APPROVED **[2021] IEHC 553**

THE HIGH COURT
JUDICIAL REVIEW

2021 No. 647 JR

BETWEEN

ZBIGNIEW ZADECKI

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 25 August 2021

INTRODUCTION

1. This judgment is delivered in respect of an *ex parte* application for leave to apply for judicial review. The judicial review is taken against a number of convictions entered against the applicant in the District Court. For the reasons set out herein, leave is refused in respect of most of the reliefs sought in circumstances where the pending appeals to the Circuit Court represent an adequate alternative remedy.

JUDICIAL REVIEW OR APPEAL

2. An application for judicial review will not normally be appropriate where an applicant has an adequate alternative remedy by way of an appeal. This is

especially so in the context of a criminal conviction entered in the District Court or the Circuit Court. This is because an appeal to the Circuit Court or the Court of Appeal, respectively, will generally represent an adequate alternative remedy. Indeed, an appeal is almost always the *preferable* remedy from an accused's perspective because of the inherent limitations on the judicial review jurisdiction.

3. Judicial review is concerned principally with the legality of the decision-making process, and not with the underlying merits of the decision under challenge (save in cases of irrationality). Put otherwise, the function which the High Court exercises in determining judicial review proceedings is far more limited than that which the Circuit Court and the Court of Appeal, respectively, would exercise in determining an appeal against conviction and sentence.

4. The inherent limitations on the High Court's judicial review jurisdiction have been described, in more eloquent terms, by the Supreme Court in *E.R. v. Director of Public Prosecutions* [2019] IESC 86 as follows (at paragraph 17).

> "[…] an accused in a criminal trial who is advised to forego an appeal and instead pursue a judicial review, faces a burden different to an argument as to right and wrong. Judicial review is not about the correctness of decision-making, nor is it the substitution by one court of a legal analysis or factual decision for that of the court under scrutiny. On judicial review, where successful, the High Court returns the administrative or judicial decision to the original source and, implicitly in the judgment overturning the impugned decision, requires that it be redone in accordance with jurisdiction or that fundamentally fair procedures be followed. If the decision-maker has no jurisdiction, that may be the end of the matter but the High Court never acts as if a Circuit Court case were being reconsidered through a rehearing, which is a circumstance where a court will be entitled to substitute its own decision. Judicial review is about process, jurisdiction and adherence to a basic level of sound procedures. It is not a reanalysis."

5. The Supreme Court judgment goes on, in the next paragraph, to emphasise that an applicant for judicial review in criminal proceedings has the "substantial

burden" of showing the deprivation of a right. It is not enough to ground a successful application for judicial review that the trial judge might have made an error of fact, nor even an incorrect decision of law.

6. The circumstances in which judicial review may be appropriate, notwithstanding the availability of a right of appeal, have been summarised as follows by Clarke J. (as he then was) in *Sweeney v. District Judge Fahy* [2014] IESC 50 (at paragraphs 3.14 and 3.15).

> "Thus, it is clear that a court may refuse to consider a judicial review application where it is apparent that the complaint made is one which is more appropriately dealt with by means of a form of appeal which the law allows. There can, of course, be cases where the nature of the allegation made is such that, if it be true, the person concerned will have, in substance, been deprived of any real first instance hearing at all or at least one which broadly complies with the constitutional requirements of fairness. To say that someone, who has been deprived of a proper first instance hearing at all, has, as their remedy, an appeal is to miss the point. In such circumstances what the law allows is a first hearing and an appeal. If there has, in truth, been no proper first hearing at all, then the person will be deprived of what the law confers on them by being confined, as a remedy, to an appeal. In such a case, judicial review lies to ensure that the person at least gets a first instance hearing which is constitutionally proper and against which they can, if they wish, appeal on the merits in due course.
>
> Where, however, a person has had a constitutionally fair first instance hearing and where their complaint is that the decision maker was wrong, then there are strong grounds for suggesting that an appeal, if it be available, is the appropriate remedy."

7. These, then, are the principles to be followed in deciding whether to grant leave to apply for judicial review in this case.

PROCEDURAL HISTORY

8. The District Court held a hearing into a large number of charges against the applicant on 16 April 2021. In some instances, the charges were dismissed. In others, convictions were entered. A full transcript of the hearing before the District Court has been exhibited as part of these judicial review proceedings. The transcript has been prepared from the digital audio recording ("DAR").

9. The applicant has brought appeals against all of the convictions to the Circuit Court. The appeals stand adjourned to 7 October 2021.

