THE HIGH COURT
JUDICIAL REVIEW

2019 No. 791 JR

BETWEEN

BRÍD SMITH
RICHARD BOYD BARRETT
GINO KELLY
PAUL MURPHY

APPLICANTS

AND

AN CEANN COMHAIRLE

RESPONDENT

Revised note of *ex tempore* judgment delivered by Mr Justice Garrett Simons on 6 November 2019

1. This is the court's ruling in relation to an application for leave to apply for judicial review, and for certain interlocutory and interim relief in the event that leave is granted. Before turning to discuss the substance of the case, it may be of assistance to remind the parties of the precise function of the court at this stage of the process. An application for leave to apply for judicial review is made on what is known as an ex parte basis. In other words, one side only is heard, that is the applicant's side. The purpose of an ex parte application is as a form of filtering device whereby the court assesses—by applying a relatively low threshold—whether a case against a public authority, such as in this case the Ceann Comhairle, is arguable or stateable. The purpose, in effect, is to ensure that public authorities are not troubled with cases that cannot succeed.

2. There are a number of implications that flow from that. First of all, the test for leave to apply for judicial review is a very low test. It is arguability, and the parties should understand that the fact that a court grants leave to apply for judicial review does not necessarily mean that the applicant will succeed at full hearing. Rather, the matter will be heard inter partes in due course and a court will then rule upon the merits of the case, and, indeed, the case may proceed by way of appeal thereafter.

3. The second aspect is that it is very unusual for a respondent to be on notice of a leave application. As I said, it is an ex parte application and, therefore, ordinarily the applicant makes the application on its own. The applicant is under a duty of good faith, he or she (usually through their counsel) will inform the court of both the good and bad points in the case. The court will make the preliminary decision as to whether or not the case can go forward.

4. The matter came before me this morning at 11:00 am. It was clearly an urgent matter for the reasons I will subsequently explain. Given the high constitutional issues involved and the potential implications of granting an injunction, I directed that the application be made on notice to the other side. In other words, on notice to the Ceann Comhairle. This possibility is expressly provided for under the Rules of the Superior Courts under O. 84, r. 24.

"24.(1) The Court hearing an application for leave to apply for judicial review may, having regard to the issues arising, the likely impact of the proceedings on the

respondent or another party, or for other good and sufficient reason, direct that the application for leave should be heard on notice and adjourn the application for leave on such terms as it may direct and give such directions as it thinks fit as to the service of notice of the application for leave (and copies of the statement of grounds, affidavit and any exhibits) on the intended respondent and on any other person, the mode of service and the time allowed for such service."

5. Counsel on behalf of the Ceann Comhairle attended this afternoon. In particular, leading counsel Mr. Conleth Bradley, SC, and junior counsel Ms. Catherine Donnelly attended briefed by the Office of the Legal Clerk of Dáil Éireann. I am very grateful to those parties for their submissions, but it is important to emphasise that they did come at very short notice, and, by definition, their ability to make arguments would have been somewhat constrained. But there is no injustice caused by that because this is an application which is ordinarily heard *ex parte*.

6. I want to emphasise that the court heard the application urgently. I heard submissions from the other side, but I understand that the submissions are not as full, and there was not affidavit evidence filed, which might otherwise have been the case.

7. The principal reason I put the application on notice was, as I say, in relation to the possibility of interim relief. For the reasons which I will outline, I am not going to grant interim relief. I will be granting leave to apply for judicial review and I will hear the parties in relation to a timetable.

8. Mr. Bradley, SC, on behalf of the Ceann Comhairle very properly indicated that if there was a risk of interim relief being granted, he would have wished to put in further materials including affidavit materials. But in circumstances where this court is not going to make an interim order, there is no injustice done to Mr. Bradley's clients by not adjourning the matter further and because it is urgent, I think that it was appropriate that we proceed today.

