THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 523 J.R.]

BETWEEN

LIAM MALONEY

APPLICANT

AND

THE MEMBER IN CHARGE OF FINGLAS GARDA STATION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDICIAL REVIEW

[2015 No. 533 J.R.]

BETWEEN

JORDAN ENNIS

APPLICANT

AND

THE MEMBER IN CHARGE OF COOLOCK GARDA STATION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 9th day of May, 2017

Introduction

1. The above entitled applications for judicial review were heard in tandem as they both raise the same issue. That is, whether or not the applicants, as arrested persons, are entitled to sight of any evidence it is proposed to put to them in the course of interview by the Gardaí in advance of such interview taking place.

The Facts in Liam Maloney

2. At 7.05 am on the 17th September, 2015, the applicant was arrested in respect of the offence of assault causing serious harm contrary to s. 4 of the Non Fatal Offences Against the Person Act 1997. The alleged offence arose out of the unlawful killing of one Vincent Maher on the 11th January, 2014.

3. Following his arrest, the applicant was conveyed to Finglas Garda Station where he requested the assistance of his solicitor, Mr. Michael Finucane. Telephone contact was eventually made after a number of attempts with Mr. Finucane at 10.28 a.m. One of the investigating Gardaí spoke to him. Mr. Finucane requested a summary of what was proposed to be put during questioning of his client. He was advised that the evidence to be put at interview would not be disclosed in advance.

4. After Mr. Finucane's initial conversation with the investigating Garda, his office sent a letter by fax transmission at 11.29 a.m. that day to Finglas Garda Station in the following terms:

> "We write on behalf of our above named client who has been detained for questioning in relation to an alleged assault that took place on or about 11 January 2014.
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> It is our understanding that gardaí are in possession of a number of documents, including witness statements that are relevant to the investigating *(sic)*. We understand also that mobile phone footage and memos of interviews with other persons detained previously will also being put to our client during interview.
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> In order that we can advise our client and protect his interests, as well as represent him effectively during the interview process, we will require all of this information to be disclosed in advance of interview. We will also require sufficient time to discuss the material with our client and obtain instructions.
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> In this regard our client relies on the provisions of EU Directive 2012/13/EU in requesting access to information about this matter that is in the hands of the prosecuting authorities. We are seeking, more detailed information about the incident under investigation in order to establish the precise nature/extent of the alleged participation by our client.
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> Our client relies, in particular, on the provisions of Article 6 (3) of the Directive, which states:
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> > *'Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.' (Emphasis added).*
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> This Directive has had direct effect in law since 02 June 2014 and is therefore applicable to these circumstances…"

5. Mr. Finucane arrived at the Garda Station at more or less the same time as the fax was sent and spoke to one of the investigating Gardaí. Mr. Finucane furnished the Garda with a copy of EU Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings. He informed the Garda that he was relying on this Directive in support of a request that he be furnished with all the evidence which would be put to Mr. Maloney in advance of any proposed interview to include all witness statements, physical exhibits and footage from recordings. The Garda declined to disclose this evidence in advance of the interview to Mr. Finucane and instead gave an outline of the nature of the evidence. Arising from that, Mr. Finucane indicated that he intended to challenge the applicant's detention in the High Court that day.

6. The interview then proceeded and in fact a total of three interviews took place with Mr. Maloney in the presence of his solicitor over the course of two days, the 17th and 18th of September, 2015. At the commencement of the first interview, Mr. Maloney declined to answer any questions put to him and stated:

> "I understand that I have been arrested on suspicion of an offence contrary to s. 4 of the Non Fatal Offences Against the Person *(sic)*. I have been advised by my solicitor that Gardaí have certain evidence they want to put to me in interview but will not disclose it in advance as a result my solicitor unable *(sic)* to advise me properly and I am unable to answer any questions."

7. Thereafter, Mr. Maloney refused to answer any questions put to him by the Gardaí. Instead he simply responded with "I refer to my last answer", "I can't answer that" or "no comment". On a number of occasions, the interviews were suspended at the request of Mr. Finucane to enable him to consult privately with Mr. Maloney.