10. These judicial review proceedings are directed to two sets of charges in respect of which the applicant was convicted. The first relate to offences under the Firearms and Offensive Weapons Act 1990; the second, to offences under the Criminal Justice (Theft and Fraud Offences) Act 2001.

11. The application for leave to apply for judicial review was moved before me on Monday 12 July 2021. The application was adjourned until 29 July 2021 to allow the applicant's legal representatives to address the court further on the question of whether the pending appeals to the Circuit Court represent an adequate alternative remedy to judicial review. On this occasion, junior counsel for the applicant, Mr. Karl Monahan, made a very thorough and helpful submission on the relevant legal principles. Judgment was reserved until today's date.

CHARGES UNDER FIREARMS AND OFFENSIVE WEAPONS ACT

12. The first set of offences relate to the possession by the applicant of two Stanley knives or blades. The applicant had been charged with an offence under section 9(1) of the Firearms and Offensive Weapons Act 1990. In brief, this section provides that where a person has with him in any public place any knife

or any other article which has a blade or which is sharply pointed, he shall be guilty of an offence.

13. Section 9(2) and (3) provide as follows:

> "(2) It shall be a defence for a person charged with an offence under subsection (1) to prove that he had good reason or lawful authority for having the article with him in a public place.
>
> (3) Without prejudice to the generality of subsection (2), it shall be a defence for a person charged with an offence under subsection (1) to prove that he had the article with him for use at work or for a recreational purpose."

14. The application for judicial review centres largely on the approach taken by the District Court judge to the statutory defence under section 9(3).

15. Having unsuccessfully applied for a directed acquittal at the close of the prosecution's case, the applicant had gone into evidence. The applicant stated that his occupation is that of a carpenter. No details were provided, however, of the name and address of his employer, nor the dates upon which it is said that the applicant had been employed. No documentation whatsoever was produced to the District Court in relation to the applicant's employment as a carpenter.

16. In cross-examination, the applicant was unable to confirm that he had been working as a carpenter on the day upon which he had been arrested for possession of the Stanley knives. It had also been put to the applicant that he had been drinking on the day in question and that this was inconsistent with his having been working that day. The applicant then suggested that the Stanley knives may have stayed in his pockets from the previous day.

17. The principal grounds advanced for judicial review are that the District Court erred in its understanding of the evidential burden placed upon an accused under section 9(3) of the Firearms and Offensive Weapons Act 1990. In particular, it is

pleaded that the onus of proof may be discharged by the defence proving that there was a *reasonable doubt* that the accused may have had the Stanley knives for the purpose of work. It is said that the District Court erred in assessing the defence on the *balance of probabilities*. Counsel on behalf of the applicant cites, by analogy, the judgment of the Court of Criminal Appeal in *Director of Public Prosecutions v. Smyth* [2010] IECCA 34; [2010] 3 I.R. 688.

18. The supposed failure to apply the proper standard of proof is said to represent a breach of the applicant's right to a trial in due course of law pursuant to Article 38.1 of the Constitution of Ireland.

19. I am satisfied that the errors which it is alleged that the District Court made are precisely the type of errors in respect of which an appeal to the Circuit Court represents the appropriate remedy. The gravamen of the complaint is that the District Court did not properly apply the provisions of section 9 of the Firearms and Offensive Weapons Act 1990 which shift the *evidential burden* onto an accused of adducing evidence as to the use of the knife or blade for work. If and insofar as the District Court may have erred in respect of the *legal burden*, the error is one which is made within the District Court's jurisdiction (in the broad sense). The error is well capable of being corrected on appeal.

20. It should be emphasised that there is no suggestion that the District Court failed to observe fair procedures in respect of these charges. It is not, for example, alleged that the applicant's solicitor was denied an opportunity to address the District Court as to the relevant standard of proof. Rather, the allegation is that the District Court, having heard submissions on the issue, erred in its understanding of the operation of the statutory defence. This is not a case,

therefore, where it can be said that there was no proper hearing at first instance (cf. *Sweeney v. District Judge Fahy* [2014] IESC 50).

21. An appeal is especially appropriate in circumstances where the evidence actually adduced before the District Court on behalf of the applicant on the question of whether he had the knives with him for use at work had been so sparse. An application for judicial review would fall to be decided by reference to this limited evidence. The High Court might hold that the evidence is too slight to put the matter in issue. By contrast, in the appeal before the Circuit Court, the applicant will have an opportunity, if he so chooses, to adduce fuller evidence.

22. Put otherwise, the applicant would be confined in judicial review proceedings to a legal argument as to the operation of the statutory defence. In the Circuit Court appeal, the applicant can raise the legal argument and can also, if he chooses, adduce further evidence as to his use of the knives at work.