9. The standard both parties agree is that of arguability, that is the test laid down in the case of *G v. The DPP*.

"It is, I am satisfied, desirable before considering the specific issues in this case to set out in short form what appears to be the necessary ingredients which an applicant must satisfy in order to obtain liberty of the court to issue judicial review proceedings. An applicant must satisfy the court in a prima facie manner by the facts set out in his 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 way of 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 O. 84, r. 21 (1), or that the Court is satisfied that there is a good reason for extending the time limit. The Court, in my view, in considering this particular aspect of an application for liberty to institute proceedings by way of judicial review should, if possible, on the ex parte application, satisfy itself as to whether the requirement of promptness and of the time limit have been complied with, and if they have not been complied with, unless it is satisfied that it should extend the time, should refuse the application. If, however, an order refusing the application would not be appropriate unless the facts relied on to prove compliance with r. 21 (1) were subsequently not established, the Court should grant liberty to institute the proceedings if all other conditions are complied with, but should leave as a specific issue to the hearing, upon notice to the respondent, the question of compliance with the requirements of promptness and of the time limits.

(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."

10. I now propose to consider, first of all, whether the case as put forward to me is arguable in that sense.

11. The proceedings have their genesis in an ongoing controversy as to the use of money messages in the current Dáil Éireann. One of the unusual features of the current Dáil Éireann is, of course, that the Government is a minority government and, therefore, does not, as had been the position in relation to most previous governments, command a majority in the House such as that it can effectively control the business of the House.

12. Members of the opposition have put forward, on a number of occasions, Private Members' Bills. These Bills have, however, been put into a form of limbo as a result of the use of Article 17 of the Constitution. In effect, Article 17 reserves onto the Executive the power to initiate and proceed with legislation which would involve a charge on the funds of the Oireachtas.

13. The relevant provision is Article 17.2:-

"Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach."

14. Such messages are colloquially known as "money messages".

15. The Applicants in these proceedings are four members of Dáil Éireann and they are concerned at what they allege is an overuse of the money message procedure. They have set about taking steps which they hope will bring to an end what they say is an inappropriate practice.

16. To achieve this, what they have sought to do is to amend one of the Standing Orders of Dáil Éireann, Standing Order 179. This is the standing order which in effect gives life to Article 17 of the Constitution by ensuring that certain Bills only progress if a money message is received.

"Bills involving the appropriation of revenue or other public moneys.

179.(1) A Bill which involves the appropriation of revenue or other public moneys, other than incidental expenses, shall not be initiated by any member, save a member of the Government.

(2) The Committee Stage of a Bill which involves the appropriation of revenue or other public moneys, including incidental expenses, shall not be taken unless the purpose of the appropriation has been recommended to the Dáil by a Message from the Government. The text of any Message shall be printed on the Order Paper.

(3) An amendment to a Bill which could have the effect of imposing or increasing a charge upon the revenue may not be moved by any member, save a member of the Government or Minister of State."

17. The four members of Dáil Eireann had proposed to use their Private Members' time this afternoon to put before the House a motion to amend Standing Order 179. (This motion had been listed in the Report of the Business Committee dated 24 October 2019 setting out arrangements for business and business scheduled for Tuesday to Thursday 5 – 7 November 2019).

18. The Ceann Comhairle, in purported exercise of his power under Standing Order 27, refused to allow this motion to go forward.

19. Standing Order 28 insofar as relevant reads as follows.

"28. (1) Every sitting of the Dáil shall be governed by a printed Order Paper which shall be prepared under the direction of the Ceann Comhairle.

(2)(a) Subject to Standing Order 27B, the Business Committee shall have the right to determine the order in which Government and private members' business shall appear on the Order Paper and, by announcement, the order in which it shall be taken each week.

(b) Any announcement or proposals made by a member of the Business Committee under Standing Order 27E shall be made on Tuesdays (or on a Wednesday where the Dáil does not sit on the Tuesday of that week), immediately following Leaders' Questions.

