THE COURT OF APPEAL

APPROVED

NO REDACTION NEEDED

Court of Appeal Record No.: 2021/188

High Court Record No.: 2021/493 JR

Neutral Citation No.: [2023] IECA 311

Haughton J.

Pilkington J.

Butler J.

BETWEEN/

A.G.

APPLICANT / APPELLANT

AND

A JUDGE OF THE DISTRICT COURT

RESPONDENT

AND

(BY ORDER) THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

AND

PAUL DOLAN, CRAIG GEOGHEGAN, EOIN KELLY AND JOHN PAUL COCHIN

NOTICE PARTIES

*[**NOTE**: ANONYMITY – ORDERS MADE UNDER S. 45 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961 PROHIBIT THE PUBLICATION OR BROADCAST OF ANY MATTER RELATING TO THESE PROCEEDINGS THAT WOULD OR COULD IDENTIFY THE APPLICANT/APPELLANT OR HIS MINOR CHILDREN]*

JUDGMENT of Mr. Justice Robert Haughton delivered on the 13th day of December 2023

Introduction

1. This appeal, in which the appellant appeared in person, arises out of directions given by the High Court (Meenan J.) in a busy judicial review list on Monday 21 June 2021 when the appellant first moved *ex parte* his application for leave to seek judicial review of a decision in the District Court. At that initial stage in the title to the proceeding the respondents included a named judge of the District Court ("the District Judge"), a named District Court Office ("the District Court Office") and four named members of An Garda Síochána.

2. By later orders of Simons J. made on 24 July 2023 limited leave to seek judicial review was granted, but not against the District Court Office, and at that time the Director of Public Prosecutions was added as a Notice Party.

3. Anonymity for the appellant and his children was granted by Meenan J. pursuant to s. 45 of the Courts (Supplemental Provisions) Act, 1961 in the order appealed, and was continued by the order of Simons J. when granting leave. Those orders prevent the publication or broadcast of any matter relating to the proceedings which would or could identify the appellant in person or his minor children until the hearing and determination of these proceedings in the High Court. That order is of continuing effect as the substantive judicial review has yet to be heard in the High Court.

Background

4. The origin of the proceeding is an incident on 25 August 2019 when the appellant was arrested and charged. Arising from his arrest the appellant made 'common informer' complaints/applications to the District Court for the issuance of summons against certain members of the Garda Síochána, and these were refused by the District Judge on 10 March 2021. These judicial review proceedings relate to that refusal.

The High Court Directions

5. On 21 June 2021 Meenan J. in an *ex tempore* ruling gave the following initial directions which are set out in his order perfected on 25 June 2021:

    1. That the title be amended to read "A Judge of the District Court" in place of naming the District Judge. This order was made pursuant to S.I. 345/2015 and the relevant part will be quoted fully later, but in essence it amends Order 84, Rule 22 (O. 84, r. 22) of the Rules of the Superior Courts and stipulates that the judge against whose decision judicial review is directed shall not be named in the title unless there is an allegation of *mala fides* or other personal misconduct.

    2. The s. 45 order for anonymity in respect of the appellant and his minor children.

    3. That the appellant have liberty to take up the transcript of the Digital Audio Recording (DAR) in respect of the proceedings in the District Court on 10 March 2021 (the Order refers in error to 10 May 2021, but nothing turns on that) on his undertaking to discharge the cost and provide a copy to the respondent.

    4. *[But also numbered 3 in the order as perfected]* That the appellant have liberty to file and serve a Notice of Motion with copies of the Statement of Grounds and grounding affidavit on the respondent and notice parties within 14 days seeking leave to apply for judicial review, returnable to the non-jury/judicial review list

viz. that the application for leave be made on notice to the respondent and notice parties.

5. *[Numbered 4 in the order]* That costs be reserved.

The Scope of the Appeal

6. The Notice of Appeal relates to the first and third of these directions, raising in essence two matters:

   (i) the appellant challenges the removal of the District Judge's name from the title and the validity of S.I. 345/2015; and

   (ii) the appellant seeks the actual audio recording of the District Court hearing on 10 March 2021.

7. It is important to record that since the appealed directions were given the appellant obtained the District Court DAR transcript, and he deployed that when moving his leave application before Simons J. on notice to the respondents (who then included the District Court Office) and notice parties. In a reserved judgment delivered on 27 March 2023 and reported at [2023] IEHC 142 Simons J. granted leave to seek *certiorari* of the District Court decision made on 10 March 2021, but refused leave to seek any other reliefs, which also meant releasing the District Court Office from the proceedings.

8. Of relevance to the appeal, Simons J. expressly states that his judgment does not address the question of whether the District Judge "*should be described in the title of the proceedings by reference to his full name*" (paragraph 54).

