THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 745 JR]

BETWEEN

NATASHA ROGERS

APPLICANT

AND

THE CIRCUIT COURT JUDGE FOR THE COUNTY OF LEITRIM AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice MacGrath delivered on the 14th day of March, 2019.

1. The applicant was convicted in the District Court of two road traffic offences on 16th June, 2015 arising from one incident of driving. The first relates to the manner of the applicant's driving (she was convicted of dangerous driving) and the second to a failure by her to provide a breath sample.

2. Following her conviction, the applicant considered instituting judicial review proceedings to seek an order of *certiorari* to quash the decision of the District judge but on advice did not pursue this course of action. As the time for filing the appeal had expired, she applied to the District judge on 29th November, 2015 for an order extending the time within which to appeal both convictions. He refused her application.

3. This refusal was appealed to the Circuit Court and on 29th June, 2016, the Circuit Court judge extended time within which to file a notice of appeal relating to the failure to provide the breath sample but not in respect of the conviction for dangerous driving.

4. The applicant seeks an order of *certiorari* quashing so much of the order of the judge whereby he refused the application to extend the time to appeal against the conviction on the charge of dangerous driving. She does not seek to review any other aspect of the order. No particular issue is raised by the respondent that only part of the order is being challenged, save to the extent addressed below.

5. This application is grounded upon the affidavit of the applicant's solicitor, Mr. John Gerard Cullen, sworn on 27th September, 2016, and the affidavit of the applicant, sworn on 3rd March, 2017.

6. It is opposed by the second respondent, the Director of Public Prosecutions, on whose behalf, Mr. Noel Farrell, state solicitor for County Leitrim, has sworn two affidavits on 13th April, 2017 and 4th October, 2018. A further affidavit was sworn by Mr. Cullen, solicitor for the applicant on 20th June, 2017. In addition to the affidavits, this court has been provided with transcripts of the digital audio recording ("*DAR*") of the Circuit Court proceedings.

7. The reliefs sought by the applicant and upon which leave was granted are set out in paras. D (i), (ii) and (iii), on grounds set out in para. E of the statement of grounds. As an issue has been raised as to the basis upon which leave to apply for judicial review was granted and in the light of the arguments made, it is relevant to consider the pleaded grounds, which are now reproduced as pleaded and in full.

8. The grounds upon which relief is sought as set out in the statement of grounds, are as follows:-

> *"The law in respect of an application for an extension of time to appeal in a criminal case is stated in The People v. Kelly [1982] IR 90. The first named respondent erred in law and/or acted in excess and/or absence of jurisdiction in that he not only proceeded to entertain then refuse an application for an extension of time to appeal the conviction of the applicant of the offence of dangerous driving by the District Court sitting at Carrick – on – Shannon but proceeded to affirm that conviction without hearing any evidence from the second named respondent and from the applicant as regards the alleged commission of that offence."*

In reality, the judge refused to extend the time within which to appeal the decision of the District Court. It is relevant, however, that reference is made to the decision of the Supreme Court in *The People v. Kelly* [2006] 3 I.R. 115.

9. The second ground as pleaded is:-

> *"The first named respondent erred in law and/or acted in excess and/or absence of jurisdiction in that he not only proceeded to entertain and then grant an application for an extension of time to appeal in respect of the conviction of the applicant for the failure to provide an Intoxiliser Breath Sample and that he set aside the Order of the District Court sitting at Carrick- on – Shannon which he had refused to permit such an extension of time to so appeal that conviction and then to refuse an application for an extension of time to appeal the conviction of the applicant of the offence of dangerous driving by the District Court sitting at Carrick – on – Shannon and proceeded to affirm that conviction by the said District Court."*

10. The third ground is that:-

> *"The second named respondent in the knowledge that the first named respondent had reserved his decision in respect of the applicant's then application to the first named respondents, sought and was permitted to make further submissions in respect of the applicant's then application to the first named respondent when the second respondent knew or ought to have known that this course of action was made by the first named respondent having erred in law and/or acted in excess of and/or absence of jurisdiction."*

11. The fourth ground as pleaded is:-

"The second named respondent sought and was permitted to make further submissions in respect of the applicant's then application to the first named respondent when the second respondent knew or ought to have known that by not materially cross – examining the applicant and me as her solicitor that the second named respondent was not permitted to make submissions based upon matters that had never been put in cross – examination to the applicant and me as her solicitor, in that this course of action was permitted and received by the first named respondent, it was done so by him having erred in law and/or acted in excess and/or absence of jurisdiction."

