THE HIGH COURT

[2023] IEHC 606

Record No. 2023/794/JR

BETWEEN:-

DAVID JAMES BOURKE

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

STEPHEN O'SULLIVAN

NOTICE PARTY

JUDGMENT of Mr Justice Barr delivered *extempore* on 27th October 2023.

Introduction.

1. This is a contested leave application, in which the applicant seeks leave to proceed by way of judicial review for an order quashing a ruling made by Ryan P. refusing him disclosure of certain documents in advance of his forthcoming trial, which is due to commence before Dublin Circuit Criminal Court on 31st October 2023.

2. The applicant is a serving member of An Garda Síochána. He stands charged in respect of two charges of corruption contrary to ss. 5(1)(b) and 7(2) of the Criminal Justice (Corruption Offences) Act 2018.

3. Counsel for the applicant, Mr. McGrory KC/SC, stated that the primary evidence against his client consisted of a surveillance transcript of a conversation that was alleged to have taken place between the applicant and his co-accused, the notice party, in the applicant's van on 22nd December 2018. In the transcript, it appears to be recorded that the applicant received €20,000 from his co-accused; he proceeded to give information to the notice party about the state of an ongoing investigation being carried out by the Criminal Assets Bureau; he appeared to give him advice in relation to the steps that he should take to protect his position; and ended by saying: "*OK, you are fine, I don't want another penny*".

4. It is the applicant's case that in the years 2011 – 2014 he was a member of the Regional Source Management Unit in An Garda Síochána, in the Limerick area, which had responsibility for the

recruitment and management of police informants. These are referred to as Covert Human Intelligence Sources (CHIS).

5. Counsel submitted that even after the applicant left that unit, he continued to have contact with various sources that he had cultivated while working on the unit.

6. The applicant maintains that in the course of his role as a recruiter and handler of informants, he had dealings with one Joseph Cahill, as one of his informants. It is permissible for the court to reveal this assertion, because Mr. Cahill instituted High Court proceedings on 7th October 2021, in which he expressly pleaded that he had become a police informant in or around 2006.

7. The proceedings brought by Mr Cahill were personal injury proceedings, which claim damages against a number of defendants including the applicant, the Commissioner of An Garda Síochána, the Minister for Justice Equality and Law Reform and Ireland and the Attorney General. In that writ, the plaintiff claimed that when he wished to cease being a police informant, he was forced to continue in that role due to threats that had been made against him and members of his family by the first and second defendants. In particular, he pleaded that he was threatened that if he did not continue working for the gardaí, his identity as an informant would be revealed to other criminals. He has pleaded that as a result of those actions, he has suffered personal injury, loss and damage.

8. The applicant sought production of a range of documents concerning Mr Cahill. In seeking production of those documents, the applicant voluntarily disclosed the line of defence that he intended to take at his forthcoming trial. That defence was summarised in the following way in the written submissions that were lodged before this court:

> "*The documents sought (the "Materials") related in particular to certain covert human intelligence source ("CHIS") actors. The applicant had formerly been a member of the CHIS unit. His defence is in part based on his assertion that his presence in the company of his co-accused, and any discussion which flowed therefrom, was in furtherance of his attempt to recruit his co-accused*.
>
> *Moreover, both the applicant and his co-accused contend that their meeting was motivated and coordinated by "JC" who is (by his own admission) a CHIS. A strand of the applicant's defence is that this person, motivated by animus, acted as an agent provocateur to engineer what appeared to be a bribery offence. Notably, JC has not been charged with any offence in relation to an alleged unlawful transaction*."

9. An initial application for an order providing for the disclosure of a range of documents concerning Mr. Cahill, was made to Crowe J. in the Circuit Court on 25th November, 2022. She was furnished with a copy of the documentation in the possession of the first and second respondents. The second respondent had resisted making disclosure of the documents on the basis that they were not relevant to the matters that would arise in the course of the applicant's trial.

10. Having heard evidence and legal submissions, Crowe J. delivered her ruling on 31st January 2023, refusing to make an order directing that disclosure be made of the requested categories of documents.

