centred on the Applicant's challenge to the search warrant and the issue of computer viruses, which were distinct from the issue of knowledge. One should also bear in mind that the evidence of a key Garda witness had been weakened on cross-examination. It was difficult to characterise the direction to acquit as either technical in nature or as an inherent weakness in the evidence.

22. With regard to the pre-trial correspondence, Ms. Ní Raifeartaigh submitted that the Applicant's letter of 2nd September had been a general comment on temporary internet files cases, and was not sufficiently precise. The trial judge's finding regarding the pre-trial correspondence was not unreasonable. In her ruling on costs, the first named respondent had been steering a middle course which sought to preserve the presumption of innocence enjoyed by the Applicant. There is no right of an acquitted defendant to costs *per se* and a relevant consideration for the courts is the public interest in the prosecution of crime.

23. Regarding the Applicant's complaint of the absence of appeal from the ruling on costs, Ms Ní Raifeartaigh submitted that there was no such right of appeal guaranteed by either the Constitution or the European Convention on Human Rights. Ms. Ní Raifeartaigh resisted any attempt to plead invidious discrimination on the basis that the Director of Public Prosecutions enjoyed a statutory right to appeal a ruling on costs in favour of a defendant. This was not pleaded by the Applicant in seeking leave for judicial review.

24. With regard to the European Convention on Human Rights, Ms. Ní Raifeartaigh submitted that this Court does not have any jurisdiction under the European Convention on Human Rights Act 2003 to make a declaration that a court has acted in violation of Convention rights. This is both by virtue of the fact that the definition of an "organ of State" in the Act of 2003 excludes courts, and the fact that the only remedy of a declaration provided for by the Act is a declaration of incompatibility in respect of legislation.

25. In the course of her submissions, Ms. Ni Raifeartaigh relied on the following authorities: *Foley v. Judge Murphy and the Director of Public Prosecutions* [2007] IEHC 232; *USK v. An Bord Pleanála* [2007] IEHC 86; *USK v. An Bord Pleanála (No. 2)* [2009] IEHC 346; *Director of Public Prosecutions v. Kelly* [2007] IEHC 450; *People (Attorney General) v. Bell* [1969] 1 I.R.

24; *Pringle v. Director of Public Prosecutions (No. 2)* [1997] 2 I.R. 225; *Sekanina v. Austria* (Judgment of the European Court of Human Rights, 25th August, 1993); *Rushiti v. Austria* (Judgment of the European Court of Human Rights, 21st March, 2000); *Lutz v. Germany* (Judgment of the European Court of Human Rights, 25th August, 1987); *Dillane v. Attorney General* [1980] ILRM 167; *Todd v. Murphy* [1999] 2 I.R. 1; and State (Hunt) v. Donovan [1975] 1 I.R. 39. The respondents in accordance with leave granted by me during the hearing made further written submissions dated 12th November, 2009 which I consider largely in accordance with the above oral submissions made during the hearing.

The Relevant Law
26. The nature of judicial review was succinctly stated by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, at 408, where he stated:-

> *"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety."…*
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> *By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or has not is par excellence a justiciable question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
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> *By "irrationality" I mean what can now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bristow [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."*

27. The first complaint advanced by the Applicant is that the first Respondent was bound by the decision of McCarthy J. concerning the pre-trial correspondence can be broadly classified under the heading of illegality. The complaint that she failed to consider the paramountcy of the normal rules on costs, and that she acted in violation of the Applicant's constitutional and Convention rights, also falls under this heading. The complaint that the decision to refuse the Applicant his costs was an unreasonable decision having regard to each of the three reasons advanced by the first-named Respondent can be classified under the heading of irrationality.

