Neutral Citation Number: [2010] IEHC 448

THE HIGH COURT

2009 791 JR

BETWEEN

JOHN BURKE

APPLICANT

AND

JUDGE RAY FULHAM AND DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Ms. Justice Irvine delivered on the 23rd day of November, 2010

1. The applicant in these proceedings is a farmer who resides at Duncummin House, Emly, Co. Tipperary.

2. By order of the High Court dated 31st July, 2009, the applicant was granted leave to apply for an order of *certiorari* quashing his conviction by the first respondent ("the Circuit Judge") on 20th July, 2009, in respect of a number of offences under the Protection of Animals Acts 1911 and 1965 and the Control of Horses Act 1996 and further offences under the Control of Dogs Act 1986 and directing him to serve a total of eight months imprisonment.

3. The order, the subject matter of the applicant's challenge, was made by the Circuit Judge following upon his appeal against his conviction in the District Court on 13th July, 2007, in respect of thirteen offences.

Appeal before the Circuit Court

4. At a hearing of the Circuit Court on 26th February, 2009, the applicant was granted legal aid. Notwithstanding this fact, the applicant represented himself when his appeal commenced on 18th March, 2009. The hearing of the appeal continued on the following day and later was resumed on 30th June, 2009. Thereafter, the proceedings continued throughout 1st, 2nd and 3rd July, 2009. At the conclusion of the prosecution's case, the applicant sought a direction which was refused. The applicant then called ten witnesses to give evidence on his behalf, including his wife and his son, but did not give evidence himself. Following the conclusion of the evidence, the Circuit Judge upheld all but two of the convictions imposed by the district judge. The applicant's appeal in respect of summonses No. 1 and 8 were allowed.

The Nature of the within Proceedings

5. The applicant was granted leave to seek an order of *certiorari* quashing the order of the Circuit Judge made on 20th July, 2009, on the grounds set out at para. E of the statement grounding his application for judicial review. Nineteen separate grounds have been advanced in support of his contention that he was not afforded fair procedures in the course of his appeal. He complains, *inter alia*, that (i) the Court failed to compel the attendance of a number of witnesses upon whom summonses had been served; (ii) he was restricted in his right to cross-examine witnesses; (iii) he was precluded from introducing certain documentary evidence; (iv) he was not afforded the services of a stenographer; (v) the trial judge did not understand the nature of the evidence; (vi) crucial errors of law were made; and (vii) a number of findings made by the trial judge were unsupported by the evidence.

6. The applicant's claim for judicial review is supported by a brief affidavit sworn by him on 6th August, 2009. This affidavit is silent as regards the vast majority of the complaints made by him in the statement grounding his application for judicial review.

7. The second respondent delivered his statement of opposition on 3rd December, 2009. Mr. Paul Fitzpatrick, State Solicitor for Tipperary South, filed an extensive affidavit dealing with each of the applicant's complaints. On behalf of the second respondent it is contended that the applicant's account of the proceedings before the Circuit Court as advised in his affidavit and statement of grounds is not accurate and that he has been guilty of material non-disclosure in the course of his application before this Court. Without prejudice to these assertions, the second respondent maintains that each of the rulings and orders made by the Circuit Judge were lawful and were made within jurisdiction and that at all times the proceedings were conducted in accordance with the principles of natural and constitutional justice.

The Law

8. Having regard to the conclusions that I have reached in the present case, it is probably necessary to restate briefly the nature of the remedy of *certiorari*. In the *State (Daly) v. Ruane* [1988] I.L.R.M. 117, a decision recently followed by Charleton J. in *O'Neill v. Judge Patrick McCartan and Director of Public Prosecutions* [2007] IEHC 83, (Unreported, High Court, 15th March, 2007), O'Hanlon J. at p. 124 described relief by way of *certiorari* in the following manner:-

> "Relief by way of *certiorari* is only appropriate in a limited category of cases. Generally speaking it involves the applicant in showing that the inferior Court or tribunal acted without jurisdiction, or in excess of jurisdiction, or in disregard of fair procedures, so that the applicant's rights to natural or constitutional justice were violated…"

9. An application for an order of *certiorari* cannot be used as a method to appeal decisions or rulings of a lower court or as a means of embarking upon a re-examination of the evidence or submissions made in the course of those proceedings.

10. In *Costigan v. Judge Brady* (High Court, Unreported, Quirke J., 20th February, 2004), Quirke J. restated the function of the court on a judicial review application:-

> "It is not the function of this court in an application for a judicial review of the order of Judge Brady to consider or revisit the merits of the application made to him.
>
> It is the function of this court to consider whether the order made by judge Brady was lawful or was, as contended on

behalf of Ms. Costigan, made without jurisdiction, or in excess of jurisdiction or in breach of principles of natural and constitutional justice."

11. In relation to the role of the court on a judicial review application, it is of course true that the court must distinguish between questions of fact and questions of law dealt with by a lower court. Decisions of fact are invariably left to the primary decision-maker and the court is not engaged as to the correctness of the decision made. An alleged error of law on the other hand may be subjected to scrutiny for its correctness. For example, the misinterpretation of a statute by a judge in a lower court if material to a conviction might well be quashed by an order of *certiorari* in judicial review proceedings.

12. Finally, judicial review is a discretionary remedy and even where an applicant establishes a legal basis for quashing a decision, the court nonetheless retains a discretion on the facts of a given case to refuse the relief sought.