CHARGES OF POSSESSION OF STOLEN PROPERTY

23. The applicant was charged with two offences of possession of stolen property contrary to section 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001. Section 18(2) of the Act provides as follows:

> "(2) Where a person has in his or her possession stolen property in such circumstances (including purchase of the property at a price below its market value) that it is reasonable to conclude that the person either knew that the property was stolen or was reckless as to whether it was stolen, he or she shall be taken for the purposes of this section to have so known or to have been so reckless, unless the court or the jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether he or she so knew or was so reckless."

24. The charges related to a LEAP card, *i.e.* a card for use on public transport, and a personal public service card, respectively. The applicant is said to have been in possession of these cards when searched by a member of An Garda Síochána.

25. Each of these cards was made out in the name of an individual *other than* the applicant. No evidence was offered on behalf of the prosecution to the effect that these cards were stolen, nor that the circumstances in which the applicant had the cards in his possession were such that it was reasonable to conclude that he either knew that the property was stolen or was reckless as to whether it was stolen.

26. At the conclusion of the prosecution's case, the applicant's solicitor applied for a directed acquittal on the basis that there was no case to answer. In response to the application, the prosecuting guard expressly stated that she accepted the applicant's solicitor submission in relation to the possession charges. (Transcript, page 54). This could only be understood as the prosecution accepting that there was no evidence before the court to the effect that the cards represented stolen property. It follows, therefore, that the application for a directed acquittal should have been allowed. It had been accepted by the prosecution that there was no evidence before the District Court to ground a conviction on these charges.

27. In the event, however, the application for a directed acquittal was refused. The District Court judge appears to have had a concern that it would be unreasonable to require the prosecution to have called the owners of the two cards as witnesses in the proceedings. The District Court judge expressly stated that he was there to ensure that justice is administered; and that a possible form of proof alluded to by the applicant's solicitor, *i.e.* the calling of evidence from the owners of the cards, is not a proof that is required.

28. The essence of the applicant's complaint is neatly captured as follows at paragraphs (d) (xxxviii) and (xxxix) of the statement of grounds.

> "The learned Judge erred in fact and in law in convicting the applicant of possession of stolen property when the prosecution conceded the legal arguments made on the applicant's behalf in support of a directed acquittal.
>
> In all the circumstances, the conduct of the proceedings lacked the appearance of justice and fairness required of a trial in due course of law pursuant to Article 38.1 of the Constitution."

29. I am satisfied that the applicant has made out arguable grounds for judicial review in this regard, and that an appeal to the Circuit Court would not represent an adequate alternative remedy. The gravamen of the applicant's case is that the District Court exceeded its jurisdiction in purporting to convict the applicant of the offences in circumstances where the prosecuting garda did not oppose the application for the direction. If this ground is made out at the full hearing of the judicial review proceedings—and this is a matter for another day—it would appear to represent a significant breach of fair procedures in that the District Court judge might be perceived as having descended into the arena. This is enough to bring this aspect of the present proceedings within the category of cases in respect of which judicial review is appropriate notwithstanding the pending appeal to the Circuit Court.

30. Leave to apply for judicial review is refused in respect of the separate grounds that the District Court had erred in admitting evidence obtained in the course of An Garda Síochána's search of the person of the applicant on 16 April 2019. Any complaint in respect of the admissibility of the evidence is eminently suitable to be dealt with by way of an appeal to the Circuit Court.

CONCLUSION AND FORM OF ORDER

31. Leave to apply for judicial review is granted in respect of the reliefs sought at paragraphs (d) (iii) and (iv) of the statement of grounds. The grounds upon which leave is granted are confined to those pleaded at paragraphs (e) (xxxiii), (xxxvi), (xxxvii), (xxxviii) and (xxxix) of the statement of grounds.

32. Leave is refused in respect of all other reliefs and grounds pleaded in the statement of grounds.

33. The applicant is to issue and serve a notice of motion, together with the pleadings to date, within 14 days of the date of perfection of the order granting leave. The motion is to be made returnable before me on 4 October 2021 at 2 pm.

34. The order granting leave will note that counsel on behalf of the applicant indicated an intention, at the commencement of the proceedings, to make an application for a recommendation that the Legal Aid – Custody Issues Scheme be applied to the proceedings.

Appearances

Giollaíosa Ó Lideadha, SC and Karl Monahan for the applicant instructed by John M. Quinn & Co. Solicitors

Approved Garrett Simons