(I) The Court's determination in judicial review proceedings
28. Order 84 Rule 26(4) of the Rules of the Superior Courts states:-

> *"Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court."*

It should be noted that it is not usual for a court to make findings of fact on judicial review. In this regard, Wade and Forsyth's seminal text *Administrative Law* (9th ed., 2004, at p. 252) distinguishes between jurisdictional and non-jurisdictional facts. The former, being mistakes of fact which carry a tribunal outside its jurisdiction are of course reviewable. The latter are usually not, though this is not to say that they will never be reviewable. One may conceive of mistakes of fact which are so egregious as to indicate reviewable irrationality. Counsel for the Applicant argued that McCarthy J. had made a "finding of fact" in respect of the pre-trial correspondence. I would not characterize his words in that way. In the course of determining judicial review proceedings, the Court will of course make "findings" as to, for example, a procedure adopted having violated natural and constitutional justice or that the reasons given for the decision were not adequately stated. These "findings" will of course bind the lower court or tribunal on remittal: it cannot adopt the wrongful procedure again or issue a decision which again fails to give adequate reasons. However, the principle of curial deference (which flows from the common-sense proposition that the decision-maker is best placed to assess the relevant facts) means that a court, on judicial review, will not trespass on the adjudicator's functions of determining "the facts".

29. In *USK v. An Bord Pleanála* [2007] IEHC 86, Kelly J. remitted a matter to An Bord Pleanála on judicial review. Relief had been conceded by the Respondent. In his decision, Kelly J. made a number of recommendations and observations in relation to the manner in which the Board should subsequently conduct its procedure on remittal. He stated:-

> *"…I propose to make a number of recommendations which, without in any way accepting the validity of any of the complaints made by the Applicant, will minimise the risk of further judicial review…*
>
> *It is not open to me to direct the reopening of the oral hearing. Indeed to do so would be quite an improper trespass by me upon the discretion vested in the Board. That said, I ought to record that counsel on behalf of the Board indicated that in his view this would be an entirely proper way for the Board to approach the matter. He furthermore assured me that the Board would, of course, be inclined to follow any legal advice proffered to it in this regard.*
>
> *With a view to minimising the risk of further judicial review, it would be prudent and correct for the Board to exercise this discretion and to reopen the oral hearing. That would provide a forum for all of the parties to place*

up-to-date information before the Inspector and also to agitate any other questions considered appropriate.

Counsel informs me that the Board consists of ten members. Only five have had any involvement with this application. Again, I would think it prudent that henceforth the matter remitted to the Board ought to be considered only by or from amongst the other five members of the Board. This suggestion is not to be taken as in any way an acceptance by me of the criticisms which have been made in the affidavits on the part of the applicant. There may or may not be substance in them. It is not necessary for me to adjudicate upon them. The suggestion that I make is to ensure that a risk of further judicial review is minimised."

30. The court order made on foot of Kelly J.'s judgment recited that the court "strongly recommended" that an oral hearing be re-opened. It reiterated the recommendation that, on remittal, the issue should be dealt with by members of the Board who had not been previously involved in the case. In fact this did not occur and four of the original members participated in a six person panel on remittal. This gave rise to a second set of judicial review proceedings where the Board's decision on remittal was impugned on the basis of objective bias. In *USK v. An Bord Pleanála (No. 2)* [2009] IEHC 346, MacMenamin J. held:-

"…one significant factor in this objective assessment [of objective bias] must be what occurred in the 2007 judicial review, and the clear views of the judge who dealt with that earlier application. He considered the affidavits and submissions made by counsel for the residents and the Board; and thereafter made orders and recommendations to the Board as to how they should conduct their procedure. Clearly this new process on remittal was to be one of substance and not mere form. The recommendations were intended inter alia to avoid any perception of unfairness.

I do not say that the failure to follow judicial advice is ipso facto proof of objective bias. It is here but one aspect connected to the objective reasonableness of the well-informed observer. But the objective views of a judge in giving judgment would be difficult to ignore…

In summary, there were therefore very substantial departures from the 2007 judgment, the very object of which was to avoid the appearance of bias on remittal. These departures, and what has been described, taken together, allow only for the conclusion, that a reasonable objective observer would apprehend that there had not been an impartial decision making process."