11. The applicant renewed his application for production of the documents, and for production of additional documents, being records of all his feelings while acting as a CHIS recruiter and handler. That application was moved before Ryan P. on 22nd May 2023. It was based on two developments that had occurred: the receipt by the applicant of the information that had been sworn by an investigating Garda to ground an application for a search warrant in respect of the applicant's computer, which information had contained references to the applicant's dealing with Mr. Cahill; and was based on the fact that it had been indicated by counsel representing the notice party, that it was his intention to bring the content of a voluntary statement that had been made by the co-accused on 20th January 2022, to the attention of the jury; in which statement the notice party had made extensive references to Mr. Cahill and had stated that he had been the person who had forced the notice party to have dealings with the applicant and had been the person who suggested that he pay money to the applicant.

12. Having considered the material that was put before her, and having considered the submissions made on behalf of the parties, Ryan P. gave her ruling on the afternoon of 23rd May 2023, at which time she held that disclosure of the documents sought would not be ordered, as she did not consider the documents to be relevant to the issues that would arise at the trial. It is that order, that the applicant seeks to quash if given leave to proceed by way of judicial review.

13. The applicant also seeks an order of *mandamus* directing the first and second respondents to make disclosure of the categories of documents that had been requested by the applicant in his application for pre-trial disclosure, as made to Ryan P. on 22nd May 2023.

Submissions of the Parties.

14. On behalf of the applicant, it was submitted that the applicant had placed more than ample evidence before the court to persuade it that he had crossed the fairly low threshold to obtain leave to proceed by way of judicial review for the reliefs sought in his statement of grounds. In this regard, counsel referred to the test as laid down by Finlay C.J. in *G v. DPP* [1994] 1 IR 374.

15. It was submitted that the applicant was entitled to rely on the extensive rights which were given to an accused in relation to the production of documentation further to Article 7 of Directive 2012/13 EU of the European Parliament and of the Council of 22nd of May 2012 on the right to information in criminal proceedings (hereinafter referred to as "the Directive"). It was submitted that Article 7(2) gave an accused a wide-ranging right to obtain documentation and other material evidence in the possession of the prosecuting authorities, in advance of his trial.

16. It was submitted that the learned Circuit Court judge, in refusing the applicant's application for documents concerning Mr. Cahill, which counsel submitted were clearly relevant to the background to his relationship with his co-accused and to his defence of entrapment, had departed from the rights that were afforded to the applicant as an accused in relation to production of material evidence, as provided for in Article 7(2) of the Directive.

17. Counsel submitted that if it were argued that the ruling of the learned Circuit Court judge was in accordance with existing Irish law, then the argument would be made that Ireland had failed to properly transpose the provisions of the directive into Irish law. In this regard, it was submitted that the Criminal Procedure Act 2021, which had been enacted subsequent to the Directive, had failed to make provision for the proper transposition of the rights conferred by Article 7(2) of the Directive. In such circumstances, as the date for implementation of the Directive had long passed, it was submitted that the provisions of Article 7(2) were directly applicable in Irish law.

18. It was further submitted that having regard to the account of the hearings before both Crowe J. and Ryan P., and in particular due to the lack of any reasons having been furnished by the latter, for her refusal to direct production of the requested documentation, that decision was amenable to judicial review for failure to give reasons as required in Irish law: see *Mallak v. Minister for Justice* [2012] 3 IR 297.

19. While it was accepted that it was not normally permissible to challenge decisions or rulings that had been made in the course of the pre-trial process, or during the trial itself, it was submitted that in exceptional circumstances where there had been a fundamental departure from the

requirements of justice or the requirement to act in a lawful manner, it was appropriate for the High Court to intervene by way of the judicial review jurisdiction that it enjoyed, so as to ensure that an accused's right to a fair trial was maintained: see *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 IR 60. It was submitted that having regard to the submissions that had been made by the applicant in relation to the non-transposition of the rights conferred upon him by Article 7(2) of the Directive and the failure to give reasons for the refusal to direct disclosure of the documentation, the present case was one in which it was appropriate for the High Court to intervene in the trial process by means of the exercise of its judicial review jurisdiction.

