



Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal		2017:150
Subject matter for indexing		

Leave is sought to appeal from	<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court
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[Title and record number as per the High Court proceedings]

Joseph Kelly	V	The Member-in-Charge of Irishtown Garda Station
High Court Record	2017/1272SS	Court of Appeal Record [AGENT] 2017:511
Date of filing		
Name(s) of Applicant(s)/Appellant(s)	Joseph Kelly	
Solicitors for Applicant(s)/Appellant(s)	Cahir O'Higgins & Co., Kingsbridge House, 17-22 Parkgate Street, Dublin 8.	
Name of Respondent(s)	The Member-in-Charge of Irishtown Garda Station	
Respondent's solicitors	None on record – appeal from refusal of <i>ex parte</i> application	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes	<input type="checkbox"/> No	X

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why	N/A	

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Birmingham, Mahon, Edwards JJ. (Court of Appeal)
Date of order/ Judgment	Judgment of 4 th May, 2017; Order perfected [INSERT] 13/11/17

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Joseph Kelly
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Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant
	<input checked="" type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party
	<input type="checkbox"/>	Petitioner		

Solicitor			
Name of firm	Cahir O'Higgins & Co.		
Email	info@coh.ie		
Address	Kingsbridge House 17-22 Parkgate Street	Telephone no.	01-8744744
Postcode	Dublin 8	Ref.	

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Mr. Pdraig Dwyer, S.C.		
Email	pauc40@hotmail.com		
Address	Law Library Four Courts Inns Quay	Telephone no.	01-8174486
		Document Exchange no.	816406
Postcode	Dublin 7		

Counsel			
Name	Mr. Karl Monahan, B.L.		
Email	karl.monahan@gmail.com		
Address	Law Library, Four Courts, Dublin	Telephone no.	0876771554
		Document Exchange no.	810263 Four Courts
Postcode	Dublin 7		

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	

Telephone no.	
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How would you prefer us to communicate with you?			
<input type="checkbox"/>		<input type="checkbox"/>	
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	The Member-in-Charge of Irishtown Garda Station
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Original status

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input type="checkbox"/>	Defendant
<input checked="" type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party
<input type="checkbox"/>	

Solicitor None on record – appeal of <i>ex parte</i> application			
Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel:			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Address		Telephone no.	
		Document Exchange no.	

Postcode	
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Counsel			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

4. Information about the decision that it is sought to appeal

<p>Concise statement of the facts found in the High Court</p> <p>The High Court did not make any findings of fact. The application before the Court was for an Enquiry pursuant to Article 40.4.2 of the Constitution. The facts of the case were set out in the grounding affidavit of David Linehan. The question before the Court was a question of law regarding whether the detention of the applicant on foot of an Order of a District Court Judge extending that detention was lawful in circumstances where, having regard to the provisions of Section 50(2) and Section 50(3) of the Criminal Justice Act, 2007 (“the 2007 Act”) and more particularly to the interplay between those two subsections, there was no evidence before the District Court to the effect that the arrest of the applicant was in accordance with Section 50(2) of the 2007 Act.</p> <p>Concise statement of the judgement of the Court of Appeal</p> <p>The Court of Appeal did not make any findings of fact as the question which arose on appeal was the same question which had arisen in the High Court and concerned whether the applicant – on the facts presented in the affidavit of David Linehan – was entitled to an Enquiry into the lawfulness of his detention pursuant to Article 40.4.2 of the Constitution.</p>
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5. Reasons why the Supreme Court should grant leave to appeal

<p>It is respectfully submitted that the point of law which the applicant contends entitles him to an Enquiry into the legality of his detention is one of exceptional public importance which it is in the public interest should be determined by this Honourable Court. This is because the point of law relied upon herein arises in the context of a very significant power of detention which is very far-</p>
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reaching and which carries with it the potential if it is not regulated strictly in accordance with the legislation creating it, to encroach in a very grave way upon the constitutional rights of citizens who are detained under that power and who are whilst so detained presumed to be innocent of any criminal behaviour.

