APPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

Neutral Citation: [2025] IECA 23

Record Number: 2023/141

Kennedy J.

Burns J.

MacGrath J.

BETWEEN/

ALAN HARTE

APPELLANT

-AND-

THE SUPERIOR COURTS RULES COMMITTEE, THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Tara Burns delivered on the 17th day of January, 2025

1. This is an appeal against the judgment of the High Court ([2023] IEHC 192, Hyland J.) refusing the appellant various reliefs, sought by way of judicial review, regarding the legality of the Rules of the Superior Courts (Judicial Review) 2011 (S.I. 691/2011) ('the 2011 Rules') and, in particular, the amendments which were effected by the 2011 Rules to O. 84, r. 21(1) and (3) of the Rules of the Superior Courts ('the RSC').

2. However, a preliminary issue arose for determination at the outset of this appeal, namely whether these proceedings are moot.

Background

3. The appellant was charged before Cavan District Court with false imprisonment and assault causing serious harm, contrary to ss. 15 and 4 of the Non-Fatal Offences Against the Person Act 1997.

4. On 28 March 2020, it was indicated to the District Court that the Director of Public Prosecutions was of the opinion that the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order and that she had certified her opinion pursuant to s. 48 of the Offences Against the State Act, 1939 ('the 1939 Act'). An application was successfully made for the appellant to be returned for trial before the Special Criminal Court.

5. On 14 August 2020, in separate proceedings to the instant proceedings *(H v. Director of Public Prosecution and Ors*), the appellant was granted leave to seek various declaratory reliefs, by way of judicial review. The reliefs sought related to the validity of the continued existence of the Special Criminal Court, having regard to the legislation which established the Court, which was asserted to be of a temporary and emergency type nature.

6. At the hearing of that action, by way of preliminary objection, the Director of Public Prosecutions submitted that the appellant was out of time in moving the leave application having regard to O. 84, r. 21(1) of the RSC, which provides that an application for leave to apply for judicial review "*shall be made within three months from the date when grounds for the application first arose*". It was argued that this date was the date the appellant was informed of the Director of Public Prosecution's certified opinion and was returned for trial to the Special Criminal Court. She further contended that the appellant had failed to proffer good and sufficient reason for the grant of an extension of time having regard to O. 84, r. 21(3) of the RSC.

7. On 24 March 2021, the High Court (Barr J.) refused the reliefs sought by the appellant in those proceedings (*H v. DPP* [2021] IEHC 215), on the basis that the application was out of time and that it was not appropriate, in the circumstances pertaining, to grant an extension of time.

8. The appellant did not appeal the decision of Barr J. He has indicated that he accepts that he was out of time in bringing the leave application and that the determination by Barr J. that he failed to advance a good and sufficient reason for failing to comply with the time limit was a determination open to Barr J. to make and is therefore unappealable.

9. Accordingly, the appellant's trial before the Special Criminal Court commenced on 28 May 2021. On 8 November 2021, he was found guilty of both counts with which he was charged and was sentenced, on 20 December 2021, to 30 years' imprisonment. His conviction and sentence is currently the subject of an appeal before this Court.

10. On 9 November 2021, the appellant was granted leave to apply, by way of judicial review, for a variety of reliefs in the instant proceedings, to include declaratory relief that the 2011 Rules are *ultra vires* the powers of the first respondent; that the 2011 Rules are repugnant to Art. 15.2.1 of the Constitution; that the provisions of legislation providing for the Superior Court Rules Committee and its powers are repugnant to Art. 15.2.1; and that there is nothing contained in such legislation indicating that the Oireachtas intended that applicants for judicial review would be subjected to the time limits envisaged by the 2011 Rules, together with damages.

11. On 29 July 2022, before these proceedings came on for hearing in the High Court, the Supreme Court delivered judgment in *Dowdall v. Director of Public Prosecutions & Ors*. [2022] IESC 36 ('*Dowdall*') wherein it upheld the validity of the continued existence of the Special Criminal Court. The

reliefs sought, and the grounds upon which they were founded, in *Dowdall* were similar to the reliefs sought in the appellant's proceedings before Barr J.