8. It should be noted that this was not the first involvement of Mr. Finucane on behalf of his client in relation to the matter. In January 2014, Mr. Finucane was in contact with the Gardaí on his client's behalf as a result of which he was offered the opportunity of carrying an independent post mortem examination on the body of Vincent Maher.

9. Later that day, Mr. Maloney moved the High Court for an inquiry into the lawfulness of his detention pursuant to Article 40 of the Constitution. It would appear that in the course of the matter being opened to the court, the judge indicated that he was of the view that the matter was more appropriately brought by way of application for judicial review. Accordingly a statement required to ground an application for judicial review was drafted and by order of the court made on that day, the 17th September, 2015, leave was granted to seek judicial review.

10. This occurred during the currency of the applicant's detention as the applicant was not released from custody until the following day, the 18th September, 2015. Accordingly one of the reliefs sought in the statement of grounds was a stay on the applicant's detention pending the determination of the proceedings and if necessary an order admitting him to bail. Apart from those reliefs, two declarations are sought by the applicant to the effect that the failure to provide the requested evidence amounted to a breach of the applicant's rights to due process pursuant to the Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. A further declaration is sought that the respondents are in breach of the Directive by failing to provide for a system giving suspects timely access to evidence against them.

11. No charge has yet been preferred against Mr. Maloney arising out of the foregoing circumstances.

The Facts in Jordan Ennis

12. On the 23rd September, 2015, Mr. Ennis was arrested in respect of the offence of assault causing harm contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997 in respect of an incident which occurred on the 19th September, 2015. Mr. Ennis, who was eighteen at the time, attended by arrangement at Coolock Garda Station with his father when the arrest took place. He requested the assistance of his solicitor Mr. Michael Finucane.

13. Mr. Finucane spoke to the investigating Garda and requested that he be furnished with copies of all evidence to include statements and CCTV footage which it was proposed to put to Mr. Ennis during the course of interview in advance of that interview occurring. In support of this request, Mr. Finucane indicated that he was relying on Directive 2012/13/EU of the European Parliament and of the Council of 22 May, 2012, on the Right to Information in Criminal Proceedings. The Garda declined to furnish the evidence to Mr. Finucane in advance and instead gave him an outline of that evidence.

14. During the course of the interview which was attended by Mr. Finucane, Mr. Ennis declined to answer any questions put to him, simply responding in every case "nothing to say" or "no comment". During the interview, Mr. Ennis was afforded the opportunity of consulting privately with his solicitor whenever such opportunity was requested.

15. Arising out of these events, later that day the applicant moved the High Court for an inquiry pursuant to Article 40 of the Constitution into the lawfulness of his detention. As in the case of Mr. Maloney, it would appear that during the course of the hearing before the court, the judge considered that the matter was more appropriately moved by way of application for leave to seek judicial review. Accordingly a statement of grounds was drafted seeking in substance the same reliefs as sought in the case of Mr. Maloney. As in Mr. Maloney's case, Mr. Ennis was still in custody when the application was made to the court. The court accordingly granted leave. Later that evening, Mr. Ennis was released from custody.

16. Unlike Mr. Maloney's case however, Mr. Ennis was charged on the 30th May, 2016, with the offence of violent disorder contrary to s. 15 of the Criminal Justice (Public Order) Act 1994, assault causing harm contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997 and the production of an article in the course of a dispute contrary to s. 11 of the Firearms and Offensive Weapons Act, 1990. Trial on indictment was directed by the Director of Public Prosecutions and Mr. Ennis was sent forward for trial on the 8th September, 2016, when the Book of Evidence was served upon him.

The Issues

17. While the applicants concede that no inculpatory statements were made by either of them during the course of interview by Gardaí which could be used against them in the course of a trial, it was submitted that the fact that the information was not disclosed in advance of interview potentially put them at a disadvantage in terms of how they responded to the questions put. Thus for example, it was said that the potential existed for the making of an exculpatory statement by the applicants in the course of interview in circumstances where they had been given the opportunity of considering the evidence in advance. This might, or might not, have been a benefit available to them in the course of a subsequent criminal trial.