12. The fifth ground is:-

"The second named respondent did not object to the affirmation by the first named respondent of the conviction of her dangerous driving by the said District Court without hearing any evidence from the witnesses as were tendered before the District Court sitting at Carrick – on – Shannon. The second named respondent as regards the alleged commission of that offence, which the second respondent knew or ought to have known that this affirmation was made by the first named respondent having erred in law and/or acted in excess and/or absence of jurisdiction."

13. The sixth ground is:-

"The first named respondent exhibited a bias against the applicant by accusing her counsel of using a word that counsel disputed and refused this counsel's application to hear a recording of the DAR recording, yet the first named respondent referred in his decision herein to having reviewed a recording on the DAR recording system in his chambers and not in open court when the first named respondent sought to clarify the use of a word by him in relation to the nature of proceedings before the District Court."

14. The seventh ground is:-

"The first named respondent exhibited a bias against the applicant when her counsel objected to the use of the word "spat" by the first named respondent to refer to the nature of proceedings before the District Court, yet the first named respondent referred in his decision herein to having reviewed a recording on the DAR recording system in his chambers and not in open court when the first named respondent sought to clarify the use of the word "spat" by seeking to contextualise it as a "petty feud" between a District Judge and the applicant's solicitor."

15. The eighth ground is:-

"The first named respondent exhibited a bias in favour of the second named respondent and against the applicant, in permitting of the second named respondent to make submissions on the 29th June 2016 when the first named respondent had previously indicated in open court that the he was reserving his decision on that date and yet most surprisingly permitted such submissions without any advance notice to the applicant and her counsel. It appeared to the applicant and her counsel that the second named respondent was more than adequately prepared to make such submissions as they were detailed in their nature and reviewed the matter raised in earlier proceedings herein."

16. Mr. Cullen avers to his belief that the decision of the judge was not in conformity with the legal test applicable to the consideration of an application for an extension of time against a criminal conviction; and that the judge misapplied the test as set out in *Kelly*. He avers that the judge failed to take into account broader issues such as the fact and effect of a conviction and the requirements of the justice of the case. Mr. Cullen addresses, at some length, what occurred in the District Court. He avers that what he describes as the affirmation of the conviction by the first respondent for the charge of dangerous driving, prevented him from ventilating matters which he fully expected would have been ventilated on appeal; and that given that this was a contested application, neither the applicant nor he were cross-examined in any material respect regarding delay or "*on medical matters".*

17. The gravamen of the case as pleaded is addressed at paras. 9 and 10 of his affidavit as follows:-

"9. I say and believe that in particular after the case had closed that the second named respondent was permitted by the court to make further extended submissions that there was no medical evidence to support the applicant's contention as to her medical condition. This was made without any notice to either myself or to the applicant's counsel; to which that counsel objected. I say and am advised by counsel that, for the second named respondent to have correctly made this type of submission, it would have had to have been correctly based upon matters that were put to the applicant and me as her solicitor in cross – examination before the first named respondent. I say and am advised by counsel that the first named respondent was in error in law or was acting in excess or without jurisdiction in permitting the submission and in then entertaining it.

10. I say and believe that on the day of the rendering of the decision, counsel for the applicant announced his appearance and stated that the above entitled matter was before the court to deliver its decision. The first named respondent indicated that the matter would be dealt with later in the day. I say that it was with considerable surprise to counsel, that the first named respondent permitted the second named respondent to make further submissions in respect of the above matter before the first named respondent had commenced to deliver his decision, being at a stage when both counsel and I believed that the case had closed. I say that the applicant's counsel objected to this course of conduct and actually requested the first named respondent to recuse himself in consequence of the conduct of the second named respondent that he had permitted. I say that this request was not adequately addressed by the first named respondent and that the applicant's counsel was requested to resume his seat. I say that the first named respondent then proceeded to deliver his decision."

18. The case was heard over several days. The applicant maintains that it was not anticipated that further legal submissions would be made or heard on the day on which judgment was expected. It is contended that the state solicitor was invited to make further submissions before judgment, but that the applicant's counsel was refused permission to reply.

