APPROVED

THE COURT OF APPEAL

[2023] IECA 332
Record Number: 2023/261
High Court Record Number: 2023/47JR

Costello J.

Noonan J.

Butler J.

BETWEEN/

KEVIN O'KEEFFE

APPLICANT/APPELLANT

-AND-

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT/RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered *ex tempore* on the 21st day of December, 2023

1. On the 17th January, 2023, the appellant was arrested at his home by members of An Garda Síochána on foot of a bench warrant. It is alleged that during the course of his arrest, the appellant's dog, a Belgian shepherd, attacked and bit one of the gardaí present. The dog was seized by the gardaí and placed in professionally operated kennels where it currently remains. On the 20th January, 2023, the appellant was sentenced by Dublin Circuit Criminal Court to a term of imprisonment of two and a half years. Until his release he must remain in prison and accordingly is not in a position to have possession of, or care for, his dog.

2. Subsequent to the arrest of the appellant, a complaint was made by a member of An Garda Síochána to the District Court pursuant to s. 22 of the Control of Dogs Act, 1986. In so far as relevant to these proceedings, the section provides:

"22.—(1) Where—

(a) on a complaint being made to the District Court by any interested person that a dog is dangerous and not kept under proper control, or

(b) on the conviction of any person for an offence under section 9 (2) of this Act,

it appears to the Court that the dog is dangerous and not kept under proper control, the Court may, in addition to any other penalty which it may impose, order that the dog be kept under proper control or be destroyed.

(2) Whenever the Court orders the destruction of a dog pursuant to subsection (1) of this section, the Court may—

(a) direct that the dog be delivered to a dog warden or any suitable person to be destroyed, and

(b) direct that the expenses of the destruction of the dog be paid by the owner of the dog.

...

(5) Where a dog is proved to have caused damage in an attack on any person, or to have injured livestock, it may be dealt with under this section as a dangerous dog which has not been kept under proper control."

3. The complaint made under this section came on for hearing very quickly before the District Court on Saturday the 21st January, 2023. Very short notice of the proceedings was served on the appellant. He instructed a solicitor who attended in court and sought a brief adjournment to allow the appellant attend at the court's next sitting on Monday the 23rd January, 2023. The District Judge refused this application and made an order under s. 22 directing the dog's destruction, which was to take place on Monday the 23rd January. Before that could happen, an urgent application was made to the High Court for leave to seek judicial review of the order of the District Court. Leave was granted and a stay imposed pending the hearing of the judicial review application.

4. On the 22nd January, 2023, the appellant delivered an amended statement of grounds seeking an order of *certiorari* of the District Court order, an ancillary declaration and a stay/injunction relating to the impugned order pending the determination of the proceedings. No allegation in the appellant's statement of grounds is directed towards the seizure and detention of the dog in the first instance nor is any relief sought in that regard.

5. On the 10th July, 2023, the CSSO, on behalf of the respondent, wrote to the appellant's solicitors attaching two documents. The first is a veterinary report dated the 29th June, 2023 from Mr. Michael G. Mitchell, Veterinary Surgeon, of Lucan Veterinary Hospital. Mr. Mitchell notes in this report that he attended at the kennels on the 19th January, 2023 to examine the dog when she was extremely aggressive, lunging at the kennel gate and stripping her teeth with intent to harm. On subsequent visits her behaviour steadily disimproved. She is challenging kennel staff and proving very dangerous in the vicinity of other housed animals. Mr. Mitchell said that the confinement was adding to the dog's stress, kennel guarding, frenzied barking and snarling. He concluded by saying:

"She has an unpredictable nature and coupled with her agility and swiftness of foot she is in my opinion a dangerous dog.

Prolonged confinement for Cleo will not be advantageous to her and in my opinion on animal welfare grounds this dog should be euthanized."

6. A letter from the kennels dated 4th July, 2023 notes that the dog had attempted to attack and bite all of its carers on a daily basis and her behaviour has deteriorated steadily since incarceration. The letter concludes with a request that the dog be euthanized in view of the danger it presents to kennel staff. Shortly after the date of this letter, before the matter returned before the High Court to be assigned a date for hearing, the respondent conceded that he would not oppose the application to quash the order of the District Court.

