

**THE HIGH COURT  
JUDICIAL REVIEW**

2007 1673 JR

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND  
JUDGE JAMES O'CONNOR

RESPONDENT

AND  
CYRIL O'BRIEN

NOTICE PARTY

Judgment of Mr. Justice Declan Budd delivered on 10th day of November, 2008

**Background**

1. These judicial review proceedings come before this Court by way of two motions which require to be dealt with prior to the substantive hearing of the judicial review proceedings. These proceedings have arisen from a prosecution of the notice party entitled "The Director of Public Prosecutions at the suit of Garda James F. Donovan and Cyril O'Brien". On foot of a direction from the applicant, the notice party was charged as followed:-

"That you on 6/11/2006 at Castlemaine, Kerry in the said District Court area of Killorglin, drove a mechanically propelled vehicle registered No. 94 D 40743, in a public place while there was present in your body a quantity of alcohol such that within three hours of so driving the concentration in your breath exceeded a concentration of 35 micrograms of alcohol per 100 millilitres of breath.

Contrary to section 49(4) and 6(a) of the Road Traffic Act 1961, as inserted by section 10 of the Road Traffic Act 1994, as amended by section 23 of the Road Traffic Act 2002."

2. On the 10th December, 2007, before the Honourable Mr. Justice Michael Peart, counsel on behalf of the applicant sought leave ex parte to apply by way of an application for judicial review for an order of certiorari by way of an application for judicial review quashing the order made by the respondent on the 13th September, 2007, dismissing the prosecution against the notice party for a road traffic offence alleged to have occurred on the 6th November, 2006. It was ordered that the applicant should have leave to apply by way of application for judicial review for the reliefs set forth at para. D of the statement grounding the application on the grounds set forth at para. E of the statement, with the usual ancillary orders in respect of the service of the originating notice of motion returnable for the 17th January, 2008, together with copies of the statement of grounds and verifying affidavit and of the order giving leave on the District Court Clerk, district area No.17 and J & P O'Donoghue & Company, solicitors, on behalf of the notice party and that the costs of the application and order should be reserved.

3. I have read the statement to ground the application for judicial review dated the 10th December, 2007, the order of Peart J. made on the 10th December, 2007, the affidavit of Michael O'Donovan, the prosecuting Superintendent, whose affidavit was sworn on the 6th December, 2007, together with the exhibits MOD 1 to MOD 4 attached thereto. I have also read the affidavit of Inspector Barry O'Rourke, sworn on the 3rd February, 2008, and the replying affidavit of the notice party's solicitor Jeremiah Paul O'Donoghue, which affidavit was sworn on the 15th January, 2008, with exhibit LH1 attached thereto. This exhibit LH1 is in respect of a notice of application to state a case, which is dated the 18th September, 2007, and signed by Superintendent O'Donovan indicating that the prosecutor being dissatisfied with the determination of the above proceedings on the 13th September, 2007, as being erroneous on a point of law, intends to apply to the District Court Judge to state and sign a Case Stated setting forth the facts and the grounds of such determination for the opinion thereon of the High Court. On the copy of the form exhibited it would appear that the words "to the judge of the District Court assigned to District No. 17" have been crossed out and that the notice was sent to Paul O'Donoghue, Solicitor, Killorglin, County Kerry. Attached to this notice is a letter dated Friday, the 20th December, 2007, from Claire Loftus, the Chief Prosecution solicitor, indicating that she refers to the proposed judicial review proceedings, *D.P.P. v. Judge O'Connor & Cyril O'Brien* and to the judicial review legal proceedings served on the notice party's solicitor by Garda Finbarr Donovan on the 17th December last. The letter continues:-

"Please note that following the issue of the above judicial review proceedings, we will not be pursuing our application to State a Case to the High Court as notified to you on the 19th September last."

4. It is abundantly clear on foot of the affidavits sworn that there is a conflict of facts in the affidavits. It is not for this Court at this stage to decide the judicial review. Clearly there is an issue as to the factual basis in respect of the application for judicial review being brought by the D.P.P., as applicant. I have mentioned the warning notice of the intended application which was sent in respect of a Case Stated, but it seems clear that when counsel was consulted on behalf of the D.P.P., then it became apparent that a Case Stated procedure was inappropriate as there was the lack of an agreed factual basis necessary for a Case Stated. Accordingly, counsel for the D.P.P. had advised that the correct procedure was to move by way of judicial review. Hence, the application by way of *certiorari*, by bringing an application for judicial review, had been served seeking to quash the order made by the respondent District Court Judge on the 13th September, 2007, whereby he had dismissed the prosecution against the notice party for a road traffic offence alleged to have occurred on the 6th November, 2006. Thus this had come to be the subject of an application for leave to apply for relief by way of judicial review and this leave was granted by order of the High Court (Peart J.) made on the 10th December, 2007. There is a clear conflict as to facts on the affidavits grounding the application when contrasted with those affidavits filed opposing the application in respect of the application for *certiorari*.