Preliminary Matters

13. The second respondent has urged the Court to confine its considerations to those grounds which are supported by the applicant in his affidavit and I accept that all of the applicant's complaints should be supported by a grounding affidavit. However, Mr. Fitzpatrick has dealt with the applicant's complaints on their merits and in these circumstances, particularly having regard to the fact that the applicant was granted leave by the High Court to argue these points, I believe that I should deal with them notwithstanding the absence of the normal evidential requirements.

14. Another complicating factor for the Court arises from the fact that the applicant has not challenged the detailed evidence set forth by Mr. Fitzpatrick in his replying affidavit and, in the course of his submissions before me, has sought to introduce vast amounts of information not mentioned anywhere in his statement of grounds or in his affidavit.

15. Whilst there is a conflict between the facts as disclosed by Mr. Fitzpatrick in his replying affidavit and the facts set out by the applicant in his statement of grounds and affidavit, this is not a case in which I believe it is necessary to resolve such disputes by directing an oral hearing.

The Court's Decision

Availability of Witnesses

16. The applicant complains that he did not get a fair trial because a number of witnesses whom he wished to have in attendance did not appear notwithstanding the fact that he served them with witness summonses. He submits that the failure on the part of the Circuit Judge to attach these witnesses for the purposes of securing their attendance rendered his trial unfair.

17. The applicant maintains that it was only on 27th July, 2009, that he was made aware of the fact that his appeal was to recommence before the Circuit Court on 30th June, 2009. He asserts that he immediately served summonses on a number of witnesses by registered post on Saturday, 27th July, 2009, but later was forced to accept that the postal slips were in fact dated 29th June, 2009. He states that on 2nd July, 2009, the Circuit Judge wrongfully and unfairly refused to attach the witnesses who had been directed to attend on 30th June, 2009.

18. The second respondent maintains that the county registrar, by letter dated 9th June, 2009, a letter which was exhibited in Mr. Fitzpatrick's replying affidavit, advised the applicant that the appeal was due to be resumed on 30th June, 2009. He contends that the applicant, notwithstanding the fact that he had been granted legal aid, decided to conduct his own defence and it was his responsibility to ensure that all of his witnesses were available for the resumption of the appeal. It is further submitted that the Circuit Judge acted *intra vires* when he ruled that, in light of the date upon which he was advised the appeal was due to resume, the date upon which the summonses were posted and the date upon which the witnesses were directed to attend, he would not attach the witnesses.

19. It is not mandatory for a judge to attach a witness who has failed to respond to a witness summons. The right to attach a witness who has failed to attend falls within the discretion of the trial judge under the provisions of O.24 of the Rules of the Circuit Court 2001. One of the grounds to be considered by a circuit judge when deciding whether or not to attach a witness for failure to attend is whether or not he is satisfied that the person served was given reasonable time to enable him/her to appear in pursuance of the summons (O. 24, r. 3).

20. In the present case, the Circuit Judge appears to have exercised his discretion taking into account those matters which are referred to in O. 24 of the Rules of the Circuit Court. This being so, his decision not to attach these witnesses was made within jurisdiction and is not open to review by this Court.

21. Another defect in the applicant's claim that he did not get a fair trial due to the absence of witnesses is the fact that, with the exception of an explanation as to the evidence he wished to adduce from Mr. David Sheehan, his former solicitor, he has failed to disclose how he has been prejudiced by their absence. Further, insofar as the applicant has set out the reasons for requiring Mr. Sheehan to attend, the same do not afford him any grounds to contend that he obtained an unfair trial by reason of his absence.

22. Mr. Sheehan was the solicitor who represented the applicant before the District Court. The applicant now states that he wished Mr. Sheehan to be present before the learned Circuit Judge so that he could question him about what happened in the course of the District Court proceedings. He told the Court that his counsel advised the district judge that Mr. Sheehan and himself were uncertain as to his fitness to give instructions and that they asked the district judge to direct an inquiry into his capacity to instruct them. That order was made and his capacity was then investigated by a consultant psychologist who reported to the Court that the applicant was fit to instruct his lawyers. Mr. Sheehan and his counsel then continued to represent him for the duration of the proceedings. However, the applicant remains convinced that, having regard to the request made to the district judge to direct an inquiry into his capacity, it was impossible for them to adequately represent him in the District Court. It was these events, which the applicant also maintains amounted to a breach of confidentiality on the part of his lawyers, that he hoped to canvas with Mr. Sheehan had he attended as a witness.

23. Having heard the applicant's submissions, I am satisfied that Mr. Sheehan's evidence was irrelevant to the issues that had to be determined by the Circuit Judge who was engaged upon a full rehearing of the offences. As for the remaining veterinarian and other witnesses who had been served with summonses, the applicant has failed to demonstrate how their absence permits him to contend that he did not receive a fair trial.

The Absence of a Stenographer

24. The applicant maintains that he was not afforded fair procedures in circumstances where the Circuit Judge, having agreed to grant him legal aid, refused to direct the attendance of a stenographer at the State's expense. He submits that by representing himself he had spared the State much expense, and that accordingly he was entitled to have a stenographer attend.

25. The second respondent maintains that the applicant did not apply to the Circuit Judge to direct the provision of a stenographer, but rather on Sunday, 21st July, 2009, wrote to the Circuit Court office requesting that a stenographer be in attendance. He was advised that a stenographer was not ordinarily provided in the Circuit Court for District Court appeals but that it was open to him to arrange for one at his own expense.