31. It is clear therefore, that the recommendations of Kelly J. in the original application were not expressed as "findings" which were strictly binding on remittal. In fact, he specifically stated that to direct an oral hearing would be an impermissible trespass on the discretion of the Board. Rather, he made recommendations which were intended to minimise the risk of further judicial review proceedings by ensuring that the Board followed fair procedures. The Board's failure to follow these recommendations was not of itself found by MacMenamin J. to be an unlawful exercise of its jurisdiction but was strong evidence of the Board's failure to adhere to fair procedures, specifically its failure to avoid the reasonable apprehension of bias on the part of its decision-makers. The *USK* litigation supports the view that courts, in exercising their judicial review functions, are rarely concerned with the determination of the facts (save for jurisdictional facts) which is properly a matter for the lower court or administrative tribunal. To find otherwise would be to act in breach of the fundamental rule that judicial review proceedings are not appellate in nature.

(II) The law relating to costs in criminal proceedings

32. In his judgment in the first judicial review proceedings, *Foley v. Judge Murphy and the Director of Public Prosecutions* [2007] IEHC 232, McCarthy J stated:- *"I believe that the provisions and authorities relevant to an application of this kind are Order 99 Rule 1 of the Rules of the Superior Courts, there being no specific rule in the Circuit Court Rules and The People v. Bell [1969] 1 I.R. 24. Accordingly, the question of costs is at the discretion of the Court."*

33. The relevant provisions of Order 99, Rule 1 of the Rules of the Superior Courts state:-

"Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:

(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.

(3) The costs of every action, question, or issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct.

(4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

34. In *People (Attorney General) v. Bell* [1969] 1 I.R. 24, the Supreme Court held that there is jurisdiction to award costs to a defendant in a criminal trial. The Supreme Court did not address the question of what factors should guide the exercise of the trial judge's discretion. Accordingly, one has to look at the decision of Kenny J. in the High Court in this regard. He awarded costs to the sole defendant who was acquitted by direction. He refused the costs in respect of the remaining five defendants who had been acquitted by the jury. The confession of the former had been ruled inadmissible while the statements of the latter had been admitted. Kenny J. emphasised that an award of costs to a defendant should not be interpreted as reflecting in any way on the prosecutor, and said that the decision to proceed with the prosecution in the case before him was proper and that the conduct of the prosecution had been moderate and fair ([1969] 1 I.R. 24 at 37 and 38.)

35. In *Director of Public Prosecutions v. Kelly* [2007] IEHC 450, Charleton J. emphasised the broad nature of the trial judge's discretion in determining an application for costs where a defendant is acquitted. He stated:-

"The matter of the identification of the relevant factors, and the application of discretion based on them, is therefore peculiarly a matter for the trial judge. I do not regard the trial judge in a criminal case, who is called upon to decide a defence or prosecution application for costs, as being bound only to consider the evidence admitted before the jury. The issue as to costs being discretionary, and not being an issue as to whether the prosecution have discharged the burden of proof on them beyond all reasonable doubt, the exercise of that discretion requires the trial judge to inquire into the conduct of the prosecution and the defence within the wider context as to whether it was reasonable to bring the prosecution and as to whether it is correct, the prosecution having failed, not to follow the normal rule and order costs in favour of a successful defendant. The disclosure documentation can, and in some cases where it may be relevant, ought to be looked at by the trial judge as can what used to be called the book of evidence. I am satisfied as well, that the responsibility exercised as to this wide measure of discretion granted to a trial judge, in this regard, is underlined by the decision of the High Court and the Supreme Court in Beverly Cooper Flynn v. Radio Telefís Éireann, Charlie Bird and James Howard [2004] 2 I.R. 72. One of the issues that can arise is as to whether a losing party, in a civil case, has gained a particular benefit, "something of value" as it has been called in some of the cases, in consequence of bringing the proceedings, never mind that the plaintiff was unsuccessful. Any such principle is highly unlikely to arise in the context of a criminal case since the jury will either simply direct an acquittal or convict the accused. It is hard to see what special benefit might be gained by the Director of Public Prosecutions in consequence of an acquittal. However, the wide measure of discretion involved was underlined strongly by Keane C.J. at p. 108 of the report when he stated:

> "The order for costs in this case was essentially a matter within the discretion of the trial judge and this Court should only intervene if satisfied that he proceeded on some erroneous principle of law in ordering the plaintiff to pay the costs of all three defendants. I am satisfied that there was no such error of law in his approach. It is acknowledged that, prima facie, the principle that costs follow the event applied and he was entitled, in my view, to hold that circumstances relied on by the plaintiff did not constitute a "special cause" within the meaning of Order 99, rule 1(3)."

