**[2020] IEHC 53**

**THE HIGH COURT**
**JUDICIAL REVIEW**

**[2017/642 JR]**

**BETWEEN**

**STEPHEN RYAN**

**APPLICANT**

**AND**
**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 12th day of February, 2020**

**Issues**

1. In these proceedings the applicant is seeking an order of certiorari quashing the decision of the District Court (Judge Patrick Durcan) made on the 10th of May, 2017, whereby he refused jurisdiction in respect of a charge against the within applicant (to the effect that on the 6th of March, 2016, he assaulted a third party causing him harm, contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997). In addition, the applicant seeks an order amending the statement of grounds.

2. The claim grounding the order of *certiorari* is:

   (a) the Judge failed to give reasons and/or his decision was irrational; and,

   (b) the decision was reached in breach of fair procedure.

**Background**

3. The incident, the subject matter of the charge against the applicant, occurred on the 6th of March, 2016, and thereafter the matter came before the District Court from time to time. On the 12th of October, 2016, the within District Judge accepted jurisdiction having heard that the DPP was directing summary disposal of the matter and having heard evidence in relation to the charge, namely that the applicant allegedly head-butted a third party and fractured his nose.

4. In due course the trial of the matter was listed for hearing before Judge Lucey on the 28th of March, 2017, but was not reached. On that date the matter was adjourned for mention only to the 10th of May, 2017, for the purpose of securing a new trial date, and in those circumstances the within applicant's presence before the Court on the 10th of May, 2017, was excused. In advance of the 10th of May, 2017, the applicant's solicitors agreed with Inspector Kennedy who was presenting the case for the prosecution that, subject to the court, an agreed hearing date would be the 13th of June, 2017.

5. On the basis of the foregoing background the applicant's solicitors instructed an agent solicitor, Ms. Brennan, to represent the applicant in the District Court on the 10th of May, 2017, for the purpose of securing the date of trial.

6. The digital audio recordings (DAR) in respect of this matter both on the 12th of October, 2016, and the 10th of May, 2017, are before the court.

7. On the 12th of October, 2016, the Judge inquired as to whether or not he had dealt with jurisdiction, and in circumstances where he had not, the Judge asked the Inspector to tell him about the matter. The Judge inquired as to whether the accused was in court and on being told he was, the Judge directed him to a particular seat. Thereafter the Inspector gave brief evidence of the alleged assault in a night club in Ennis and furnished the court with a medical report on the third party from his GP. The Inspector also indicated that the DPP was directing a summary disposal. The Judge stated that he would accept jurisdiction. Thereafter the matter was adjourned further.

8. On the 10th of May, 2017, when the matter was called, Ms. Brennan indicated that she appeared for the applicant and the Judge stated that the matter involved a s.3 assault. The Judge asked the Inspector what the matter was about "*…again, will you just remind me?*" The Inspector gave brief evidence of the alleged incident without being in a position to furnish dates but did furnish the court with the same medical report which was furnished on the 12th of October, 2016, whereupon the Judge indicted that the matter was too serious and declined jurisdiction. Following a brief interchange with the Inspector, the Judge indicated that the matter would be listed again on the 19th of July, 2017. Ms. Brennan clarified the adjournment date and that concluded the matter before the Judge.

9. The applicant's solicitor on record, Ms. Catriona Carmody, swore an affidavit to ground the application for judicial review which affidavit is dated the 31st of July, 2017. In para. 8 thereof she deposed to the fact that Ms. Brennan had informed her that the court was advised of the prior hearing date and that the matter was in the list to secure a new date, the Inspector had indicated it was an assault matter and the Judge declined jurisdiction and put the matter in to the 19th of July, 2017, and the Judge was not informed of any detail of facts.

10. The statement of grounds is dated the 30th of July, 2017. The relief of certiorari quashing the decision of the 10th of May, 2017, together with an order staying the prosecution until the determination of the within proceedings is sought. Thereafter the factual background to the 10th of May, 2017, is set out including the agreement that subject to the court the matter would be listed for hearing on the 13th of June, 2017, and further indicated that the scope of the instructions given to Ms. Brennan were as aforesaid. The asserted factual background was as per para. 8 of the affidavit aforesaid of Ms. Carmody as opposed to in accordance with the facts now known because of production of the DAR.

11. The statement of grounds suggests that Judge Durcan without explanation reversed his earlier determination to accept jurisdiction and did not give reasons. It is alleged that the decision was arrived at *ultra vires* and/or was unfair. It is asserted that the Judge failed to have regard to relevant considerations and had regard to irrelevant considerations. It is asserted that the decision was irrational and made without advance notice in the absence of the applicant and his duly instructed solicitor and without the opportunity for submissions.