9. However also of note is that in his Notice of Motion seeking leave the appellant had sought to amend his Statement of Grounds to add the following additional paragraph:

> "*As mentioned at paragraph 14 of the Grounding affirmation, the first named respondent read [the] ex tempore decision which [the District Judge] had prepared before the hearing. As such, what ensued was a premeditated unfair hearing, an infringement of the Applicant's constitutional right to a fair hearing and a contempt of the Court (as upheld by the Supreme Court in the State (Quinn) v Ryan [1965] 1 IR 70. This purported hearing was all but made in good faith / <u>bona fide</u>, demonstrating <u>mala fide</u> of the first named respondent.*"

Simons J. refused the application to amend. Thus, while the appellant attempted to expand the grounds to include a plea of *mala fides* based on a deliberate breach of the appellant's right to a fair hearing due to the *ex tempore* ruling having been prepared before the hearing took place, this application was refused and there has been no appeal from that refusal.

10. The appellant sought a review by Simons J. of the leave judgment and decision on the basis of a number of alleged omissions and errors. This was refused by the further decision of Simons J. delivered on 10 July 2023, and reported at [2023] IEHC 386.

11. The appellant did not appeal the leave decision, or refusal to review, and the time for any appeal expired some time ago. Further the appellant told this court that he does not intend to appeal, or seek an extension of time within which to appeal, those decisions. However, the appellant indicated that notwithstanding his failure to appeal, he believes he is entitled to bring a further application to the High Court to set aside these judgments on the basis that they are void *ab initio* and that he intends to do so when time and resources permit. Whatever about the merits of this approach – and on its face it seems to me that any such application would be a collateral attack on final judgments already given and therefore bound to fail – it does mean that the parties to the applications before Simons J. are likely to find themselves back in the High Court facing such an application.

Notice of Appeal

12. This raises 12 grounds, 11 of which relate to the non-naming of the District Judge in the title. The appellant has grouped these in his Notice of Appeal under two headings:

13. **"paragraph 1 of the order"**

Grounds 1 – 4 plead that the trial judge did not afford him a fair hearing in preventing him from making submissions on substitution of "A Judge of the District Court" for the name of the District Judge, and by proposing "*to retract the paragraph 3 of his order, if the Applicant were to persist with his intended submissions*" (Ground 2), and by challenging him to appeal instead (Ground 3). Ground 4 pleads this as infringing his right to a fair hearing under Article 6.1 of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union.

14. **"unconstitutionality of S.I. 345/2015"**

This is pleaded in Grounds 5 – 11 as breaching the principle of "*Open Justice*" (Ground 5). Ground 6 pleads that the instrument is repugnant to Articles 15.2 and 15.4 of the Constitution, and Grounds 7 – 10 refer to caselaw to support the propositions that the instrument breaches 'open justice' and has the "*intent of preserving of the immunity of the Judge*", and Ground 11 alleges breach of the right to an effective remedy enshrined in Article 13 ECHR.

15. **Ground 12** – this is the only ground relating to the third order made by Meenan J. concerning the DAR, and it reads:

> "*12. The principle of legitimate expectation means that the same submissions should result in the same result. The Applicant explained that, as result of his French accent, the transcripts proves to be so inaccurate that Irvine J. (as she was then called) gave orders for the release of the CD of the Audio recording rather than the transcript. By*

refusing same, the learned judge erred in law against the principle of Legitimate Expectations."

16. In Part IV of the Notice of Appeal, under 'Orders Sought' the appellant applies for an order naming the District Judge in the title and also seeks:

> "*ii) that a CD of the Audio of the hearing in… District Court be released to the parties*".

Preliminary issues arising and ruled on at appeal hearing

17. The first of these concerned the very short (half page) submission – I use that word advisedly – filed by the appellant on 10 November 2023, and it is convenient to recite this in full:

> "*1. This is an appeal of an ex parte application before Mr. Justice Meenan. Such appeal of an ex parte application should be made ex parte, as per the precedent in Gaultier v CRO, heard in the Supreme Court on an ex parte basis, notwithstanding that those Judicial Review proceedings were concluded. No appearance of the Respondent party was allowed.*
>
> *2. Therefore, I am in disagreement with the view of Ms [Justice] Costello in relation to my obligation of filing a written submissions.*
>
> *3. Furthermore, I am not in a position to file more detailed submissions until I receive the audio recording of the hearing before Mr. Justice Meenan.*
>
> *4. Those are my written submissions.*
>
> *5. I reserve my right to rely on further oral submissions.*"

18. The appellant effectively makes no written submission on any ground raised in his Notice of Appeal, and complains that he can't make a "detailed submission" until he receives the audio recording of the hearing before Meenan J.

19. It transpires that the appellant was sent an approved transcript of the hearing before Meenan J. on 20 October 2023. As the appellant's written submissions were outstanding, the appeal was listed for mention in the Directions List on 3 November 2023, at the request of the appellant. He then applied for an adjournment as he wished to obtain the audio recording of the High Court hearing. That application was refused and Costello J. indicated that at the appeal hearing he could point out any errors he believed there to be in the transcript. The appellant also applied to have the appeal heard *ex parte* but that application was also refused by Costello J. Time was then extended for the appellant's submissions to be filed by close of business on 10 November 2023, and Costello J. further ordered that unless so lodged the appeal would stand dismissed with costs to the respondent District Judge to be adjudicated in default of agreement. She further varied directions for the respondent's submissions to be lodged by 17 November 2023 and for the Books of Appeal and Authorities to be lodged by 20 November 2023.