19. Mr. Cullen also avers to his belief that it was most curious that the second respondent was fully prepared to make what he describes as a detailed submission. He details the exchanges between counsel and the judge including those concerning the use of the word "spat", the refusal of a request to review the DAR recording of the court proceedings, and that the judge listened to such recordings in his chambers and not in open court. These matters are relied upon to substantiate the allegation of judicial bias. It is alleged that the judge displayed bias through his interruptions, in making certain accusations against counsel; and in permitting the state solicitor to make submissions on the day that judgment was due to be delivered.

20. The manner in which the statement of grounds, and indeed the grounding affidavit supporting this application, are phrased is somewhat complicated. It became clear at hearing and in the submissions made by counsel for the applicant, Ms. Brennan S.C., that central to the case is a breach of the rules of constitutional and natural justice that the applicant was not afforded due process at trial. Although at times in the statement of grounds this has been couched in terms of alleged bias on the part of the first named respondent, in essence the claim of the applicant is that there was a breach of the rules of natural justice in relation to the manner in which the proceedings were conducted by the learned judge, with particular emphasis being placed on the fact that on the morning on which the decision was due to be delivered, the state solicitor was permitted to make representations and counsel for the applicant was not.

21. A further contention is that the judge erred in law and acted in excess of jurisdiction in failing to apply the legal test appropriate to the issue of whether an extension of time ought to be granted. In support of this, reference is made to the fact that the judge arrived at contradictory conclusions in respect of the two convictions.

22. These allegations are denied by Mr. Farrell who avers that on the date the decision was due to be given, he did not seek to make any further submissions but that the judge inquired of him whether he wished to do so. He is confident that he did not say anything which had not previously been said. He avers that there was nothing to prevent the applicant's counsel from responding. Instead the applicant's counsel objected and requested the judge to recuse himself.

23. It is submitted by Mr. O'Malley B.L. that the prosecuting solicitor was simply repeating the background facts which had already been put before the court and that he did not seek to adduce any new evidence or make further legal submissions. Indeed, he also submits that there is nothing to suggest that the judge was unwilling to entertain further submissions from the applicant's counsel; if there were any to be made.

24. I have considered the transcript of the DAR recordings from which the following is evident. At the conclusion of the hearing on 28th June, 2016 the judge stated that he would not deliver judgment on that day. He wished to consider the decision in *Director of Public Prosecutions v. Cagney* [2013] 1 I.R. 493 and relevant sections of the applicable legislation. On the following morning, before delivering judgment, the judge commenced by asking the prosecuting solicitor whether he had anything to add to the submissions made by counsel for the applicant. Mr. Farrell proceeded to so do. He attempted to distinguish Cagney on the facts by submitting that in *Cagney* the defendant had made an attempt to breathe into the intoxilyser whereas in this case no such attempt had been made.

25. The following is the exchange between the judge and Mr. Farrell at this point of the proceedings: -

> *"MR. FARRELL: Well, I have never seen the transcript, Judge, and I accept that. So, there is a bit of a hill to climb there. Maybe Ms Natasha Rodgers can produce evidence on appeal that on the date in question she did have a medical condition that precluded her, Judge, from using the intoxilyser. That is a distinction, Judge, between this case and the Cagney case. However, in the Cagney case Ms Cagney didn't mention any substantial reason, so it is a little bit stronger, the Natasha Rodgers case, that she did mention this difficulty that she had, Judge, but, as I said, she made no attempt whatsoever; it was a blank refusal. So, I suppose, Judge, that very judgment might indeed constitute the issue that I raised with you very briefly on the first day, that the case had to be decided -- you have to decide it, perhaps, on the decision the People v. Kelly, as to whether the requirements of justice would require that an appeal be allowed -- or that an extension of time be granted, if there was a possibility of an injustice or evidence having been wrongly admitted or excluded. And that's the essential nub of the matter and perhaps not the other areas well traversed by my learned friend, Judge. It is a net issue.*
>
> *JUDGE: Now, in DPP v. Natasha Rogers --*
>
> *MR MCCOY: Judge, may I --*
>
> *JUDGE: I don't require you to reply, thank you, Mr McCoy.*
>
> *MR MCCOY: No, Judge, I --*
>
> *JUDGE: Would you sit down, please?*
>
> *MR MCCOY: I am very sorry, Judge, but I have to ask you now to recuse yourself. I understood --*
>
> *JUDGE: No, no, no, Mr --*
>
> *MR MCCOY: . . . I am making the application Judge.*
>
> *JUDGE: Yes. I am refusing the application now.*
>
> *MR MCCOY: Very good, Judge."*

The judge then proceeded to deliver judgment.