18. The essential thrust of the applicant's case is that interrogating Gardaí were not entitled to "ambush" the applicants with evidence to gauge their reaction without them having been given a fair opportunity beforehand to consider that evidence. It was

suggested, for example, that an unprepared interrogated party when confronted by surprise with evidence in the course of interview might be tempted to lie or say something in an unguarded or unprepared moment that might be used against him subsequently. It was contended that this was contrary to the terms of the Directive and what is referred to as the "Roadmap" adopted by the Council of Europe in relation to the rights of suspects in custody which is in the course of evolution.

19. The respondents on the other hand submitted that insofar as any issue of unlawful detention was concerned, the applicant's claims herein are now moot since the detention came to an end shortly after the grant of leave in both cases. As regards the declaratory reliefs sought, it was argued that the applicant had no locus standi to seek these reliefs in circumstances where they had not demonstrated that they had suffered any prejudice nor had they shown how such reliefs could potentially be of benefit to them at any subsequent criminal trial. It was said that the applicants were in effect seeking an advisory opinion of the court which is something the court should not permit.

Mootness
20. The principles applicable in this regard were considered by the Supreme Court in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 I.R. 274 where Denham C.J. said:

> "[13.] The current proceedings, insofar as they relate to the deportation order against the third appellant, are moot, as that deportation order has been revoked.
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> [14.] As the deportation order has been revoked, there is no basis upon which to proceed. Furthermore, any decision by this court would be based on a hypothesis, and would be an advisory opinion. It has long been the jurisprudence of this court that it will not give advisory opinions, except in exceptional circumstances, such as under Article 26 of the Constitution, or as identified in the case law of the court.
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> [15.] Thus, while the parties had a real dispute when the proceedings were commenced, this is no longer the case.
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> [16.] As has been cited by this court previously, including by Hardiman J. in *Goold v. Collins* [2004] IESC 38 (Unreported, Supreme Court, 12th July, 2004), the dictum of the Supreme Court *in Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342 reflects the law of this jurisdiction where it is stated:-
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> 'An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercised its discretion to depart from it.' "

21. It seems to me clear therefore, that insofar as any complaint about the applicant's detention is concerned that formed the basis for the institution of these proceedings, any such issues are now moot. There is no claim for damages in these proceedings.

The Applicants' Claims for Declarations
22. The issue that arises in this regard is whether the court should grant declarations as to the meaning and effect of legislative provisions in advance of a criminal trial which, in the case of Mr. Maloney at any rate, may or may not arise at all.

23. If such declarations were to be granted in favour of the applicants, it is unclear what, if any, effect they may have. The applicants do not seek to prohibit their trials. Rather, in the event that they do proceed, they wish to have the benefit in advance of rulings of this court in relation to the lawfulness of the interview process conducted by the Gardaí which, depending of the circumstances, they may or may not at their discretion choose to deploy at the trial. It is somewhat difficult to perceive such circumstances.

24. The applicants have not to my mind explained what prejudice has accrued to them or might so accrue in the future by virtue of the matters of which they complain. They refused to answer any questions put to them as was their right. They were accompanied throughout the interviews by their solicitor. They were given the opportunity of consulting privately with their solicitor during the course of the interview on numerous occasions and they availed of those opportunities. Nothing therefore emerged from the interviews which could be used against them.

25. The applicants however say that by the same token, nothing emerged which could have been potentially used in their favour and they were somehow denied the opportunity of at least having the potential to make an exculpatory considered statement which might have arisen in circumstances where the evidence was available in advance. I do not quite follow that argument.

26. As I have said, the applicants were accompanied throughout the interviews by their solicitor. Whenever any issue arose upon which the applicant's solicitor wished to take instructions, the interview was adjourned to allow for private consultation to take place and instructions to be given. There is no obvious reason why on the resumption of the interview, had either applicant wished to make some form of considered exculpatory statement, now having seen the relevant evidence, he could not do so.

