Neutral Citation: [2016] IEHC 288

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 63 J.R.]

BETWEEN

TEZAUR BITA

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, THE ATTORNEY GENERAL AND IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 12th day of May, 2016

1. At around 3.45 am on 27th August, 2015, it is alleged that the applicant parked his car at Old Nangor Road, Clondalkin, Dublin 22 and proceeded to relieve himself in bushes. This was said to have been witnessed by a member of An Garda Síochána, who arrested the applicant. Following a search in custody the applicant was allegedly found to be in possession of a small amount of cocaine.

2. He was charged with two offences; an offence contrary to s. 3 of the Misuse of Drugs Act 1977 and the offence of indecent exposure, contrary to s. 5 of the Summary Jurisdiction (Ireland) Amendment Act 1871.

3. The applicant was, at one point, also charged with an offence contrary to s. 38 of the Road Traffic Act 1961 but this charge was subsequently withdrawn.

4. Mr. Keith Spencer B.L., for the applicant, in a very able submission, applied to me *ex parte* for leave to seek prohibition of his trial, on the grounds that s. 5 is unconstitutional.

5. I refused the application in an *ex tempore* decision on 1st February, 2016. The applicant then appealed the refusal to the Court of Appeal, and when the matter was listed for hearing on 18th March, 2016, I am told that that court only had before it a note of the ruling taken by the applicant's lawyers rather than an approved note.

6. As the applicant will no doubt now be aware, O. 86A, r. 9(3) of the Rules of the Superior Courts 1986 as substituted by the Rules of the Superior Courts (Court of Appeal Act 2014) 2014 (S.I. No. 485 of 2014) requires an appellant, in an expedited appeal (as here), to lodge a note of an *ex tempore* ruling "*authenticated by the Judge of the court below*". (The same procedure applies under O. 86A, r. 13(3) for ordinary appeals.) Obviously this was inadvertently overlooked by the applicant in this case.

7. The Court of Appeal adjourned the matter to allow this to be rectified and Mr. Spencer then applied to me for a written decision. In view of how that matter arose I explored with him whether he wished to have a pretty much *verbatim* note of the original Digital Audio Recording or a more detailed reserved decision setting out more full reasons, and he expressed openness to either option. Given all of the circumstances, including the difficulty with the papers before the Court of Appeal, it would seem that the latter would probably be the course that would be most helpful for the applicant and that is what I now do.

8. The essential ground of challenge against s. 5 was unconstitutional vagueness, in reliance on the judgments of Hogan J. in *Douglas v. D.P.P.* [2013] 1 I.R. 510 and *McInerney v. D.P.P. and Curtis v. D.P.P.* [2014] 1 I.R. 536. It is also submitted that the section lacks principles and policies: *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381.

The test for leave in G. v. D.P.P.

9. In *G. v. D.P.P.* [1994] 1 I.R. 374 at 377 to 378, Finlay C.J. set out the criteria for the grant of an ex parte application for leave. In some previous leave decisions (e.g., *M.McK. v. Minister for Justice and Equality* [2016] IEHC 208 (Unreported, High Court, 25th April, 2016)), I have attempted to summarise these requirements. As developed by subsequent changes to the rules of court, and subsequent caselaw, the criteria can be summarised as follows:-

> (i) That the applicant "*has a sufficient interest in the matter to which the application relates*" (p. 377);
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> (ii) That "an arguable case in law can be made that the applicant is entitled to the relief which he seeks" (p. 378) on the basis of facts averred to by the applicant. Of course in particular circumstances a higher threshold than arguability applies, such as where legislation requires substantial grounds, or where the grant of leave would itself be likely to determine the event (*Agrama v. Minister for Justice and Equality* [2016] IECA 72 (Unreported, Court of Appeal, 22nd February, 2016) per Birmingham J. at para. 32);
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> (iii) That the application has been made within the appropriate time limit or that the Court is satisfied that it should extend the time limit in accordance with the applicable rules of court or legislation;
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> (iv) That "*the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure*" (p. 378);
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> (v) That there are no other grounds to warrant the refusal of leave. "*These conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an ex parte*

application" (p. 378).

10. It is now therefore necessary to assess the present application under the headings that are in issue in this case, in particular alternative remedies and discretion.