26. From my analysis of the transcript I conclude that counsel attempted to intervene prior to the delivery of the judgment. To that extent, it would appear that Mr. Farrell is mistaken in his recollection of what transpired. This is quite understandable. He had been on his feet immediately before the exchange and did not have the DAR transcript available to him when preparing his affidavit. On the basis of the transcript, while counsel may have come to the decision to make an application to recuse somewhat precipitously, I do not believe that it is accurate to say that there was nothing to prevent the applicant's counsel from responding to what the prosecuting solicitor had said. It appears from the transcript, and it is my interpretation of what occurred, that counsel did make an attempt to intervene but the judge requested that he resume his seat.

27. Mr. O'Malley B.L. for the respondent submits that one should not look at a portion of the transcript in isolation and that consideration must be given to the entirety of what occurred over the course of three days of hearing in the Circuit Court. As evidencing the fair approach which the judge took, counsel refers to what occurred on the first day of the hearing, 12th April, 2016 when an exchange took place between the parties as to the appropriate test to be applied by the judge in determining the nature of the application before him. The judge then informed counsel for the applicant that if he was to decide the case then, on the evidence adduced, he would refuse the application. He afforded counsel time within which to make submissions on the law and adjourned the

case to the following term to permit those submissions to be made. At the resumed hearing there was a debate as to whether an appeal remained open if one proceeded by way of judicial review. An exchange also took place as to the appropriate test to be applied in deciding whether to grant an extension of time for appeal in a criminal case. Counsel submits that it was accepted that the appropriate test was that outlined in *The People v. Kelly* [1982] I.R. 90., a test described as a relaxation, in the interests of justice, of the criteria governing the principles applicable to the extension of time in a civil case, enunciated in *Éire Continental Trading Co. Ltd. v. Clonmel Foods Ltd* [1955] I.R. 170.

28. In his judgment, in considering the intoxilyser issue, the judge considered the decision in *Kelly* as follows:-

> *"The particular result of this is that where there appears the possibility of injustice, mistrial or evidence wrongfully admitted or excluded, the absence of an earlier intention to appeal, delay in making the application or conduct of the appellant should not prevent the court from so acting. On the facts, the success of the appeals of the person tried with the appellant raised a question requiring examination by way of appeal."*

The judge further considered a passage from the judgment of O'Higgins C.J. in *Kelly* as follows:-

> *"The particular person seeking the extension of time within which to file a notice of appeal and indicates that perhaps the behaviour of the individual was not exactly as one would like, and so it may well be that this complaint is ill – founded and that the circumstances of his interrogation differed materially from that of his co – accused, nevertheless, justice in my view requires at least that the matter be considered and investigated. In my view, although the lapse of time was considerable in this case and the conduct of the appellant unmeritorious, nevertheless, the justice of the case requires that his complaints with regard to the admission of statements of evidence ought to be examined by way of appeal*

29. Applying this to the dangerous driving aspect of the appeal, the judge concluded:-

> *"I am satisfied that in relation to the dangerous driving accusation that the judge found on the facts that it amounted to dangerous driving and, consequently, that was the decision of the judge. I see nothing in the transcript or anything which would give me reason or cause to extend the time to file an appeal to that decision and I am refusing the application to extend time for the appeal against the dangerous driving."*

He then considered the intoxilyser charge, in respect of which he extended the time for appeal.

30. Counsel for the applicant argues that the judge misdirected himself in law in considering the transcript of the evidence in the District Court. She highlights that when the applicant began to discuss her driving, the judge stated that he was not hearing the case. The relevant portion of the transcript records as follows: -

> *"Question: And then ultimately you were told no, that it was -- the safe thing was to appeal the conviction?*
>
> *Answer: Yes, to appeal, definitely. To appeal because the dangerous driving charge which was completely inaccurate, and the -- and like, that junction, okay, you have to stop at white lines, and then there was all the other issues.*
>
> *JUDGE: I'm not hearing the case.*
>
> *Answer: Sorry."*

The witness then proceeded to give evidence in respect of her intention to appeal.