20. Paragraph 10 of this court's Practice Direction CA06 entitled 'Submissions, books of appeal and authorities in civil appeals', effective from 3 October 2022, requires *inter alia* that written submissions should set out "*(iii) The issues to be decided on the appeal…*" and then "*(iv)...should identify the relevant legal principles, focus on the issues in the appeal and engage directly with the findings made by the trial judge.*"

21. Regrettably the appellant's written 'submission' fails to engage with any of the grounds of appeal. It does not even attempt to suggest that there are any errors in the transcript of the hearing in the High Court, and if so what those are, with the result that this court is unable to consider whether they are of any significance. The appellant therefore failed to comply with Practice Direction CA06.

22. The half page 'submission' was also entirely contrary to the spirit and letter of directions given by Costello J., the purpose of which was to ensure that this appeal was ready for hearing and that the assigned panel could identify the issues and arguments, and the texts and authorities relied

upon by each party. The appellant's statement at paragraph 2 in his 'submission' in which he suggests that he does not have the obligation to file a written submission is therefore wrong; that obligation was directly imposed by the direction of Costello J., and arises from CA06, and the power to give such directions is clearly part of the inherent jurisdiction of the court. The appellant's failure to file a proper written submission in support of his appeal is therefore a breach of binding court directions, and indeed is an affront to the directions given.

23. CA06 in paragraph 21(d) sets out the possible consequences for non-compliance with the practice direction, and includes the following:

> "*(II) In any case, the Court may make such orders as it considers appropriate, including (but not limited to):*
>
> *(i) orders disregarding, disallowing, or striking out submissions whether in whole or in part;*
>
> *(ii) orders in relation to costs (including, but not limited to, orders disallowing in whole or in part the costs of the party in default).*
>
> (iii) *orders dismissing an appeal or striking out a notice of appeal and consequential orders or costs.*"

24. This list of possible consequences would seem to follow from the inherent jurisdiction of the court to manage and regulate its own processes by direction, including giving binding directions for the proper preparation and timely service of appeal submissions in order to ensure the smooth running of appeals, avoidance of ambush, and efficient use of court time, and including the granting of an "unless" order/direction, as occurred here when Costello J. made her order on 3 November 2023 extending time for the lodging of the appellant's submissions.

25. As this begged the question whether the court should allow the appeal to proceed or adjourn it or strike it out, the parties were invited to make submissions on these alternatives.

26. In the course of his submission the appellant disclosed that he had with him a speaking note with his (further) oral submissions. This he had sent by email to the Court of Appeal Office and solicitors for the other parties in court some minutes before the court sat, and had not been read by the members of the court. At one point in response to the court the appellant admitted that he had put in his half page submission "*just to stop time running*".

27. He also submitted that he needed the DAR *recording* of the hearing before Meenan J. in order to prepare submissions – the point he had made to Costello J. on 3 November 2023. When he was asked by the court what was wrong with the transcript, a copy of which he had had since 20 October 2023, the appellant paused at length while he considered his response, and the court afforded him time to look through the three pages of transcription. He then made vague suggestions to the effect that it did not record what he had said in court. It was very apparent that he was considering this for the first time – notwithstanding that Costello J. had said on 3 November 2023 that he could point out any alleged errors to this court at this hearing – and that he could not credibly point to any difference, let alone any material difference, between the transcript and his belated recall of what was said on 21 June 2021. The appellant then went so far as to suggest it could have been "edited" by the trial judge, an allegation repeated in his 'Outline Verbal Submissions'. This was a scandalous suggestion given that there was no basis for it whatsoever in the evidence before this court, or even the appellant's own recollection of what had been said.

28. The appellant also submitted that he had a constitutional right to the recording, notwithstanding that he had the transcript, but he provided no cogent argument or authority to support that proposition. He also pleaded for indulgence on the basis that he was a litigant in person with "*two jobs*", and that "*I have many cases*". He outlined these as including two judicial reviews, a proceeding commenced by Plenary Summons issued by him, a claim against the Revenue

Commissioners which he is appealing to the ECHR having lost an appeal in the Supreme Court, and a further judicial review in respect of costs.

29. Having heard brief replying submissions the court rose and on resuming delivered its ruling. The court was of the view that it would have been fully entitled to strike out the appeal, but that in the exercise of its discretion it would nevertheless proceed to hear it. It was also decided that the court would receive and consider copies of the appellant's 'speaking note'.

30. Secondly in its ruling the court made it clear that it was rejecting as misconceived the appellant's written submission that the appeal should be *ex parte,* as the respondent would clearly be affected in the event that the court allowed the appeal and ordered that the District Judge be named in person in the title. Further it appeared that the appellant had not objected to representation for the respondent and District Court Office attending at and participating at the leave hearing. The respondent, who had lodged a written submission addressing the naming of the District Judge issue, was therefore entitled to be heard.

31. Thirdly in its ruling the court addressed whether counsel for the District Court Office had a right of audience on the appeal, having regard to the fact that it was let out of the proceedings at the leave stage. In this regard a written submission had been filed on behalf of this party/the Courts Service addressing the issues of whether the appeal should be heard *ex parte,* and the issue of whether the *recording* of the DAR from the District Court should be released to the appellant.