26. The averment by Mr. Fitzpatrick that the applicant did not apply to the Circuit Judge requesting that a stenographer be provided at the expense of the State, an assertion not refuted by the applicant, means that there is no ruling of the Court which can be challenged in these judicial review proceedings. Notwithstanding this fact, I intend to briefly consider the right of a litigant to have a stenographer provided at the expense of the State in circumstances such as arise in the present case.

27. Firstly, I can find no legal authority to support the applicant's submission that the State is obliged to provide him with a stenographer if he makes such a request in the course of criminal proceedings in the District Court. Further, as a matter of fact, the applicant has not demonstrated to the Court how the absence of a note-taker or stenographer rendered the trial of his proceedings unfair. Vast numbers of cases, often involving very significant rights, are dealt with every day of the week in courts of every jurisdiction without a stenographer. It has never yet been held that a court's determination in such circumstances should be considered unsafe or the procedure unfair to the point that the order should be set aside.

28. It is perhaps appropriate to reflect briefly upon the function of a stenographer in court proceedings. A stenographer takes no part in the proceedings nor in the decision-making process. The same are entirely controlled by the trial judge who rules on all matters material to the proceedings. It is, therefore, difficult to see how the absence of a stenographer can be said to render proceedings unfair or render their outcome suspect.

29. In proceedings where a stenographer is present, whether paid for privately or where provided by the court, the stenographer's note is often, particularly in a short case, not available until after the case has been concluded, the order of the trial judge made and/or any sentence has been imposed. In a longer case, a transcript of the evidence covering the early days of a trial may become available and be of assistance to a litigant in examining witnesses later in the course of the proceedings. However, the same benefit can be achieved by a litigant maintaining a note of the evidence themselves or by asking another person to do this on his/her behalf. This is a right enjoyed by all litigants as was confirmed by Cooke J. in *Tracey v. Judge Malone & Anor* [2009] IEHC 14, (Unreported, High Court, Cooke J., 20th January, 2009). In that case, the trial judge, when dealing with the right of a litigant to engage, at his/her own expense, a professional stenographer, stated at para. 16 of his judgment the following:-

> "At the hearing of the present application the court expressed the view that the applicant did not need any permission from the District Judge to be accompanied at a case heard in open court by a person to take notes on his behalf whether that person was a professional stenographer retained at his own expense or a gifted amateur able to provide a verbatim note. Subject only to the general entitlement and duty of the judge to ensure the orderly, fair and efficient conduct of the proceedings, no permission of the court was required. Counsel for the Director of Public Prosecutions concurred in this proposition."

30. Insofar as the applicant has maintained an entitlement to a stenographer to be provided at the State's expense for the duration of any criminal proceedings before the District Court, I am satisfied that this argument is untenable. On his submission the only benefit he ascribes to having a transcript available is that it would permit him to identify more easily any injustice done or any adverse ruling made in the course of those proceedings, thus making a challenge to the outcome in another court easier to pursue. He does not demonstrate how the absence of a stenographer in the course of the proceedings themselves would render the hearing itself any different, never mind unfair. Further, given that an appeal from a conviction in the District Court is by way of a full rehearing in the Circuit Court, the unavailability of any transcript of the District Court proceedings should be regarded as irrelevant from a judicial review point of view, that appeal affording him an adequate alternative remedy.

31. Insofar as the applicant maintains a right to the presence of a stenographer for the currency of his appeal from a conviction in the District Court, his argument is once again without foundation. The applicant does not make the case that the stenographer's note is integral to the fairness of the proceedings before the Circuit Court, but submits that the transcript is essential as an aid to maintain proceedings in another court, perhaps by way of judicial review. This is something he can still do using his own note or a note taken on his behalf by somebody engaged by him, whether that person is a professional stenographer or a member of the public.

32. For all of these reasons, I reject the applicant's claim that he is entitled to have his convictions quashed by virtue of the absence of a stenographer.

Right of Cross-Examination

33. The applicant contends that he was not afforded a fair hearing because he was not given sufficient opportunity to ask questions of a number of the State's witnesses, especially Mr. O'Gorman and Mr. Quirke.

34. Mr. Fitzpatrick, in his replying affidavit, maintains that Mr. Quirke gave evidence-in-chief over about 30 minutes on 18th March, 2009. Thereafter, he was examined at length for a number of hours by the applicant. When the case resumed the following day namely, 19th March, 2009, the applicant did not seek to further examine Mr. Quirke.

35. Mr. Fitzpatrick, in his replying affidavit, also states that once Mr O'Gorman had completed his examination-in-chief he was cross-examined by the applicant over two days for approximately six and a half hours. He contests the assertion that the Circuit Judge did anything more than ask the applicant to confine himself to relevant questions. Whilst the applicant did not contest these facts by filing a replying affidavit, in the course of his submissions he maintained that he was precluded from further examining both witnesses.

36. Even if the applicant is correct that he was curtailed in his examination of the aforementioned witnesses, I accept the submission made by the second respondent that a judge is entitled to close down a cross-examination once he is satisfied that he has afforded the questioner a fair opportunity to ask all relevant questions of the prosecution witnesses.