31. Ms. Brennan S.C. contends that in so finding, the first respondent effectively prejudged and determined the merits of the appeal and deprived the applicant of her right to conduct her appeal in a manner in which she and her legal advisers might see fit. She emphasises the importance of the right of appeal in the context of the administration of justice.

32. On this issue of bias Ms. Brennan S.C. refers to a number of exchanges between the judge and counsel in support of the contention that to the objective bystander, a perception of bias arises. These included exchanges between counsel and the judge as to whether counsel should withdraw a remark about the State Solicitor being incompetent, something which counsel denied that he had said. In the Circuit Court, counsel objected to the use of the word "spat" by the judge, who later withdrew it. Following delivery of his judgment, however, the judge stated that he was more than justified in using that word and that nothing improper could be read into it, as it meant no more than an engagement in a brief and petty quarrel. Ultimately, the exchange between counsel and the judge concluded on reasonably cordial terms. During those exchanges it appears that the judge also, and not unreasonably, took the view that it was inappropriate to introduce into the particular application matters concerning the alleged behaviour of the District Court judge and the solicitor for the applicant in the court below.

33. Counsel for the applicant highlights these exchanges as giving rise to a perception that justice was not seen to be done. Reliance is placed on the decision of Morris J. in *Dineen v. Delap* [1994] 2 I.R. 228 and observations by Kearns P. in *Farrelly v. Watkin* [2015] IEHC 117, where it was found that repeated interruption of cross-examination by the trial judge had led to an apprehension in the mind of the reasonable onlooker that there had not been a fair trial. On the application of the test as set out in *The State (Hegarty) v. Winters* [1956] I.R. 320, being whether the actions in question reasonably give rise in the mind of an unprejudiced onlooker to the suspicion that justice was not being done, and that a fundamental rule is that it is necessary not alone that justice be done, but that it must be seen to be done. Kearns P. concluded that the proceedings could not be viewed by a reasonable onlooker as manifesting the qualities of constitutional justice appropriate to a criminal trial.

34. The applicant also places reliance on *Maher v. Kennedy & DPP* [2011] IEHC 207 a decision of Hogan J. where is stated at para 12:-

> *"When these submissions concluded, the State Solicitor rose with a view to replying to these submissions. At that point the judge indicated that he did not require to hear from the prosecution. He then turned to counsel for the applicant and is said to have stated: 'the point is rubbish - utter rubbish. There is absolutely no ambiguity whatsoever'. He then made a remark to the effect that the applicant had claimed that his solicitor would always get him off. He added that he had 'no time for these technical drink driving points'. When asked by counsel to state reasons, he indicated that he had just given his reasons. The judge then proceeded to affirm the conviction."*

It was on the basis of this exchange and on the facts that Hogan J. concluded that the remarks were such that a reasonable,

objective and informed observer might justly fear that the judge's ability to preside over a wholly impartial hearing had been inadvertently compromised by such remarks.

35. Mr. O'Malley B.L. submits that there is no evidence to support an allegation of bias and submits that bias entails some element of prejudgment on the part of the adjudicator, something which is absent in this case. He relies on dicta of Fennelly J. in *O'Callaghan v. Mahon* [2008] 2 I.R. 514 where at p. 669, he stated:-

> *"The result of all these judgments is that objective bias cannot be inferred from the fact that a court or tribunal has made a number of erroneous decisions. Bias, if it exists, must flow from some element external to the decision-making process. There are many examples. The best known are some personal or financial interest of the decision-maker either in the subject matter of the decision making process or in relation to the parties to the dispute over which the decision maker is to preside. Overt and declared bias is, of course, another example."*

36. On the issue of the application of the appropriate test, the applicant submits that that the judge misapplied the test in *Kelly* when considering whether an application to extend time should be granted and that he mistakenly applied a far more stringent test than that which is properly applicable as explored in Kelly and decisions such as *DPP v. Hughes* [2013] 2 I.R. 619 and *DPP v. Walsh* [2017] IECA 120.