7. The matter came before Hyland J. for directions on the 25th July, 2023 when the judge proposed that if both parties consented, the matter might be remitted to the District Court with the dog remaining in detention pending the determination of the complaint. This suggestion was advanced by the judge with a view to avoiding the necessity for a full hearing of the judicial review with attendant significant costs. The appellant declined to consent to this course notwithstanding the fact that he remained in prison and accordingly an urgent date for hearing was fixed on the last day of term, the 31st July, 2023. The matter came on for hearing that day before Simons J. who delivered a written judgment on the 11th August, 2023. This was followed by a subsequent hearing on the issue of costs and a possible stay pending appeal on 18th August, 2023. A second written judgment was delivered by the High Court on 23rd August, 2023.

8. It is perhaps rather surprising that given that there was agreement to quashing the order of the District Court, it nonetheless became necessary to have an urgent full hearing of the matter before the High Court which generated two written judgments both delivered shortly

thereafter during the long vacation. This was necessitated by the refusal of the appellant to accept that the dog should remain housed in kennels pending a re-hearing by the District Court. Given that the appellant himself had throughout this period been in prison, and is likely to remain there until after the matter has been heard by the District Court, this approach seems somewhat difficult to rationalise.

9. However, the appellant makes the case that the High Court had no jurisdiction to direct the detention of the animal in circumstances where that would only follow, he submits, from a properly made order of the District Court under s. 22 of the 1986 Act. Since there is, as yet, no such order, the appellant submits that the High Court has no jurisdiction to direct the detention of the dog further. The appellant's proposal was that the dog should be released into the care of his cousin, a Mr. Kinahan, although no evidence was put before the High Court as to Mr. Kinahan's ability to care for or control the dog.

First judgment of the High Court

10. In its judgment of the 11th August, 2023, the High Court (Simons J.) set out the background to the matter as I have briefly summarised it. As I have said, the central issue in the case was whether the court had jurisdiction to order the detention of the dog as a condition of the remittal of the matter to the District Court. The court accordingly carried out a review of the jurisprudence relevant to the jurisdiction of the High Court to make consequential orders in connection with orders of *certiorari* noting a number of judgments up to and including *Balz v An Bord Pleanála* [2020] IESC 22 discussing this issue. Simons J. noted that the appellant had argued that there was no legislative basis for detaining the dog pending the re-hearing in the District Court and that the court should restore the *status quo ante* by directing the release of the dog.

11. In dealing with these arguments, the judge said the following (at para. 38):

> *"38. The flaw in these arguments is that the legality of the seizure and subsequent detention of the dog has never been challenged in these judicial review proceedings. Rather, the proceedings are directed exclusively to the fairness of the District Court hearing. It will be recalled that the dog had been seized at the time of the applicant's arrest, and thus was already detained as of the date of the District Court hearing. Had the applicant wished to contend that the seizure and subsequent detention of the dog were unlawful, then he should have included pleas to this effect in his Statement of Grounds. The applicant did not do so. It is not now open to the applicant, at the conclusion of the proceedings, to advance a case which is not pleaded.*
>
> *39. For similar reasons, the applicant's argument that the release of the dog would restore the status quo ante is also misplaced. The factual position as of the date of the institution of these judicial review proceedings had been that the dog had already been seized and detained. This, then, represented the status quo ante. It is to be reiterated that the legality of the seizure and detention of the dog have never been challenged by the applicant."*

12. The judge was satisfied having regard to the jurisprudence referred to that the High Court had jurisdiction to impose such stay in relation to the matter as would minimise the risk of injustice. The judge concluded that the balance of justice weighed heavily in favour of the dog remaining in professional care pending the re-hearing in the District Court. He noted that the correctness of the reports from the veterinary surgeon and the kennels had not been challenged by the appellant. He also noted that the appellant had put no evidence before the High Court as to the ability of the nominated family member to care for and control the

dog. The judge was of the view that given that the appellant is in prison, there is no direct prejudice to him as a result of the dog remaining in the kennels.

