Neutral Citation [2016] IEHC 542

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 299 J.R.]

BETWEEN

K.R.A. AND B.M.A.

(A MINOR SUING BY HER MOTHER AND NEXT FRIEND K.R.A.)

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 3)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of October, 2016

1. In *The Art of the Advocate* (London, 1980) (pp. 49 to 50), Richard du Cann gives an account of the celebrated libel action, *Laski v. Newark Advertiser Co. Ltd.,* tried by Lord Goddard L.C.J. and a jury in 1946. At an earlier point in the trial, the plaintiff's junior counsel Sir Valentine Holmes conceded, in a single, somewhat off-hand sentence, that damages would not be sought in relation to one particular allegation imputing cowardice to the plaintiff. In his final speech however, leading counsel for the plaintiff Sir Gerald Slade Q.C. asked for a verdict in his client's favour on this allegation. Sir Patrick Hastings Q.C., counsel for the defendant, then intervened to demonstrate by reference to the transcript that Slade's junior had previously abandoned this point. Du Cann acknowledges the tremendous pressure this must have created for Slade at that moment: "*In that one possibly ill-considered sentence, which was not vital to the argument then taking place, the whole of Slade's point, one upon which he believed he could win the whole case, was swept away in the middle of his final speech. Whatever the obligations to his client and whatever the personal feelings he had himself, Slade recognized the most important single fact of the situation: Hastings had already addressed the jury on the basis that the point was abandoned".* Slade then told Lord Goddard: *"I am not going back on anything Sir Valentine Holmes said, any more than I should go back on anything I said myself; and I therefore prefer to err on the side of fairness and I shall not ask the jury to deal with that part of the libel at all"*. Du Cann's comment on this is that *"[t]his is honest dealing of a very high order indeed".* But it is also advocacy at its most practical. Any other course would have been unworkable for the simple reason that the earlier representation had been relied upon.

2. Just how unworkable has been demonstrated in the present case where an alternative approach was taken. When it was drawn to the attention of leading counsel for the respondent that the submissions and objections being made, at a very late stage in the day after the hearing proper had concluded, were radically inconsistent with concessions and submissions made at an earlier point by his junior counsel, the court was metaphorically afforded an insouciant shrug and was simply told that these were good points and would be persisted in – *even though the earlier representations had been relied upon* by the other participants in the proceedings and the court itself. The fallout from that ill-founded strategy continues in the present application.

3. In the substantive decision in this case, *K.R.A. (No. 1),* I refused an application for *certiorari* of a decision not to revoke deportation orders under s. 3(11) of the Immigration Act 1999. In *K.R.A. (No. 2),* I granted the applicants leave to appeal that refusal to the Court of Appeal pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and also awarded the applicants their costs in the particular circumstances of the case. The respondent now applies for leave to appeal against the order in relation to costs and in relation to the interlocutory injunction granted pending the determination of the appeal. I have considered the relevant case law in relation to leave to appeal including *Arklow Holidays Ltd v. An Bord Pleanála* [2007] 4 I.R. 112 and *Glancré Teoranta v. Cafferkey* [2004] 3 I.R. 401.

4. Following the circulation of an unapproved version of the present judgment, the respondent applied to me to have certain matters clarified, and the present version is the revised version taking into account those submissions and including other appropriate clarification and refinement.

Does a party need leave of the High Court in order to cross-appeal to the Court of Appeal?

5. The first issue that arises is whether I should entertain the application for leave to appeal, or in other words, whether I should take the view that the High Court is required to give leave in order to facilitate a cross-appeal, where leave has been given to the other party to file an appeal to the Court of Appeal.

6. In the present case, there are a number of factors militating in favour of finding that such leave to appeal is required. Firstly, both parties are agreed that leave to cross-appeal is required.

7. *K.I. v. Minister for Justice* [2012] IEHC 501 (Unreported, High Court, 9th May, 2012) appears to be the only case where this precise question has appeared for judicial consideration. In that case, Hogan J. took the view at para. 14 that where the applicant sought to appeal against a costs order, a certificate was required to do so. At para. 16, he refused such a certificate, and at para. 17, stated that the Minister's application for a certificate to cross-appeal the same costs order did not arise. Thus, at a minimum, Hogan J. did not seem to see anything wrong with the approach adopted in that case by the respondent, namely that leave to cross-appeal was required.