It is desirable that the point be litigated as – on the particular facts of this case – the spectre is thrown up of a citizen being subjected to a period of detention in a Garda Station potentially extending to a period of seven days without the persons vested with the power to extend that detention (in the instant case a District Court Judge) having to be satisfied that the person was lawfully arrested in the first place.

Thus, if the judgments of the High Court and the Court of Appeal herein are upheld, a person who is presumed to be innocent of any offending behaviour and who is not charged with a criminal offence – can be arrested unlawfully and committed to a detention on foot of that unlawful arrest but later have that detention extended by a Judge appointed under the Constitution without that Judge having to be satisfied that the originating arrest was lawful.

The applicant's detention continues to be live at the time of the drafting of this Application. It is highly likely that this detention will have come to an end before this Honourable Court has an opportunity to consider this application. To the extent that this raises the issue of mootness, the Court is asked not to shut out the application on the grounds of mootness for two reasons:

1. The period of detention which can potentially be authorised by the 2007 Act is very lengthy in the life of the person subjected to that detention but is very short in the context of the timeframes attendant upon making an application of the within kind to this Honourable Court. In this case, it must be acknowledged that the High Court and the Court of Appeal accommodated the applications below with remarkable speed. Even with that, it is highly unlikely that the point sought to be litigated herein could ever reach this Honourable Court if the applicant required to be undergoing the impugned detention at the time of the Court's consideration of the same; and
2. The unlawfulness of a detention can have an impact on the admissibility of any evidence obtained during the period of unlawfulness, should such be found and thus can have an effect beyond the period of the detention itself.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

1. The Court of Appeal erred in law in failing to find that the threshold for the directing of an Enquiry into the lawfulness of the applicant's detention had been met in circumstances where:
 - Section 50(2) of the 2007 Act in essence provides that it is a person who is arrested by a Member of An Garda Siochana, such Garda having reasonable cause

to suspect that the person has committed a specific type of offence who may be detained under that subsection for the periods identified in Section 50(3);

- Thus, it is a condition precedent to the exercise of the power to extend a person's detention, which is at issue herein, that the person be lawfully arrested under Section 50(2);
- Section 50(3)(g) of the 2007 Act permits a District Court Judge to extend the detention of a person whose detention has previously been extended by a Garda not below the rank of Chief Superintendent under Section 50(3)(c);
- Section 50(3)(c) of the 2007 Act permits a Garda Chief Superintendent to extend the detention of a person whose detention has previously been extended by a Garda not below the rank of Superintendent under Section 50(3)(b);
- Section 50(3)(b) of the 2007 Act permits a Garda not below the rank of Superintendent to extend the detention of a person who has been detained pursuant to Section 50(2);
- Thus, the 2007 Act creates a direct chain between the lawful arrest of a detainee for the purposes of Section 50(2) and the extension of that person's detention under Section 50(3);
- The information before the learned District Court Judge who granted an extension of the applicant's detention was to the effect that the applicant had been arrested for an offence contrary to Section 71 of the Criminal Justice Act, 2006 (which is an offence sufficient to engage Section 50(2));
- The Detective Chief Superintendent who gave evidence to the learned District Court Judge on wide range of issues relating to his ongoing investigation candidly accepted that he 'had nothing to do with the arrest';
- The arresting Garda was not in Court;
- The Detective Chief Superintendent in the course of his information indicated that the documents authorising the extensions of the applicant's detention under Section 50(3)(b) and Section 50(3)(c) were available in Court. That was presumably in an effort to satisfy the learned District Court Judge that the current detention was lawful by tracing its root back to the first extension but not to its genesis with the arresting Garda;
- There was no evidence before the learned District Court Judge as to the state of knowledge of the arresting Member in relation to the ongoing investigation prior to his effecting the arrest of the applicant from which any inference could be drawn as to any suspicion on his part;
- Counsel for the applicant submitted to the learned District Court Judge that it was

a condition precedent to the exercise of the Court's jurisdiction under Section 50(3)(g) of the 2007 Act that it be satisfied that the arresting Garda had the requisite suspicion under Section 50(2);