20. In support of the assertion that Article 7(2) of the Directive conferred a right on an accused to sight of relevant evidence, counsel referred to the decision of the Court of Appeal in *Fitzgerald v. DPP* [2022] IECA 271.

21. The submissions that were made by Mr. McDonagh SC on behalf of the second respondent and by Mr. Kennedy SC on behalf of the remaining respondents, can be taken together, as they essentially made identical submissions as to why leave should not be granted in this case.

22. Essentially the argument of the respondents as to why leave should not be granted, rested on two grounds, as follows: first, it was submitted that s. 6 of the Criminal Procedure Act 2021 provided a specific statutory regime whereby applications could be made prior to the holding of the trial in relation to various matters that may arise during the trial. The section provided that any rulings given by the judge at the hearing of such pre-trial applications, could be deemed to be rulings given in the course of the trial itself. The Act further explicitly provided that no appeal should lie from any pre-trial rulings given pursuant to an application made under section 6 of the 2021 Act. However, the Act further provided that it would be open to an accused to challenge such pre-trial rulings as part of any appeal that he or she may bring following the conclusion of the trial. It was submitted that having regard to these clear statutory provisions, it was impermissible for the applicant to bring these proceedings seeking to set aside a refusal of a disclosure application that had been made by him prior to his trial.

23. It was submitted that the case law of the Superior Courts was clear, that in general the trial process should be seen as being a unitary process, such that it would be impermissible and inappropriate for the High Court to embark on a judicial review of rulings that were made in the course of the trial process: see *Freeman v. DPP* [2014] IEHC 68; *ER v. DPP* [2019] IESC 86. It was

submitted that the decision in *People (DPP) v. McKevitt* [2009] 1 IR 525, where the court had intervened by way of its judicial review jurisdiction in respect of the ruling that had been made at the pre-trial stage by the Special Criminal Court, was an exceptional case, where the court felt compelled to intervene due to the risks to human life that had occurred as a result of the ruling that had been made by the lower court. It was submitted that the present case did not have anything like the exceptional character that existed in the *McKevitt* case.

24. It was submitted that the applicant's reliance upon the Disclosures Directive was completely misplaced. It was submitted that while Article 7(2) provided a right to an accused to have access to material evidence in advance of the trial, it was not necessary for Ireland to pass any specific statutory or other measure to incorporate that right into Irish law, because an accused already had that right under Irish law, which right had been held to flow directly from the provisions of Article 38 of the Constitution. Accordingly, it was submitted that the applicant's contention that Ireland had failed to transpose the Directive by reference to the enactment of the 2021 Act, was totally misplaced.

25. It was submitted that insofar as the applicant had complained of a lack of reasoning in the impugned ruling made by Ryan P. on 23rd May 2023, it was submitted that there was no admissible evidence that she had failed to provide adequate reasons for her decision, because no transcript or DAR recording of the entire application and of the judge's ruling, had been presented to the court.

26. It was submitted that as the judge had had sight of the relevant documentation, had heard the submissions of counsel on behalf of the applicant and the DPP and had considered the authorities that had been opened to her, there was no basis on which the ruling could be impugned for want of jurisdiction, or for unfairness in the hearing of the application, or on any other basis.

27. It was submitted that in all the circumstances outlined, the applicant had not disclosed even an arguable basis on which he could obtain the reliefs sought in the statement of grounds.

Conclusions.

28. As this is a contested leave application, it will be useful to set out the well-known test for obtaining a grant of leave to proceed by way of judicial review, which was set down almost 30 years ago in *G v. DPP* [1994] 1 IR 374, by Finlay C.J. at pp. 377 – 378. That test was repeated by Humphreys J. in *McD v. DPP* [2016] IEHC 210, to take account of subsequent changes to the rules of court and subsequent case law in the following way at para. 23 of his judgment:

"*In G. v. D.P.P. [1994] 1 I.R. 374 at pp. 377 to 378, Finlay C.J. set out the criteria for the grant of an ex parte application for leave. As developed by subsequent changes to the rules of court, and subsequent caselaw, the criteria can be summarised as follows:*

(i) That the applicant "has a sufficient interest in the matter to which the application relates" (p. 377);