12. In the statement of opposition of the 11th of January, 2019, it is denied that the Judge took into consideration irrelevant factors and it is asserted that he made his decision on the basis of medical evidence he was provided with and gave specific reasons namely that the matter was too serious to be dealt with summarily.

13. Furthermore, it is denied that there was a breach of fair procedure as the applicant had a legal representative, Ms. Brennan, in court to defend his interests and she had the opportunity to make submissions if she wished but did not do so. Further, it is indicated that Ms. Brennan could have sought an adjournment to take further instructions but again did not do so.

14. The statement of opposition was grounded upon the affidavit of Inspector Kennedy of the 18th of December, 2018, and at para. 5 he states that he understood the case would receive a hearing date which was to be the 8th of June, 2017. At para. 7 he said the Judge was not informed that the matter was simply listed for mention for a new hearing date or that the matter had been previously listed and he further indicated that no submissions in relation to the issue of jurisdiction were made by either side. At para. 9 it is stated that the Judge was unaware that the issue of jurisdiction had been dealt with previously. At para. 11 it is stated that no issue was raised by Ms. Brennan. At para. 12 it was indicated that the matter came before Judge Durcan on the 19th and 26th of July, 2017, but the applicant did not raise the issue of jurisdiction with the District Court. It is indicated that prior to the issue of the DAR being resolved the applicant maintained the within proceedings on the 31st of July, 2017.

15. In the events, considerable difficultly was encountered by the applicant in obtaining a copy of the DAR from the District Judge and in fact the District Judge refused to afford a copy of the DAR. Ultimately, by way of application on the 4th of October, 2017, heard on the 8th of January, 2018, an order was made entitling the applicant to a copy of the DAR of the two relevant dates. The DAR became available to the applicant on the 18th of June, 2018.

16. In July, 2019 leave was afforded to the applicant to issue a notice of motion seeking to amend the statement of grounds and it was agreed between the parties that said amendment application would take place at the trial of the within judicial review proceedings.

17. The amendment sought was to the effect that the Judge was not informed that: he had previously accepted jurisdiction; that the matter had been previously listed on the 28th of March, 2017, but was not reached; that the matter was in the list on the 10th of May, 2017, to fix a new hearing date; that agreement on the proposed new hearing date had been reached; that the accused had been excused from attending on that day; that the accused was represented by a solicitor acting on behalf of Ms. Carmody on the 10th of May, 2017; and, that the Judge was not provided with the report from an ENT specialist which it is suggested failed to confirm that the injured party had a fracture to his nose. It is asserted that without considering the matter any further the Judge without explanation reversed his earlier determination to accept jurisdiction.

**Amendment**

18. The applicant asserts that there is no time limit for the making of an application to amend a statement of grounds in judicial review proceedings. The applicant relies on Mr. Justice Humphreys' judgment in *W (B) v. Refugee Appeals Tribunal and Ors.* [2015] IEHC 725, to support this contention. The applicant asserts that in accordance with that judgment the amendment is arguable, an explanation (on the basis of a low threshold as mentioned by Mr. Justice Humphreys) is available and no prejudice is occasioned to the respondent.

19. I am not in agreement with the applicant's assertion as to the breadth of application of the judgment of Mr. Justice Humphreys, particularly in relation to any excusing of a time delay or that it was permissible for the applicant to make an application to amend the statement of grounds beyond the period of three months from the date upon which the applicant was in possession of all necessary information and documents to support the amendment sought.

20. Nevertheless, in circumstances where the amendment merely reflects more accurately the events of the 10th of May, 2017, and where the respondent was not viewing the issue on the basis of a delay in making the application for amendment (but rather was attempting to resist the application for an amendment on the basis that it represented an about turn on the part of the applicant as to the factual circumstances grounding the application for judicial review), I do not intend to determine the issue of amendment on the basis of delay.

21. The respondent instead relied upon the Supreme Court judgment of *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29, and in particular the judgment of Fennelly J. to the effect that if leave is granted and an amendment is sought outside the time limits, the applicant must justify the application and explain the delay and the reasons why the amendments were not included in the original statement of grounds. Mr. Justice Fennelly indicated that in explaining the delay same would be just as in the case of a late application. The court noted that courts are reluctant to admit new grounds which comprise an entirely new cause of action.

22. In the circumstances given that:

    (1) the amendment sought is limited to reflecting more accurately the events which occurred before Judge Durcan on the 10th of May, 2017;

    (2) there is no suggestion that the respondent has been prejudiced in any way;

    (3) the respondent is aware of the nature of the amendment sought since the respondent was served with a notice of motion in or about July, 2019 and indeed prior to that date when the applicant sought the consent of the respondent to the making of said amendments;

    (4) there is no replying affidavit entered by the respondent seeking to refuse the relief of an amendment; and,

(5) time is not a factor being relied upon by the respondent.

