THE HIGH COURT

2024/1262 JR

Neutral Citation [2025] IEHC 93

BETWEEN:

JAMES FINUCANE

APPLICANT

AND

A JUDGE OF THE DISTRICT COURT

RESPONDENT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 18th of February, 2025

1. **Introduction**

1.1 This Applicant seeks declaratory relief in respect of a statement made in court by a District Court Judge in a criminal case in which he is one of a number of co-accused. He claims that the statement was defamatory and thus showed bias against him. He does not seek to quash any decision, but has conflated defamation law with the process of reviewing judicial decisions.

1.2 Procedurally, there is no relief sought in this case. As is clear from Order 84 of the Rules of the Superior Courts, declaratory relief may be claimed as part of an application for the various reliefs which are properly the subject matter of such an application, for instance, certiorari or mandamus in respect of a decision or failure to make a decision. There is no such substantial relief claimed in this case.

1.3 The application must fail. Firstly, statements made by a judge in court are absolutely privileged. They may not form the basis of a later attack by launching defamation proceedings. While this may not necessarily prevent judicial review proceedings, in that such a statement may form the basis of an argument that the judge was displaying subjective bias, the circumstances in this case do not approach an arguable case that there was either objective or subjective bias on the part of the judge, even at the height of the Applicant's claim. Not only was the statement capable of a wholly innocuous interpretation, the Applicant did not raise the issue with the judge at the time, giving him no opportunity to clarify the meaning of his words. There are no grounds on which this Court could grant leave to seek declaratory relief or any judicial review remedy in respect of the events described herein.

2. <u>Factual background</u>

2.1 This applicant was charged with affray and appeared before Tallaght District Court in January 2024. On 30th April 2024 a District Judge ruled that the Applicant and another adult appearing before him should be made co-defendants of a child appearing before the Children's Court in respect of the same allegation and the cases were processed together for some time thereafter.

2.2 This, therefore, was a case of an alleged offence in which there were both adult and child defendants. On the 20th of May 2024 the case was called and the Respondent Judge referred to the case saying "*Oh I remember this case it involves children, videos and social media*" or words to that effect.

2.3 The Applicant seeks judicial review of this statement, as he put it, not of a decision of the Court. He argues that an objective person hearing a sentence describing a case involving the words *children, videos* and *social media* would reasonably draw the conclusion that the case was related to inappropriate videos or images of children received from or uploaded to social media.

2.4 Finlay C.J. identified the test for leave to initiate judicial review proceedings in the case of G v. Director of Public Prosecutions [1994] 1 I.R. 374 (at p. 377): "*An applicant must satisfy the court in a prima facie manner by the facts set out in the affidavit and submissions made in support of his application of the following matters: (a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20(4). (b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by judicial review. (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks. (d) That the application has been made promptly and in any event within the three months or six months time limits provided for in Order 84, r.21 (1), or that the Court is satisfied that there is a good reason for extending this time limit... (e) That the only effective remedy, on the facts established by the applicant, which the applicant would obtain would be an order by way of judicial review, or if there be an alternate remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure*.

2.5 The very essence of the remedy of judicial review is that it is a way of correcting decisions made by various public bodies. This is clear from the specific remedies available: certiorari, to quash a decision, mandamus to direct a course of action or decision and prohibition to prevent one. Declaratory remedies are available but as a corollary to the main relief sought, rarely if ever are declaratory remedies the only relief sought. As the authors of Hogan and Morgan on Administrative Law (2023 ed) express it: *The High Court possesses an inherent power to supervise the legality, rationality and procedural fairness of the activities of inferior courts, tribunals and other public authorities. The High Court, when exercising its powers of judicial review, is not concerned with the merits but rather with the lawfulness of the decision under review. An unlawful decision will be ultra vires the public body in question—or, put another way, the public body has no jurisdiction to make an unlawful decision*.

2.6 This action seeks to correct a statement, not a decision. There is no stateable ground on which to seek declaratory relief: the purpose of judicial review is not to give a second opinion but to permit correction of a decision, usually by remitting it to the original decision maker. Here, there is no challenge to the decision made but only to a sentence spoken in the context of remanding a matter to a later date. This is not an appropriate use of the remedy. Judicial review is not a means of correcting statements in a public court, whether defamatory or not, unless they lead to a decision that is amenable to review. In this case, the statement was not defamatory.