It is therefore important to examine the conduct of the prosecution and, in so far as that is possible, to examine the conduct of the defence in the case to determine how the discretion as to costs ought to be exercised. Since the judgment of Clarke J. in Veolia Water U.K. plc & Ors. v. Fingal County Council [2006] I.E.H.C. 240, this discretion as to costs has been exercised, in complex civil cases, on the basis of considering the success or lack of success of parties within the individual issues argued within such a case. This is done out of fairness to the parties who need to expend time in meeting sometimes unmeritorious arguments and, thus, in order to discourage parties from raising additional merit-less issues that may add to the length and expense of litigation. It seems that these particular principles can rarely have an impact on criminal cases."

36. Charleton J. continued by setting out a non-definitive list of ten factors which might usefully be considered by the trial judge in exercising its discretion as to costs in criminal proceedings:-

(1) Was the prosecution justified in taking the case through it being founded on apparently credible evidence?

(2) Did anything within the investigation by the Gardaí give rise, of itself, to the existence of a serious inherent doubt as to the guilt of the accused? I use this test, in distinction to a matter that might raise a reasonable doubt because, firstly, the trial judge must distance himself or herself from the evidence and, secondly, it is for the jury to judge whether there is any reasonable doubt about the guilt of the accused.

(3) Was there any indication that the case had been taken against the accused through being based on an abuse of his rights through oppressive questioning, which contributed to a confession that was unreliable in law?

(4) Whether the accused was acquitted by direction of the trial judge or acquitted upon consideration by the jury? Then one might go on to consider the reason for such acquittal by the trial judge, whether as to a failure in technical proofs or if it was one of the rare cases of inherent weakness in evidence that had actually been offered.

(5) If there had been an acquittal by direction of the trial judge, was this one based upon a decision that required the exclusion of evidence, and if so, whether that exclusion was based upon a serious, as opposed to a mistaken, abuse of the accused's rights? This is not a circumstance to apply the rule as to the exclusion of evidence based on a mistake that accidentally infringes some constitutional right of the accused. What might be considered here is deliberate abuse by the servants of the State.

(6) What answer had the accused given to the charge when presented with an opportunity to answer it? The purpose of a Garda investigation is not to provide an opportunity to an accused person to state what his defence is; Kevin McCormack v. The Judge of the Circuit Court and the D.P.P. [2007] I.E.H.C. 123. The purpose of any fair investigation, however, is to seek out the truth; sometimes according with an initial police view as to who is guilty and oftentimes contradicting it. A fair interview upon arrest would naturally bring an accused person to the point that he or she is expected to deal with the preliminary outline of the case inculpating the suspect and allow him or her an opportunity, if he or she wishes, the chance to say what the answer to it is or might be, in a case based on circumstantial evidence.

(7) What was the conduct of the accused in the context of the charge that was brought, specifically in terms of who he was associating with and on what ostensible basis? Sometimes an accused can be partly responsible for attracting suspicion by dealing with and having close relations with those who are closely linked to criminal activity. Such a relationship may be explained in evidence in an apparently reasonable way, but at other times the course of dealings may be left untreated in any reasonable way in the evidence. Suspicion can arise against an accused in other ways, such as by running away or apparently destroying what might be relevant evidence.

(8) What was the conduct of the accused in meeting the case at trial?

(9) Whether any positive case was made by an accused such as might reasonably be consistent with innocence and whether any right was exercised to testify as to that case or whether an opportunity was used under the Prosecution of Offences Act, 1974 to communicate with the Director of Public Prosecutions as to the nature of that defence?