37. In *Walsh*, an *ex tempore* decision of the Court of Appeal delivered 6th March, 2017, an extension of time was granted even though it was apparent that the intention to appeal had not been formed until such time as the applicant had served a prison sentence which had been imposed in respect of a driving offence. He had also been disqualified from driving for a period of fifteen years. On his release from prison, his inability to obtain a driver's licence had a significant impact on his employment. Peart J. noted that although the applicant had received advice from his legal team following the sentence, his focus was then on the imprisonment, not on the disqualification element of the sentence. The appellant had not applied his mind to the question of the length of the disqualification or the fact that he could not apply for restoration of his licence until two thirds of the period of disqualification had expired. Peart J. observed:-

> *"8. The question is whether an extension of time for appeal should be granted on the basis of what is said by the applicant in his grounding affidavit and although it is what I would describe as a close run thing given the reason for the fact that no appeal was lodged, nevertheless the court is of the view that the justice of the situation merits him being granted a short extension of time within which to appeal the length of the disqualification."*

Ms. Brennan S.C. submits that this decision is particularly pertinent to the circumstances in which her client finds herself. She is not now in a position to drive and this may affect her livelihood.

38. In *Hughes*, the Court of Criminal Appeal reiterated the distinction between the principles applicable to an appeal in a civil case and those which apply to an appeal in a criminal case. At para. 17 Hardiman J. stated: -

> *"…the court is satisfied that a broader and less technical approach is mandated to such an application in relation to an appeal against a criminal conviction. The court is entitled to look to the broad considerations of the justice of the case even if it is satisfied, as we are, that no intention to appeal was formed within the time limited for doing so."*

39. Counsel argues that the judge interpreted his obligation to act "a*s the justice of the case requires"* as being an obligation to allow an appeal only if there had been a fundamental defect in the original trial. She submits that in applying his mind to the merits of the appeal in the manner in which he did, he applied a test which was more stringent than the *Éire Continental* test, a test which itself is more stringent than that which applies in criminal appeals. It is submitted that the judge failed to take into account broad considerations of justice and the impact on the applicant of a refusal of leave to appeal. This is particularly so, it is argued, in the case of a *de novo* appeal where an accused may take an entirely different course than that taken in the District Court; and is not confined to the stated grounds of appeal.

40. It is also submitted that the judge erred in law and exceeded his jurisdiction in a manner that warrants intervention by this court. In this regard reliance is placed on *Murphy v Minister for Social Welfare* [1987] I.R. 295 where the claimant sought an order of *certiorari* quashing decisions of a deciding officer and appeals officer of the respondent. An incorrect test had been applied in deciding whether the applicant had been in insurable employment. The correct test was whether his employment came within the appropriate schedule of the Social Welfare (Consolidation) Act, 1981. Blayney J. concluded that those making the decisions had not properly understood the law to be applied, and it followed, on the basis of Council of *Civil Service Unions v. Minister for Civil Service* [1985] A.C. 374 that the decisions were vulnerable to challenge. In *Killeen v D.P.P.* [1997] 3 I.R. 218, Keane J. stated at p 229 that:-

> *"The question posed in this case can now be stated as follows. If the District Judge in the present case discharged the applicants because he considered he was precluded from sending them forward for trial by reason of the defect in the warrant, was that an error of law which it was within his jurisdiction to make? I am satisfied that it was not. If the District Judge was of that view, it follows that he failed to determine the precise question assigned for decision to the District Court i.e as to whether, on the materials before the court, there was a sufficient case to put the applicants on trial. If that was his decision, it constituted an error of law which renders his order a nullity in accordance with the legal principles already set out."*

41. On this point, counsel for the respondent, Mr. O'Malley B.L. submits that the judge acted within jurisdiction and that, in any event, irrationality or unreasonableness are not grounds advanced in the pleadings. He accepts that the test to be applied when adjudicating upon an application for an extension of time is that which was set out in *Kelly* and that such applications should be determined by considering the requirements of justice in light of the particular circumstances of the case. He submits that there is nothing to suggest that the judge did anything other than consider the justice of the application in the light of the particular circumstances. Thus, the judge had regard to the possibility that there might have been a medical reason why the applicant had failed to provide a breath specimen, a matter to which he could properly have regard. However, no such consideration applied to the conviction for dangerous driving which, was an entirely separate issue. He also relies on the following comments of the judge which were made in the context of his consideration of somewhat heated exchanges in the District Court as being indicative of his desire and intention to do justice:-

> *"Whatever about the relationship between Mr Cullen and his local judge, I must look after the interests of Ms Rogers; she is the primary focus of my attentions in this particular case and she should not be seen to suffer an injustice or a perceived injustice."*