8. In *McPhillips v. Minister for Justice, Equality and Law Reform* [2015] IESC 47 (Unreported, Supreme Court, 18th May, 2015), the respondent sought to appeal a costs order without a certificate. Murray J. noted at para. 40 that *"the Oireachtas had in mind any appeal from the 'decision' including all elements of the decision, of the High Court*". The reference to "*all elements of the decision*" is particularly apposite in this case.

9. *Canty v. Private Residential Tenancies Board* [2008] 4 I.R. 592, was another case where an applicant was not entitled to appeal a costs order without leave, as were *Rowan v. Kerry County Council* [2015] IESC 99 (Unreported, Supreme Court, 18th December, 2015) and *Browne v. Kerry County Council* (Unreported, Supreme Court, 24th May, 2014).

10. As a matter of first principles, Mr. David Conlan Smyth S.C. for the respondent makes the point that if a party that was granted leave to appeal subsequently withdraws the appeal, that would leave a cross-appealing respondent high and dry if such a party was then seeking to ask the appellate court to vary the order of the High Court without any extant certificate to its benefit in that regard.

11. One might also envisage a multi-handed fight where, just to take an example, the Human Rights and Equality Commission were brought in to argue that a particular provision was incompatible with the ECHR. If a losing applicant appealed with a certificate and pursued a point of Irish law only, and if the Commission did not seek a certificate, the doctrine that leave for one party implies leave for all would mean that the Commission (in this hypothetical example) could pursue an issue of legislative incompatibility in the Court of Appeal even if none of the primary parties wished to do so. This sort of forensic free-for-all does not seem to comport with the policy of s. 5 which is firmly to restrict the circumstances in which appeals may be brought.

12. Admittedly, the courts have historically taken the view that a party given leave to appeal can argue all its points even those on which leave to appeal was refused (see *e.g., Scott and ors. v. An Bord Pleanála and ors.* [1995] 1 I.L.R.M. 424). There may however be some signs of different attitudes emerging – certainly the Supreme Court has taken the view that it will only deal with the questions of public importance identified by it when granting leave to appeal. While one can make the point that that is a different and final form of appeal, it can also be said that the statutory and constitutional provisions are equally silent as to the scope of an appeal to that court as to the Court of Appeal. But even on the generous approach that all one's points are in play, such a doctrine has not to date been extended to allow an order made against some other party to be appealed where that party would have needed leave to appeal if that order had stood alone.

13. Thus a party that gets leave to appeal on a substantive order can impliedly also appeal against a costs order against it without further leave. However that does not mean that other parties can appeal any and all orders against them including as to costs without leave given *to them.*

14. Finally, it may be worth mentioning the practice in relation to the admittedly different procedure for onward appeal to the Supreme Court, whereby it is abundantly clear that leave to cross-appeal is specifically required (see *McEnery v. Garda Commissioner* [2016] IESC 26 (Unreported, Supreme Court, 12th May, 2016) per Clarke J. at para. 3.6; as well as numerous determinations where leave to cross-appeal, particularly on costs, was decided upon (e.g. *Minister for Justice and Equality v. N.H.V.* [2016] IESCDET 105 (22nd July, 2016), *Garda Representative Association v. Minister for Public Expenditure* [2016] IESCDET 68 (5th July, 2016) at para. 14*; D.P.P. v. Avadenei* [2016] IESCDET 101 (8th July, 2016); and *C. v. Minister for Social Protection* [2016] IESCDET 111 (15th September, 2016) which has similarity to the present case where the losing party sought leave to appeal and the State also sought leave to cross-appeal a costs order made against them by way of exception to the rule that costs follow the event). Of course I am acutely conscious that determinations are not of precedential values as to questions of substantive law, but it seems reasonable if not necessary to take them into account in order to illuminate questions of appeal procedure. Certainly the Supreme Court has not said thus far that they cannot be considered even for that purpose. While I do not put huge weight on any analogy drawn from the determinations procedure (given that the Supreme Court operates under separate constitutional provisions) nonetheless the concept of leave being required to cross-appeal to the Court of Appeal where leave to appeal is restricted by provisions such as s. 5 of the Illegal Immigrants (Trafficking) Act 2000 could be said to draw at least mild support from the analogous requirement for leave to cross-appeal to the Supreme Court.

15. Having regard to all of the foregoing matters, which all point in the same direction, I conclude that, in proceedings governed by a leave to appeal procedure, a party that wishes to appeal to the Court of Appeal an order, including a costs order to which it objects, must obtain leave to do so if that order standing alone would require leave to appeal, even if leave to appeal has been granted to another party.