5. At the start of the District Court proceedings, it seems that a debate occurred as to the location of the alleged offence, particularly as to whether it was in the town land of Castlemaine or in the adjoining town land of Annath. The case being made for the D.P.P. in the judicial review is that the Director's representative had not yet opened the case or called any witnesses. Furthermore, the Director makes the case that the prosecution case had neither been opened nor had any witnesses been called in relation to the substantive issue, but only a preliminary preparatory issue as to the location of the alleged offence had been discussed as a preliminary matter before the District Court Judge. According to the case being made on behalf of the D.P.P., efforts were made at the District Court Judge's suggestion by the parties to ascertain the location of the scene of the offence and to try to resolve the question as to which town land was the venue of the alleged offence. There is a clear conflict on the affidavits filed on behalf of the D.P.P.'s side when compared with the affidavits filed on behalf of the notice party as to the facts, both, as to the process and events

in the District Court. It is obvious that the recollections of what occurred in the District Court differ. It would seem likely that the issue which will confront the court in the judicial review in due course is as to whether the District Court judge erred in dismissing the case, or whether he was justified in dismissing the case because there was still a conflict on the point as to where and in which town land the alleged location of the offence was and perhaps also whether this was a material or pertinent issue. Thus one issue is likely to be as to whether the District Court Judge was justified in dismissing the case because there was still an outstanding conflict on the point of where the location of the scene of the offence was or because there was some procedural unfairness on the part of the prosecution. Since the recollection of the solicitor for the notice party and the recollection of the Superintendent, Michael O'Donovan, who was conducting the case on behalf of the D.P.P., differs as to the factual basis for the events, and since there is an onus on the applicant Director to establish the sequence of events in the case, accordingly an application has been brought by counsel on behalf of the applicant D.P.P. for an order pursuant to O. 40, r. 1 of the Rules of the Superior Courts. This application seeks to provide for the cross-examination of the solicitor, Jeremiah Paul O'Donoghue, whose two affidavits have been filed on behalf of the notice party. The key issues in conflict on the affidavits are that the solicitor for the notice party says that the prosecution had run its case and had closed its case, whereas Superintendent O'Donovan on the contrary says that the locus in quo issue was aired as a preliminary issue and that the prosecution, for whom he appeared, had not opened its substantive prosecution case at all or called any witness. It would seem that the general location for the alleged offence was known but there was conflict as to which town-land was involved. Counsel for the applicant is submitting that the District Court Judge was premature in dismissing the case before the prosecution had even opened the substantive case or had called witnesses, whereas the solicitor for the notice party submits that the State's case had been opened and closed and that he himself had introduced the evidence of an engineer. The Superintendent acting for the D.P.P. had no recollection of this engineer being called and on the contrary believed that he himself had not begun the substantive case, save that he had made reference only to the preliminary point as to which was the correct town land of the *locus in quo*.

6. There are clearly issues as to the facts of what occurred in the District Court and there is a conflict on the face of the affidavits. The onus is on the D.P.P. in bringing this judicial review to establish the facts and it is accordingly eminently sensible for the D.P.P. to have brought this motion for leave to cross-examine the deponent of the affidavit filed by the notice party's firm of solicitors, being the affidavit in fact of Jeremiah Paul O'Donoghue, the notice party's solicitor. Since the narrative in his affidavit seems to conflict strongly with the version of events in the affidavit of Superintendent Michael O'Donovan, who was the representative of the D.P.P. conducting the prosecution, it is eminently reasonable and practical for the D.P.P. to have brought this motion and it is expedient that the court should grant liberty to cross-examine the deponent of the affidavit of Jeremiah Paul O'Donoghue. Counsel for the D.P.P. has indicated that a similar facility of cross-examination should be offered in respect of those whose affidavits have been filed on behalf of the Director. Thus both Superintendent O'Donovan and Inspector O'Rourke have been tendered for cross-examination. I will consult counsel as to whether an order is required for clarity on this aspect. Since Inspector Barry O'Rourke and Superintendent Michael O'Donovan have both sworn affidavits in respect of the transactions in the District Court, it appears that they are the two persons to be present if counsel on behalf of the notice party wishes to avail of the offer made on behalf of the D.P.P. to tender them for the purpose of their being cross-examined.

7. Counsel for the D.P.P. made it clear that Terence Hamilton, who swore the grounding affidavit on behalf of the D.P.P., had not been present in the proceedings in the District Court and accordingly, counsel would appear to be correct that it would not be appropriate for Terence Hamilton to be tendered for cross-examination. I note that at para. 8 of his affidavit, Mr. Hamilton says that although the issue of the Case Stated is not referred to in the grounding affidavit, when leave was sought at the *ex parte* stage, counsel on behalf of the D.P.P. informed the High Court that the D.P.P. had first decided to proceed by way of Case Stated, but had then decided that judicial review proceedings were more appropriate given that it was difficult to formulate a clear point of law or an uncontentious factual basis for a Case Stated. Thus counsel on behalf of the D.P.P. had informed Mr. Justice Peart, who granted the leave application, of the situation with regard to an initial suggestion that the matter might be brought by way of a Case Stated, and he deposes to the fact that Mr. Justice Peart did not express any concerns about this proposed change of procedure from Case Stated to judicial review.

