

THE HIGH COURT

[2022] IEHC 173

RECORD NO. 2019/737JR

BETWEEN

OLIVIER ALARY

APPLICANT

AND

CORK COUNTY COUNCIL AND BY ORDER LEONARD MCCARTHY

RESPONDENTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 16 March 2022

Introduction

1. The applicant seeks to challenge by way of judicial review his conviction on 24 July 2019 in Bantry District Court for three offences for engaging in casual trading without a valid casual trading licence contrary to s.3(1) and s.3(3) of the Casual Trading Act 1995 ("the 1995 Act") on respectively 26 November 2018, 6 December 2018 and 24 January 2019. Charges that he had failed, refused or neglected on each of these occasions to comply with a requirement of an authorised officer contrary to Section 10(4) and Section 10(6) of the 1995 were taken into consideration. For the section 3 offence committed on 26 November 2018, the District Judge imposed a fine of €500. For that committed on 6 December 2018, he imposed a fine of €1,000. For that committed on 24 January 2019, he imposed a fine of €1,500. In each case the applicant was given 6 months to pay the fine and was told of his right to appeal the convictions of the Circuit Court within 14 days. Recognisances were fixed in the amount of €100. The applicant did not appeal. On 21 October 2019, the applicant sought and obtained leave to bring the within proceedings as against the Council and a notice of motion was issued to join the second named respondent. On 4 February 2020 an order was made joining the second respondent.
2. The applicant has previously taken unsuccessful judicial review proceedings against the Council relating to an earlier conviction on 30 September 2016, whereby he was found guilty of engaging in casual trading selling artisan breads at Wolf Tone Square, Bantry Co Cork. He was convicted in the District Court and on appeal by the Circuit Court on 21 July 2017 his conviction was upheld, and he was fined €100. He judicially reviewed his conviction and the matter was heard before Noonan J. Judgment was delivered on 24 July 2018 dismissing the application. The applicant appealed the dismissal of his case to the Court of Appeal. Judgment was delivered by Binchy J. on 23 March 2021 dismissing the appeal. Many of the matters that were heard and determined, not just by the High Court but also by the Court of Appeal, have been raised again in these proceedings. I deprecate the waste of Court time in raising issues in these proceedings that have already been determined in the context of other proceedings.
3. The applicant represents himself but that does not absolve him of the need to identify with precision grounds of challenge that are known to law. That is clear from, *inter alia*, the decision of MacMenamin J. in *C O'S v Doyle* [2014] 1 IR 556 where he held that the obligation to identify the real issues and properly frame and plead a judicial review binds all litigants. The applicant has failed to do this. Many of the points raised by the applicant

do not amount to grounds known to law. I address below those grounds that can be identified as discrete arguments capable of being adjudicated upon.

Validity of summons

4. The first point raised by the applicant is that the summons for the offences of which he was convicted were addressed to him at 23 Wolf Tone Square, Bantry Co Cork, which he says does not exist as an address. He asserts that this invalidates the convictions. In support of this point he subpoenaed a number of witnesses who were obliged to travel from West Cork and spend the day in Court. He examined them on diverse subjects such as whether the address is a valid one, how the address was identified for the purpose of the summons, whether he had previously provided that address to the Council in the course of a telephone conversation and other points. None of this evidence was relevant to the determination of these proceedings, both because the facts in relation to the address on the summons were largely undisputed and, more significantly, because the point is entirely misconceived.
5. The erroneous address did not affect the validity of the summons in circumstances where the applicant was personally served with the summons by Garda O'Donovan at Wolf Tone Square, Bantry on 15 June 2019. Garda O'Donovan endorsed statutory declarations of service on 27 June 2019 and swore an affidavit of service on 2 December 2019. Indeed, in a letter of 25 June 2019, prior to the hearing, the applicant complained to the District Court office that the summons was fraudulent as 23 Wolf Tone Square was not a proper address. At paragraph 24 of the affidavit of Mr. O'h-Ici, authorised officer pursuant to the Casual Trading Act 1995 Act, on behalf of the Council, sworn 25 May 2021, he avers that Judge McNulty said at the hearing that he was satisfied the applicant was aware of the summons. There is no conflict in respect of any of these facts.
6. Despite this, the applicant sought liberty to examine Sgt. Bohan, a sergeant at Bantry Garda station, although no affidavit had been sworn by Sgt. Bohan in these proceedings. Barr J. refused liberty. Nonetheless the applicant went ahead and served a subpoena on Sgt. Bohan. The Council had no knowledge of this in advance of the case and only learnt about it on the day of the hearing. Sgt. Bohan travelled from West Cork on foot of the subpoena and was present at the start of the hearing. After submissions as to whether I should hear Sgt. Bohan, I permitted the applicant to examine Sgt. Bohan. This was because, as I explained at the hearing, Sgt. Bohan was in court, the applicant indicated he was likely to be very short with him, and given the importance of moving the matter along, I decided I would take a pragmatic approach and allow the applicant to examine him. As Sgt. Bohan gave evidence, it quickly became clear that Sgt. Bohan had served the applicant with a summons in an entirely different case and one that had no relevance to the instant proceedings. A full day of Sgt. Bohan's time was wasted in him coming to Dublin for the purpose of giving quite irrelevant evidence in these proceedings. It is quite wrong that the applicant should have wasted both Court time and that of Sgt. Bohan in this way.