12. At the hearing of the instant action before the High Court (Hyland j.) (1 and 2 December 2022), the appellant informed Hyland J. of the Supreme Court's decision in *Dowdall.* However, the respondents choose not to argue the issue of mootness. Having heard the substantive case, Hyland J. determined to refuse the reliefs sought by the appellant.

13. The appellant appealed against the decision of the High Court to this Court, but also sought leave to pursue a direct appeal to the Supreme Court. Having considered the appellant's application, the Supreme Court did not immediately determine the matter, but rather directed that it be listed for oral hearing. In its judgment on the application ([2024] IESC 2), O'Malley J. explained that the reason the application was listed for an oral hearing was the concern of the Court that the case was moot having regard to the decision of the Supreme Court in *Dowdall*. Ultimately, the Supreme Court refused the appellant leave to appeal with O'Malley J explaining that a real question arose as to whether the proceedings were moot in light of *Dowdall* which was more appropriately considered by this Court in this appeal.

14. When the appeal before this Court came on for hearing, the Court raised the matter of mootness at the outset. The appellant's written submissions to this Court were silent on the issue of mootness. Neither did they advert to the judgment of O'Malley J. in relation to the appellant's application before the Supreme Court. The Court learnt that the appellant and respondents had answered, in writing, various questions asked by the Supreme Court in advance of oral argument. The Court asked to receive this material.

15. This Court determined that it would hear the mootness aspect of the case, on a preliminary basis, before moving to the substantive case. Having heard the submissions of the parties with respect to the issue of mootness, the Court determined to deliver its judgment with respect to this issue.

Submissions of the Parties

16. The appellant submitted that his case was not moot. He asserted that his right of access to the courts had been impermissibly interfered with by O. 86, r. 21(1) and (3) of the RSC, which he asserted were ultra vires the powers of the first respondent and therefore unlawful. While the appellant accepted that the substantive case before Barr J was doomed to failure in light of *Dowdall*, it was submitted that a live controversy existed as to whether his right of access to the courts had been unlawfully restricted. This, it was argued, was not dependent on his case before Barr J. being capable of success but rather was a standalone issue of importance.

17. The appellant submitted that a declaration that he was prevented from having his case before Barr J considered because of an ultra vires and unlawful amendment effected by the 2011 rules would vindicate him. It should be noted, however, that such a declaration was not sought by the appellant in his Statement of Grounds.

18. The respondents submitted that these proceedings were moot as they arose from the challenge by the appellant to the validity of the continued existence of the Special Criminal Court which was subsequently rejected by the Supreme Court in *Dowdall*. Those proceedings were determined against the appellant and were now finalised with no appeal having been brought by the appellant against the judgment of Barr J. Furthermore, the appellant's trial had taken place and was finalised before the Special Criminal Court. Accordingly, it was submitted that the appellant had no remaining interest in a successful outcome in the proceedings and a live controversy did not exist between the parties.

The Law

19. The legal question of when proceedings become moot has been considered in many cases. In *Gould v. Collins* [2005] 1 ILRM 1, Hardiman J explained the concept in the following manner:-

> *"A proceeding may be said to be moot where there is no longer any legal dispute between the parties…. Parties may have a real dispute at the time proceedings commence, but time and events may render the issues in proceedings, or some of them, moot. If that occurs, the eventual decision would be of no practical significance to the parties."*

20. In the leading case of *Borowski v. Canada* [1989] 1 SCR 342, the Supreme Court of Canada concluded:-

> *"An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the court is called upon to reach a decision."*

21. In *Lofinmakin v. Minister of Justice, Equality and Law Reform* [2013] 4 IR 274, McKechnie J, explained the reason why courts should decline to hear moot cases at paras 59 to 61 of his judgment, as follows:-

> *"[59] The rule by which a court will decline to hear and determine an issue on the grounds of mootness is firmly based on the deep rooted policy of not giving advisory opinions, or opinions which are purely abstract or hypothetical. This policy stems from and is directly related to the system of law within which our courts discharge their essential function of administering justice. Apart from any special jurisdiction*

conferred by statute, by the Constitution, or resulting from our membership of the European Union, the system in question is fully adversarial. Consequently, there must exist some issue(s), embedded within a factual or evidential framework, the determination of which is/are necessary so as to resolve the conflict or dispute which necessitated the proceedings in the first instance. It has therefore always been recognised that, without such a concrete foundation, the courts typically will decline to intervene.