8. The affidavit of Terence Hamilton was sworn on the 26th February, 2008, and this confirms that counsel for the D.P.P. had explained to the D.P.P.'s office that judicial review proceedings were more appropriate. There was a real problem about bringing a Case Stated to the High Court because of the practical difficulties in stating a case because, in respect of the case being made on behalf of the D.P.P., it was not possible to agree a narrative factual basis for a Case Stated. This is because those swearing affidavits on behalf of the prosecution as to what occurred in the District Court in Kerry, were deposing to the fact that no evidence or factual evidence had been heard in the District Court. It would seem that the advice given by counsel to the D.P.P.'s office was correct and sensible and that the appropriate procedure to adopt to have the matter brought before the High Court was to proceed by way of judicial review and not by way of Case Stated. It would also seem that the initial notification of a move to initiate a Case Stated was simply an error as to the correct procedure to adopt, which counsel for the D.P.P. correctly made clear was to go by way of Judicial Review rather than by way of Case Stated in all the circumstances of this case. It would seem a little harsh to label such an error as "procedural opportunism" and "abuse of process", as the initial move to think of initiating a Case Stated was seemingly because of an honest mistake in all likelihood rather than by dint of any devious stratagem.

9. Since then, the contents of the D.P.P.'s direction in respect of bringing proceedings by way of judicial review, rather than by way of Case Stated, has been explained in the affidavit of Terence Hamilton and since the matter of which procedure is appropriate is very much a legal matter, there would appear to be no point in making an order for discovery in relation to the documents and advices which have given rise to the direction given by the Director of Public Prosecutions. P.P., which direction is dated the 3rd December, 2007, and referred to in para. 5 of the affidavit of Terence Hamilton sworn on the 26th February, 2008, in these proceedings. There seems to be no good reason for discovery in respect of the D.P.P.'s decision as the reasoning for his decision has been disclosed and the advices of a legal nature given to the D.P.P. make obvious good sense, and it is simply a straightforward legal matter. The initial move to initiate a Case Stated was based on an erroneous view of the law and in reality a Case Stated would have been problematic in the absence of an agreed factual basis, and in all the circumstances of this case a judicial review application is clearly much more appropriate.

10. No discovery of documents is required to ascertain the true facts of these proceedings in the District Court in respect of which conflicting affidavits have been filed. The onus of proof is on the D.P.P. and his counsel has submitted that leave to cross-examine is required to clear the mist of confusion caused by the conflicting versions of events out of the way. This is the procedure envisaged in order for O.40, r.1 (see *Collins & O'Reilly, Civil Proceedings and the State in Ireland: A Practitioner's Guide*, 2nd Ed., (Thomson Round Hall, Dublin, 2003) at pP. 148). If authority is needed on this aspect then the case of *Sabrina Dunphy (a minor suing by her guardian ad litem, Sarah Molloy) v. D.P.P.* [2005] 3 I.R. 585, would appear to be germane. On the contrary side, the notice party seeking discovery had not shown evidence suggestive of an impropriety or mala fides on the part of the Director and the affidavit of Terence Hamilton had explained at para. 5, how the Direction came to be given, on the legal advice given by counsel for the Director. In *Cunningham v. The President of the Circuit Court and the D.P.P.* [2006] I.R. 541, it is clear that a challenge to the long established protection of the D.P.P. in respect of privilege over documents was unstateable, unless such a direction of the D.P.P. came from *mala*

*fides* or the person seeking discovery could demonstrate an absence of fair procedures or a waiver of privilege.

11. Accordingly, I refuse the order sought compelling discovery or disclosure in respect of the Direction dated the 3rd December, 2007, of the Director, the applicant herein. Furthermore, since the subject matter of the direction is explained in para. 5, and also in para. 8 of the affidavit of Terence Hamilton, it would be inappropriate to make an order for discovery of the legal advice given by counsel to the Director, and particularly since relevant information about this Direction has already been set out in the affidavit of the D.P.P.'s officer dealing with the case. Since there is a considerable unresolved conflict as to the factual basis in respect of the matters and events which occurred in the District Court in these proceedings, it is appropriate that an order pursuant to O. 40, r. 1 of the Rules of the Superior Court should be made providing for the cross-examination of Jeremiah Paul O'Donoghue and for the presence of Superintendent Michael O'Donovan and Inspector Barry O'Rourke, who have been tendered for cross-examination if required by counsel and solicitor for the notice party. I will by agreement reserve the costs of these two motions. It would be expedient that consideration be given as to whether the presence of Inspector O'Rourke would be required and also thought should be given also thought should be given to the sequence of further steps to be taken in this case.