(10) Have the prosecution made any serious error of law or fact whereby the case became on presented on a

wrong premise? The same question is applicable to the defence."

37. *Director of Public Prosecutions v. Kelly* is relevant to the within proceedings insofar as it illustrates the parameters of the first named Respondent's discretion in determining the Applicant's application for costs. This is of assistance in determining if she correctly understood and applied the law and whether her decision was reasonable in all of the circumstances of the case. It is of course not the function of this Court on judicial review to engage in any assessment of the merits of the Applicant's application for costs.

(III) The presumption of innocence

38. Reliance was placed by counsel for the Applicant, in challenging the first named Respondent's decision on costs, on the fact that the Applicant enjoys the presumption of innocence under both the Constitution and the European Convention on Human Rights. I consider a costs application to be analogous to the application for a certificate under s. 9 of the Criminal Procedure Act 1993 that a person has suffered a miscarriage of justice entitling them to compensation. In respect of the latter, the Supreme Court found in *Pringle v. Director of Public Prosecutions (No. 2)* [1997] 2 I.R. 225, that the fact that Mr. Pringle's conviction had been quashed pursuant to s.2 of the 1993 Act did not automatically entitle him to a s. 9 certificate. Blayney J. stated:-

> *"The presumption of innocence is fundamental to a criminal trial, but an inquiry as to whether a s. 9 certificate should be given is not a criminal trial. It is an inquiry as to whether there has been a miscarriage of justice, the onus of proof being on the applicant and is not a trial in which the onus is on the State to prove the guilt of the accused. The presumption of innocence has no place in such an inquiry."*

39. Nevertheless, nothing should be said or done in the context of an application for costs which would violate the presumption of innocence, such as suggesting that the person was in fact guilty or throwing doubt on his innocence (*Sekanina v. Austria* (Judgment of the European Court of Human Rights, 25th August, 1993); *Rushiti v. Austria* (Judgment of the European Court of Human Rights, 21st March, 2000). However, there is a middle ground which allows the trial judge to go beyond the finding of guilt or innocence in the case and to take into account other considerations, without overstepping the mark into violating the presumption of innocence. Such considerations might (in appropriate circumstances) include previous admissions of the accused, evidence which was ruled inadmissible, the nature of the acquittal, and whether, at the outset of the case, the prosecution stood a reasonable chance of securing a conviction. The fact that a prosecution was fairly and properly brought may be a factor weighing in the DPP's favour in a ruling on costs. A negative ruling on an acquitted defendant's application for costs does not of itself violate the Applicant's right to be presumed innocent under Article 38.1 of the Constitution and Article 6.2 of the European Convention on Human Rights.

(IV) The absence of an appeal

40. It is common case that the decision of the first named Respondent to refuse the Applicant's application for costs is an order from which there is no right of appeal in Irish law. The jurisdiction of the Court of Criminal Appeal to hear appeals in criminal matters, either from the Circuit Court or the High Court, is only triggered by a conviction on indictment (ss. 31 and 63 of the Courts of Justice Act, 1924). The right of appeal generally available to the High Court from judgments and orders of the Circuit Court is restricted to civil actions or matters (s. 38 of the Courts of Justice Act, 1936). The Applicant in these proceedings accepts that there is no general common law right of appeal, nor does Article 34.3.4 of the Constitution require there to be an appeal from each and every decision of the Circuit Court. Article 34.3.4 refers to a "right of appeal as determined by law" from courts of local and limited jurisdiction. This provision was considered in the case of *State (Hunt) v. Donovan* [1975] I.R. 39, where the prosecutor complained of the absence of a right of appeal from his sentence in the Circuit Court. The High Court (Finlay J.) dismissed his application and the Supreme Court affirmed. Finlay J., delivering the High Court judgment stated (at 48-49):-