The applicant has a more convenient remedy

11. Section 5 of the Act of 1871 creates an offence committed by *"[a]ny person who within the limits of the police district of Dublin Metropolis, in any thoroughfare or public place, shall wilfully and indecently expose his person or commit any act contrary to public decency".* As far as males are concerned, "*person*" in this context means penis (see *Cox v. D.P.P.* [2015] IEHC 642 (Unreported, High Court, 20th October, 2015) per McDermott J. at paras. 29 to 30, dealing with s. 4 of the Vagrancy Act 1824). The offence can be construed in a gender-neutral manner; a woman exposing her vulva should also be regarded as thereby exposing her person (see *Evans v. Ewels* [1972] 1 W.L.R. 671). In any event, confining the discussion to males for present purposes, mere exposure of the penis is insufficient. The defendant must do so "*indecently*", or do another act "*contrary to public decency*".

12. That point is crucial. Merely exposing one's penis in a public place does not necessarily constitute an offence under s. 5. There are many possible counter-examples where to do so is manifestly not indecent: urination in a public lavatory; use of certain bathing places; discreet "skinny-dipping" more generally; certain saunas; exposure for the purposes of theatre; *avant-garde* performance art; discreet artistic photography; and so on. Such life-affirming activities are not contrary to contemporary community standards and therefore could not legitimately be the a priori object of criminal punishment, whether based on decency considerations or otherwise.

13. I would remark in passing that contrary to what might be an expansive interpretation of *Douglas and McInerney*, a court sitting without a jury is not necessarily to be precluded from forming a view as to contemporary community standards. Juries provide a crucial (and under our system, essential) safeguard in non-minor, non-special criminal cases, but there is no constitutional requirement that that safeguard is required in any and every form of proceedings where contemporary community standards come into play.

14. Is public urination one of the examples of "*expos[ure]"* which is necessarily indecent? Obviously not.

15. Public urination is certainly capable of being indecent if carried out in an indiscreet manner. But there is quite a difference between the person who urinates into bushes and one who does so, say, into the public roadway. The latter may well be viewed as acting indecently. But it would be a perversion of language and biology to call public urination a *necessarily* indecent act. The discreet public urinator is a world away from the category of those accused of "*flashing*" and public masturbation, who benefitted from the decisions in *Douglas and McInerney.*

16. Leaving indecency aside, however, it has to be acknowledged that public urination is frequently an anti-social act and may in certain circumstances breach s. 5 of the Criminal Justice (Public Order) Act 1994. All depends on context in such a situation. The person who urinates publicly (even discreetly) because he cannot be bothered to avail of a reasonable alternative is engaging in anti-social behaviour. His fellow urinator in a different and secluded location who has no reasonable alternative and acts discreetly and reasonably when confronted with an unavoidable exigency is unlikely to be contravening s. 5 of the 1994 Act or to be acting criminally at all.

17. On the basis of what is said by Mr. Spencer it is well within the bounds of possibility that the applicant will be acquitted because of the absence of any circumstances of indecency. As I understood the defence position from submissions, the suggestion was that the applicant was answering an urgent call of nature and by inference doing so discreetly by availing of bushes. If so, that is simply not indecent conduct such as is prohibited by s. 5 of the 1871 Act.

18. It would therefore be overkill to allow the applicant to proceed to ask the court to strike down a duly enacted law, which, subject to the Constitution, I am bound to "*uphold*" (Article 34.5.1°), in circumstances where he may well not be convicted under that law.

19. As noted above, *G. v. D.P.P.* permits the court to refuse leave where there is a more convenient remedy. A quick summary trial in the District Court which could be over for all time within a couple of weeks and which holds out at the very least a reasonable possibility of acquittal is just simply a more convenient remedy than a full-blown constitutional action in the High Court involving major issues of constitutional law and the putting of the validity of an Act of Parliament (*prima facie* continued into our law in 1922 and 1937) at stake, which may drag on for years, and seeing as it has already involved the Court of Appeal at the leave stage, may do so again at the substantive stage. This may establish interesting constitutional jurisprudence but what does it do for the applicant, the courts system or other litigants who do not have alternative remedies and who require to draw on the resources of the court?