(ii) That "an arguable case in law can be made that the applicant is entitled to the relief which he seeks" (p. 378) on the basis of facts averred to, albeit that the court can also have regard at least to uncontradicted evidence adduced by a respondent who has been put on notice of the application. Of course in particular circumstances a higher threshold applies, such as where legislation requires substantial grounds, or where the grant of leave would itself be likely to determine the event (Agrama v. Minister for Justice and Equality [2016] IECA 72 per Birmingham J. at para. 32);

(iii) That the application has been made within the appropriate time limit or that the Court is satisfied that it should extend the time limit in accordance with the applicable rules of court or legislation;

(iv) 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" (p. 378).

d(v) That there are no other grounds to warrant refusal of leave. "These conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an ex parte application." (p. 378)."

29. Turning to the substantive issues that are before the court on the hearing of this application, it is important to note that this court is not sitting as an appeal from the decision of Ryan P. in relation to the application for disclosure of documents made by the applicant. This court is not concerned with the merits of the application that was made on behalf of the applicant to the learned Circuit Court judge. As noted in the *Fitzgerald* case, this court is only concerned to see whether an arguable case

has been made to the effect that the ruling of the learned Circuit Court judge ought to be set aside because she departed from the requirements to hold a fair hearing, or to give a reasoned decision, or otherwise acted outside her jurisdiction. In this regard see the *dicta* of Edwards J. at para. 121, where he stated that, on a hearing of an application for leave to proceed by way of judicial review, the concern of the judge is not with the merits of the decision, his concern rather was with the process and whether it was fair and conducted in accordance with law.

30. It has been stated on a number of occasions that the High Court should be slow to intervene by way of the exercise of its judicial review jurisdiction in the conduct of criminal trials that are extant before a lower court. In *Freeman v. DPP*, Kearns P. emphasised the unitary nature of the criminal trial process, when he stated as follows:

> "*If every ruling or decision given by the trial judge during the course of a criminal trial could be challenged by way of judicial review, the resultant outcome would be chaos and the criminal justice system would become totally incapable of operating effectively. At the very least the process could be open to abuse at every turn*."

31. Those observations were commented upon with approval by Charleton J. in *ER v. DPP*, where he examined the question of whether the High Court should intervene by way of judicial review in an ongoing criminal trial at paras. 19 *et seq*, and commented as follows at paragraph 21:

> "*Of its nature, a criminal trial is complex, as this case demonstrates, evidence heard in the absence of the jury and rulings by the trial judge as to: the applicability of legislation designed to assist child witnesses and witnesses with special needs; legal argument; argument and speeches by counsel; a direction by the trial judge to the jury; and ultimately, the verdict. This is not to be diverted into the supervisory jurisdiction of the High Court to ensure adherence to the Constitution and the law being properly invoked. It was not so invoked here*."

32. Charleton J. noted that while the High Court and on appeal the Supreme Court, had intervened by way of the exercise of its judicial review jurisdiction in *DPP v. Special Criminal Court*, that case had turned on truly exceptional and almost unique facts. He noted that in the High Court, Carney J. had stated that it was unique in his experience that reliefs of the type sought by the applicant in that case, had been sought during the continuance of a criminal trial. The High Court judge had gone on to state:

"*It cannot be emphasised strongly enough that an expedition to the judicial review court is not to be regarded as an option where an adverse ruling is encountered in the course of a criminal trial. I am undertaking this application for judicial review during the currency of the trial because a need has presented itself to urgently balance the hierarchy of constitutional rights including, in particular, the right to life. In the overwhelming majority of cases it would be appropriate that any question of judicial review be left over until after the conclusion of the trial. In the instant case, such an approach would have led the Director of Public Prosecutions to abort the trial and the people of Ireland would have been deprived of their right to have a particularly heinous crime prosecuted to a verdict of either conviction or acquittal*."

33. In the *ER* case, Charleton J. noted that in giving the unanimous judgment of the Supreme Court, on the unsuccessful appeal by the accused, O'Flaherty J. had endorsed "*everything that Carney J. said about the undesirability of people repairing to the High Court for judicial review in relation to criminal trials at any stage (and certainly not during the currency)*" but he had accepted the utterly exceptional nature of the circumstances leading to the application in that case, which involved the State's duty to vindicate the right to life of a confidential informant.