[60] In addition to this basic justification for the rule, there are a number of other reasons which support its existence, including what has been described as 'judicial economy', which can also be termed 'judicial efficiency' or 'judicial effectiveness'. In a time of scarce and declining resources on the one hand and of an ever increasing stream of litigation, much of which is lengthy and complex, on the other, the courts must consciously scrutinise and carefully calculate how best they can fulfil their functions. Consequently, where necessity of resolution is not required, the courts quite correctly will be most reluctant to get involved.

[61] There is another related but broader consideration which must also be kept in mind: it is that the discharge of the judicial function is best performed where the reference point is focussed on resolving defined issues in a concrete legal setting. In that way there is much less danger of inadvertently overstepping the reach of the judicial role as envisaged in Article 34 of the Constitution…."

22. Having considered a range of cases from this jurisdiction together with the Canadian case of *Borowski*, McKechnie J. set out the principles which apply when the question of mootness arises for determination at para. 82 of his judgment:-

"(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing;

(ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined;

(iii) the rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model;

(iv) it follows as a direct consequence of this rationale, that the court will not – save pursuant to some special jurisdiction – offer purely advisory opinions or opinions based on hypothetical or abstract questions;

(v) that rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness;

(vi) in conducting this exercise, the court will be mindful that in the first instance it is involved in potentially disapplying the general

practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved. It will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice;

(vii) matters of a more particular nature which will influence this decision include:-

(a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for the case to retain its essential characteristic of a legal dispute;

(b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;

(c) the type of relief claimed and the discretionary nature (if any) of its granting, for example, certiorari;

(d) the opportunity for further review of the issue(s) in actual cases;

(e) the character or status of the parties to the litigation and in particular whether such be public or private: if the former, or if exercising powers typically of the former, how and in what way any decision might impact on their functions or responsibilities;

(f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law;

(g) the impact on judicial policy and on the future direction of such policy;

(h) the general importance to justice and the administration of justice of any such decision, including its value to legal

certainty as measured against the social cost of the status quo;

(i) the resource costs involved in determining such issue, as judged against the likely return on that expenditure if applied elsewhere; and

(j) the overall appropriateness of a court decision given its role in the legal and, specifically, in the constitutional framework."

22. The question or mootness is therefore determinable by reference to the "*two-step analysis*" outlined in *Lofinmakin,* namely a) are the proceedings moot, and if so, b) should the Court nonetheless exercise its discretion to determine the moot legal question.

The First Step—Are the Proceedings Moot?

23. As outlined in *Lonfinmakin*, the initial question to be determined is whether there is a live controversy, described as a tangible and concrete dispute, in existence between the parties.

24. The legal dispute which presented in the proceedings before Barr J, no longer is in existence between the parties. Apart from those proceedings being finalised, with no appeal taken by the appellant, the substantive legal issue which arose therein was determined to finality by the Supreme Court in *Dowdall* in terms that were against the appellant's case. Accordingly, what had been, at the time of the hearing before Barr J, a live dispute, no longer possess that character.

25. The appellant suggested that a live controversy is in existence, namely whether his right of access to the courts was unlawfully restricted by the amendments introduced by the 2011 Rules, even if that access was to litigate a case doomed to failure.

26. As explained in *FA v. IPAT* [2021] IECA 296, the doctrine of precedence does not render a case, where the same legal issues arise, moot, but rather renders it doomed to failure for the party advancing the argument which has failed before a higher court. Accordingly, the appellant is correct that his right of access to court is not limited to accessing court to litigate a potentially successful case. He has a right of access to court to litigate a doomed case, although there of course would be cost consequences in such a scenario. By way of example, had *Dowdall* been delivered by the Supreme Court in advance of the appellant's case being determined by Barr J., his case would not have been rendered moot by the Supreme Court's decision, but rather would have been doomed to failure.