16. It is, therefore, necessary to go on to consider Mr. Conlan Smyth's application.

Does the costs order involve a point of law of exceptional public importance?

17. Murray J. in *McPhilips* at para. 16 said that: *"it is difficult to envisage a discretionary and fact specific question of legal costs ever constituting a point of 'exceptional public importance'"*. I consider that observation is apposite to this case, which in a number of respects was very case-specific.

18. The closest that Mr. Conlan Smyth came to a point of law of exceptional public importance in relation to costs was in his submission that my decision in *R.A. v. Refugee Appeals Tribunal (No. 2)* [2015] IEHC 830 (Unreported, High Court, 21st December, 2015) (to the effect that the existence or otherwise of a point of exceptional public importance was relevant to the discretion under O. 99 as construed in *Dunne v. Minister for Environment Heritage and Local Government* [2008] 2 I.R. 775) was not agreed with by Eagar J. in *Balc v. The Minister for Justice and Equality (No. 2)* (Unreported, High Court, 16th February, 2016).

19. However, it would be inappropriate to grant leave on the basis of an apparent contradiction between *Balc (No. 2)* and *R.A. (No. 2)* for the simple reason that, as I pointed out in *K.R.A. (No. 2),* the decision in *Balc (No. 2)* was based on a fundamental misunderstanding of what was decided in *R.A. (No. 2).* A divergence in jurisprudence can and often does amount to a point of law of exceptional public importance warranting the grant of leave to appeal. But that is not always the case, because not all divergences of jurisprudence are identical. Some arise from a different considered view being taken on all the relevant material. But such is the comedy of errors capable, despite all best efforts, of descending on any human activity that it must be acknowledged that other divergences can arise from mistake or misunderstanding. Because it incorrectly represents *R.A. (No. 2)* as deciding the opposite of what that judgment expressly states, the decision in *Balc (No. 2)* falls firmly into the latter category. Now that this matter has been clarified, there is, in my view, no real risk of that misunderstanding being perpetuated and therefore on no basis to hold that there is a point of law of exceptional public importance in relation to the costs determination in this case.

20. More generally, it is more or less unheard-of for a party to disclaim any liability to be bound by its representations to the court, so the conduct which influenced the making of a costs order against the respondent is unlikely to be repeated by other parties. The decision on costs therefore does not significantly transcend the individual case so as to warrant leave to appeal (see *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 I.R. 704 (McKechnie J.)).

Is it in the public interest that there be an appeal to the Court of Appeal?

21. The fall-back question that could arise is whether the respondent can rely on there being a point of law of exceptional public importance in the substantive issues in the case overall as a basis for an appeal on costs, even if the point of law relates to those substantive issues alone rather than costs specifically. I do not have to decide this point in this application because even if I was of the view that there was either a point of law of exceptional public importance in relation to costs, or that the respondent could rely

on the point already certified in the substantive proceedings, the difficulty arises for the respondent as to whether an appeal would be in the public interest. The manner in which a party conducts the proceedings is an aspect of that public interest test.

22. By way of context as to one aspect, the issue in relation to whether s. 5 of the 2000 Act applies to a judicial review of a s. 3(11) refusal was initially introduced in the present case by my raising it with the parties, although as I intimated in the substantive judgment I had been alerted to the point by Mr. Michael Conlon S.C. in another case. When the point was raised in these proceedings, neither side suggested that the issue should not be decided. Each side asked me to decide it in their favour. That amounts to an invitation by each side to decide the point, albeit one that was instigated by a previous invitation by me requesting to be addressed on the issue.

23. As appears from the decisions in *K.R.A. (No. 1)* and *K.R.A. (No. 2),* a number of the aspects of the conduct of the proceedings by and on behalf of the respondent were inappropriate, particularly the following:-

> (i) telling the court that there was no pleading objection to the points being made by the applicant, and then after the hearing launching a pleading objection on points that were the subject of the prior concession;
>
> (ii) doing so without drawing the attention of the court to the concession previously made by the respondent;
>
> (iii) requesting the court during the hearing to determine the applicability of s. 5 in a manner favourable to the respondent, thereby consuming time and energy on the part of the court, and subsequently after the hearing submitting for the first time that this point did not need to be decided, thereby in effect declaring the efforts made in considering this issue to have been a waste of the court's time;
>
> (iv) doing so without drawing the court's attention to the fact that the respondent had previously specifically asked that the point be decided in its favour;
>
> (v) failing to object to the applicants' submission regarding the educational rights of non-national children during the hearing, and then seeking to launch a pleading objection after the hearing was over;
>
> (vi) asserting the foregoing as a matter of right without acknowledging any liability to be bound by previous representations to the court;
>
> (vii) maintaining the foregoing stance despite the prior inconsistent representations to the court, which had been acted upon, being pointed out to the respondent's lawyers.