37. Whilst fair procedures demands that a person charged with criminal offences be afforded an opportunity to cross-examine prosecution witnesses, that right is not open-ended. The right to cross-examination is linked to the doctrine of *audi alteram partem*. That right must be subject to the right of the trial judge to conduct proceedings in an orderly, fair and efficient manner. In this case, the applicant chose to refuse the legal representation which had been offered to him. Nonetheless, it was incumbent on the Circuit

Judge to afford him a right to be heard and this right includes his right to ask whatever questions were material to the criminal charges. It is uncontested that the applicant permitted six and a half hours to cross-examine one witness and four hours to cross-examine another. Generally, questions concerning the admission or exclusion of evidence, including a decision on the part of the trial judge to refuse or permit a line of questioning, is a matter for the decision-maker and not for the High Court. In any event, even if this Court were not so confined, the applicant has not demonstrated any reason why the period of time allocated to him by the Circuit Judge should not have been more than ample to permit him to challenge these witnesses on the evidence which they gave in chief. Neither has he advised the Court as to how any curtailment of cross-examination, precluded him from defending these proceedings.

38. Accordingly, I would dismiss this ground of complaint.

Documentary Evidence
39. The applicant maintains that the Circuit Judge did not allow him to introduce into evidence a significant amount of documentary evidence upon which he wished to rely. In particular, he complains that he was not allowed to produce a number of allegedly material photographs. He maintains that some of these were used in the course of the District Court proceedings and he thought he was automatically entitled to produce them in the course of his appeal. He accepts that whilst these photographs had been taken by a digital camera, they were not dated. He further accepts that he did not have available in court a means of establishing the date upon which some of them were taken and that the record of the same was one which was on his computer system.

40. The second respondent maintains that the Circuit Judge afforded the applicant an opportunity to formally prove any photographs upon which he wished to rely and that it was only when he was not in a position to prove the dates upon which they were taken that he refused to allow their introduction. These facts are not contradicted.

41. As already stated earlier in this judgment, questions concerning the admissibility or exclusion of evidence are a matter for the trial judge and any ruling on such a matter is unlikely to provide grounds upon which that decision can be reviewed in the High Court. However, on the agreed facts, it appears to me to be the case that the Circuit Judge acted entirely within jurisdiction and it is not for me to interfere with the decision of a trial judge to exclude photographs, the provenance whereof the applicant was not in a position to establish.

Failure to Exclude a Witness
42. The applicant maintains that he was not afforded fair procedures in circumstances where Mr. John McConville, a member of the Special Investigation Unit of the Department of Agriculture, Food and Rural Development ("the Department") remained in court, notwithstanding an agreement that prosecution witnesses would remain outside of the court other than when giving their own evidence. The applicant maintains that Mr. McConville was seen speaking to the prosecution witnesses and he believes that he was tutoring them as to what had been said in the courtroom when they were not present.

43. The second respondent maintains that the applicant applied to have Mr. McConville excluded from the courtroom at the commencement of the trial and that this application was refused by the Circuit Judge given that he was not a witness in the proceedings. The second respondent also maintains that Mr. McConville was not involved in tutoring or informing any of the prosecution witnesses as to what had happened in the courtroom in their absence.

44. I am satisfied that the applicant has established no grounds to complain that he obtained an unfair trial by reason of Mr. McConville's presence in court. Firstly, the judge acted within jurisdiction in permitting him to remain in court. Further, whilst a bald assertion has been made by the applicant that he believes that Mr. McConville was involved in tutoring or informing witnesses as to what had happened in the courtroom in their absence, he has not referred to any evidence given by any witness which would support this assertion. Likewise, even if he is correct that Mr. McConville may well have spoken to prosecution witnesses either after or before they gave evidence, he has not told the Court how any such interaction prejudiced his defence to the proceedings. Neither did the applicant make any complaint to the Circuit Judge or renew his application to have Mr. McConville excluded. Accordingly, I reject this ground of complaint.

Evidence of Monica Burke
45. The applicant makes a number of complaints regarding the conclusions of the Circuit Judge based upon the evidence given by his wife, Monica Burke, in the course of his District Court appeal. The applicant states that his appeal was allowed by the Circuit Judge in relation to summonses No. 1 and 8 and that he was successful in these appeals due to her evidence. He has submitted to me that it was illogical therefore for the Court to have rejected her evidence in relation to the other summonses and to have convicted him on foot of them.

46. The sufficiency or adequacy of evidence in a lower court cannot be the subject matter of judicial review proceedings before the High Court. Once there is evidence given by a witness on any particular issue, it is then open to the trial judge to accept or reject that evidence and also to assess the weight to be attached to it. Regardless of this fact, it is in any event clear that in respect of two of the summonses that the learned Circuit Judge accepted the evidence of Mrs. Burke. This does not mean the Circuit Judge did not give due consideration to her evidence in relation to the other charges. Indeed, the fact that the applicant's appeal was allowed on two summonses based upon the evidence of his wife is clear evidence that the learned Circuit Judge did give due consideration to her evidence.

47. The applicant also submitted that the Circuit Judge did not pay sufficient regard to challenges which he made to officers of the Department whom he contended had behaved improperly whilst on his property and had failed to leave his lands at his request. Once again, the applicant's submission is based upon his misunderstanding as to the circumstances which give rise to a claim for judicial review. Decisions as to the admission or exclusion of evidence and the weight to be attached to evidence are for the trial judge or the decision-maker and are not a matter which can be subjected to scrutiny in an application for judicial review. In any event, even if it is the case that the applicant, as alleged, could establish that these Department officials did not leave his property when he requested them to do so, he has not demonstrated to this Court how these facts were in any event material to his conviction.

48. The applicant maintains that the Circuit Judge erred in law in failing to dismiss the summonses against him in circumstances where his wife, Monica Burke, was a co-owner of all of the animals. He maintains that the summonses were invalid by virtue of the fact that she was not also charged with the same offences.