(c) Subject to paragraph (d), following the proceedings comprehended by paragraph (b), the Ceann Comhairle may permit, at his or her discretion, questions to the Taoiseach about the taking of business which has been promised, including legislation promised either within or outside the Dáil; about the making of secondary legislation; and as to when Bills or other documents on the Order Paper needed in the House will be circulated: Provided that the Taoiseach may request a Minister or Minister of State to respond to the issue raised.

(d) The proceedings on the matters comprehended by paragraphs (b) and (c) and Standing Order 27E shall not exceed 30 minutes, save that any time taken on a division on the Order of Business shall not be reckoned in the calculation of that 30 minutes.

[…]"

20. See also letter of 4 November 2019 to Bríd Smith, TD.

"I refer to your Private Members' motion that I have examined and taken advice upon. Your motion seeks to amend Dáil Standing Order 179, which gives effect to Article 17.2 of Bunreacht na hÉireann.

At the outset, there are serious drafting ambiguities within the motion which make it unclear and give rise to difficulties of interpretation and implementation.

It appears that the effect of paragraph (3) could allow Private Members' Bills, which would constitutionally require a recommendation from Government, to be passed by Dáil Éireann without one. As such, this paragraph conflicts with the scheme of the separation of powers as set out, in particular with articles 28.4 and 17.2.

It appears that paragraphs (2) (b) and (4) are consequential on paragraph (3) and would fall as a result.

In the circumstances the motion cannot be printed on the Order Paper and I await your instructions as to how you wish to proceed with this motion."

21. The Ceann Comhairle indicated that he had received legal advice to the effect that it would be unconstitutional for the House to deal with Bills in respect of which a money message had not been received. It seems that the legal advice was initially given orally, but it appears from the content of a subsequent Dáil debate that it has now been put into writing.

22. As I say, that is the underlying controversy, whether or not the money message system is being over abused. The Applicants in this case seek to remedy it.

23. The immediate cause of the controversy was the refusal of the Ceann Comhairle to allow their motion to go ahead, and that decision, which was made earlier this week, precipitated a series of events which culminated in the application before this court this morning.

24. In order to decide whether leave to apply for judicial review can be granted, it is necessary to consider whether the threshold of arguable case has been reached. It seems to me that this may usefully be approached in two stages. The first question is whether there is an arguable case that Article 17 of the Irish Constitution is being overused. It seems to me, on the basis of the material and, in particular, a document entitled "Opinion on the Constitutional Limits of the 'Money Message' Procedure under Article 17.2 of the Constitution of Ireland ("***the Academics' Opinion***") (prepared by Dr David Kenny, Assistant Professor in Law, Trinity College Dublin and Dr Eoin Daly, Lecturer in Law, National University of Ireland, Galway) which has been put before me on affidavit, that there is at least an arguable case that the current understanding by the Government of the money message procedure may be overly generous or overly broad. I am satisfied that there is an arguable point there.

25. See, in particular, pages 14 and 15 of the Academics' Opinion as follows.

> "4. Constitutional Concerns with the Money Message Procedure
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> The money message procedure, as currently practised, raises constitutional concerns. In particular, a salient concern is that to extensive and interpretation of the procedure may place on justified limits on the capacity of the national parliament to pass legislation independently of the executive organ of the State, which is a separate constitutional entity from the legislature and which is subordinate or subject, in many ways, to the authority of Dáil Eireann in particular. Even in the UK, where constitutional norms are underwritten and largely based on historical conventions, concerns have arisen at various times about inappropriate use of the equivalent money resolution procedure unduly fettering the power of Parliament. Given that Bunreacht na hÉireann protects, in express terms, the power to make laws in Article 15.2, and gives that power solely and exclusively to the Oireachtas, there is a real risk that Article 17.2 could be read or applied excessively to the detriment of that power in a constitutionally problematic way.
>
> The can be no doubt that the government has a very broad power in respect of state finances and money bills. The question is whether there is any constitutional limit to this power, as instantiated in Article 17.2. Can it be used in any way, and in any manner? Can it be elaborated on in the standing orders in any way, shape or form without calling into question its constitutional propriety?
>
> We think that it cannot — that there must be constitutional limits to the procedure less did functionally undermine the legislative power of the State and effectively cede it to the executive. This argument can be made both based on the overall structure and ethos of the Constitution and by reference to the particular constitutional rules about the relationship between Parliament and the legislature. In short, the interpretation and