Decision

42. In my view, the facts and circumstances of this case cannot be equated with those decisions such as in *Maher*. I do not believe that there is anything of significance in the exchanges between the judge and counsel that should be elevated into the status of a finding that the judge acted in a manner such as might have given rise to a reasonable apprehension of bias in an objective bystander. When the transcripts of the evidence over the course of three days of the trial are viewed in their entirety, I do not believe that it is reasonably open to the court to conclude that the judge acted in a manner, or that his interventions were such, that a reasonable onlooker might form the impression that he was resolute in his determination to find against the applicant, irrespective of the arguments of counsel. Nor in my view, when the transcripts are viewed in their entirety, is there evidence upon which a reasonable observer might be apprehensive of the judge's ability to preside over an impartial hearing. While some of the exchanges could be described as testing and probing, in my view, these are not to be equated with circumstances in which a predisposition of bias on the part of the judge has heretofore been established. It is clear, as Mr. O'Malley B.L. points out, the judge adjourned the case on the first day to permit further submissions on the law to be made.

43. Further, I do not believe that allegations of lack of fair procedures, such as not being afforded the right to be heard, in and of itself necessarily establishes bias. The authorities indicate that bias must be established otherwise than by reference to the decision itself. In all the circumstances, I am not satisfied that bias as a ground of review has been established in this case. I do not believe that what might be described as a frank exchange between the court and counsel as to the manner of the running of the case, in and of itself and in the circumstances of this case, establishes bias. I also accept Mr. O'Malley's submission that the fact that the judge arrived at different conclusions on each charge supports the absence of bias.

44. It is, however, a fundamental principle of natural and constitutional justice that a party should be afforded the right to be heard. It does not seem to me, however, that the court should entertain endless submissions and observations going back and forth during the course of a hearing. In my view, it is permissible and lawful for a judge to terminate repeated exchanges in the interest of good administration of justice. However, once a judge takes such a view, great care should be exercised to ensure that the parties have been afforded the right to be heard including the right to reply on relevant issues.

45. An analysis of the transcript shows that on the first day of the hearing the matter was approached by the applicant on the basis that the test to be applied was the *Éire Continental* test. The state solicitor drew the courts attention to the fact that the appropriate test in a criminal matter was that in Kelly and not that in the *Éire Continental* case. This led to an adjournment to afford counsel for the applicant the opportunity to make further submissions on that test. Written submissions were prepared and delivered to the court on 27th June, 2016. The test in *Kelly* was addressed and the effect of it was summarised to be that if a judge considers a refusal would result in injustice, time to appeal ought to be extended. An extract from the decision of O'Higgins C.J. was quoted, with emphasis being placed on whether an intention to appeal had been formed within the required time and whether there were stateable grounds of appeal. Thereafter the submissions largely addressed the issue of judicial review and delay in seeking relief.

46. Ms. Brennan S.C. submits that when one examines the transcript of the hearing which took place on 28th June, 2016, it is evident that the state solicitor addressed the question of delay, and what he considered to be the intention of the applicant to pursue judicial review, rather than enter upon a discussion of the test in *Kelly* and its application to this case. I have read the transcripts and it seems to me that this submission on what occurred on the 28th June, 2016 is largely correct. This is evident from the transcript of the second day's hearing where the following is recorded:-

> *"MR. FARRELL: It seems that, very briefly, that the appellant in this case was determined to go down a particular route of judicial review. That was the full focus of dealing with the unhappy events that apparently occurred in the District Court. And when all avenues were exhausted there, that three counsel were consulted, the accused reverted to a simple appeal to this Court, which I think she should have done if there were merits in an appeal to you but, in my submission, there was never an intention to appeal to you in the ordinary way and that this was a case that was hell bent on going to the Four Courts. The only other thing that I will say, Judge, is it is of some antiquity now, this detection, and it seems, Judge, that the State has to be ready and able and willing to prosecute at any time and that can pose – it is difficult and I really don't want to respond any further, Judge."*

47. At the conclusion of that day's hearing the judge is recorded as saying that he was reserving his decision and that the net issue was whether *D.P.P. v Cagney* applied. It is recorded that he felt that the other arguments in the case did not require the same *"depth or weight to attach"* to them.