49. Whilst a fundamental legal error made by the trial judge might give rise to relief by way of *certiorari*, I remain entirely unconvinced that the summonses issued against the applicant can be stated to be legally invalid because his wife was not also charged with the same offences. The applicant has produced no authority to support his contention that the summonses are invalid because only one of two joint owners was prosecuted. The fact that the applicant was solely charged gives him no grounds to quash the convictions. A

summons is only the means whereby an individual is brought to court to answer an offence. Once a party turns up on foot of a summons, the only matter with which the court is concerned is the offence itself.

The Circuit Judge as an Employee of the State
50. I reject as misguided the applicant's submission that I should quash the convictions of the learned Circuit Judge on the basis that he is an employee of the State. The applicant sought to maintain that in circumstances where he has brought a substantial claim seeking damages against the State by way of plenary summons proceedings, presently at pleadings stage, this would inspire the Circuit Judge to convict him in respect of the charges before the Court, thus making it more difficult for him to pursue his claim against the State. There is simply no evidence to support the type of bias alleged against the Circuit Judge. Further, if any litigant was in a position, merely by the issue of a substantial claim for damages against the State, to contend that he could then not be tried in respect of a criminal offence by any judge employed by the State, there would be no system whereby justice could be administered.

European Communities (Protection of Animals kept for Farming Purposes) Regulations 2000 (S.I. No. 127 of 2000) ("the Regulations")
51. The applicant maintains that the Circuit Judge erred in law in entertaining the prosecutions brought by the second respondent by reason of the fact that at the time of the alleged offences notices had been served by the Department upon himself and his wife pursuant to regulation 7 of the Regulations.

52. The applicant maintains that once a regulation 7 notice is served by the relevant department a farm and its animals should then be considered to be under the control of the department, such that the owner of the farm bears no responsibility for behaviour that would otherwise constitute an offence under other animal welfare legislation such as the Protection of Animals Acts 1911 and 1965, the Control of Horses Act and the Control of Dogs Act 1986. Thus, he maintains that the Circuit Judge had no jurisdiction, he and his wife having been served with the regulation 7 notice, to try him for those offences set out in the thirteen summonses.

53. I reject the applicant's argument based upon the regulation 7 notice. A regulation 7 notice is served where an authorised officer is of the opinion that:-

> "(a) an animal is being caused unnecessary pain, suffering or injury,
>
> (b) there is a serious risk to the welfare of an animal,
>
> (c) the conditions under which an animal is being bred or kept are in contravention of these Regulations."

54. The owner of the animals may, under the Regulations, be required to take certain action and this will be specified in the notice. The owner, if he/she wishes, may contest the notice by way of an appeal to the District Court under the provisions of regulation 9.

55. Whilst the Regulations give an authorised officer significant powers in terms of the seizure, sale or disposal of animals, they do not divest the owner of his/her statutory obligations in respect of the care of the animals, the subject matter of such notice. Accordingly, the existence of a regulation 7 notice cannot preclude a prosecution of an owner for offences under other statutory provisions such as the Protection of Animals Act 1911, as amended by the Protection of Animals (Amendment) Act 1965, and the Control of Horses Act 1996 or the Control of Dogs Act 1986.

56. A further argument made by the applicant arising from the Regulations is an assertion that the Circuit Judge erred in law in permitting his prosecution for the relevant offences by reason of the terms of a District Court order entered into with the agreement of the Department.

57. A regulation 7 notice was served upon the applicant and his wife on 18th October, 2005. That notice required them to take certain steps in relation to the care and management of animals on their farm. They appealed that notice to the District Court, as they were entitled to do under regulation 9. An agreement was then entered into between the parties to the effect that the original notice would be amended to read as follows:-

> "(i) Reduce the number of Bovine animals in your holding at Duncummin, Emly, by 200 by the 5th January 2006.
>
> (ii) Refrain from moving Bovine animals into the aforementioned lands at Baggotstown and Coolnadown without permission from the Superintending Veterinary Inspector at the District Veterinary Office, Limerick.
>
> (iii) Remove all sheep to appropriate winter pasture by the 8th December, 2005.
>
> (iv) Refrain from purchasing any other animals without permission from the Superintending Veterinary Inspector at the District Veterinary Office, Limerick."

The order of the District Court gave the parties "liberty to re-enter".

58. The applicant maintains that by virtue of the aforementioned District Court order that any animal welfare matters would have to be brought back to the District Court on foot of the "liberty to re-enter" provisions in the order.

59. Whilst the applicant and his wife were required under the regulation 7 notice to take the action therein specified, there is nothing in the terms of that order which can render them immune from prosecution by the appropriate authority in respect of a breach by them of other statutory obligations. The fact that the parties were given "liberty to re-enter" makes sense having regard to the agreement between the parties as to the steps to be taken by the applicant and his wife in relation to their livestock. However, that "liberty to re-enter" is confined to the directions contained in that order and cannot be interpreted so as to alter in any way the responsibilities of the applicant and his wife under other statutory provisions in relation to the welfare of their animals.

60. Having considered all the evidence placed before me in relation to this issue, I am satisfied that there is nothing in the court order made upon the applicant's appeal against the regulation 7 notice by agreement on 1st November, 2005 to preclude summonses being issued in respect of the offences alleged to have taken place on 22nd November, 2005, 25th November, 2005, 18th January, 2006, 19th January, 2006 and 20th January, 2006.

61. I am accordingly satisfied that there is no basis for the applicant's assertion that the Circuit Judge acted in excess of jurisdiction or without jurisdiction when convicting the applicant on eleven out of the thirteen offences with which he was charged. I am satisfied

that the Circuit Judge enjoyed a distinct and separate jurisdiction enabling prosecutions to be brought against the applicant regardless of the existence of any regulation 7 notice or any court order giving the parties liberty to re-enter in respect of that notice.