32. Technically the District Court Office was no longer a party to the proceedings, and neither it nor the Courts Service was a notice party or applying to be a notice party or *amicus curiae.* Counsel argued that it was a party to the orders under appeal, and had been served with the Notice of Appeal, and therefore had *locus standi.* Counsel also articulated a concern that if the recording of the DAR was released to the appellant he would deploy it not to appeal but rather to apply once more in the High Court for a review of the leave decision or in support of a further application to

amend the Statement of Grounds. In response the appellant, while affirming that he would not be seeking an extension of time to appeal the leave order, did not close off the possibility of making a further application to the High Court.

33. The court considered there was some force to counsel's arguments, decided to hear counsel for the District Court Office *de bene esse,* and so informed the parties.

34. Following the preliminary rulings the appellant was permitted to hand in copies of his 'Outline of Verbal Submissions'. It immediately became apparent that this document in paragraph 3 set out scandalous material that could have no possible relevance to the substance of his appeal to this court, and the court ordered that that paragraph should not be read out and should be treated as erased from the document.

35. Further the document commenced with the following two paragraphs:

> "*1. This appeal is part of a string of proceedings which I initiated in order to reform the entire Judiciary of the Irish State, as the only one way to get Justice, following the decisions of the High Court in [Appellant] v CRO 2013 and [Appellant] v Revenue 2017.*
>
> *2. To achieve such a goal, and with the support of Open Justice Ireland, which I am acting Chairman, there are 3 axis:*
>
> *a) Ensure scrutiny of the judiciary;*
>
> *b) Make judge [sic] accountable;*
>
> *c) All Judicial decisions to be clearly reasoned, including addressing the Core Element of a party decision, as required by law.*"

36. It need hardly be said that the pursuit of such general objectives (laudable though they may be), which seek to pursue a political agenda, has no place in an appeal before the court, a subject to

which I will return briefly at the end of this judgment. This appeal falls to be decided on its particular facts and the law relevant to those facts, to which I now turn.

(i) First Issue: Naming the Judge – O.84, r.22 (2A)

37. Meenan J. directed the removal of the name of the District Judge from the title on the basis that he was "*perfectly satisfied on your papers that you have demonstrated no mala fides on the part of the district judge*." (Transcript, p.1 lines 22-23). Later the trial judge stated:

> "*The second matter is that there is a provision in the rules that you do not name a district judge in person. All right. Now, if you want to name a district judge in person, you'd have to bring an application or set out grounds upon which that judge acted mala fides. You haven't done so…*". (Transcript, p.2 lines 16-20)

He also added:

> *"…I am substituting a judge of the district court. All right? Now, if you want the district judge to be named you're going to have to set out grounds for doing so. You haven't done it in your affidavit but you're free to do so at a later stage in the proceedings. Okay. So, there you are.*" (Transcript, p.2 lines 28-32)

38. There is no ground of appeal that alleges that the District Court Judge acted *mala fide*, and no written submission identifying the factual or legal basis upon which it is suggested the trial judge was wrong on this issue. The appellant's 'Outline Verbal Submission' also does not identify any legal or factual basis for an argument that Meenan J. was wrong or that the District Judge acted *mala fide.* That alone is sufficient to find against the appellant on this issue.

39. When pushed on what factual basis there was on affidavit or in the transcript of the District Court hearing for any allegation of *mala fides* the appellant resorted to suggesting that the content of the

District Judge's decision showed bias (whether objective or subjective was not made clear), and it appeared that it was on this basis that the appellant alleged *mala fides.* However bias is not a ground upon which the appellant was granted leave to seek judicial review, and it does not necessarily equate to *mala fides*. The appellant's reference to the content of the District Judge's decision I took to be a reference to the three reasons that were given for refusing the appellant's application to issue the five summonses. The adequacy and correctness of that reasoning are of course at the heart of the leave to seek *certiorari* that was granted to the appellant, and will fall to be decided at the substantive hearing.

40. Instead of alleging *mala fides* the appellant in the Notice of Appeal at Grounds 1-4 pleads that the trial judge did not afford the appellant a fair hearing in preventing him from making submissions on this point, and by proposing "*to retract the paragraph 3 of his order, if the Applicant were to persist with his intended submissions*" (Ground 2), and by challenging him to appeal instead (Ground 3).

41. As indicated earlier, there are two paragraphs 3 in the Order, but in Grounds 2 and 3 the appellant appears to be referring to the second of these *viz*. the order granting liberty to the appellant to apply for leave within 14 days on notice to the respondent and notice parties. Thus the transcript shows that the trial judge said:

> "*JUDGE: Well, now do you want me to -- well, let's take the first matter first. Are you saying that you do not want me to direct that your application to be on leave because if it is the alternative is I strike out your proceedings? Now, do you want that?*" (Transcript, p.1 lines 30-33)

42. Firstly, these words are directed only at any point the appellant might have wished to make to the trial judge in relation to requiring the application to be on notice. I do not read them as being directed at the issue of naming the District Judge, or to retracting his decision to order the release

of the DAR of the District Court hearing to the appellant. Of course, the trial judge did not strike out the proceedings and the appellant proceeded on notice and did obtain leave.