20. Exhaustion of remedies is an ever present theme in the law. I will mention only a few examples. One cannot complain to Strasbourg without first exhausting all domestic remedies by virtue of art. 35(1) of the ECHR. The same rule applies under the International Covenant on Civil and Political Rights (art. 2 of the Optional Protocol). The State (*Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381 per O'Higgins C.J. at p. 393 militates strongly in favour of exhaustion of remedies by way of appeal prior to judicial review. See also *Stefan v. Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 230 (per Denham J. (McGuinness and Hardiman JJ. concurring)); *Tomlinson v. Criminal Injuries Compensation Tribunal* [2004] IEHC 53; [2004] 3 JIC 0302 (Unreported, High Court, Kelly J., 3rd March, 2004,); *Sheahan v. Minister for Social and Family Affairs* [2010] IEHC 4 (Unreported, High Court, 14th January, 2010) (MacMenamin J., refusing relief where there was a failure to appeal before seeking judicial review); and *McCarthy v. Brady* [2007] IEHC 261 (Unreported, High Court, 30th July, 2007) (de Valera J., refusing relief where there was a failure to avail of an appeal against an order of the District Court). *RAS Medical Ltd. v. Royal College of Surgeons in Ireland* [2016] IEHC 198 (Unreported, High Court, Noonan J., 19th April, 2016) furnishes yet another recent example of the point. The principle can arise in other contexts also. Posner J. recently remarked in *American Commercial Lines LLC v. Lubrizol Corp*. (No. 15-3242, US Court of Appeals for the 7th Circuit, 25th March, 2016) that "[*a] competent party—a big boy like [the plaintiff] — should be required to exhaust its contractual remedies before invoking tort law and tort-like extensions of contract law"* (at p. 6).

The requirement to reach constitutional issues last

21. The need to exhaust remedies takes on a particular importance where a constitutional or major public law issue is at stake, because of the principle of "r*each[ing] constitutional issues last"* (per Denham J., as she then was, in Gilligan v. Special Criminal Court [2006] 2 I.R. 389 at 407; see also O'B. v. S. [1984] I.R. 316 per Walsh J. at 328); A*shwander v. Tennessee Valley Authority* 297 U.S. 288 (1936) per Brandeis J. at pp. 346 to 347: "'*It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' Burton v. United States 196 U.S. 283, 196 U.S. 295".*

22. In my decision in *Casey v. D.P.P.* [2015] IEHC 824 (Unreported, High Court, 21st December, 2015), I held that the requirement to reach constitutional issues last means that an applicant should generally exhaust his or her remedies in the criminal process before

bringing an application for judicial review before the High Court. Indeed, at the level of broad generality it would be an improvident exercise of judicial resources, particularly given the requirement to uphold the laws of the State, to embark on an enquiry into the constitutionality of a duly enacted statute before it is determined that the applicant is clearly damnified to the extent of being convicted under it. If the applicant is not convicted or, having been convicted, is acquitted on appeal, the issue of constitutionality simple does not arise. If the applicant is convicted he can then apply for *certiorari* of the Circuit Court order, on both conventional administrative law grounds and on ground of unconstitutionality. The latter will not arise if the decision can be set aside on administrative law grounds, such as if the learned trial judge (hypothetically) erroneously equates public urination per se with indecency.

Any alleged unfairness is not inevitable
23. Recent case law is very clear that prohibition should only be granted in "*exceptional*" circumstances, in particular *M.L. v. D.P.P.* [2015] IEHC 704 (Unreported, High Court, Noonan J.,13th November, 2015). *Kearns v. D.P.P.* [2015] IESC 23 (Unreported, Supreme Court, Dunne J. (Denham C.J., Murray, Hardiman and O'Donnell JJ. concurring) 15th January, 2015). The case law establishes a number of principles relevant to whether such exceptional circumstances exist.

24. *Sirbu v. D.P.P.* [2015] IECA 238 (Unreported, Court of Appeal, Hogan J. (Irvine and Kelly JJ. concurring) 9th November, 2015) emphasised that prohibition will only arise whether there is a real risk of an inevitability of unfairness, and there is no such inevitability here. Not only is there no inevitability of unfairness but there are no "exceptional" circumstances warranting prohibition.

The challenge would be in vacuo and potentially moot prior to findings of fact and law in the context of the ultimate outcome at trial
25. Mr. Spencer argued that a clear *actus reus* and *mens rea* can be found in the Act of 1824 considered in Cox v. D.P.P. but the offence under s. 5 lacks a defined *mens rea* and so falls under the Douglas doctrine.

26. He also argued that the offence under s. 5 is virtually indistinguishable from that in Douglas. He contended that there is no objective standard in the legislation, it is inherently vague and there are no principles or policies to clarify what exactly is prohibited by the section.

27. An assessment of the Act as it applies to this applicant would have to consider what precisely the *mens rea* to be implied into the Act should be (probably intent or recklessness), and what the circumstances of the alleged offence were. The latter is a matter for the trial to establish, a process which will also make rulings on the former as necessary. A hearing of this point at this stage is *in vacuo.* To hear the challenge after the applicant is convicted, if he is, and after he exhausts the appeal to the Circuit Court, would ensure that the challenge would be heard on the basis of definitive findings of fact and law by the trial judge. Matters would then be clarified and the issues which the applicant would then have standing to complain about would then be made clear. For example if it were found that a particular applicant was urinating not in a discreet manner but in a clearly indecent manner, that would have an impact on whether he could really contend that he was not on notice of what conduct was prohibited.