> *"Is the much less explicit and much less emphatic language of sub-s. 4 of s. 3 of Article 34 [compared with sub-s.3 of s. 4] to be interpreted as prohibiting the law from determining that in some cases no appeal should lie from a court of local and limited jurisdiction? I do not think so. I have no difficulty in interpreting sub-s. 4 of s. 3 as prohibiting the constitution of a court of local and limited jurisdiction from which there was no appeal at all; but there is a very large gap between that interpretation and one which excludes the right of the law to determine from which precise decision an appeal will lie.*
>
> *Therefore, I have come to the conclusion that sub-s. 4 of s. 3 of Article 34 does not confer a universal right of appeal from the Circuit Court, and that the effect of s. 13, sub-s. 2(b), of the Criminal Procedure Act, 1967 (which prevents a person, who has pleaded guilty to an offence in the District Court and who has not withdrawn that plea in the Circuit Court, from appealing against the severity of the sentence imposed on him) is not inconsistent with sub-s. 4 of section 3.*
>
> *Although in the light of my decision it is unnecessary to decide it, I think that I should express a view on the meaning of "law" in sub-s. 4 of section 3. I take the view that it means statute law, and that the right of appeal there mentioned is one which requires a statutory vesture. The laws in force in Saorstát Éireann immediately prior to the coming into operation of the Constitution of 1937. which are mentioned in Article 50 of that Constitution, included the existence of a court of local and limited jurisdiction, namely, the Circuit Court of Justice from which the right of appeal, in both civil and criminal cases, was statutory and solely statutory in origin. It can not be suggested that there was ever a common-law right of appeal from such a court of local and limited jurisdiction. If the "law" mentioned in sub-s. 4 of s. 3 of Article 34 were to be other than statute law, it cannot be the common law and, therefore, it must be a constitutional law. However, it does not seem to me that such an interpretation of the sub-section is sensible. If it were intended by that sub-section that the Constitution should give a right of appeal from the decisions of the courts of local and limited jurisdiction, such right to be implemented by the Courts in furtherance of their obligation to secure the constitutional rights of citizens, the words "as determined by law" contained in the sub-section would be quite unnecessary.*
>
> *As I have already referred to the provisions of sub-s. 3 of s. 4 of Article 34, it is relevant to point out that the phrase there employed ("prescribed by law") is by virtue of sub-s. 4 of that section clearly applicable to statutory law for sub-s. 4 prohibits the enactment of any law excepting the right of appeal in certain types of cases.*

Therefore, if it became material, I am satisfied that the right of appeal conferred by sub-s. 4 of s. 3 of Article 34 is a right of appeal requiring, in the words of the Chief Justice in Meads's Case, supra , a statutory vesture."

41. The Supreme Court affirmed the decision of Finlay J. It is thus clear that as the Circuit Court is a creature of statute, any appeal therefrom must also have a statutory basis. Article 34.3.4 of the Constitution does not require that there be an appeal from each and every decision of the Circuit Court. Rather it requires that no court of local and limited jurisdiction be established from which there is no right of appeal. In *Todd v. Murphy* [1999] 2 I.R. 1, the Supreme Court refused to declare that s. 32 of the Courts and Courts Officers Act, 1995 was unconstitutional in failing to provide a right of appeal to a defendant from a Circuit Court's decision on the venue of a trial. In the judgment of the High Court, subsequently affirmed by the Supreme Court, Geoghegan J. stated (at 5):-

"It may be difficult to draw the line as to when a right of appeal is constitutionally required but it is not necessary to draw it in this case as in my view it was clearly open to the Oireachtas to preclude a right of appeal from a preliminary decision of a trial judge in a criminal case to alter the venue of the trial."

42. Article 6 of the European Convention on Human Rights (incorporated into Irish law by the European Convention on Human Rights Act, 2003) does not guarantee a right of appeal from every decision made by a Court. It does require that where an appeal procedure is provided by domestic law, it must comply with Article 6 and access to it must not be blocked disproportionately or unfairly (Ovey and White, *The European Convention on Human Rights*, 4th ed., 2006, at 173-174). Article 2 of Protocol No. 7 to the Convention (which entered in force on 1st November, 1988) guarantees a right of appeal in criminal matters of conviction and sentence only.