43. Secondly, in posing this question to the appellant in my view the trial judge was merely pointing out to him that if he was not willing to proceed on notice then the appropriate order would be to strike out his *ex parte* application as it was not one which it was appropriate to hear *ex parte*. Albeit that it may have been done robustly, there was nothing wrong with that – the court was setting out clearly the appellant's choice of proceeding on notice or not at all.

44. There is certainly nothing in the transcript to suggest that the trial judge was proposing to retract his order for the release of the DAR transcript if the appellant persisted with further submissions. Grounds 2 and 3 must therefore fail.

45. As to the wider suggestion in Grounds 1 and 4 of breach of a constitutional or Article 6 ECHR right to a fair hearing, it is important to put the trial judge's remarks in context. This was a busy Monday morning judicial review list with many cases listed (this application was no.18)[1], and the many applicants and legal practitioners present were entitled so far as time permitted to have their applications addressed or case managed unless they were being adjourned. Typically, in order to make efficient use of the limited court time available, the presiding judge will have read the papers in advance, at least sufficiently to form a preliminary view as to whether the leave applications might be dealt with *ex parte* on the day, or whether a direction should be made requiring it to be made on notice. This case followed that pattern.

46. Further I am satisfied that the trial judge had read the papers. This is not just because he said so (Transcript, p.1 line 4). It is apparent from his grasp of the essential features of the papers that he had read them in advance.

[1] The Legal Diary for the day shows that at 10.30am Meenan J. took the Non-Jury List with 27 cases listed, and then commenced the Judicial Review List (19 cases in all) at 11.30am, and took up the Judicial Review *Ex Parte* List, with four cases, at 2.00pm.

47. From that reading of the papers the trial judge had clearly formed the view that this was not an application that should be decided *ex parte.* There was nothing wrong with that and it was entirely within his discretion. An order requiring a leave application to be made on notice is of a type that is frequently made when an *ex parte* application for leave is moved before the court. As I have noted earlier, that particular order was not appealed by the appellant and the appellant thereafter proceeded on notice and ultimately obtained leave from Simons J. to seek *certiorari* of the district court decision.

48. Secondly, the trial judge was not deciding anything of substance – just the opposite. His directions meant that the leave application would be decided on another occasion, and his order that the District Judge not be named did not decide anything of substance.

49. With the benefit of hindsight, it might have been preferable that the trial judge would have afforded the appellant a better opportunity to say why he asserted the district judge should be named in the title. I do not think that this rendered the hearing unfair, because he did leave the door open - he made it clear to the appellant that he could at a later stage adduce further evidence with a view to having the District Judge named as respondent (Transcript, p.2 lines 18-20 and again at lines 29-32). In any event I am not satisfied that this would warrant this court remitting the matter for rehearing. There are two further reasons for this.

50. Firstly, the question whether the District Judge should be named fell to be considered on the basis only of the evidence before the trial judge i.e. the evidence adduced in appellant's first sworn 'Affirmation' of 24 May 2021, which was all that was before Meenan J. Before looking at that affidavit, it is helpful to consider what might amount to "*mala fides*" or "personal misconduct" for the purposes of O.84, r.22 (2A). That sub rule, which substituted for the old Rule 22(2), was inserted by S.I. 345/2015,[2] and it reads:

[2] Rules of the Superior Courts (Judicial Review) 2015, promulgated by the Superior Court Rules Committee under statute. The Minister for Justice and Equality concurred in the making of the new rules on 1 August 2015.

"*(2A) Where the application for judicial review relates to any proceedings in or before a court and the object of the application is either to compel that court or an officer of that court to do any act in relation to the proceedings or to quash them or any order made therein—*

(a) the judge of the court concerned shall not be named in the title of the proceedings by way of judicial review, either as a respondent or as a notice party, or served, unless the relief sought in those proceedings is grounded on an allegation of mala fides or other form of personal misconduct by that judge in the conduct of the proceedings the subject of the application for judicial review such as would deprive that judge of immunity from suit,

(b) the other party or parties to the proceedings in the court concerned shall be named as the respondent or respondents".

51. In *Hall v Stepstone Mortgage Funding Limited* [2015] IEHC 737, at Humphreys J. stated:

"*11. A judicial review action must relate to an underlying public law function being carried out by somebody, but not necessarily by the respondent. It is not the law that the respondent must itself be a public law entity. In the present case, the action clearly relates to a public law function, namely an order made by a judge of the Circuit Court. Order 84, r. 22(2A)(a) says expressly that "the judge of the court concerned shall not be named in the title of the proceedings". However some entity should normally be a legitimus contradictor, and in a case where the action relates to a challenge to a judicial proceeding, that entity is the other party to the underlying proceeding. The onus falls on such a party to defend the decision made by the court, if it wishes to do so, and that is what Mr. Hall is giving Stepstone Mortgage Funding Limited the opportunity to do. In doing so, he is acting entirely within the rules. The preliminary objection is, for that reason, misconceived. Such a respondent can adopt the stance that it does not wish to defend the decision, in which case the question becomes a*

matter between the applicant and the court, whereby the applicant must satisfy the court to the appropriate standard that the underlying decision was flawed. If, on the contrary, the other party does wish to defend the underlying decision, then it is entirely at liberty to do so, with all of the rights and liabilities that attach to any respondent."