24. It seems to me that the public interest insofar as it is a component of the test for leave to appeal must include the concept that parties must engage with the court in accordance with certain basic ground rules. This does not seem to have happened in this case. While the respondent's position has been to express "*regret*" for this state of affairs, that expression of regret is coupled with the statement from Mr. Conlan Smyth that "*we stand over the position we adopted subject to the court finalising the certificate application*". Someone who says "we regret what happened but we didn't do anything wrong" is effectively saying not a great deal more than "Sorry you feel that way". The respondent's position is that to have said much more than that would have undermined the application for leave to appeal. I appreciate the difficulty, but it is of the respondent's making. No solid basis has been put forward as to why it can be said that I was wrong to reject the respondent's stance of not being bound by previous representations to the court. It is therefore not oppressive to suggest that it would have been preferable for the respondent to review that stance. In any event, my view on the public interest test is based on a retrospective assessment of how the respondent acted in this case independently of whatever the respondent's current position might be.

25. The best Mr. Conlan Smyth can do is to say that the applicants were not prejudiced because even at the eleventh hour they could have sought an amendment to answer the respondent's attempted U-turn. That is simply not an answer for a host of reasons of which I will mention only one, namely that, as I pointed out in my previous decision, due to the impact of the case on other proceedings, I had determined that judgment had to be given imminently and there was not time in the circumstances for any such amendment application and the consequent preparation and exchange of amended pleadings that could have arisen therefrom. That is not of course to say that if there had been time, the conduct by and on behalf of the respondent would have been appropriate – it would not. That the respondent does not seem to have digested or addressed the reasons set out in my previous judgment as to why we were well past the point when amendment of pleadings was a realistic answer only reinforces my conclusion in the light of the foregoing discussion that it would not be in the public interest to grant leave to appeal.

The injunction

26. Mr. Conlan Smyth also seeks leave to appeal the interlocutory injunction restraining deportation pending the determination of the appeal to the Court of Appeal. A misunderstanding appears to have occurred in that it was my intention in signalling the question of the injunction at the end of the judgment in *K.R.A. (No. 1)* that the injunction was on the table for discussion when the matter resumed for hearing of any consequential items. In fact, I did not receive any submission as to why the injunction should not be continued, and therefore, continued it in the *K.R.A. (No. 2)* judgment. Mr. Conlan Smyth now complained that he has been deprived of a hearing of this issue. I had intended that the respondent would be on notice that this matter was on the agenda for the reason I have mentioned, and that therefore Mr. Conlan Smyth had the benefit of the opportunity that he now seeks; but, as I say, some misunderstanding seems to have occurred.

27. It seems to me that the granting of a certificate to appeal the injunction to the Court of Appeal (if such a certificate is necessary in that regard, which I am not deciding), is not the only or the best way in which this difficulty could be overcome. A more convenient way to deal with it could be for me to vary the injunction to permit Mr. Conlan Smyth to apply to the High Court for a discharge of the injunction. Under those circumstances, it does not seem to me that it is appropriate that I should specifically facilitate, by way of a certificate, a more cumbersome procedure of applying for an order varying the injunction in the Court of Appeal (which would in any event, by reason of the absence of submissions to date, be effectively deciding it as a court of first instance in the circumstances of the present application). Ms. Boyle very reasonably accepted that the matter could be reviewed in this court rather than have to be decided by the Court of Appeal at this stage. When addressing the matter, the court dealing with it should not be particularly influenced by my original order to continue the injunction on an interlocutory basis, because that decision was not the product of any deep examination of the point but merely a simple preservation of the *status quo* in the absence of detailed or indeed any submission at that time.

Order

28. For the foregoing reasons, I will order:

(i) that the respondent's application for leave to appeal to the Court of Appeal in relation to the order as to costs and in relation to the interlocutory injunction be refused; and

(ii) that the injunction herein be varied so as to provide that the deportation of the applicants be restrained until further order (in lieu of the previous order that it continue until the determination of the appeal), and that the injunction be listed on Monday 10th October, 2016 for any submissions that might be made by either party as to whether it should be continued or discharged. I will hear the parties on whether I should re-consider the matter in the circumstances or whether it should be heard de novo by the judge in charge of the Asylum List.