13. In the course of his judgment, the trial judge considered the proper interpretation of s. 22, given the argument that was advanced in the appellant's written submissions. It appears that the appellant contended that the statutory test of whether the dog is *"dangerous and not kept under proper control"* would have to be determined by reference to the date of the hearing before the District Court and since, on that date, the dog will be in kennels being professionally cared for, the prosecution cannot satisfy the test that the dog is not kept under proper control and accordingly, remittal would be futile. The judge dealt with the argument as follows:

> *"54. With respect, such an interpretation of the legislation would be absurd. It would mean that a dog, no matter how dangerous and how out of control when in the care of its owner, could never be the subject of a destruction order if the dog had been seized by a dog warden in advance of the hearing before the District Court. Put otherwise, if the District Court, in assessing the question of control, is confined to considering the circumstances of the dog when in the charge of the dog warden, then the ability of the owner to control the dog would be irrelevant. This would defeat the legislative intent."*

14. The judge noted that this argument was one that the appellant did not seek to stand over in oral submissions in court. An alternative argument was advanced that the District Court would be confined to considering the factual circumstances of the dog as of the date of the original hearing, the 21st January, 2023. The judge rejected this argument saying that the purpose of remittal was to allow a fresh hearing and in so far as the first limb of the test

is concerned, the District Court is not confined to hearing evidence in relation to the behaviour of the dog prior to the 21st January, 2023.

15. This meant that the District Court was entitled to hear evidence of the dog's subsequent behaviour in the kennels. To do otherwise would be inconsistent with the purpose of the Act in the judge's view. The judge indicated his provisional view that there should be no order as to costs given that both parties had been partially successful. However, the appellant sought to claim his costs or a portion thereof and so a further hearing was required to deal with the issue of costs and also a stay pending appeal.

Second judgment of the High Court

16. On the question of costs, the judge affirmed his provisional view. However, he declined to stay the remittal to the District Court pending an appeal to this Court on the basis that no arguable ground of appeal had been demonstrated by the appellant. The appellant advanced the same argument that the District Court was confined to considering the factual circumstances of the dog as of January 2023 and therefore evidence of subsequent behaviour would have to be excluded. In supplementing this argument, counsel argued at the costs/stay hearing that the complainant would have to prove a lack of proper control and the dog being dangerous as matters which had occurred concurrently.

17. Therefore, it was said that anything that happened after the dog had been taken out of the control of the appellant would not be relevant. The judge said that he had already dealt with this in the principal judgment but went on to do so again in greater detail. He held that there was nothing in the section which confined the assessment of whether the dog is dangerous to behaviour which occurred concurrently with the dog being in the control of its owner. Thus, evidence of the dog's behaviour in the kennels would, in the judge's view, be admissible and also relevant for the purposes of s. 22(5) of the 1986 Act. The judge observed

that the latter is a form of deeming provision whereby the criteria for the making of a destruction order are deemed to be fulfilled upon proof of an attack on any person. Thus, evidence of attacks on one or more kennel personnel would be directly relevant under that subsection also.

18. The judge was therefore of the view that the contended for interpretation of s. 22 was demonstrably incorrect and did not meet the necessary threshold for the imposition of a stay. The judge also reiterated that the balance of justice was such as to hold that it weighed heavily against the imposition of a stay on remittal.

19. The appellant subsequently brought a motion before this Court seeking a stay pending the determination of the appeal. On the 6th October, 2023, the directions judge of this Court granted a stay on the remittal to the District Court. The basis on which the stay was granted was that if this Court were to disagree with the view of the High Court as to the proper interpretation of s. 22, the appeal would be rendered moot if the hearing in the District Court had concluded on the basis of the High Court's expressed view of s. 22 before the appellant had the opportunity of having his appeal determined.

Did the High Court have jurisdiction to remit subject to conditions?

