

THE HIGH COURT

[2013 No. 4955 P]

BETWEEN

LUIS RODRIGO HERRERA

PLAINTIFF

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 24th June, 2013

1. The plaintiff is an Argentinean national who has been resident in this State since 1st September, 2012. He was, however, arrested by members of An Garda Síochána on 25th February, 2013, in connection with allegations of serious criminal offences. At that point, his Argentinean passport was taken by the Gardaí who arrested him. On the following day the applicant was charged with an offence contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997, and was remanded in custody.

2. On 26th April, 2013, the applicant was refused bail at Harristown District Court. However, on 30th April, 2013, this Court released the applicant from that custody following an inquiry under Article 40.4.2 of the Constitution. In the course of those Article 40 proceedings the applicant voluntarily agreed to appear in the District Court on the next date and stay out of the Mullingar area, away from the allegedly injured party. On 7th May this Court granted leave in judicial review proceedings whereby the applicant sought to challenge aspects of the criminal prosecution and a stay was granted in respect of those proceedings. On 29th May 2013 this Court granted an order of certiorari quashing the decision of the District Judge vacating the assignment of legal aid in the criminal proceedings.

3. In early May 2013 the applicant's solicitor had contacted the Gardaí at Mullingar requesting the return of the applicant's passport. Although this correspondence was not formally replied to, the plaintiff's solicitors was informed that the passport would not be released at this time.

4. In the meantime the proceedings have been mentioned on a number of occasions before the District Court and the plaintiff is not currently subject to any bail bond or any other condition requiring him to attend before the District Court, which in any way restricts his travel or liberty.

5. The plaintiff now seeks the return of his passport. It should be noted that he is currently unemployed but that he has a job offer in Spain where he is entitled to work, having both a work and residency permit. To this end the plaintiff had booked a flight from Dublin to Barcelona on 12th May 2013 in order to take up this offer of employment, but he found himself unable to travel by reason of the absence of his passport.

6. The plaintiff now seeks an interlocutory mandatory injunction compelling the return of his passport. The question of whether such relief should be granted is the single issue which I am now required to consider in this judgment. At the conclusion of the hearing of that application on June 10th I granted the plaintiff such relief. I now set out the reasons for that conclusion.

Whether the plaintiff is entitled to a mandatory interlocutory injunction

7. The first question which, logically, ought to arise is whether the Gardaí have any lawful basis for holding the plaintiff's passport. Here it may be stressed that the plaintiff is not presently subject to any constraints with regard to travel such as might, for example, have been imposed by a court as a condition of bail by, e.g., remaining within a particular district in the State (Bail Act 1997, s. 6(1)(b)(i)) or surrendering any passport (Bail Act 1997, s. 6(1)(b)(iii)). It might also be observed that the detention of a passport in these circumstances seriously compromises the constitutional right to travel (*The State (M.) v. Attorney General* [1979] I.R. 73 per Finlay P.; *O'Neill v. O'Keeffe* [2002] 2 I.R. 1 per Kearns J.) and, accordingly, the legal basis for the refusal to hand back the passport would have to be clearly established in law (cf. by analogy the judgment of the Supreme Court in *Murphy v. Greene* [1990] 2 I.R. 566).

8. When pressed as to what the legal basis for the withholding of the passport was or might be, counsel for the State freely and fairly acknowledged that he could not point to any relevant statutory provision or common law power which would enable the Gardaí to hold and retain a passport in these circumstances. But he nonetheless argued, relying on standard principles governing the grant of mandatory interlocutory injunctions, that this Court should be extremely slow to grant the plaintiff the relief sought.