27. In those circumstances, it is somewhat difficult to understand what precise prejudice arose or what injustice occurred that could be remedied by the court. Hypothetical possibilities are not enough. As Denham C.J. noted in *Lofinmakin*, the court does not give advisory opinions. The function of judicial review is not to advise proofs in advance of a criminal trial or indeed any form of disciplinary process. In dealing with such an issue in *Fingleton v. Central Bank of Ireland* [2016] IEHC 1, this court noted:

> "[114.] In *Carroll v. Law Society* [2000] 1 ILRM 161, the applicant applied to the respondent for admission as a solicitor having passed the necessary examinations. His application was refused on the basis of his failure to satisfy the respondent's Education Committee that he was a proper and fit person to be admitted as a solicitor. A meeting of the committee was convened to conduct an inquiry into the substance of a complaint made against the applicant. Before the meeting took place, the applicant applied for declarations by way of judicial review that the committee had no jurisdiction to hear and determine the complaint but if it did that certain procedural safeguards must be put in place and further that he had fulfilled the statutory requirements to be admitted as a solicitor. McGuinness J. refused the application on a number of grounds. On the procedural issue, she said (at p. 174):-
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> > 'However, the Society submitted that it was not the function of judicial review to direct proofs or procedures in advance; the purpose of judicial review was to review conduct that had occurred rather than to direct procedures

in advance. In this context counsel for the Society referred to the judgment of Carroll J. in Phillips v. Medical Council [1992] ILRM 469 at 475 :

> 'Judicial Review does not exist to direct procedures in advance but to make sure bodies which have made decisions susceptible of review have carried out their duties in accordance and in conformity with natural and constitutional justice.'

The Education Committee's inquiry in this case is not a court of law, but, as the Society itself acknowledges, it is crucial to the applicant's future professional career and it must act fairly and in accordance with the principles of constitutional justice.

I would however accept the submission of Mr Hedigan that it is not the function of judicial review to direct procedures in advance and I regard the dictum of Carroll J. in Phillips v. Medical Council as persuasive authority. I am not therefore prepared to make the declaration sought by the applicant.'

[115.] Similar views were expressed in *J. Murphy v. Flood* [2000] 2 I.R. 298 and *Bailey v. Flood* (Unreported, High Court, 6th March, 2000). In *Kennedy v. DPP* [2007] IEHC 3 , the applicant was a clerical officer in the Immigration Section of the Department of Justice, Equality and Law Reform. While so employed, he was alleged to have corruptly accepted gifts from applicants for residency permits in exchange for favourable treatment. While awaiting trial on charges brought under the Prevention of Corruption Act 1906, as amended by the Prevention of Corruption Act 2001, he sought a declaration that s. 4 of the 2001 Act was unconstitutional. In the course of his judgment, MacMenamin J. said (at p. 20 – 21):-

> "[34.] In the instant case this court accepts the submissions made on behalf of the Attorney General that what is in question here is a hypothesis which has not occurred and may never occur. As matters stand no presumption has been invoked against the applicant. This court is unaware, and can only speculate as to how the evidence will evolve at trial. It may be, hypothetically, that the prosecution may call witnesses to say that they paid money to the applicant as a reward for granting them favours. As matters stand the applicant has not put in issue any of the statements contained within the book of evidence. The applicant has not engaged with the evidence in any way nor identified the nature of his defence or which facts may be in issue. In the event that witness statements go unchallenged it may not be necessary for the prosecution to invoke the provisions contained within s. 4 of the Prevention of Corruption (Amendment) Act, 2001 at all.
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> One must look too, to the role of the trial judge. As matters stand such judge has not been asked to give any ruling on the meaning of the term 'deemed' or the expression 'unless the contrary is proved' in the impugned section. The applicant's core complaint in these proceedings is based on the contention that 'unless the contrary is proved' means 'unless the contrary is proved on the balance of probabilities'. Whether that contention has any force or application remains to be determined at trial.'
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> [116.] The applicant here appears to be proceeding on the assumption that the inquiry will have regard to the admissions of INBS and the agreement in a way that will be prejudicial to him. All of that remains to be seen and is, at this juncture, purely hypothetical. The court is, in effect, being asked to direct the inquiry prospectively as to how it should conduct its business. That is not the function of judicial review."