7. In circumstances where Barr J. had refused to give liberty to examine Sgt. Bohan, I find that it was an abuse of the process of the Court on the part of the applicant to serve a sub-poena on him and require him to come to court.
8. Returning to the question of the wrong address, as noted above, the applicant was personally served and therefore the incorrect address on the summons did not in any way prejudice him insofar as service is concerned. The applicant participated fully in the District Court hearing on 24 July 2019.
9. Further, the case of *Payne v Brophy* [2006] 1 IR 560 makes it clear that technical or procedural defects in a summons do not go to the jurisdiction of the summons where they do not relate to the validity of the complaint.
10. Accordingly, the applicant has failed to make out even a stateable case that the incorrect address on the summons rendered the convictions invalid, even assuming for the purpose of the argument that this argument is one susceptible to judicial review proceedings, as opposed to an appeal point.

Provision of documents

11. The next matter raised by the applicant is that he provided documents in advance of the hearing to the District Court office and that those were not made available to the District Judge. The documents appear to have been the letter of 25 June 2019 that I refer to above, complaining about the inaccuracy of the address at 23 Wolf Tone Square, and emails from 2018 where he alleged "fraud" in the summons due to the incorrect address and the fact that he did not consent to his name being spelt in lower case. However, the applicant himself accepted both in his statement of grounds at paragraph 9 and during his submissions at the hearing, that he provided copies of the documents in question to the District Court Judge at the hearing and that the District Judge accepted those documents. This is confirmed by the affidavit of Mr. McCarthy, Chief Clerk, Clonakilty District Court Office, sworn 28 October 2021, where he avers as follows:

"... before I could locate the documentation, the applicant herein handed me another copy of the documents which copy I gave to the Judge who then proceeded to hear the case. I say therefore that all matters were before the Judge on the day and that no matter was withheld from the Judge in any fashion".

12. Moreover, Mr. McCarthy, while being cross examined by the applicant, explained that he had told the applicant that evidence in the District Court was given viva voce but that he eventually said he would take the documentation, would put it in the file but that the Judge would not see the documentation until the case started in Bantry. In the course of cross examination, the applicant accepted that it was correct that he had been told this by Mr. McCarthy.
13. In those circumstances it is difficult to see why this ground was advanced at all given that the applicant knew the material would not be provided in advance. Moreover, there is no

dispute but that he received the material. In the circumstances I am satisfied this ground of challenge is quite unstateable.

Unconstitutionality and/or invalidity of the 1995 Act/Bye-Laws

14. The applicant appears to make an argument that (a) the Casual Trading Act 1995 Act and the Bantry Bye-Laws are unconstitutional and/or in breach of the common law or Magna Carta Hiberniae and (b) the fact that casual trading Bye-Laws were not made other than for places other than Bantry invalidates the Bantry Bye-Laws.
15. In relation to the constitutionality/common law/Magna Carta plea, I agree with the pleas of the Council in its statement of opposition to the effect that the applicant's statement of grounds discloses no stateable case in support of these pleas. I further agree that the matters are *res judicata* as between the applicant and the Council, the said issues having been determined- and roundly rejected - by the High Court and Court of Appeal. In this respect, I refer to paragraphs 11-15 of the judgment of the High Court in *Alary v Cork County Council* [2018] IEHC 544 and paragraphs 19 to 29 of the judgment of the Court of Appeal in *Alary v Cork County Council* [2021] IECA 84 which address these precise claims. Those judgments conclude, *inter alia*, that there is a right to regulate Bantry market under the 1995 Act. The cases of *Listowel Livestock Mart Ltd. v William Bird & Sons Ltd* [2009] 4 IR 631, *Simmonds v Kilkenny Borough Council* [2007] IEHC 208 and *Simmonds v Ennis Town Council* [2012] IEHC 281 clearly establish the power to regulate a market by bye-laws made under the 1995 Act and to require that traders at any such market hold casual trading licences.
16. I agree with the Council that it is an abuse of process for the applicant to be asserting the same in the current proceedings and I therefore do not propose to entertain this ground of challenge.
17. In relation to the point made that other towns do not have similar Bye-Laws, no legal argument has been advanced as to why this is unlawful. Accordingly, I reject this ground of judicial review.