43. Reference was made by counsel for the Applicant to the fact that the statutory role of the Court of Criminal Appeal has been broadened by the enactment of s. 24 of the Criminal Justice Act, 2006. This provision confers power on the Attorney General or the DPP, as appropriate, to appeal against an order of costs made in favour of an accused tried on indictment who has been acquitted. No argument was raised by counsel for the Applicant that this amounted to invidious discrimination in violation of Article 40 of the Constitution.

(V) Remedies under the European Convention on Human Rights Act, 2003

44. The European Convention on Human Rights Act, 2003, which incorporates the Convention into domestic law, provides for two types of remedies. Firstly, s. 3 provides that the court may award damages (where no other remedy in damages is available) for breach of the duty on an "organ of the State" (excluding courts) to perform its functions in a manner compatible with the State's obligations under the Convention. Secondly, the court may make a declaration of incompatibility under s. 5 of the Act in respect of a statutory provision or rule of the common law which is in conflict with a Convention right. This declaratory relief is not available in respect of an omission to legislate.

45. While courts are excluded from s.3, this is of course not to say that the Convention is of no relevance to courts in the exercise of their functions. Section 2 of the Act places a duty on courts in interpreting and applying a rule of law to do so in a manner compatible with the State's obligations under the Convention. (This obligation is strengthened by s. 4 of the Act, which states that judicial notice shall be taken of the Convention provisions and, *inter alia*, any judgment of the European Court of Human Rights on any question in respect of which that Court has jurisdiction.) This interpretative obligation is a thorough one which applies to all courts, at all times, in every circumstance.

46. While a court certainly cannot be the subject of a remedy under sections 3 or 5 of the 2003 Act, it remains the case that the obligations conferred by the Act must be also placed within the existing scheme of judicial review. It is conceivable that this Court could find that a lower court or tribunal erred outside jurisdiction in failing to interpret the relevant law in accordance with the State's obligations under the Convention, as required by s. 2 of the 2003 Act. This might constitute a ground for judicial review on the basis that the decision-maker failed to understand correctly the law that regulates his decision-making power and give effect to it. Of course, it should be borne in mind that many of the Convention rights are coterminous with constitutional rights and that declaratory relief of this nature might be more easily obtained on the basis that the decision-maker acted in breach of the Constitution.

The Court's Assessment

47. The first question which falls for consideration is whether the first named respondent was bound by any finding of McCarthy J., in remitting the decision on costs, that the accused had alerted the prosecution to the weaknesses in their case in pre-trial correspondence. The respondent argues that the applicant did not include any such plea in his grounds and objects to his now attempting to plead the same. The grounds upon which an applicant moves to obtain leave to seek judicial review must always be clearly and accurately set out. The respondent must know clearly the case he has to meet. Blanket catch-all phraseology in the pleaded grounds cannot be relied upon where there is a specific claim. In this complaint, the applicant very firmly pleaded at hearing that the circuit court judge did not reconsider the matter in the light of the high court findings. Although many other matters were quite explicitly pleaded in paragraphs (1) to (7), no mention of this ground appears. Ground eight is not one in my view that is permissible as it attempts to provide the kind of catch-all safety net referred to above. Moreover this court itself needs to be clearly informed as to the exact parameters of the leave granted since that leave is the source of the court's jurisdiction to review. For these reasons I find that the applicant may not argue this ground. Since I have heard extensive argument on both sides I do think however that I should set out my view of the merits of this part of the applicant's case. I do not agree with counsel for the applicant that McCarthy J. in his judgment made the findings he did in binding terms. He stated merely that it appeared to him that the letters of 2nd and 11th September, 2002 were relevant to the question of costs in as much as the issue of guilty knowledge pertaining to the location of the child pornography was raised. He did not discuss the significance of this relevance, and his view is not expressed in a manner which in any way curtails the discretion of the first named Respondent to determine the application for costs de novo on remittal. The order of certiorari was granted on the basis of a failure of the first named Respondent to give reasons for her decision. It is clear then that she must give adequate reasons when she determines the matter on remittal. This was the extent of her duty to comply with the findings of this Court on remittal. It is clear that her discretion continues to apply, and it would be very rare for this Court, on judicial review, to interfere with the discretion of the trial judge (who has had the benefit of hearing the whole criminal trial) regarding the matter of costs. I am satisfied that McCarthy J. was of the view that these letters should be borne in mind, but I think that the matter of assessing and weighing their relevance to her discretion on costs remained one for the first named Respondent alone to determine. It seems to me that she did consider this correspondence. She found insupportable the accused's claim that he had put the prosecution on notice of the flaw in the prosecution case. In my view this was a finding within her jurisdiction.