At paragraph 17, Humphreys J. went on to consider the threshold:

"*17. As noted above, Mr. O'Sullivan suggested that the learned Circuit Court judge should have been named as a respondent because rule 22(2A)(a) goes on to say that a judge should be named if there is "an allegation of mala fides or other form of personal misconduct by that judge in the conduct of the proceedings the subject of the application for judicial review such as would deprive that judge of immunity from suit". Such an allegation must, by definition, be made by the applicant. Mr Hall, as an applicant, made no such suggestion in his amended papers (having made clear that he was no longer relying on scandalous material in his original papers). What these applicants are actually alleging is in essence that the learned Circuit Court judge should not have made the order she did, and are suggesting that aspects of the hearing unduly curtailed their rights to fair procedures. That sort of allegation is absolutely not at the level of gravity as would engage the exception set out in Order 84, rule 22(2A)(a). Merely because it is suggested that a particular hearing did not in some way or for some reason, whether outside the control of the court or otherwise, fully observe all of the stipulations of fair procedures does not, in any way, make it appropriate to name the judge as a respondent. Something much more flagrant and deliberate would be required to reach the level required to sustain an allegation of mala fides, and the applicants here have made no such allegation in their amended papers. I, therefore, find that the learned Circuit Court judge in the present case was quite properly excluded from the title of the proceedings by the applicants*."

52. I broadly agree with those observations, although in practice it may be difficult to identify when the line is crossed between a curtailment of a litigant's right to fair procedures and something "more flagrant and deliberate" that may constitute *mala fides*. There will be a spectrum of cases where a court may fail to afford a litigant fair procedures, from a failure to afford a reasonable time within which to put in a pleading or submission that may be capable of being remedied before a decision is taken, to a more egregious failure such as not affording a litigant an opportunity to address the court on a critical issue. I also agree with Humphreys J. that the onus is on the applicant seeking to have the judge named in person. I would add that the test would seem to be an objective one, which must be based on the evidence presented. It is a matter for the trial judge at the leave stage to determine whether there is a sufficiently particularised plea of *mala fides*/personal misconduct based on sufficient evidence to justify the District Judge being named in the grant of leave to apply for judicial review. A simple assertion that the District Court judge acted *mala fides* would not suffice. While the appellate court can draw different inferences from the relevant evidence (which will almost invariably be on affidavit), it should be slow to do so, and should afford the trial judge a reasonable margin of appreciation.

53. In terms of what might be relevant to *mala fides* or personal misconduct (as opposed to complaints about the reasons given for the decision in the District Court) there is relatively little said in the appellant's affidavit. In paragraphs 10 and 12 the appellant complains that he was not given 'liberty' or 'opportunity' to read his application to the District Court in open court. In my view this carries no force because it had been read by the District Judge, and reading it out was not necessary and would have been a waste of valuable court time. The courts are all too frequently accused of not allowing a party to read out a document or extract in open court, or not allowing it to be 'read into the record'. There are doubtless occasions when the court must allow this to happen e.g. the publication in open court of an agreed apology in defamation proceedings. In general however where a judge says he or she has read a document that should be taken as *prima*

facie evidence that it has indeed been read, and it would require weighty evidence to displace such presumption.

54. The appellant then avers that he was "invited to speak" by the District Judge, and he clearly availed of that opportunity.

55. The only other matter raised, in paragraphs 13 and 14, is that the District Judge, having "*put [the appellant] at ease*" then "*started to read his ex tempore decision*". The affidavit does not go so far as to assert that the District Judge's decision was prepared in advance of the hearing. The District Judge may well have had notes which were consulted or from which the District Judge read in delivering the decision, but that is not a basis for alleging *mala fides.* In his oral submission the appellant argued that there was "*no certainty that it was not a pre-made decision*" and that this amounted to *mala fides.* This argument misses the point that the onus was on the appellant to demonstrate *mala fides*, at the level of gravity indicated by Humphreys J. in *Hall*.

56. It seems to me that the appellant's real objection was to the trial judge's reasoning for his refusal to issue the five summonses, set out in paragraph 14 of the affidavit *viz.* (i) that there was a risk of prejudice; (ii) the applications were premature; and (iii) the applications were an abuse of the process. Thus, the gravamen of the appellant's complaint *in this affidavit* is not a breach of fair procedures *per se* but rather the reasons given by the District Judge for refusing the orders sought.

57. Considering that affidavit objectively does not demonstrate any basis for alleging *mala fides* or personal misconduct on the part of the District Judge, and I agree with the trial judge's decision in this regard. On the basis of the material before him I do not see that he had any alternative but to direct the removal of the District Judge's name from the title.

58. Secondly, the appellant affirmed a further affidavit on 11 November 2022 to support his application to amend/broaden the Statement of Grounds to plead that in the District Court he had "*a premeditated unfair hearing*" which was a "*contempt of the Court*" and which "*demonstrated*

mala fide of the first named respondent". This post-dated the directions of Meenan J. and as it was not before him it does not fall to be considered on as part of this appeal.