application of this constitutional rule, either in the Standing Orders and/or in parliamentary practice, cannot be such as to functionally limit or frustrate legislative powers of the Oireachtas. This would undermine the separation of powers envisaged by the Constitution, and particularly the stipulation in Article 15.2 that the Oireachtas is the "sole and exclusive" legislative authority for the State."

26. The second matter to be considered then is whether the challenge to the Ceann Comhairle's ruling is one that is potentially challengeable by way of judicial review, i.e. is it justiciable before the courts. That is a much more difficult question because it seems to me on the basis of Article 15.10 and Article 15.11 that there is a clear issue here in relation to the separation of powers.

"10 Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.

11 1° All questions in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present and voting other than the Chairman or presiding member.

2° The Chairman or presiding member shall have and exercise a casting vote in the case of an equality of votes.

3° The number of members necessary to constitute a meeting of either House for the exercise of its powers shall be determined by its standing orders."

27. The Dáil is, in effect, the master of its own procedures. On the facts of this particular case, although the initial decision not to allow the motion go forward for debate was as a result of a ruling by the Ceann Comhairle, that ruling was, in effect, ratified by a *subsequent* vote of the Dáil itself. What happened was that the proposed order of business for today (Wednesday 6 November 2019) was put to a Dáil vote on 5 November 2019. A majority of the Dáil voted in favour of the proposed business, which, of course, omitted the very motion which is the subject-matter of these proceedings, i.e. the motion to amend Standing Order 179.

28. There was much debate before me as to what inferences this court should draw from that sequence of events. In particular, it was suggested by leading counsel on behalf of the Applicants, Mr. John Rogers SC, that the vote should not be understood as ratifying or in some way endorsing the view of the Ceann Comhairle. Counsel may well be right on that—but that is a matter for full hearing—and that is why I am going to allow leave to apply for judicial review. I will return to this point, however, because it is relevant in relation to whether or not to grant an interlocutory injunction.

29. So just to summarise my findings in relation to the first question of leave to apply for judicial review, I am satisfied that there is an arguable case. I emphasise it is only an arguable case that I need to be satisfied of at this stage. The fact that leave is granted in no way determines—nor is even indicative of—the ultimate outcome of these proceedings.

30. I am satisfied that there is an arguable case in relation to Article 17.2 of the Constitution. I am also satisfied that it is arguable that the Ceann Comhairle's decision may be justiciable before this Court. Now, having said that, my attention has very properly been brought to a number of judgments including the judgment in *O'Malley v. An Ceann Comhairle* [1997] 1 I.R. 427; the recent judgment in *Kerins v. McGuinness* [2019] IESC 11; and the judgment in *Callely v. Moylan* [2014] IESC 26, [2014] 4 I.R. 112.

31. Each of these judgments, in their own way, emphasises the caution which this court should exercise in trespassing upon the functions of Parliament and how it runs its business. But notwithstanding that case law, I think this particular issue is not so clearly outside the jurisdiction of the court that leave to apply for judicial review should be refused.

32. Mr. Rogers, SC, has brought my attention to the fact that the very issue raised in this case is a fundamental one. If the Applicants are correct (and I emphasise I am making no finding in relation to that) and the money message procedure is being abused, that is a serious matter which has potential knock-on consequences for the effectiveness of parliamentary representation. Therefore, notwithstanding that body of case law, there is just enough at this stage to allow an application for judicial review go forward.

