APPROVED **[2023] IEHC 139**

THE HIGH COURT
JUDICIAL REVIEW

2023 No. 207 J.R.

BETWEEN

G.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF GARDA CRAIG GEOGHEGAN)

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 March 2023

INTRODUCTION

1. The within proceedings take the form of judicial review proceedings pursuant to Order 84 of the Rules of the Superior Courts. Leave to apply for judicial review was granted *ex parte* by reserved judgment dated 14 March 2023, *G. v. Director of Public Prosecutions* [2023] IEHC 134 ("***the leave judgment***"). The applicant subsequently contacted the registrar by email on 16 March 2023 and requested that the leave judgment be amended to "*expand upon*" the reasoning on what were described as "*core elements*" of the applicant's submissions on the leave

application. The applicant's email then identifies three paragraphs of the leave judgment which are of concern to him.

2. Having considered this email, I directed the registrar to inform the applicant that I did not intend to revisit the leave judgment. I also directed that the leave order should be finalised, i.e. "*perfected*", to ensure that the applicant had sufficient time to issue an originating motion in advance of the return date of 27 March 2023. The present judgment recites the rationale for my decision not to revisit the leave judgment.

EXCEPTIONAL JURISDICTION TO REVISIT WRITTEN JUDGMENT

3. Much of the case law on the jurisdiction to revisit a written judgment is concerned with appellate courts, rather than courts of first instance. (See, generally, *In the matter of Greendale Developments Ltd (No. 3)* [2000] 2 I.R. 514 and subsequent case law). This is because a party who is dissatisfied with a judgment of first instance will typically have a right of appeal against that decision. This right of appeal will generally provide a party, who is aggrieved by a first instance judgment, with an effective remedy. The grounds upon which a judgment may be appealed are much broader than the grounds upon which a court of first instance can revisit its own judgment.

4. It is only at appellate stage that the jurisdiction to revisit a written judgment assumes an especial significance. This is because an application to revisit the written judgment may be the only avenue open to a party dissatisfied with a decision of an appellate court. In practice, such applications are rare, and even more rarely successful.

5. The Court of Appeal has confirmed, in *Bailey v. Commissioner of An Garda Síochána* [2018] IECA 63, that a court of first instance has jurisdiction, prior to the order envisaged by the judgment having been drawn up and perfected, to revisit an issue decided in a written judgment. The Court of Appeal posited the following test. The High Court, if asked to revisit an issue already decided in a written judgment, must be satisfied that there are "*exceptional circumstances*" or "*strong reasons*" which warrant it doing so. The principle of legal certainty and the public interest in the finality of litigation dictate that such a jurisdiction must be exercised sparingly. The Court of Appeal went on to explain that these considerations apply with even greater force to the decision of an appellate court, which is normally to be regarded as final and conclusive.

6. A very useful summary of the principles is to be found in the judgment of the High Court (McDonald J.) in *HKR Middle East Architects Engineering LL v. English* [2021] IEHC 376.

7. The following considerations appear to me to be relevant to an application to revisit a decision of first instance in respect of which there is an unrestricted right of appeal. The judge who is asked to revisit their own judgment should have regard to the fact that, on most occasions, the appropriate avenue of redress for a person aggrieved by a judgment is to exercise their right of appeal. The parties to litigation are entitled to assume that, absent an appeal, a written judgment, which has been approved by the judge and has been published, is conclusive.

8. A party who is dissatisfied with a written judgment should not normally be entitled to reagitate their proceedings before the court of first instance. Were this to be allowed to happen, it would, in effect, insert an additional layer of judicial decision-making, whereby a party would seek to have the judgment

revisited by the trial judge, as a prelude to an appeal if unsuccessful. This would add to delay and involve the parties incurring further costs. The proceedings would, in effect, be subject to three hearings: (i) the initial hearing; (ii) the hearing of the application to the court of first instance to reopen its judgment; and (iii) the hearing of the appeal.

9. There will, however, be limited circumstances in which it may be appropriate to invite a court of first instance to review its own judgment. Perhaps paradoxically, an application to reopen a judgment may be appropriate where the alleged error falls at either end of a spectrum of significance. If the error is minor, and relates to a matter peripheral to the rationale of the judgment—such as, say, a mistake in the narration of events—then this is something which might legitimately be corrected by way of revision of the judgment. If the error is obvious and is very serious, and would inevitably result in a successful appeal and a remittal to the court of first instance for rehearing, then again there might be something to be said for the judgment being revisited by the court of first instance. The parties might, for example, have failed to bring a crucial statutory provision or precedent to the attention of the judge at the initial hearing, only to do so post-judgment. It might be preferable for the court of first instance to reopen the judgment to ensure that all relevant legal principles have been addressed.

10. Between these two extremes, however, an aggrieved party will normally be expected to avail of their right of appeal rather than seek to have the judgment revisited by the court of first instance.

11. It should be emphasised that the placing of limitations on the jurisdiction of a court of first instance to reopen its own judgment is not informed by a naïve

belief that judges do not make mistakes. As explained by O'Donnell J. in *Nash v. Director of Public Prosecutions* [2017] IESC 51 (at paragraphs 6 and 7), errors can and do occur. The limitations on the jurisdiction to reopen a first instance judgment are not designed to deny an aggrieved party a remedy; rather they simply restrict that remedy, in most cases, to a right of appeal. The rationale for so doing is that parties to litigation are entitled to assume that a written judgment, which has been approved by the judge and has been published, is conclusive, subject only to the invocation of a right of appeal within time.