20. The first point to be made here is the one I noted at the outset, as did the High Court, that there is no challenge made in these proceedings to the lawfulness of the seizure and subsequent detention of the dog. That occurred prior to any hearing in the District Court. Accordingly, the fact that the order of the District Court has been quashed by agreement does not mean that the dog is automatically released. The appellant contends, wrongly in my view, that once the District Court order falls away, the release of the dog must follow. This is not to say that the appellant was precluded from raising an issue as to the detention of the dog once the respondent applied for remittal of the matter to the District Court because

he had not challenged its original detention prior to the District Court hearing. Nonetheless in the context of the High Court Judge considering the position pending a remittal, the starting point was properly the existing status of the dog in *de facto* unchallenged detention.

21. I am perfectly satisfied that the trial judge correctly analysed all the relevant jurisprudence regarding the attachment of conditions to the remittal of a case for hearing to the original decision maker. I think it is sufficient for this purpose to simply refer to the dicta of O'Donnell J. (as he then was) in *Balz v An Bord Pleanála* [2020] IESC 22, where he said (at para. 28 - 29):

> *"28 It is now accepted that the court has jurisdiction to stay an order or to postpone the making of any order (which may have the same effect). That indeed is an important element in the court's capacity to do justice in any individual case. Otherwise, the court would be unable to distinguish between cases of flagrant, deliberate, and serious breach on the one hand, and perhaps innocent and limited error for which the party indeed may not themselves be responsible, but where, nevertheless, serious and disproportionate consequences could ensue if effect was given to an order of the court immediately.*
>
> *29 The question, however, of whether it is appropriate to make an order with immediate effect arises with particular force where there is, moreover, a jurisdiction to cure the error. This may occur in the context of judicial review where perhaps an order may be found to be invalid because of procedural error or failure, which does not reflect in any way on the merits of the case. Where a substantive decision may be made which may have the same*

effect as the impugned decision, a question arises as to what the position should be in the meantime."

22. Thus, even if it could be said that the impugned order of the District Court, which now stands quashed, formed the basis for the detention of the dog, which as I have said I do not accept, it is clear in my view that it was open to the High Court to remit the matter for further hearing by the District Court. The question then is what should be the position in the meantime? This is not a case of filling a legislative lacuna but rather of regulating what the position should be pending the remitted District Court hearing, which is analogous to the situation dealt with by the Supreme Court in *Balz*. Thus, the High Court did have an inherent jurisdiction to impose a condition of the nature of that under challenge. The judge was in my view very careful to strike the appropriate balance of justice in imposing this condition.

23. On the one hand, it is very difficult to see what possible prejudice is suffered by the appellant as a result of the imposition of the condition in circumstances where he remains incarcerated in prison and will not have the benefit of the company of the dog in any event. On the other hand, there is at the very least significant *prima facie* evidence that this dog is extremely dangerous and could represent a threat to public safety if released from its current confinement. In those circumstances I am perfectly satisfied that the judge was entirely correct to impose the condition and had jurisdiction to do so.

Interpretation of section 22

24. Again, I find myself in agreement with the views expressed by the trial judge. I agree with his view that the first argument advanced by the appellant, namely that at the date of the hearing before the District Court, since the dog will be under control in kennels, it cannot be regarded as *"not kept under proper control"*, as being quite absurd. As the judge observed, this would defeat the legislative intent and it is unsurprising that this argument

was abandoned in oral submission, having been initially advanced in the appellant's written submissions. The judge was nonetheless correct to consider it as it seems to me that it provides valuable guidance to the District Court in relation to the future hearing of this matter.

25. The same observations apply with regard to the alternative argument of the appellant, namely that the requirement that the complainant establish that the dog is both dangerous and not kept under proper control concurrently means that these two conditions must be satisfied as of the date of the seizure of the dog but without reference to any subsequent evidence of the dog's behaviour and temperament in the kennels. Here again, I agree entirely with the view of the trial judge that such an interpretation is quite unwarranted and requires reading words into the section that are not there. This interpretation, again, would give rise to a patently absurd result which would defeat the purpose of the Act.