48. The second issue which arises for determination is whether the decision of the first named Respondent to refuse the Applicant's application for costs was lawful and reasonable, having regard to the applicable law and the circumstances of the case. I am satisfied that it was. I accept the view advanced by counsel for the second, third and fourth named Respondents that the rule that costs follow the event while applicable is of less weight in criminal cases, where the public interest in the prosecution of crime must be weighed in the balance. With regard to the three reasons identified by the first named Respondent in refusing the Applicant his costs, I am satisfied that these are factors which properly arose for consideration in the exercise of her discretion (*Director of Public Prosecutions v. Kelly* [2007] IEHC 450). Nor can her conclusion be said to be unreasonable in light of these three factors. She was entitled to take into account the previous admissions of the accused, the nature of the acquittal, evidence which had been ruled inadmissible, and her finding that the prosecution had been properly brought and maintained. In exercising her discretion, the first named Respondent had the considerable advantage of having been the trial judge in the proceedings and was best placed to determine the application for costs. Her finding that the direction given by her in the trial was given on technical grounds is parsed far too closely by the applicant in these proceedings. Whether she characterized the nature of the direction as technical or due to an inherent flaw in the technical evidence or indeed as a mixture of both is again something that I consider within her jurisdiction. Nobody could be better placed than the trial judge to make such an assessment.

49. The decision of the first named Respondent was impugned on the basis that it was in violation of the Applicant's presumption of innocence under Article 38.1 of the Constitution and Article 6.2 of the European Convention on Human Rights. Having considered the relevant authorities, I am satisfied that her decision did not violate the presumption of innocence. In the course of her decision, the first named Respondent did not state that the Applicant was in fact guilty or throw doubt on his innocence of the charge. She did make reference to his own previous admission, supported by inadmissible evidence, that he had accessed child pornography on the Internet. The determination on costs, and the corresponding duty to state reasons, would be thwarted if the trial judge could not make any reference to such factors. Moreover, it should also be noted that it was the applicant herein who insisted that she give the fullest reasons. Given her duty to avoid violating his right to the presumption of innocence, the trial judge was obliged to tread a narrow and difficult line and I think she did so fairly and correctly.

50. Counsel for the Applicant also argued that the absence of a statutory right of appeal from the decision of the first named Respondent to refuse the Applicant his costs was in breach of his rights under the Constitution and the European Convention on Human Rights. Having considered the relevant authorities, I am not satisfied that this is the case. The decision on costs is a consequential order of a trial judge following the acquittal of a defendant. It is a matter which is properly within the domain of the trial judge, who has had the benefit of hearing all of the criminal proceedings. The possibility of judicial review provides a safeguard for the acquitted person against an arbitrary, unreasonable or unlawful exercise of the trial judge's discretion in this regard. The absence of a statutory right of appeal for the Applicant in relation to the first named Respondent's decision on costs does not of itself violate the Constitution nor is it in breach of the State's obligations under the European Convention on Human Rights.

51. Since I have found that the decision of the first named Respondent to refuse the Applicant's application for costs was not in breach of the European Convention on Human Rights, it is unnecessary for me to reach any conclusion on the remedies which might be available on judicial review in the event of such breach.

52. In all of the circumstances outlined, and for the reasons stated above, I must refuse the reliefs sought by the Applicant.