3. <u>Defamation and Absolute Privilege</u>

3.1 A defamatory statement, according to the interpretation section of the Defamation Act of 2009, means a statement that *tends to injure a person's reputation in the eyes of reasonable members of society*. Further, a statement made by a judge performing a judicial function is one that is made on an occasion of absolute privilege. This is set out in s.17 of the 2009 Act, as follows:

> **17**. (2) … *it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought was—…*
>
> *(e) contained in a judgment of a court established by law in the State,*
>
> *(f) made by a judge, or other person, performing a judicial function,…*

3.2 The Applicant's argument does not consider the definition of defamation nor the context in which these words were spoken. The context, combined with the plain words used, make it clear to this Court what must have been clear to any reasonable person in the District Court on that day: this Applicant, the accused in the case referred to by the Judge, was a co-accused of the child or children in question. Even if this was not clear, the context could not, reasonably, have led

to an impression that this Applicant had committed an offence against a child, still less one that involved images of children being abused.

3.3 The Applicant confirmed that what followed the impugned statement was a discussion about procedures in the Children's Court. That being the case, the sentence uttered not only made no reference to any impropriety of a sexual nature, no reasonable person would consider that the matter concerned inappropriate or offensive videos, images of children or anything that would suggest abuse of children, which is the meaning contended for by this Applicant. If it had been such a case, for one, the children would not have been his co-accused in the action but would have been his victims. Further, there would have been no question of the case being heard in the Children's Court, which is a court in which child accused are processed, not child victims.

3.4 Finally, in this context, there was no indication or suggestion of any inappropriate conduct by anyone, least of all the Applicant, in respect of any child in the statement itself or in the subsequent court discussion. In a world in which every adult and every second child has a phone on which videos and social media apps are ubiquitous, it is completely untenable to suggest that these three words, taken together, mean anything improper or untoward. Without more context, the short phrase uttered was wholly innocuous. Even if the Judge was mistaken about one or all aspects of the case, the words spoken are not capable of bearing the meaning ascribed to them by the Applicant.

3.5 There is no arguable ground for judicial review, on the substantial issue, because the words spoken are not capable, in their natural meaning and in the context in which they were spoken, of bearing the defamatory meaning argued for by the Applicant.

3.6 It is significant that the Applicant, who maintains that he understood the words to bear this meaning, did not take the opportunity to clarify what was said or to correct the impression that he argues was made by these words. I asked the Applicant to describe to me what, if anything, he said by way of response or in

order to draw the judge's attention to the effect he says the words had on him. He offered two submissions: firstly, that he was not given any opportunity to speak and secondly, that this was not relevant. Again, neither of these submissions is correct. He was offered an opportunity to file an affidavit outlining his efforts to correct the statement but declined to do so.

3.7 No evidence was presented, therefore, to suggest that the Judge was rushing through the process or interrupting counsel or the Applicant. Further, the Applicant effectively concedes that he did raise the issue at a later sitting of the Court, albeit before a different judge.

3.8 Furthermore, the Applicant does not consider the full defence afforded to a judge performing his judicial function in court. There is no prospect of success in a defamation case against the Judge due to this defence.

3.9 If, as this Applicant sought to do, one argues that a Judge (or any decision maker) has made a statement which is unfairly damaging to a party, the most efficient and effective remedy is to alert the Judge to the issue and give him an opportunity to withdraw the offending statement, amend it, disagree with the proposed interpretation or clarify its meaning or contents.

4. Procedural Grounds

4.1 Order 84, rule 18(2), Rules of the Superior Courts provides: *(1) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to- (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition, certiorari, or quo warranto, (b) the nature of the persons and bodies against whom relief may be granted by way of such order, and (c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application by way of judicial review.*

4.2 This makes it clear that declaratory relief is available, but in the context of proceedings in which the substantive remedy is one quashing a decision, requiring a decision or event or prohibiting a decision or event. None of these is relevant here so the action is one that exists, procedurally, in a vacuum.

4.3 The Supreme Court has dealt with this issue in O'Brien -v- Tribunal of Enquiry into payments to Messrs Charles Haughey & Ors, [2016] IESC 36, O'Malley J. delivering her judgment in the case commented (paragraphs 53 – 54) as follows:

The distinction made between declarations and injunctions on the one hand and the primary judicial review reliefs on the other may in part, as Hogan & Morgan suggest, reflect the fact that declaratory relief can be available where the latter reliefs would not. However, the same principles apply regarding the requirements of justiciability and the unwillingness of a court to grant an order that would be futile or would confer no practical benefit.