34. In light of those statements of the law, and having regard to the provisions of the 2021 Act, I am satisfied that the submissions made on behalf of the respondents are correct. It is not appropriate for the applicant to seek to set aside pre-trial rulings that have been made, merely because he does not agree with those rulings. The 2021 Act provides in section 6 that one or more pre-trial hearings may be held prior to the commencement of the substantive trial. Sub-paragraphs (14) and (18) are of relevance. They provide as follows:

(14) Subject to subsection (15) and section 7 , where the trial court makes an order at a preliminary trial hearing or under subsection (11)—

(a) the order shall—

(i) have binding effect, and

(ii) where the court considers it appropriate and so directs, have effect as though it had been made in the course of the trial of the offence, and

(b) without prejudice to the generality of paragraph (a)(ii), no appeal shall lie against the order, pending the conclusion of the trial of the offence.

[…]

(18) Nothing in this section shall affect the right of the accused to appeal against conviction in respect of an offence, including insofar as any ground of such appeal relates to matters arising from a preliminary trial hearing in respect of the trial of the offence concerned.

35. I am satisfied that having regard to the statutory provisions outlined above, it is not appropriate for the applicant to seek to proceed by way of judicial review. There is a statutory mechanism in place which provides for the making of pre-trial applications. It would make the holding of criminal trials almost impossibly cumbersome, were a disappointed applicant allowed to proceed by way of judicial review application in respect of any pre-trial rulings that were made adverse to them.

36. The right of an accused to a fair trial is preserved. That is a continuing right which inures right through to the conclusion of the trial process. If there is a basis for renewing the application for production of the required documents, the applicant can renew his application to the trial judge. The trial judge is under a duty to ensure that the trial is fair. He or she can take whatever steps are necessary to ensure that that objective is achieved.

37. It is not appropriate for the applicant to proceed by way of judicial review, merely because he has obtained rulings from two Circuit Court judges that are adverse to what he was seeking. However, his right to challenge the correctness of those rulings is preserved, as he is entitled to appeal those rulings as part of any appeal against the ultimate verdict, that he may bring before the Court of Appeal. This case is not at all similar to the extraordinary circumstances that arose in the *McKevitt* Case. This was an application for disclosure of documents by the gardaí. Such applications are very common. Thus, one is not in the circumstances that pertained in the *McKevitt* case. A similar decision to that made by this court on this aspect of the case, was also made by Edwards J. in the *Fitzgerald* case where the applicant had also claimed that he had been denied production of relevant material, which had been refused by the trial judge on his application for production of same; Edwards J. stated: "*Those were decisions made within jurisdiction and if the applicant is dissatisfied, his remedy was to appeal to the Court of Appeal.*"

38. I turn now to deal with the second main ground on which the applicant seeks to challenge the ruling made by Ryan P. on 23rd May 2023. The essence of his submission in this regard, was to the effect that Ireland had not correctly transposed the disclosures directive by the enactment of the 2021 Act. Article 7(2) of the directive provides as follows:

"*Member states shall ensure that access is granted at least to all material evidence in the*

possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence."

39. It was submitted that the 2021 Act, in making provision for various types of pre-trial hearings, had not gone nearly far enough to transpose the requirements of Article 7 of the directive, or to achieve its objectives.

40. I do not think that that submission is well-founded. It is well known that directives do not have to be transposed word for word into the national law of Member States. The obligation on the Member State is to ensure that the objectives of the Directive, or the rights that it creates for various people, are provided for in the national law of the Member State on or before the designated implementation date. The Member State is left free to decide by what mechanism the provisions of the directive shall be implemented in national law.

41. More importantly, if the provisions of national law already provide for rights that are equivalent to, or perhaps even greater than, the rights provided for in a Directive; there is no need for the Member State to alter its law in any way. I accept the submission that was made by counsel on behalf of the respondents that in relation to the obligation to make disclosure to an accused in advance of his trial, the provisions that existed in Irish law prior to the enactment of the Directive, were at the very least, comparable, if not more extensive than those provided for in the Directive relating to pre-trial disclosure.