59. This second affidavit was considered by Simons J. at the leave application, but he rejected the application to amend for reasons given at paragraphs 45-49 – see his decision reported at [2023] IEHC 142. He refused the amendment because the appellant's second 'Affirmation' of 11 November 2022 gave no explanation for not having raised the new plea earlier, but significantly he went on to find that there was no evidence of *mala fides*, stating:

> "*47. Even if the applicant had provided an explanation for his delay, leave to amend would still have to be refused because the amended ground fails to meet the threshold of an arguable case. There is nothing in the verifying affidavit of 24 May 2021 which alleges that the District Court judge had prepared his decision before the hearing, still less that there had been a "premeditated unfair hearing" or "contempt of the Court". To say that the District Court judge read his ex tempore decision is, at most, ambiguous. To describe a decision as being ex tempore indicates that it has not been prepared in advance. It certainly does not convey the allegations of mala fides contained in the amended ground. Tellingly, in his subsequent affidavit of 11 November 2022, the applicant expressly says that his "initial application for leave to apply for judicial review was not based on the criteria of fairness or unfairness of the judge*".

60. Finally, if and insofar as the High Court is being asked to infer, in the absence of any direct affidavit evidence to that effect, that the District Judge had worked off notes at the time the ruling was delivered, same would not support an arguable case in respect of the amended ground. The applicant had furnished papers to the District Court Office in advance of the hearing on 10 March 2021, and the District Judge had told the applicant on a number of occasions that the papers had been read. The applicant was expressly asked whether he wanted to add anything to the "*informations*" which had been forwarded to and read by the judge. In the event, the applicant did

not make any detailed oral submission. The fact, if fact it be, that the District Judge may have referred to notes when delivering the ruling would not have been improper in the circumstances. See, by analogy, *Lohan v. Solicitors Disciplinary Tribunal* [2023] IECA 18 (at paragraphs 52-66).

61. Even if we were to permit the appellant to rely on his later affidavit (and there has been no application to adduce further evidence before this court) I agree with what Simons J. said at paragraphs 47 and 48 of his decision, which is in effect repeated at paragraphs 39-44 in his second judgment (reported at [2023] IEHC 386) in which he refused to review his leave judgment. As noted earlier those judgments and the leave order have not been appealed by the appellant.

Constitutional/ECHR Challenge to S.I. 345/2015

62. In so far as the appellant attempts in Grounds 5-11 of his Notice of Appeal to challenge the constitutionality of S.I. 345/2015, or assert that it is a breach of ECHR rights, he did not raise any such challenge in the High Court, either before Meenan J., or later before Simons J. Nor is any such challenge pleaded in the Statement of Grounds and no attempt was made to amend the Statement of Grounds to include such a plea subsequent to Meenan J.'s ruling.

63. Moreover O. 60, r.1 requires that if any question as the validity of any law having regard to the provisions of the Constitution arises the party having carriage of the proceedings must forthwith serve notice on the Attorney General, if not already a party. As far as the constitutional challenge to S.I. 345/2015 is concerned, the Attorney General has not been joined as a party to this appeal. Accordingly, this argument does not reach first base.

64. It has also been held that constitutional issues should be considered before issues relating to the ECHR. This principle was summarised by Murray C.J. in *Carmody v Minister for Justice, Equality and Law Reform and Others* [2010] 1 I.R. 635, at page 650:

> "*…when a party makes a claim that an Act or any of its provisions is invalid for being repugnant to the Constitution and at the same time makes an application for a declaration of incompatibility of such Act or some of its provisions with the State's obligations under the Convention, the issue of constitutionality must first be decided.*"[3]

65. These are no mere technicalities, as any such challenges, be they constitutional or under the ECHR, would require to be fully argued at first instance and on appeal, with all appropriate parties present.

66. Further the appellant chose not to make any written submission on these issues before handing in his 'Outline of Verbal Submissions', which left the respondent with no opportunity to consider them or prepare reply submissions.

67. For all these reasons the appellant cannot be permitted to argue that S.I. 345/2015 is unconstitutional or breaches of ECHR rights in this appeal and it is not therefore necessary to address the very general submissions which he made in line with his 'Outline of Verbal Submission' to support these contentions.

(ii) Second Issue: DAR recording – District Court 10 March 2021

68. The District Judge declined the appellant's request to take up the DAR. However, Meenan J. in his order gave the appellant leave to take up the DAR transcript of the District Court proceedings on 10 March 2021 in the normal way.

69. O.123, r.9(5) provides that:

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

[3] Para. [50].

by the applicant to the transcript writer of the transcript writer's fee for producing the transcript."

70. The first insuperable difficulty faced by the appellant is that he has not at any stage brought an application before the High Court seeking the *actual recording* of the District Court proceeding on 10 March 2021. That is an application of a sort for which specific provision is made in O.123, r.9 (1) – (4) and is one that would have to have been made in the first instance to the High Court as the court seised of the substantive judicial review proceedings. His failure to follow that procedure – or make any such application to the High Court – is fatal to his appeal on this point, as there is no decision to appeal.