The "practical benefit" concerned does not have to be material – the right to one's good reputation is undoubtedly an interest that will be protected .Thus, for example, in State (Furey) v. Minister for Justice & anor. [1988] I.L.R.M. 89 *this Court held, inter alia, that reputational damage caused by a discharge from the army carried out in breach of fair procedures justified the grant of certiorari even though the applicant's period of enlistment had long since expired. Similarly, the damage to the applicant's reputation was a significant consideration in* Dellway Investments Ltd. v. NAMA [2011] 4 I.R. 1. *However, it is necessary to stress that in each of those cases there was evidence that unfair procedures had led to the decisions in question, which in turn had led to the damage to the applicants' reputations.*

4.4 At paragraph 58 O'Malley J. added: *"it is conceivable that the reputation and dignity of an individual could be damaged by egregious conduct and procedures in the course of a process to the extent that the courts would grant declaratory relief, even if the tribunal ultimately made no adverse findings against that individual. However, that is not what is alleged to have happened here."* The last comment applies equally to this Applicant.

4.5 The statement made in this case could not, by any stretch, be characterised as egregious conduct. Even at the height of his case, the Applicant does not claim that the words were spoken deliberately in order to damage him or his reputation.

5. <u>Conclusion</u>

5.1 Judicial review is not the appropriate remedy to challenge a statement such as this one. Certiorari might be available where the words spoken led to a decision which was unfair and the applicant's reputation was damaged as a result of the decision. Fundamentally, I am satisfied that the words cannot be interpreted, reasonably, as they have been interpreted by this Applicant.

5.2 Even if what was said was capable of giving offence or causing damage to a party in court, that party should challenge the statement either immediately or soon afterwards by bringing the judge's attention to the point made. This is the remedy in such a case, not to say nothing and then mount a challenge in the High Court in a separate action. In this case, a correction or a single question would have clarified what the Applicant says was damaging to him. The Applicant is incorrect to submit that his response or his alternative remedies are irrelevant, insisting that when something is said which is untrue, there are consequences and that he had no opportunity to defend himself.

5.3 On the contrary, judges, litigants and witnesses in court cases are expected to give rulings, statements and evidence without fear of litigation as a consequence. This is an important policy consideration which led to the enactment of s.17 which protects litigation from such challenges. If the law were otherwise, most litigation would produce spin-off cases in which the parties and witnesses sued each other, the lawyers or the judges involved for statements made or repeated in court with which they did not agree, seeking damages, seeking to quash the decisions or, as here, seeking purely declaratory

relief. If a party is not entitled to claim under defamation law, he cannot circumvent that by claiming declaratory relief in judicial review proceedings.

5.4 In Shatter v Guerin [2021] 2 I.R. 415, at paragraph 45, O'Donnell J (as he then was) commented; "*…the good name of the citizen is one of the personal rights the State is obliged to defend and vindicate…In most contexts, the legal protection of a person's good name as required by the Constitution is to be found in the law of defamation…Some commentary which is damaging to a citizen's good name may not be actionable without proof of malice, or even at all, such as a statement made on an occasion of absolute privilege. It is not the case, therefore, that the Constitution requires that even false statements which are damaging to a person's reputation should always give rise to a remedy at law*."

5.5 This excerpt confirms that the Applicant's constitutional remedy is in defamation proceedings if, as he has done here, he argues that all he requires is declaratory relief in respect of the statement. However, under the 2009 Act, he will be defeated by the defence set out in s.17, namely that the statement was made by a judge performing his judicial function. Only exceptionally will a defamatory statement in court be the subject matter of a successful judicial review application. This is far from being the case here, as even the Applicant appears to concede, in that no decision was made, still less a decision contrary to his interests, on foot of the allegedly defamatory comment.

5.6 The Applicant was in court when the impugned statement was made and had every opportunity to defend himself against a damaging or unfair statement and declined the opportunity to outline on affidavit why he did not do so. The impugned statement was neither damaging, nor unfair. While it may have been inaccurate, it was not a statement which affected the Applicant as it was an attempt to identify the case and not a statement implying any wrongdoing.

5.7 It is incorrect to argue that there was a power imbalance and that he could not defend himself. Even if the statement was unfair (which is far from the case here), a litigant has several remedies in such a case: he may immediately

correct the judge. This is the most obvious, effective and efficient remedy. If there is a genuine concern that a judge is not listening this must be borne out by evidence and may be the subject of a judicial review if it affects the decision made. This Applicant does not suggest that there was an error in the decision made and does not seek to quash any decision. There is also the remedy of an appeal to correct an error of fact or of law by the judge but, again, that is not appropriate here as there is no decision to appeal, as yet.

5.8 Perhaps most plainly put: the purpose of judicial review is to correct or prevent errors which invalidate decisions. There was no error here, let alone one which vitiated a later decision. This application must be refused. There are no costs implications as this application was made *ex parte* so no other court dates are required.