Sentence
62. The applicant maintains that the custodial sentence imposed upon him was unlawful, for two reasons. Firstly, he submits that the Circuit Judge passed a custodial sentence surmising that he could not pay a fine. He states that the Circuit Judge should have conducted an inquiry into whether or not he could pay a fine prior to imposing a custodial sentence. He also contends that it is unconstitutional to impose a fine in circumstances where that fine had already been prepaid through the seizure of his stock by Department officials.

63. I reject both of the aforementioned submissions. Firstly, the applicant is not entitled to assume that the Circuit Judge would not have imposed a custodial sentence had he been aware of the fact that the applicant could pay a fine. The Circuit Judge was not under any obligation to enter into an assessment of the applicant's ability to pay any fine prior to imposing a sentence. Secondly, the applicant has not established any basis for his assertion that the Circuit Judge assumed he could not pay a fine or that if he could pay the fine, he would not have imposed a custodial sentence. The nature of the sentence to be imposed is a matter for the trial judge and this is an exercise carried out in accordance with well-established sentencing principles. The Circuit Judge imposed a custodial sentence which was within his jurisdiction and accordingly that order cannot be the subject matter of an application for judicial review before this Court. The applicant has further put forward no argument or authority in support of his proposition that the seizure and/or sale of any of his stock by the Department precludes the imposition upon him of a fine within the range provided for in the relevant statutory provisions. I accordingly reject this ground of complaint.

Lack of Evidence
64. The applicant submitted that the convictions imposed should be quashed by reason of the lack of evidence before the Circuit Judge. He complains that in certain instances no photographs were proved to demonstrate the condition of the animals on the date when the offences are alleged to have taken place. He refers to the lack of evidence of tag numbers in respect of the animals allegedly mistreated and to the absence of precise measurements in one of the cases relating to the absence of feed for certain animals. In that case, the prosecution witnesses maintained that the feed, whilst present, was stored too high for the animals to obtain access to it. The applicant maintains that the Circuit Judge was not entitled to convict him upon what he described was the "story" of the relevant witnesses.

65. As already stated earlier in this judgment, judicial review does not lie for the purposes of reviewing the weight of the evidence relied upon by a judge of a lower court. Hence, this submission is entirely ill-conceived. Further, the applicant clearly misunderstands the rules of evidence and the jurisdiction of a judge to convict once he has evidence which satisfies him beyond reasonable doubt that the offence was committed. It is open to a judge to convict upon the oral evidence of a witness alone even if the witness might have been in a position to corroborate his "story" by producing additional evidence by way of photographs, measurements, tag numbers or otherwise.

66. In circumstances where the Circuit Judge clearly had evidence in relation to each of the offences, he was entitled to convict once satisfied that the burden of proof had been discharged. I accordingly reject this ground of complaint.

Confusion
67. At para. 7 of his statement of grounds the applicant maintains that his convictions should be quashed because the ruling by the Circuit Judge demonstrates "confusion and lack of clarity" on his part. He then embarks upon what can only be described as a stream of consciousness wherein he refers to many different aspects of the evidence as "absolute proof that this Judge does not know what he is talking about".

68. I am satisfied that the issues which the applicant has sought to raise at para. 7 of his statement of grounds are not justiciable in these proceedings. The applicant is not entitled to trawl through the evidence heard in the Circuit Court and dredge up complaints as to how that evidence was dealt with by the Circuit Judge and then seek to use the judicial review procedure either as a means of quashing decisions made within jurisdiction by the Circuit Judge or as an appeals procedure to reverse findings of fact made by him based upon evidence in those proceedings. It is not for this Court to rake over the evidence given by either the witnesses for the prosecution or the defence, nor is it the function of this Court to analyse the findings of the Circuit Judge in relation to that evidence or review any of his rulings in relation thereto. It is not the function of this Court to decide if the Circuit Judge was wrong in his findings of fact, but rather whether he acted within jurisdiction in convicting the applicant and whether that conviction was achieved in the course of a hearing that was procedurally fair and free from any error of law that might otherwise render a conviction suspect.

69. I am satisfied on the evidence before me that the applicant has no *bona fide* claim that fair procedures were not adopted by the Circuit Judge. Neither has he convinced me that at any time the learned Circuit Judge acted *ultra vires*. The applicant appears to have been afforded tremendous latitude in terms of the manner in which he was permitted to conduct his defence. His claim for relief by way of *certiorari* is unfounded and is in many respects misconceived given that he has raised a plethora of arguments which afford him no right to maintain proceedings by way of judicial review.

70. It is regrettable that the applicant seems to believe that he is entitled to bring to a standstill any proceedings brought against him almost as soon as the first ruling adverse to his interests is made by the trial judge. In this regard, the applicant has an established pattern of seeking to use proceedings by way of judicial review in the High Court as a method to frustrate in the first instance the orderly conclusion of proceedings in a court of primary jurisdiction and, if he does not succeed in that regard, to use the same procedure to seek to quash any ultimate adverse finding or conviction as may follow upon the conclusion of those proceedings.