71. In any event the appellant has, since he first sought judicial review, obtained the District Court transcript and he deployed it in the leave application (it is quoted in the judgment of Simons J.), which was successful insofar as he was granted leave to seek *certiorari*. To that extent his appeal on this issue has been overtaken by events, especially as the leave he obtained was for that single relief and he was refused an amendment to the Statement of Grounds that would have allowed him to argue a refusal to issue the summonses based on allegations of lack of fair procedures or *mala fides.* He might have been able to muster an argument for the production of the recording if that amendment had been made. He did not appeal that refusal, and it seems to me that the appeal on this point is now moot.

72. In any event the appellant has singularly failed to say why he needs the audio recording. In my view the appellant would need to advance cogent reasons for seeking the recording when he already has the transcript. A bald assertion that he does not believe the transcript to be accurate does not amount to cogent reasons. To date the appellant has not pointed to any material errors in the DAR transcript that is in his possession. In the context of this appeal it cannot be said that the appellant is in any way disadvantaged in not having access to the DAR recording.

73. The appellant refers the court to passages from the judgment of O'Donnell J. (as he then was) in *In the Matter of [An Applicant] and The Companies Acts, 1963-2009* [2019] IESC 89, at paragraphs 12-14. However this does not establish any principle upon which he can rely. In that case the appellant informed the court that he had been provided with the audio recording in error, and provided his own transcript of that recording to the court. It was not therefore a case in which the court was called upon to decide whether to release the recording. In any event having identified the minor differences between the official transcript and the appellant's transcript O'Donnell J. stated:

> "*15. It does not appear there is a significant or material distinction between the two transcripts, but in the hope of avoiding further misunderstanding and confusion, I am prepared, for these purposes, to use the transcript prepared by [the appellant], without suggesting that that is a desirable or appropriate course to follow in most cases. It appears likely that the exchange was recorded without notifying the court or seeking permission. If so, then, quite apart from the undesirability, and indeed illegality, of such a course, it suggests a high degree of suspicion on [the appellant's] part.*"

74. For these reasons I would dismiss this appeal.

75. Having heard the appeal fully I am of the view that it was appropriate for the court to hear counsel for the District Court Office both because it was a named party respondent in the *ex parte* application before Meenan J., and because of a well-founded apprehension that if the recording was to be released it would be used by the appellant to bring further applications to the High Court to review or amend the leave decisions and orders. It should in my view be treated as if it were a notice party on the appeal.

Addendum

76. I would add that although no application was made to strike out this appeal as an abuse of process in my view it had all the features of an abuse. It related only to preliminary directions of the court, and to a large extent it became moot once leave to seek judicial review was granted and the leave order was not appealed. On the naming issue, the challenge to the S.I. 345/2015 on constitutional grounds could not be raised because the Attorney General was not a party, and it followed that the ECHR challenge could not be pursued. The claim to have the recording of the District Court hearing released was also fatally flawed because the O.123, r.9 process had not been followed, and in any event no credible reason was advance for acceding to such an application. The appeal was, in effect, unstateable.

77. More particularly the opening paragraphs of the appellant's 'Outline of Verbal Submissions' disclose that his real purpose in pursuing the appeal was a political objective as Chairman of 'Open Justice Ireland' – "*to reform the entire Judiciary of the Irish State, as the only one way to get Justice*", to "*Ensure scrutiny of the judiciary*", to "*make judge[s] accountable*", and so that "*All judicial decisions to be clearly reasoned, including addressing the Core Element of a party decision as required by law*". The only legitimate purpose in pursuing an appeal is to obtain a different outcome to that in the court below on the facts of the particular case. In explicitly putting other objectives front and centre the appellant was pursuing the appeal for improper purposes, using the court as an opportunity to 'grandstand', and wasting court time.

78. The 'Outline of Verbal Submissions' was replete with scandalous material that had no place in a serious submission on relevant legal issues, and the court had to intervene to prevent the appellant reading out the worst parts. Further there is no reason why the appellant could not have produced this document as his written submission, in accordance with the directions of Costello J. In my view he flouted those directions in putting in a half-page submission "*just to stop time running*" (to use his own words) and withholding his real submission from the parties and the court until the hearing was about to start, and characterising it as a 'speaking note'. With the benefit of

hindsight the court should have struck out this appeal at the outset for failure to comply with directions and/or as an abuse of the process. If nothing else, this appeal demonstrates the wisdom of ensuring compliance with directions to ensure appeal papers are properly prepared and delivered to all parties and the court well in advance of the hearing date, and the inadvisability of accepting 'speaking notes' and such like produced on the day.

Costs

79. As this judgment is being delivered electronically I will indicate the costs orders that I propose the court should make. As the respondent was entirely successful I would order that the appellant do pay the costs of the appeal to the respondent, such costs to be adjudicated by a legal costs adjudicator in default of agreement. I would direct a stay on that order pending the finalisation of the substantive judicial review in the High Court. I would make no order as to the costs of the District Court Office/Courts Service and for the sake of clarity I would direct that its name be deleted from the title to the proceedings. If any party wishes to seek any different order they should so inform the Court of Appeal Office in writing or by email within 14 days from the electronic delivery of this judgment, and the court will arrange a short hearing if it is required. In default of any such notification the proposed orders will be made and perfected.

Pilkington and Butler JJ. have indicated that they agree with this judgment and the orders proposed to be made.