42. The obligation that rests on the prosecution in relation to making pre-trial disclosure was noted by Carney J. in the *DPP v. Special Criminal Court* case as being an obligation to provide "*any document which could be of assistance to the defence in establishing a defence, in damaging the prosecution case, or in providing a lead on evidence that goes to either of those two things*". In addition, it had been held in the decided cases prior to the enactment of the Directive, that that obligation rested on the prosecution by virtue of the provisions of Article 38 of the Constitution to provide for a trial in due course of law, which incorporated the right to a fair trial.

43. I note that my conclusions in this regard, are supported by the observations of Edwards J. in the *Fitzgerald* case, where he noted at para. 96, that the Directive reinforced and, in many respects, largely mirrored existing Irish domestic law with regard to disclosure. He went on to note that while Article 7 created clear obligations in pursuit of the objective of safeguarding the fairness of

proceedings, those obligations were anchored to the familiar notions of materiality and relevance.

44. In these circumstances, I hold that the applicant's argument that by enacting the 2021 Act, the State failed to adequately transpose the provisions of the Disclosures Directive, is misconceived. The 2021 Act was not designed to transpose the provisions of Article 7(2) of the directive into Irish law, for the simple reason that those rights were already firmly enshrined in the common law in Ireland at that time. Accordingly, this ground of challenge to the ruling of Ryan P., is not arguable.

45. I hold that the submission made on behalf of the applicant that Ryan P. failed to give adequate reasons for her ruling is not an arguable ground of challenge to her decision for the following reasons: first, I accept the submission made by counsel on behalf of the respondents, that the applicant has not proven by way of admissible evidence the terms of the actual ruling, rather than its outcome, that was made by Ryan P. While there is an averment in the grounding affidavit sworn by the applicant that the judge simply stated that she was refusing to order disclosure, as she did not feel that the documents sought were relevant to the issues that were likely to arise at the trial; that does not purport to be an accurate reporting of her actual words. More importantly, the court is not aware of what arguments may have been led by either side in the course of an application which seems to have run over two days. If the applicant had wished to seriously challenge the adequacy of reasons given for the ruling, it was incumbent on him to produce an accurate transcript of the hearing of the application before Ryan P., which could have been easily obtained by making an application for production of the DAR.

46. Furthermore, it is well settled that the duty to give reasons does not require in every instance, a detailed analysis of the facts giving rise to an application, of the arguments made in support of, or against the application, and an analysis of the relevant legal principles. There may be occasions when such level of reasoning is required, but that is not to say that such level of reasoning is required in every case for judges called upon to make rulings in the course of a criminal trial, or in the course of a pre-trial application. Given the absence of admissible evidence in relation to the content of the terms of the application that was moved before Ryan P. and in particular in relation to what she actually said on the relevant date, the applicant has not established an arguable basis on this ground on which the decision could be struck down.

47. Finally, I can deal briefly with two further matters that arose in the course of argument. First, the application for an order of *mandamus* is unsustainable, as this court would not have jurisdiction to direct any of the respondents to make disclosure in the course of a criminal trial. Secondly, at the

conclusion of his argument in rebuttal, counsel for the applicant stated that in reaching her determination that the documentation was not relevant, Ryan P. did not have sight of the additional documentation that had been sought by the applicant in that application, being the records of his dealings as part of the Regional Source Management Unit. This ground of challenge to the decision is not arguable, because it has not been pleaded in his statement of grounds.

48. Having regard to all the material that has been placed before the court and having regard to the submissions of counsel and the authorities referred to herein, the court is not satisfied that any arguable case has been made out that the learned Circuit Court judge acted in excess of jurisdiction; or dealt with the application in a manner that was unfair to either of the parties, or otherwise acted in a manner that was unlawful. The court is not satisfied that the applicant has made out any arguable case for the reliefs as sought in the statement of grounds sufficient to satisfy the test set out in *G v. DPP*. For this reason, the court refuses the applicant leave to proceed by way of judicial review for the reliefs set out in his statement of grounds.