71. The within proceedings were heard by me during a two week period when I heard three other applications for judicial review also brought by this applicant and two motions in yet another set of judicial review proceedings wherein Mr Burke is also the applicant. This has given me a unique opportunity to assess the applicant's approach to the conduct of litigation in all jurisdictions. I have also considered the decisions of my colleague Edwards J. in two further sets of judicial review proceedings brought by the applicant, namely, *Burke v. Judge Mary Martin & Director of Public Prosecutions* [2009] IEHC 441, (Unreported, High Court, Edwards J., 9th October, 2009) and *Burke v. Minister for Agriculture & Ors.* (Record No.2008 966 J.R.). Having done so, I am convinced that the proceedings which were heard before me, when taken in conjunction with the two sets of proceedings which were heard by my colleague Edwards J. and which are referred to in more detail in the course of my decision in the case of *John Burke v. Judge Mary Martin & Director of Public Prosecutions* (Record No. 2010 379 J.R].,demonstrate that the applicant has not only a seemingly inexhaustible appetite for litigation which is without merit but that he harbours a deliberate and sustained intention to thwart the administration of justice.

72. The citizen's right of access to the courts, which is one of the personal rights of the citizen contained in Article 40.3 of the Constitution of 1937, is not an absolute right.

The court may of its own motion, in certain circumstances, order that no proceedings, either of a certain type or at all, can be issued by a certain person without leave of the court. Such an order is colloquially described as an Isaac Wunder Order.

73. Amongst the factors a court may consider justify the making of such an order are first, the bringing of one or more actions to determine an issue already determined by another court of competent jurisdiction; second, where it is obvious that an action cannot succeed or would lead to no possible good; third, actions brought for an improper purpose including harassment and oppression of other parties; fourth, the rolling forward of issues into subsequent actions; fifth, the whole history of the matter, sixth; a failure on the part of a party instituting proceedings to pay the costs of previous proceedings wherein they were unsuccessful; and finally the conduct of a party who persistently pursues unsuccessful appeals.

The jurisdiction of the superior courts to impose Isaac Wunder Orders was addressed in *Riordan v. Ireland (No. 4)* [2001] 3 I.R. 365 where Keane C.J. in the Supreme Court stated at p. 370 as follows:-

> "It is, however, the case that there is vested in this court, as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly groundless and vexatious. The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public office as well as by private citizens. This court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation.…
>
> This court is extremely reluctant, as the High Court has been, to restrain the access of any citizen to the courts. The stage has clearly been reached, however, where the proper administration of justice requires the making of such an order as against the applicant. Accordingly, in addition to dismissing the present motion the court will, in exercise of its inherent jurisdiction, order that the applicant be restrained from instituting any proceedings, whether by way of appeal or otherwise, against any of the parties to these proceedings or the holders of any of the offices named as defendants or against the Oireachtas, the Government or any member thereof or Ireland (other than in relation to the taxation of costs), whether in the High Court or the Supreme Court, except with the prior leave of this court, such leave to be sought by application in writing addressed to the Registrar of the Supreme Court."

74. To understand the applicant's pattern of seeking to use High Court judicial review proceedings to frustrate proceedings pending against him in the District and Circuit Courts, it is necessary to very briefly address the four other sets of proceedings which this Court has adjudicated upon over the last two weeks. What is set out below is only a skeletal account of the challenges raised by the applicant in the course of those proceedings.

75. The first of the five cases was *John Burke v. Judge Mary Martin & Director of Public Prosecutions* (Record No. 2010 379 J.R]. That case involved two applications. The first brought by the D.P.P. to set aside an order of Peart J. whereby he granted leave to the applicant to apply for judicial review in respect of certain orders made by Judge Martin in the course of a procedural application at Tipperary District Court on 3rd June, 2009. The second brought by the applicant seeking to commit *inter alia* the State solicitor for County Tipperary for alleged contempt of court for issuing the motion to set aside. The Court set aside the order of Peart. J. made *ex parte* whereby he granted leave to the applicant to maintain those judicial review proceedings and wherein, in particular, he had granted him a stay on the proceedings then pending against him in the District Court. It did so on the grounds that the applicant had failed to make proper disclosure of two other sets of proceedings in which he had been refused leave to apply for judicial review by Edwards J. in circumstances where the Court was satisfied that if these facts had been made known that the trial judge would not have granted him the relief which he did. The Court also stated that it found it difficult to accept the applicant's assurances that he had acted *bona fide* in the course of his application to Peart J. The Court further noted that in the proceedings before Edwards J. the applicant had maintained that the proceedings against him in the District Court should be stayed on the basis that District Judge Anderson had seisen of the relevant prosecutions, whilst in the proceedings before me he maintained that Judge Martin had seisen of the very same proceedings, yet another example of an abuse of the process of the Court. In relation to the applicant's committal motion, the Court found that even if the D.P.P.'s application had proven unsuccessful, such a failure could not have provided a valid or lawful basis for any application to commit him for contempt of court.

76. The second case was *John Burke v. Garda Bourke & Ors* (Record No. 2009 409 J.R). In that case the applicant was granted leave to apply for an order of *certiorari* challenging the validity of orders of the District Court made on 19th and 24th March, 2009, whereby bench warrants were issued for his arrest when he failed to attend in respect of certain summonses listed for hearing before the Court. He was arrested and admitted to bail on the same date. The applicant submitted the warrants should not have issued. He also complained that the district judge who dealt with him following his arrest had shown bias towards him in other proceedings and should not have dealt with the matter. The Court found that the district judge was entirely within jurisdiction to issue the warrants for the applicant's arrest having been satisfied that he was on notice of the hearing or that he should have been in attendance. The applicant did not establish the existence of bias and this allegation was dismissed. The Court also concluded that, as the warrants were spent at the time the applicant had applied for leave to apply for judicial review, in such circumstances the relief sought was without merit.