Jurisdiction

18. Next, it was alleged that the District Judge had no jurisdiction to convict the applicant. The sequence of events at the hearing was set out in full in Mr. O'h-Ici's affidavit of 25 May 2021 and appears to be as follows. The applicant did not appear when the summonses were called at Bantry District Court on 24 July 2019. A bench warrant was issued. The applicant was arrested and brought to Court by member of An Garda Síochána. When the case was called, the applicant refused to cooperate with the proceedings and refused the proffered legal representation. The trial proceeded. Evidence was given by Mr O'h-Ici in respect of the Bantry Bye-laws and of the commission of the offences alleged in the summons. The applicant declined the opportunity to cross-examine Mr O'h-Ici. He declined to give evidence on his own behalf. He repeatedly interrupted the Judge saying that he was a man and not a legal person and that he had a soul and that the Judge did not have the authority to hear the case. He read out written submissions arguing, *inter alia*, that 23 Wolf Tone Sq. was not an address in Ireland.

19. I can see no basis whatsoever for the argument that the Court did not have jurisdiction. The applicant has made all sorts of utterly unstateable and incomprehensible arguments about him being a living man, not a dead fiction nor a legal entity and a person whose name is only valid when written in lowercase. None of these submissions appear to have any relevance to the within proceedings or the conviction. Insofar as they are deployed to seek to argue that the Court did not have jurisdiction I reject them in their entirety.

Estoppel

20. Next the applicant argues that he is not bound by the Bye-Laws because he did not consent to them. At paragraphs 20 and 21 of his statement of grounds he refers to an email sent by him in October 2015 to the Council outlining his terms and conditions for trading in Bantry. He argues that, because this was not objected to within 7 days, his terms and conditions for trading were unconditionally accepted by the Council.
21. A person is bound by the Bantry Bye-Laws irrespective of whether he or she consents to them. The notion that the applicant could effectively escape from his obligations under the Bye-Laws by sending the terms upon which he would trade to the Council, and that the Council is bound by same if they do not object within 7 days, is a complete legal nonsense.
22. Moreover, this argument has already been addressed by the Court of Appeal where it is stated at paragraph 31 as follows:

"31. The appellant also advanced arguments to the effect that he is not bound by the Bye-laws because he did not consent to them, and that the respondent is estopped from relying upon them by reason of a notice he served on the respondent in November 2018. He also places some reliance on a notice he served on the respondent as far back as October 2015, protesting about the Bye-laws and their enforcement by the respondent. These arguments are entirely without substance or merit whatsoever."

Differential Treatment

23. As in the previous judicial review proceedings brought in respect of convictions for casual trading in Wolf Tone Square, the applicant complained at the hearing that he had been singled out for treatment and that other traders whom he believes may not be trading in compliance with the 1995 Act are not stopped by the Council. No factual or evidential basis for that argument has been identified. The applicant sought to introduce photos at the trial for the first time in support of this argument but I refused to allow same given the lateness of the application and the failure to obtain leave in respect of the matters sought to be advanced at the trial. Even if this argument had been properly before the Court, I note the comments of Binchy J. in *Alary* at paragraph 30 where he noted that it was no function of the Court in proceedings such as these to engage in an investigation of such complaints which are concerned with the implementation of the Bye-Laws and not their validity and which are not properly within the ambit of the pleadings.

Conclusion

24. The applicant has failed to identify any legal arguments that would warrant the quashing of his convictions. Accordingly, the within proceedings are dismissed.
25. I propose to make a costs Orders against the applicant in favour of the first and second named respondents in circumstances where he has been entirely unsuccessful in all his arguments. If any of the parties wish to argue against this course of action they should file written submissions *on the question of costs only* by *24 March 2022*, such submissions to be delivered by email to the registrar.
26. The judicial review will be listed before me, remotely only, i.e. on-line and not in person, for final Orders on 30 March 2022 at 10:00am. The parties should contact the registrar if necessary for details as to how to access the on-line hearing.