27. The appellant is seeking to establish that the restriction placed on him by virtue of the amendments introduced by the 2011 rules unlawfully restricted his right of access to court. However, this is in circumstances where no further consequence now arise: his case before Barr J. is finalised with no appeal taken; the appellant's trial has taken place before the Special Criminal Court; the validity of the continued establishment of that Court has been upheld by the Supreme Court; the appellant accepts that he cannot mount a challenge to his conviction before the Special Criminal Court on the grounds of the validity of its continued establishment; and the appellant acknowledges that a damages claim will not arise as the case before Barr J was doomed to failure.

28. Accordingly, while the appellant is of the view that he would be vindicated in some way should the instant substantive issue be determined in his favour, there would be no practical significance to such a determination and he has no remaining legal interest in this outcome. By reason of the analysis conducted, a live controversy cannot be said to exist between the parties. The dispute in existence relates to the lawfulness of time limits imposed in respect of another case which has reached finality

and where the legal issue arising has been determined against the appellant in separate proceedings.

29. The right of access to courts is an important right, however it must be with a view to resolving a live controversy relating to a tangible and concrete dispute between the parties. A determination of unlawfulness of the time limit cannot be considered to be an end in itself, but rather must be in respect of some other benefit which is absent this case. The right of access to court is not an unlimited right and can be restricted in a number of circumstances, to include striking out if proceedings are an abuse of process, vexatious, or moot. Vindication for the appellant that the time limit imposed upon him was unlawful (if that proved to be the outcome of these proceedings, in relation to which I express no view), when his action was doomed to failure in the first place, and when no other practical benefit arises in the circumstances of this case, does not come within the realm of a live controversy.

30. Accordingly, I am of the opinion that the instant proceedings are moot as a live controversy has not been established to be in being.

The Second Step—The Court's Discretion

31. As explained by McKechnie J in *Lonfinmakin*, departing from the rule against hearing a moot case should be the exception and should be embarked upon by a court reluctantly and with caution. While the principles relating to the exercise of the Court's discretion to hear a moot case have been revisited by O'Donnell CJ in *Odum v. Minister for Justice and Equality [2023] 2 ILRM 164*, with particular reference to the Supreme Court exercising this discretion, I am the opinion that the circumstances arising in *Odum* are very different from the instant matter such that it can be distinguished and that the principles outlined in *Lonfinmakin* should guide my discretion in this matter.

32. Furthermore, the appellant's position was that the proceedings were not moot. He did not advance an argument that should the Court determine otherwise, there were particular reasons why the Court should take the exceptional step to exercise its discretion to hear the case.

33. The issue which arises in the instant proceedings, namely the lawfulness of the 2011 Rules is a matter which may be litigated in any other case where a litigant faces this statutory obstacle. Indeed, applications to extend time to bring a leave application are a regular feature in Judicial Review cases. Accordingly, this matter may be litigated at any stage in the future in a case involving a live controversy. The refusal of this Court to hear the substantive issue will not have the effect of the law standing without the possibility of challenge for a significant period of time. In addition, the law in this area is not uncertain and has been considered on a number of occasions by the appeal courts. Having regard to the fact that the appellant will not be in a position to utilise the benefit of a declaration that the 2011 Rules were ultra vires the first respondent and therefore unlawful, (if that proved to be case after the Court heard the instant proceedings, in respect of which I express no opinion), together with the other considerations outlined above, I am of the view that the justice of the case does not require the Court to depart from the rule that this Court should not hear a moot case.

Conclusion

34. I am of the opinion that the legal issues sought to be determined by the appellant in these proceedings are moot and that the justice of the case, having regard to the matters set out in *Lonfinmakin*, does not require me to depart from rule against hearing moot cases.

35. Accordingly, I am upholding the appellant's preliminary objection to the hearing proceeding on the basis that the proceedings are moot. I therefore dismiss the appellant's appeal on this basis.

Approved

No Redaction Needed