- The Detective Chief Superintendent – without formally conceding anything – indicated that the Member-in-Charge was in Court and was said to have had a conversation with the arresting Member which might shed light on the latter's state of mind at the time of the arrest of the applicant; but the Member-in-Charge was not called to give evidence;
 - Thus, at the first opportunity which the applicant had to enquire into the legality of the process by which he was being held, which was a judicial process, at which he raised the issue of the legality of his arrest not being established, this issue was not resolved and he was subjected to a further extension of his period of detention.
2. The Court of Appeal erred in law in finding that the application for an Enquiry pursuant to Article 40.4.2 of the Constitution was an illegitimate use of the Article 40.4.2 procedure.
 3. The Court of Appeal erred in law in finding that Judicial Review was a more appropriate remedy for litigating the applicant's complaints. This cannot be correct having regard to authorities including the decision of this Honourable Court in *Sheehan v District Judge Reilly* [1993] 2 I.R. 81 or in light of statutory provisions providing for the suspension of time if a person is produced in Court for the purpose of challenging the legality of his detention which envisages the use of the Article 40 procedure.
 4. The Court of Appeal erred in law in finding that the legality of the applicant's arrest was not a condition precedent to the exercise of the jurisdiction of the District Court under Section 50(3)(g) of the 2007 Act.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Karl Monahan, B.L.

Padraig Dwyer, S.C.

7. Other relevant information

Neutral citation of the judgment appealed against e.g. Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

Unknown.

References to Law Report in which any relevant judgment is reported

1. *Sheehan v District Judge Reilly* [1993] 2 I.R. 81
2. *The People (Director of Public Prosecutions) v Tyndall* [2005] 1 I.R. 593
3. *Walshe v Fennessy* [2005] 3 I.R. 516
4. *S. McG v Child and Family Agency* [2017] 2 JIC 2301
5. *White v The Governor of Mountjoy Prison* [2017] IEHC 551
6. *Finnegan v Member-in-Charge of Santry Garda Station* [2007] 4 I.R. 62

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

An Order (1) setting aside the Order of the Court of Appeal; (2) directing the holding of an Enquiry by the High Court into the lawfulness of the applicant's detention.

What order are you seeking if successful?

Order being appealed: set aside vary/substitute

Original order: set aside restore vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

N/A

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

N/A

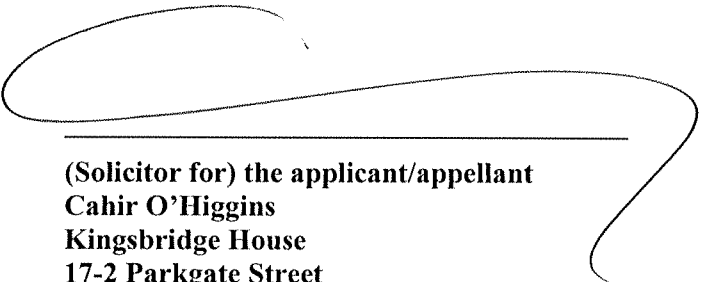
Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? Yes No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>	No
If Yes, please give details below:						

Will you request a priority hearing?	<input type="checkbox"/>	Yes	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>	No
If Yes, please give reasons below:								
The applicant is presently in the 5 th day of a detention which he contends has been unlawful since the start of the 3 rd day. That detention (with appropriate extensions under statute) has a maximum likely duration of 7 days (although time may be suspended in certain conditions which can extend the overall duration of the period during which the 7 days will expire). Thus, the litigation of the issue herein is urgent.								

Signed: 

(Solicitor for) the applicant/appellant
Cahir O'Higgins
Kingsbridge House
17-2 Parkgate Street
Dublin 8.

Please submit your completed form to:
The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.
This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.