33. I also attach some significance to the submission made by Mr. Bradley, SC, on behalf of the Ceann Comhairle to the effect that the money message procedure, if not subject to judicial review, is in effect non-justiciable or cannot be challenged anywhere.

34. Mr. Bradley, SC was forced to argue—and this is clearly no criticism of him, but merely reflects the position adopted by the Ceann Comhairle—that there is no obvious constitutional check or balance on the potential abuse of the money message procedure other than by way of an application for judicial review before this court. There is no obvious procedure whereby, for example, Dáil Éireann can countermand the view of the Government in relation to a particular Bill.

35. I simply highlight those factors as indicating that the threshold for leave to apply has been met. At the risk of belabouring the point, I just want to finish this aspect of the judgment by saying that all I am doing is granting leave to apply. It is a low threshold, ordinarily done on an ex parte basis. I am simply allowing the case to go forward.

36. Most applicants in private litigation do not have to go through this procedure and are not subject to a filtering. So, therefore, there is only so much that can or should be read into the decision of this court to grant leave to apply for judicial review.

37. The next issue then to be dealt with is the question of interlocutory relief. In a sense that has become moot in that the time originally allocated for the discussion of the Applicants' motion to amend Standing Order 179 (which was 4.20 pm this afternoon) has come and gone. Therefore, there is very little that this court could do at this stage. However, even if the case had been brought earlier or the timetable had been longer, I would not have granted interlocutory relief.

38. I say this principally because I have concerns as to the separation of powers. It seems to me that an applicant who looks for interlocutory relief in judicial review proceedings must meet the test as laid down by the Supreme Court in its judgment in *Okunade v. Minister for Justice* [2018] IESC 56. Where the relief involves a *prima facie* or a potential trespass on the powers of another organ of State, I think a slightly higher threshold must be met and I do not think that the Applicants in this case have met that threshold. It seems to me that were this court to have granted an interlocutory injunction, it would have had the practical effect of rewriting the order paper which was voted upon and passed by a majority of Dáil Éireann yesterday (5 November 2019). I do not think that this court should do that on an interlocutory basis. It seems to me that the Dáil had decided what business it was going to deal with today. That order paper omitted (to the annoyance of the Applicants) the motion that they wished to debate. But this court cannot overlook the fact that there has been a vote, a majority vote, by Parliament in favour of that form of order paper.

39. Mr. Rogers, SC, may well be correct and that it would be wrong to go further than that and to read into that vote some form of ratification or endorsement of what the Ceann Comhairle has done. At bottom, however, what has happened is the Dáil ruled this week as to what business it would transact today and, in particular, this afternoon. That schedule consciously or deliberately omits the motion which the Applicants wish to bring forward. As I say, it would take an exceptional argument to persuade this court that it has jurisdiction at an interlocutory stage to interfere with that and to direct Parliament to debate a matter which Parliament itself has voted it will not debate.

40. For that reason, this is not a case where interlocutory relief is appropriate and, therefore, I refuse to grant any stay in relation to either the conduct of the Parliament's business or in relation to the Ceann Comhairle. I think instead that the appropriate way of dealing with this matter is to give this case an expedited hearing.

41. To that end, what I propose to do is as follows. I propose to list the matter for directions (I will hear the parties on a precise date but what I am minded to do is to list it as soon as possible so either on Thursday or Friday of this week). I propose to list it before the judge in charge of the Judicial Review List who is Mr. Justice Meenan.

42. I would ask the parties, if possible, to agree a realistic timetable for the exchange of, in the first instance, pleadings and affidavits and, thereafter, written legal submissions. Once that is in order, Mr. Justice Meenan can direct a trial of the action. I am not retaining seisin of the case myself, I am not the judge in charge of the list. This is a case

that requires case management and Mr. Justice Meenan can, in all good time, allocate a hearing date.

NOTE:

This revised note includes quoted extracts from documents and case law referenced in the ex tempore judgment but not read out in full at that stage due to pressure of time and the urgency of the case.