DISCUSSION

12. The applicant has identified three paragraphs of the leave judgment which he seeks to have amended. I address each of these, in turn, below.

13. The first paragraph identified is that at paragraph 14 of the leave judgment. Having previously set out the provisions of Order 84, rule 22(2A), the judgment states as follows:

> "As appears, a judge should not normally be named in the title of the proceedings by way of judicial review, either as a respondent or as a notice party. The reference to a judge not being "*named*" in the title of the proceedings indicates that the judge should not be "*joined*" in the proceedings as a respondent or notice party. The intention of the rule is not that a judge's actual name be redacted in the title of the proceedings but rather that the judge will not normally be joined in judicial review proceedings at all. The normal position is that the proper respondent will be the other party to the proceedings in the lower court. In the present case, therefore, the normal position would be that the Director of Public Prosecutions would be the only respondent to the judicial review proceedings."

14. The applicant contends that Order 84, rule 22(2A) "*goes against the Constitutional principle of Open Justice which encompasses the requirement of scrutiny of the Judicial Process and Accountability of Judges*". The applicant

then cites the judgment of the Supreme Court in *Kilty v. Judge Dunne* [2020] IESC 65.

15. With respect, the concerns raised by the applicant in relation to this aspect of the leave judgment appear to be based on a misunderstanding of the limits of the leave judgment. The leave judgment has nothing to say in respect of the validity of Order 84, rule 22(2A) precisely because the applicant has not sought, in his statement of grounds, to challenge the validity of the rule and has named neither the Superior Courts Rules Committee nor the Minister for Justice as a respondent to the proceedings. In the absence of any such challenge, the application for leave fell to be determined by reference to the rule as it stands. If and insofar as the applicant now wishes to pursue a challenge to the validity of the rule, it is open to him to apply to amend his statement of grounds to include such a challenge and to apply for leave in respect of same. In the event that leave to apply were to be granted, the parties would then have an opportunity to address the court as to the *timing* of any challenge to the validity of the rule relative to the other issues in the proceedings. It might be, for example, that such a challenge would be heard first.

16. As appears from the leave judgment, the determination of an application for leave in respect of a separate challenge to an aspect of the District Court Rules has been adjourned generally with liberty to amend the statement of grounds.

17. The second paragraph of the leave judgment identified by the applicant is paragraph 16. For ease of exposition, it is convenient to set out paragraphs 16 and 17 together as follows:

> "In the present case, the legal question of whether reporting restrictions should be imposed in respect of the criminal proceedings is not clear-cut. The role of the minor children in the criminal proceedings is peripheral, and the case can be

> contrasted, for example, with a case where the accused person is a minor child. In such a case, reporting restrictions would apply under the Children Act 2001.
>
> The present case is a borderline case, and whereas I have been satisfied, on the low threshold applicable to an application for leave to apply for judicial review, that there are arguable grounds for contending that an anonymisation order should be made, there are respectable arguments in the other direction."

18. The applicant, as part of his request for the amendment of the leave judgment, reiterates points previously made in his grounding affidavit to the effect that he is contemplating calling his minor children as witnesses at the criminal prosecution and that the refusal of an anonymisation order "*infringes [his] constitutional right to prepare [his] defence which also come in contravention to the European Union Directive 2012/13/EU*".

19. With respect, the adjudication on these points is a matter for the substantive hearing of the application for judicial review and is not something which required to be addressed in detail in the leave judgment. The function of the judge hearing the leave application is simply to determine whether or not there are arguable grounds for judicial review. This threshold issue has been decided *in favour of* the applicant in the leave judgment and he has been granted leave to challenge the decision not to grant an anonymisation order. It is only if leave to apply for judicial review had been refused on these grounds that it would then have become necessary to address the applicant's arguments in more detail in the leave judgment.

20. The final paragraph of the leave judgment identified by the applicant is paragraph 23. This paragraph forms part of my ruling on the applicant's application for an interim mandatory order directing the District Court to issue an anonymisation order in the criminal proceedings. This mandatory order had

been sought on an *ex parte* basis. As explained in more detail at paragraphs 20 to 23 of the leave judgment, I held that the mandatory relief sought by the applicant goes far beyond anything which could reasonably be granted on an *ex parte* basis; and that the practical effect of the interim relief, if granted, would be that the applicant would have achieved the principal relief sought by him in the judicial review proceedings, without the other side having had an opportunity to be heard by the High Court. I concluded that the justice of the case would be met, instead, by the imposition of a stay on the criminal prosecution before the District Court, pending the determination of the judicial review proceedings or further order of the High Court. This would ensure that both parties have an opportunity to make detailed submissions in relation to the judicial review proceedings before the hearing in the District Court is resumed.

21. The applicant seeks to have this aspect of the leave judgment amended on the basis that the prosecution of the alleged offences, which date from August 2019, should not be delayed any further "*as justice delayed is justice denied*".

22. With respect, this is simply a reformulation of a point previously made at the *ex parte* hearing on 14 March 2023. The exceptional jurisdiction to reopen a written judgment does not exist to allow a party to seek to reagitate or to elaborate upon points which were or might have been made at the original hearing.

23. The fact, if fact it be, that there may have been prosecutorial delay does not disentitle the respondent from being heard prior to the making of an interim order which would effectively dispose of the judicial review proceedings. As explained in the leave judgment, it is a fundamental principle of constitutional

justice that a party who is affected by an order should be heard in relation to same.

CONCLUSION

24. The leave judgment remains as is and will not be amended. These proceedings will next appear before the court, for mention, on 27 March 2023 as previously scheduled.

Approved