I am satisfied that it is in the interests of justice and would aid the court in properly disposing of the matter to afford the applicant leave to make the necessary amendments to the statement of grounds.

**Reasons**

23. The applicant argues that the District Judge did not give a reason for his refusal to accept jurisdiction in the matter, and as such, a refusal based on the same facts presented to the Judge on the 16th of October, 2016, was irrational.

24. The respondent relies on the case of *Reade v. Reilly* [2009] IESC 66 , where the District Judge accepted jurisdiction but on hearing some of the evidence he subsequently changed his mind, following which the accused brought judicial review proceedings. Mr. Justice Charleton in the High Court stated that the District Judge was not only at liberty to change his mind but was obliged to do so if he felt that a summary disposal of the matter was not appropriate, and by doing so he ensured the accused's constitutional rights were upheld. It was stated that the District Judge could change his mind without an additional hearing or a change in evidence. In the appeal to the Supreme Court it was indicated that if the evidence disclosed a non-minor charge the District Court was not entitled to try the case.

25. In fact, Judge Durcan was not given precisely the same evidence on the 10th of May, 2017, as was given on the 16th of October, 2016. A fundamental variable was the fact that the Judge was not advised that the DPP had directed a summary disposal. The Judge indicated that the charge was too serious to be disposed of in a summary manner. The Judge appears to have been unaware that his decision of the 10th of May, 2017, was not in accordance with a prior decision made by him and he was not advised of his decision of the 16th of October, 2016.

26. In the circumstances and based on the DAR transcript provided, I am satisfied that the applicant has failed to establish that the Judge did not give reasons for his decision on the 10th of May, 2016, or that his decision was otherwise irrational.

**Breach of fair procedures**

27. At para. E10 of the statement of grounds the applicant complains that there was a breach of fair procedures in that the decision was taken without advance notice, in the absence of the applicant and his duly instructed solicitor, and without the opportunity for submissions to be made.

28. During the course of oral submissions, the applicant also complained that only one of two possible medical reports were furnished to the District Judge. In this regard, the second report that was not furnished does not in fact confirm that the injured party did not suffer a fracture to his nose, as suggested by the applicant. The applicant also complained that the decision was made on the basis of partial facts only.

29. In *Lawlor v. Hogan* [1993] ILRM 606, Murphy J. held that an accused has a fundamental constitutional right to be present and to follow proceedings. The judicial process requires the presence of the accused to enable such process to be performed. If, however, the accused conscientiously absents himself from the hearing the District Judge has a discretion as to whether or not to proceed.

30. In *Dawson v. Hamill* [1990] 1 I.R. 213, Lynch J. dealt with a matter where counsel had been excused by the District Judge in respect of the date for which the matter was put in for judgment. However, on that further date, additional evidence was heard and therefore the accused was not represented by his counsel of choice or any other agreed person. A grant of certiorari was afforded.

31. In *Richards and Anor. v. O'Donohoe* [2013] IEHC 487, Birmingham J. held that fairness of procedure requires an opportunity to be heard. In that matter the accused's appeal was allowed. He left the building and in his absence the Judge reinstated the matter, an essential witness for the prosecution then being present. An order quashing the decision was afforded. The matter was appealed to the Supreme Court. O'Malley J. in the Supreme Court dealt with the "*breast of court jurisdiction*" and indicated that this involved a prompt application to apply to the District Court to vacate an order and that it is not a facility exercisable where the party seeking to reverse the order was represented and made no effort of a formal nature to object to its making.

32. In *Lynch v. Anderson* [2010] IEHC 284, Kearns J. accepted jurisdiction on the basis that the invalidity of the charge was raised from the outset.

33. In the UK case of *R. v. Leyland Magistrates* [1979] 1 AII ER 209, following the discovery of two further witnesses who might have been called to assist the accused's position and known to the prosecution, the applicant sought an order of certiorari to quash a conviction. It was held that although certiorari would not be likely to quash the decision in order to introduce fresh evidence, the failure of the prosecution to notify the applicant of the existence of two witnesses had prevented the court from giving the applicant a fair trial and notwithstanding that the court had not themselves been in error, certiorari would nevertheless go to quash the conviction.