28. As I said in *Casey*, an approach requiring the court not to express a view on the constitutionality of legislation until such time as it has been finally applied to a defendant in criminal proceedings would be a more economical use of judicial resources because of the significant possibility that the issue may be capable of being resolved in the course of that process. An applicant may be acquitted, or, if convicted, may have that conviction overturned on appeal. Alternatively, facts as found in the course of the criminal process may deprive an applicant of standing to make particular arguments, or render those arguments clearly unsustainable; thereby reducing if not eliminating the necessity for the court to embark on what may be a quite theoretical investigation of the constitutionality of the legislation. As in Casey, for the court to determine the validity of that legislation in a prohibition application prior to the full ascertainment of the factual matrix in the course of the criminal process could, in many instances, amount to the determination of a moot question.

Leave for prohibition in the context of a constitutional challenge to a criminal statute puts the statute into suspension
29. As I noted in Casey, if any one applicant is given leave in relation to a constitutional challenge to an offence, prior to trial, this will amount in practice to a suspension of the legislation in question, because any other defendant charged with the same offence will know that they must also be entitled to a similar order for the asking. As emphasised above, it is the function of the judiciary to "*uphold*" the Constitution and the laws, not to contribute to a situation where those laws can be put into suspension, or at least not without very substantial reasons going well beyond the satisfaction of the mere threshold of arguability for the purposes of the grant of leave to seek judicial review (see e.g. *Agrama v. Minister for Justice and Equality* [2016] IECA 72 (Unreported, Court of Appeal, 22nd February, 2016) per Birmingham J. at para. 32) for a related example of where mere arguability cannot be applied in a mechanical and universal fashion as being the applicable test).

Limited exceptions to the contrary
30. The foregoing is not an absolute, black-and-white rule, because there are a limited number of cases where applicants have been permitted to challenge statutes prior to trial on previous occasions.

31. Mr. Spencer submitted that the criminal defendants in *Cox, Douglas and McInerney* were in the same position and that there are other cases where a challenge to the constitutionality of a statute prior to conviction in the District Court was permitted. I acknowledge these exceptions including venerable cases such as *East Donegal Cooperative Livestock Mart Limited v. Attorney General* [1970] I.R. 317 and *Norris v. Attorney General* [1984] I.R. 36, but bearing in mind the overwhelmingly weighty considerations favouring reaching constitutional issues last, it seems to me that those cases must be regarded as exceptions rather than as some statement of a general rule.

32. *Osmanovic v. DPP* [2006] 3 I.R. 504 [2006] IESC 50 provides some support on the face of it for the applicant, but in a judgment given today in *North East Pylon Pressure Campaign Ltd.& Maura Sheehy v. An Bord Pleanála* (Unreported, High Court, 12th May, 2016) I discuss in more detail why Osmanovic should not be regarded as stating the general rule.

33. That judgment explains in some more detail reasons which are equally applicable to explain why the present application should also be refused. In summary those reasons include the following:-

> (i) to determine an issue of validity prior to an exhaustion of other remedies would be contrary to the principle of reaching constitutional issues last;
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> (ii) to postpone such an issue until the finalisation of underlying proceedings would be a more economical use of judicial resources because of the significant possibility that the issue may be capable of being resolved in any event in the course of that process, for example by an acquittal of an applicant;

(iii) facts as found in the course of the criminal process may deprive an applicant of standing to make particular arguments, or render those arguments clearly unsustainable, thereby reducing, if not eliminating, the necessity for the court to embark on what may be a quite theoretical investigation of the constitutionality of the legislation;

(iv) for the court to determine the validity of that legislation in a prohibition application prior to the full ascertainment of the factual matrix in the course of the criminal process could, in many instances, amount to the determination of a moot question;

(v) since *Osmanovic* was decided, the law on prohibition has moved on very significantly, and it has now been definitively established that prohibition, at least in the criminal context, should not be granted save in "*exceptional circumstances*" (see authorities referred to above);

(vi) this is not simply because matters of fairness can be dealt with by the trial judge, but is also important because the criminal process impacts on the rights of third parties, particularly injured parties:- see the observations of Kearns P. in *Coton v. D.P.P.* [2015] IEHC 302 (Unreported, High Court, 21st May, 2015);