9. It is true that the courts have been traditionally reluctant to grant such relief, mainly because this has the effect of disposing in substance with the proceedings. This was the very point made by Keane C.J. in *Attorney General v. Lee* [2000] IESC 80, [2000] 4 I.R. 68, 80 when he stated that:

"In the present case, the High Court granted an interlocutory injunction directing the defendant to attend the adjourned hearing. However, although in form the order appealed from is an interlocutory injunction, it is obvious that, if upheld, it will finally dispose of the proceedings. It is, accordingly, not entirely logical to resolve the issue as to whether the interlocutory injunction should or should not have been granted by reference to the usual test, i.e. as to whether the plaintiff has established that there is a fair question to be tried. If it should emerge at the plenary hearing of the proceedings, that, while there was a fair question to be tried, the defendant was entitled to succeed, it is difficult to see how justice could be done to the defendant where the interlocutory order has effectively disposed of the entire case."

10. The approach which was taken by the Supreme Court in *Lee* was effectively to ask whether the defendant had any potentially sustainable defence to the application. In that case the defendant had persistently refused to attend the inquest of her late husband and, given the paucity of the penalty prescribed by the Coroners Act 1962, the Attorney General sought an injunction compelling her attendance for this purpose. Such relief was granted in this Court, but the Supreme Court allowed the appeal, stating that there was

no direct evidence that Ms. Lee's attendance at the inquest was essential. It followed that at a full hearing Ms. Lee might have been able to defend the application on the basis she was not an essential witness at the inquest. The injunction was discharged and the plaintiff had to proceed to a full hearing in order to seek this relief.

11. In the present case, therefore, the first question therefore is whether the defendants can show that they have any potentially sustainable defence to the plaintiff's action. For this purpose, the defendants, having admitted custody of the plaintiff's passport and that they have refused to return it, would have to show at least some arguable defence to the plaintiff's claim based on statute or common law. No such defence has been advanced or has even been suggested.

12. In these circumstances, the plaintiff's entitlement to a mandatory interlocutory injunction is all but unarguable. If, for example, A borrows B's motor vehicle and then refuses to return it when called upon by B to do so, it would be little comfort to B to be told that the courts very rarely granted interlocutory mandatory relief or that B would have an adequate remedy in damages for which A was a mark. In such circumstances it would be the plain duty of this Court to order the immediate return of the vehicle unless A could set up some potentially plausible defence.

13. Indeed, it was in this vein that, as I have previously observed, Article 40.3.2 obliges the courts to secure litigants an effective remedy to vindicate their constitutional rights to persons and property and not simply to afford a remedy which is purely theoretical or illusory in character: see, *e.g.*, *Albion Properties Ltd. v. Moonblast Ltd.* [2011] IEHC 107; *Wallace v. Irish Aviation Authority* [2012] IEHC 178. This is especially so where the grant of injunctive relief is necessary to secure to the plaintiff a core constitutional right and where the refusal of relief could prejudicially hinder the exercise of that right. In these circumstances the courts cannot be beguiled by legal formalism or corralled into the unthinking and uncritical application of rules governing the grant of interlocutory relief without taking proper account of these factors.

Conclusions

14. Here we then come to the substance of the matter. The plaintiff needs to travel abroad in order to take up an offer of employment. Although he stands charged with serious criminal offences, there is presently no bail or other similar constraint placed upon him by law in respect of having access to his passport or travelling abroad, such as might be imposed on an accused under the terms of the Bail Act 1997.

15. In these circumstances, there is no legal basis by which the Gardai can hold or detain the plaintiff's passport. Given this state of affairs, it is incumbent on this Court to secure the plaintiff an effective remedy in order to enable him to exercise his constitutional right to travel. It was for these reasons that I granted the plaintiff an interlocutory mandatory injunction directed to the first defendant requiring him to hand over the plaintiff's passport to the plaintiff's agent with immediate effect.

16. For the avoidance of any possible doubt I should make clear that this judgment addresses only the position of a person who is *not* subject to any constraints with regard to travel or travel documents which have been imposed under the Bail Act 1997 as a condition of securing bail. The plaintiff is not presently subject to such constraints and the imposition of any such constraints in the future would be entirely a matter for the District Court or any other court duly seized of the matter in the course of the criminal process and nothing in this judgment should be taken as expressing any view whatever on the outcome of any such application (were indeed it to be made) under the Bail Act 1997.