48. On the following day, when it was anticipated that judgment would be given, and at the judge's invitation, the state solicitor made submissions. Although they primarily related to the intoxilyser conviction, and the decision in *Cagney*, he also made further submissions on the application of the test in *Kelly*, as follows:-

> *"MR FARELL: Well, I have never seen the transcript, Judge, and I accept that. So, there is a bit of a hill to climb there. Maybe Ms Natasha Rogers can produce evidence on appeal that on the date in question she did have a medical condition that precluded her, Judge, from using the intoxilyser. That is a distinction, Judge, between this case and the Cagney case. However, in the Cagney case Ms Cagney didn't mention any substantial reason, so it is a little bit stronger, the Natasha Rodgers case, that she did mention this difficulty that she had, Judge, but, as I said, she made no attempt whatsoever; it was a blank refusal. So I suppose, Judge, that very judgment might indeed constitute that issue that I raised with you very briefly on the first day, that the case has to be decided – you have to decide it, perhaps, on the decision the People v. Kelly, as to whether the requirements of justice would require that an appeal be allowed – or that an extension of time be granted, if there was a possibility of an injustice or evidence having been wrongly admitted or excluded. And that's the essential nub of the matter and perhaps not the other areas well traversed by my learned friend, Judge. It is a net issue."*

49. The judge delivered his decision after he had heard the submissions from the prosecuting solicitor, which on the face of it were confined to issues concerning the intoxilyser, in respect of which ultimately, the judge extended the time within which to appeal. The aspects of that decision in relation to the intoxilyser offences on the part of the judge are not challenged. However, it appears that it was in that context that the test in the *Kelly* case was addressed.

50. Having considered the transcripts and Mr. Cullen's affidavit I must conclude that counsel for the applicant was somewhat taken by surprise at this point. In the circumstances, I believe that once he sought to address the court in response, the correct approach, as a matter of law, was for the judge to hear counsel before arriving at his decision and proceeding to deliver judgment.

51. While I do not accept that there is evidence of bias on the part of the judge, I believe that he perhaps unwittingly fell into error in failing to adhere to the principles of natural justice and in particular the right to be heard *audi alteram partem*. I further accept

that this occurred in the context of submissions on the appropriate legal test applicable, albeit in the context of a consideration of the intoxyliser matter, but it was on a matter which was at the heart of the case.

52. Having considered the affidavits, the transcripts and the submissions of the parties, I believe that there may be substance to counsel for the applicant's contention that the judge, when reviewing and considering the evidence, entered upon consideration of the merits of the appeal as if it was a full hearing and that the he may have fallen into error in this regard. Nevertheless, Mr. O'Malley B.L. points out that legal irrationality is not a ground expressly pleaded or upon which this court should intervene. In the light of the jurisprudence which requires an applicant to set out the grounds of challenge with specificity in pleadings in judicial review matters, it seems to me that there is much merit to this argument. In *A.P. v DPP* [2011] 1 I.R. 729, Murray C.J. stated at para. 5:-

> *"[5] In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought."*

On the face of it, therefore, although the *Kelly* test was addressed in the affidavit of Mr. Cullen, this was not a ground upon which leave was clearly or precisely sought or granted, or a ground which this Court can now entertain. As it transpires, however, I believe it unnecessary to determine this issue, save to note that what was addressed in the final exchange was not on a peripheral issue, rather a central one regarding the test to be applied. This, to some extent, magnifies the importance of the right to reply and to be heard in the circumstances of this case.

53. I have come to the conclusion that once further submissions had been made on the morning of the judgment, it was in the circumstances incumbent on the judge to entertain any response before proceeding to his determination and pronouncement of his judgment. This is particularly so in circumstances where the state solicitor's submission concerned a fundamental issue regarding the test to be applied by the court, as set out in *Kelly* and, importantly, in the light of the impression which had been given by the judge on the previous day that all that remained was to deliver judgment. In this regard, I must find that the applicant's constitutional rights and rights to natural justice were infringed, however unintentionally and unwittingly.

54. I must therefore allow the application on this ground.

55. I wish to deal specifically with an issue arising from an indorsement of the statement of grounds being reference therein to *"S.I. No. 345/2015 (O84R22(2)) Mala fides/misconduct is alleged"*. The statement of grounds contains certain allegations of bias on the part of the judge, but in my view, on any reading, these grounds could never have amounted to *mala fides* or bad faith on his part and I believe it was inappropriate that this should have been endorsed on the statement of grounds. It must be acknowledged, however, on the hearing of the case, that Ms. Brennan S.C. made it clear that no such imputation was intended nor was it being pursued.