34. In *Regina v. Criminal Injuries Compensation Board* [1999] 2 A.C. 330, a decision of the House of Lords, a claim before the respondent was rejected on the basis that the medical evidence gave no assistance in determining the applicant's claim. The essence of the claim before the House of Lords was to the effect that there is jurisdiction to quash the respondent's decision because that decision was reached on a material error of fact with reference being made to Wade & Forsyth, Administrative Law, 7th Edition (1994), pp.316-318, where it was stated that such a ground of review had long been familiar in French law and had also been adopted by statute in Australia. The text book states that:

> *"It is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy. If a "wrong factual*

*basis" doctrine should become established, it would apparently be a new branch of the ultra vires doctrine."*

35. In de Smith, Woolf & Jowell, Judicial Review of Administrative Action, 5th Edition (1995), at p. 288, it is stated:

> *"The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention."*

36. In the House of Lords, the court was satisfied that there was jurisdiction to quash on the ground that what happened in the proceedings was a breach of the rules of natural justice and constituted unfairness. It was stated that it did not seem to be necessary to find that anyone was at fault in order to arrive at such a result. It being sufficient if objectively there is unfairness. During the course of the judgment the court held that the board was very dependent on the assistance and co-operation of the police who have investigated the alleged crimes of violence.

**"Breast of the court"**

37. The respondent argues that the applicant might have applied before Judge Durcan on the adjourned date in July, 2017 when the matter came again before the court in relation to the decision made on the 10th of May, 2017. Further it is highlighted that the applicant was represented by a solicitor and if only to agree a date of the 13th of June, 2017, clearly the date given being the 19th of July, 2017, should have alerted such solicitor. The respondent highlights that there was no application to make submissions. Indeed there is not before the Court either the note of, or an affidavit of Ms. Brennan. The respondent suggests that the Inspector contributed to the difficulty presented to the court but was not entirely responsible.

38. In my view, the breast of the court jurisprudence does not apply in the instant circumstances because:

(1) even when the matter was before the court on the 19th of July, 2017, the applicant's solicitors clearly did not then have a full picture of what in fact occurred on the 10th of May, 2017, as is evident from the subsequent statement of grounds and grounding affidavit of Ms. Carmody;

(2) the adjourned date was in excess of two months after the impugned order, therefore, was not sufficiently proximate to engage the breast of the court jurisprudence; and,

(3) difficulty would have been encountered by the applicant on foot of the jurisprudence in *Richard & Anor. v. O'Donohoe* aforesaid where O'Malley J. indicated that such jurisprudence is not exercisable where the party seeking to

reverse the order was represented and made no effort of a formal nature to object to its making.

**Decision**

39. The manner in which the court dealt with the issue of jurisdiction in respect of the instant charge was properly dealt with on the 16th of October, 2016 when:

    (a) the court inquired as to whether or not the accused was present;

    (b) the court insisted on the accused sitting in a particular area - this suggests that he was being positioned within the court to appreciate the significance of what was taking place; and,

    (c) the court had been advised by the Inspector that the DPP was directing a summary disposal of the matter.

None of the foregoing factors were present at the hearing on the 10th of May, 2017.

40. When the court inquired of the Inspector as to what the matter was about, it does appear to me that it was appropriate for the Inspector to advise the court that the matter was in for mention to seek an alternate date of trial, having not been reached on the previous occasion. In my view, in affording the selective factual background, including failure to advise that the accused was excused from being present on that particular date, and that the court had previously accepted jurisdiction, unfairness in the process was triggered.

41. The applicant's unhelpful representation before the court in respect of possible submissions or indeed an accurate note of what occurred, either on the date, or by way of explanation to the court, to the effect that Ms. Brennan was not in a position to deal with anything other than agreeing an alternate trial date, in my view, contributed to the unfairness. In addition, the court in departing from the procedure adopted on the 16th of October, 2016, compounded the unfairness to the applicant accused.

42. Although as is apparent from the foregoing the applicant's representation on the date was in part responsible for the difficulties presented, this must be seen in light of the fact that the matter was in for mention to fix a date for a new trial, which in fact had been agreed, and in circumstances where the applicant accused had been excused from attending.

43. Accordingly, I am satisfied that objectively unfairness was present in or about the hearing which gave rise to the impugned decision on the 10th of May, 2017. A considerable degree of such unfairness arose because of the limited description by the Inspector as to what was then before the court, in circumstances where it is clear from the transcript that the court in arriving at its decision was relying on the Inspector's account and the accuracy thereof.

44. Accordingly, I am satisfied that the applicant has demonstrated that there was a breach of the rules of natural justice resulting in procedural unfairness to the applicant sufficient to quash the decision of the 10th of May, 2017. In my view, the applicant's

representative's complicity in such unfairness can more properly be dealt with in the relevant order for costs, as opposed to by depriving the applicant of the reliefs sought.

45. An order will be made quashing the decision of the District Judge made on the 10th of May, 2017, together with an order remitting the matter to the District Court for further consideration.