The allocation of costs in the High Court

26. The allocation of costs in the High Court is a matter of discretion to be exercised within well-settled principles and more recently, having regard to the provisions of s. 169 of the Legal Services Regulation Act, 2015 and the recast O. 99 of the RSC. There are many judgments of this Court which indicate that an appellate court will be slow to interfere with the exercise of such discretion by the court of trial once it is within the range of judgment calls reasonably open to the High Court. This is particularly so in the context of costs orders.

27. In *Heffernan v Hibernia College Unlimited* [2020] IECA 121, an appeal from a costs order made by the High Court, Murray J., speaking for this Court, said (at para. 30):

> *"It is also clear that the exercise by the High Court of its discretion in calibrating these various consideration should not be lightly upset by an appellate court: As the*

Supreme Court has most recently explained in the context of the balancing exercise undertaken by a trial court in making discovery order 'it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below is outside the range of judgment calls which were open to the first instance court.' (Waterford Credit Union v J & E Davy [2020] IESC 9 at para. 6.3). The exercise of such restraint by an appellate court has been repeatedly stressed in the context of first instance decisions in respect of costs… However, and at the same time, an appellate court retains jurisdiction to interfere with a costs order where the trial judge has erred in principle, or failed to attach weight to the appropriate factors relative to the particular decision in hand."

28. Section 169 of the Legal Services Regulation Act, 2015 provides that entirely successful parties will be usually entitled to their costs but the court may order otherwise having regard to various matters including the conduct of the party and whether it was reasonable to pursue issues in the proceedings. It will be recalled in this regard that the respondent conceded the appellant's substantive claim before a trial date was fixed but the appellant declined to accept the proposal of the list judge that the matter be remitted with the dog being detained in the kennels pending the second hearing in the District Court.

29. The appellant declined that offer and litigated the case to conclusion essentially on the issue of the dog being detained in the kennels, which he comprehensively lost. It seems to me that the judge would have been well within his discretion in awarding the costs of the proceedings, at least post the 25th July, 2023, to the respondent which as he observed, are likely to have exceeded the costs incurred up to that point in time, particularly when one has regard to the fact that there were actually two substantive hearings before the High Court on the 31st July and the 18th August, 2023. In those circumstances, I cannot see how it could be

said that the order made by the High Court here was not one that was comfortably within the range of judgments reasonably open to it.

Was the High Court wrong to refuse a stay on remittal pending appeal?

30. In deciding whether or not to grant a stay, the High Court correctly had regard to whether arguable grounds of appeal could be said to exist or not. In the event, the judge concluded that there were no such grounds. His views have been vindicated in this judgment. It seems to me that when one has regard to the survey of the jurisprudence by the trial judge, it must be regarded as being long since well-settled that the court has a clear discretion to impose such conditions on the remittal of a matter for re-hearing as the justice of the case requires.

31. This may involve pausing the effect of the order and, as pointed out by O'Donnell J. in *Balz*, in substance treating the impugned order as temporarily valid in order to ensure a fair outcome. On this view, the trial judge was I think correct in concluding that, in reality, the argument about jurisdiction was very weak. I think the same goes for the appellant's case concerning the proper interpretation of s. 22 which appears to me to have been unsupported by any authority, but rather to the contrary.

32. I do not think this view is necessarily affected by the fact that the directions judge in this court did in fact impose a stay pending appeal. That was granted on the assumed basis that if an arguable case could be said to exist, then it might render the appeal moot not to grant a stay. However, after a full consideration of all the arguments, the respondent's position has been vindicated so to that extent, I do not think the fact that a stay was granted by the directions judge on motion should be regarded as in any way decisive on this issue.

33. I would accordingly dismiss this appeal.

[Costello J.]: I have listened carefully to the judgment just delivered by Mr. Justice Noonan and I agree with same.

[Butler J.]: I have also listened to the judgment delivered by Mr. Justice Noonan and confirm my agreement with it.