77. The third case was *John Burke v. Judge David Anderson & Director of Public Prosecutions* (Record No. 2010 25 J.R). In that case the applicant was granted leave to apply for judicial review in respect of certain rulings made by the district judge at Kilmallock District Court on 11th January, 2010. In 2008 the applicant had been convicted of certain offences in relation to the mistreatment of animals. These convictions were quashed and the proceedings were referred back to Judge Anderson for rehearing. The applicant claimed, *inter alia*, that (i) he had been placed in double jeopardy; (ii) he was wrongfully denied the services of a stenographer; (iii) the judge was biased against him; (iv) he was curtailed in his right to cross-examine a witness; and (v) these matters and certain other procedural rulings made against him were such as to deny him a procedure that was in accordance with the principles of natural justice and fair procedures. The Court found that the applicant's reliance upon the rule against double jeopardy was misplaced. The Court rejected the applicant's claim that he was denied fair procedures on the basis that the trial judge did not rule immediately on a legal point raised by him but instead decided that he would rule on the issue having heard all of the evidence. The Court found that the absence of a stenographer did not impact on the applicant's right to a fair trial. The applicant's claim of bias against Judge Anderson was based on mere requests that the applicant put on his jacket to maintain the decorum of the Court and that this was not sufficient to demonstrate bias. The applicant's claim that he was unreasonably curtailed in cross-examining a witness was groundless as the applicant had been permitted to cross-examine the relevant witness for some four and a half hours.

78. These within proceedings are the fourth of the five sets of proceedings involving the applicant.

79. The fifth case was *John Burke v Judge Hamill & Director of Public Prosecutions* (Record No. 2009 1070 J.R]. The applicant was granted leave to apply for judicial review in respect of an order made by District Judge Hamill. The applicant complained that Judge Hamill should not have heard the cases as Judge Martin had seisen of them in circumstances where she had considered documentation in relation to the cases on an earlier occasion. The Court found that Judge Martin had only dealt with procedural matters and that there was no reason why Judge Hamill should not have accepted jurisdiction. The Court also rejected the applicant's complaint that the district judge should not have embarked upon the hearing of the summonses listed before him until after the High Court had determined any challenge he may have made to the constitutionality of the statutory provisions pursuant to which he had been prosecuted. The applicant had not obtained any order in the High Court staying proceedings against him in the District Court. The applicant complained also that the sentence of one month imprisonment imposed upon him was unlawful and *ultra vires* in that the District Judge directed that the applicant receive psychiatric treatment whilst in prison. Two copy orders were put before the Court, the first recommended psychiatric treatment the second ordered treatment. The Court preferred the first order as it was signed by Judge Hamill but concluded that even if the Court were to prefer the second order, the part of the order directing the applicant to have psychiatric treatment did not form any part of the sentence and therefore it was severable from the penalty of one month's imprisonment imposed. Accordingly the district judge did not act *ultra vires*.

80. These five sets of proceedings have satisfied me that the applicant falls into the category of plaintiff described by Keane C.J. in *Riordan v. Ireland (No. 4)* and more recently by Hardiman J. in *Shannon v. Judge Moran* (Unreported, Supreme Court, 9th December, 2004). His conduct is only consistent with a deliberate and sustained intention to thwart the administration of justice and designed to make it impossible for judges in the District and Circuit Courts to deal with cases concerning him which are presently pending before them. The applicant seems to believe that his access to the courts is unfettered and any ruling made against his interests entitles him to go immediately to a higher court to stop the proceedings in the lower court. On the other hand, if a judge decides to postpone a ruling, that decision also becomes the subject matter of an application for judicial review, accompanied by a consequential application to stay the proceedings in the lower court pending the outcome of those proceedings. Any restriction or time limit imposed by the trial judge on the duration of his examination of witnesses leads to an equivalent effort to stop the proceedings in their tracks as does any ruling as to the areas which may be canvassed by him in the course of such examination. These are but a few examples of the matters which the applicant has sought to litigate in the course of the proceedings before me.

81. Further, the applicant has adopted what I can only describe as a type of divide and conquer technique in his judicial review litigation. By this I mean he has managed to make a number of his leave applications to different judges and in the course of so doing he has also been found guilty of failing to disclose to them a full account of his other proceedings. Thus he has managed to obtain leave of the court to pursue grounds of complaint that would otherwise not have been granted to him had the presiding judge been aware of all matters material to his application for leave.

82. The jurisdiction of the court to impose Isaac Wunder orders should only be invoked sparingly. I am however satisfied that it is now clearly necessary to take action to protect the court's processes from abuse and to ensure that the administration of justice may proceed without unwarranted interference, particularly in relation to the proceedings outstanding against the applicant in the District and Circuit Courts. The order is also required to the prevent the further waste of the court's resources which are not limitless and also to alleviate the state of the financial burden of bearing the costs of defending the ongoing onslaught of unmeritorious litigation which it may never recover from the applicant even if costs are awarded to the successful respondent in every case. Accordingly, in addition to dismissing the present application, the Court will, in exercise of its inherent jurisdiction, order that the applicant be restrained from instituting any proceedings in any jurisdiction, whether by way of appeal or otherwise, against any person holding the office of Judge of the Supreme, High, Circuit or District Court or against the Director of Public Prosecutions, any member of the legal profession or government minister, except with the prior leave of the President of the High Court, such leave to be sought by application in writing addressed to the Chief Registrar of the High Court.