(vii) the criminal trial is a mechanism to vindicate the legal, constitutional, EU and ECHR rights of a victim of crime, the strengthening of such rights has been a growing theme in recent legal developments, such as directive 2012/29/EU of the European Parliament and of the Council of 25th October, 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (victims' directive), and which rights include the positive rights arising from the State's "*obligation to conduct an effective prosecution" (Söderman v Sweden* (Application No. 5786/08) European Court of Human Rights, 12th November 2013, para. 88); and that to allow a criminal trial to be de-railed unnecessarily by judicial review, when the matter complained of either lacks merit or could be dealt with more proportionately within the trial, creates the potential for such delay or interference with the criminal process as to bring the performance of this obligation to victims into question;

(viii) if it is the case that an applicant can secure a postponement of his or her trial simply by challenging the constitutionality of the relevant legislation, an avenue for the delay or frustration of the criminal process will have opened up, because the practical implementation of the statute concerned would be put into suspension pending the determination of that challenge;

(ix) the separation of powers requires the court to refrain from putting the constitutionality of legislation under scrutiny unless it is necessary to do so; there are enough pressures on the parliamentary system without the courts creating an unnecessary legislative emergency by bringing into being a situation where a statute may be struck down even though there may be other ways to vindicate the legitimate rights and interests of a particular applicant.

34. As discussed in *North East Pylon*, it would be illogical in the extreme if the law was such that prohibition generally can only be granted in exceptional circumstances, but that this approach of exceptionality did not apply if an applicant was seeking to challenge the validity of legislation, and that in the latter case prohibition could be sought as a general rule as soon as imminent danger had been demonstrated. Such an approach would fundamentally undermine the recent jurisprudence which has sought to emphasise the necessity to bring a challenge at the conclusion of the process rather than to disrupt it midstream. It would furthermore put a huge premium on seeking to challenge the constitutionality of legislation. This would be, in the language of Kennedy J. (dissenting) in *Luis v. United States* 578 US (2016) (slip op. p. 17) "an approach that creates perverse incentives".

35. I discuss the possibility of such exceptional cases further in *North East Pylon*, but this is not such an exceptional case. Virtually every public interest consideration, including convenience to the applicant, militates in favour of postponing this challenge until after the criminal process concludes.

The challenge involves a proposition already rejected in caselaw

36. I might comment in passing (although in the circumstances not as a ground for refusing the application) that the challenge is in any event based on the proposition that "*indecency*" is a vague notion akin to the concepts of "*offending modesty*" or "*the morals of the community*" at issue in *Douglas and McInerney*. But those latter concepts are outlying relics of a departed era; "*indecency*" by contrast is built in to multiple elements of the criminal law and is well established. Even the modern offence of sexual assault is merely a renamed version of indecent assault. If s. 5 is condemned, sexual assault must follow. Most importantly, an allegation that gross indecency was unconstitutionally vague was rejected by Moriarty J. in *P.P. v. D.P.P.* (Unreported, High Court, not yet circulated, October, 2015) where a vagueness challenge to s. 11 of the Criminal Law Amendment Act 1885 which created an offence of "*gross indecency*" with a male person was rejected. As I read this result, it would not have been possible to uphold the offence of gross indecency if the concept of indecency was itself unconstitutionally vague. A proposition that has already been rejected in the decided caselaw should not generally be regarded as arguable for future judicial review purposes, as otherwise there would be no end to the recycling of dead points. There can be exceptions where new circumstances arise for example. However, as stated, I am not basing the decision on this point in the circumstances.

Hearsay and failure to engage with the facts

37. In any case, the application in this case is grounded on the affidavit of the applicant's solicitor and not the applicant himself. In addition, in formal terms the affidavit is somewhat opaque as to what the defence case actually is because the grounding affidavit only refers to the facts in terms of what is alleged against the applicant rather than what he says happens (although Mr. Spencer sought to outline the applicant's position to some extent in submissions). The applicant has failed to sufficiently "*engage with the facts*" (per Hardiman J. (Murray C.J. and McGuinness J. concurring) in *Scully v. D.P.P.* [2005] 1 I.R. 242 at 252; *per* O'Donnell J. (Fennelly and Finnegan JJ. concurring) in *Byrne v. D.P.P.* [2011] 1 I.R. 346 at 352) and has failed to swear the affidavit personally, which are in and of themselves further separate and independent grounds of refusal; albeit that if these were the only difficulties I might well have explored with the applicant's lawyers whether they wished to rectify them. As the application was being refused on other grounds, that course was not necessary or appropriate.

Order

38. For the foregoing reasons, leave to seek prohibition is not appropriate in this case.