28. In *C.C. v. Ireland, the Attorney General and the DPP* [2006] 4 I.R. 1 the applicants were charged with unlawful carnal knowledge of a female under the age of fifteen. The applicants claimed that they believed the complainant to have been over fifteen and had consented to sexual relations. It was submitted that their belief in this regard would form part of their defence were it not for the apparent prohibition in law of such defence. Accordingly, in advance of their trials, the applicants brought judicial review proceedings seeking declarations that their belief was a defence and that its exclusion rendered the relevant statutory provision unconstitutional. The High Court held that a *bona fide* mistake as to age whether reasonable or otherwise was not a defence and delivered a substantive judgment on the issue. The applicants appealed to the Supreme Court. In the course of delivering her judgment, Denham J., as she then was, noted (at p. 9):

> "While an application for judicial review in the currency of a trial may be successful only in the most exceptional circumstances, applications for judicial review prior to trial fall into a different category. However, even in these latter cases it is still, inter alia, within the discretion of the court to refuse the application for judicial review on the grounds that the issue would be best met at the trial by the trial judge."

Denham J. went on to consider that although the facts in the case were somewhat hypothetical, having regard to the importance of the issues and the fact that the High Court had already given a substantive judgment, the exceptional circumstances justified the Supreme Court in considering the matter. She dissented from the majority and upheld the decision of the High Court but noted (at p. 10):

> "However, this decision should not be regarded as a precedent determining that an issue of statutory interpretation would routinely afford circumstances such as to provide a basis for a judicial review pre-trial."

29. In his judgment, Fennelly J., as one of the majority, expressed similar sentiments on the appropriateness of judicial review to the construction of statutory provisions in advance of a criminal trial (at p. 53):

> "[132.] By pursuing the route of judicial review, the applicant has sought to have rulings made in advance of his trial as to the interpretation of the applicable statutory provisions. This is not a procedure which the court should approve. The forum for ruling on the law applicable in criminal cases is the court of trial.
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> [133.] I am compelled, however, to agree that, exceptionally, in view of the course events have taken, this court must consider the correctness of the substantive rulings which have, in fact, been made by the High Court Judge."

30. Fennelly J. went on to approve the dicta of Carney J. in *DPP v. Special Criminal Court* [1999] 1 I.R. 60 where he said (at p. 69 to

70):

> "It is unique in my experience that relief of this nature is being sought during the currency of a trial which remains at hearing. It cannot be emphasised strongly enough that an expedition to the judicial review court is not to be regarded as an option where an adverse ruling is encountered in the course of a criminal trial. I am undertaking this application for judicial review during the currency of the trial because a need has presented itself to urgently balance the hierarchy of constitutional rights including, in particular, the right to life. In the overwhelming majority of cases it would be appropriate that any question of judicial review be left over until after the conclusion of the trial."

31. In commenting on this passage, Fennelly J. said (at p. 54):

> "[134.] I fully agree with those sentiments. I also believe that, in general, they are applicable to an application such as the present made pending a criminal trial. It is, of course, commonplace for applications to be made to prohibit criminal trials. Such applications are brought by way of judicial review. It is, however, quite inappropriate and a usurpation of the function of the court of trial for an accused person - or the prosecution, for that matter - to seek advance rulings from the High Court as to how any legal provisions should be interpreted in the course of a pending trial. It happens that the present case concerns a trial pending in the Circuit Criminal Court. Judicial review is not available at all in respect of a trial pending in the Central Criminal Court (the High Court). The proper forum for the determination of legal matters arising in the course of trial is the trial court itself, subject to appeal to the Court of Criminal Appeal."

Conclusions

32. In my view, these authorities clearly establish that judicial review is not, save in the most exceptional circumstances which do not arise here, available to accused persons, less still to persons not actually accused, to seek directions or declarations as to the interpretation of legal provisions in advance of their trials based on hypothetical issues that might never arise. That would be entirely inappropriate and, as the Supreme Court has pointed out, a usurpation of the function of the trial judge. If the court of trial misapplies the law, then the remedy is an appeal or in some cases, an application to quash the conviction by way of judicial review.

33. As Fennelly J. noted in *C.C.*, the forum for ruling on the law applicable in criminal cases is the court of trial. Further, the applicants have not demonstrated to my mind that the grant of the declarations sought, even were such relief available, would serve any useful purpose. The fact that the parties or their lawyers may wish for some form of guidance or clarification as to the meaning of the relevant Directive is not a basis upon which this court could or should entertain an application for judicial review.

34. For these reasons, I am satisfied that these applications must be dismissed.