[2017] IEHC 661

THE HIGH COURT

2017 No. 37 JR

Between:

JOSEPH LAVERY

Plaintiff

– and –

DISTRICT JUDGE JAMES FAUGHNAN

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 1st November, 2017.

I. Background

1. This is an application for leave to bring judicial review proceedings. The applicant, Mr Lavery, has, since 4th July, 2016, been the subject of a so-called *Isaac Wunder* order whereby he is prohibited "*from issuing any further proceedings without the leave of the President of the High Court or of another Judge of the High Court nominated by the President*." High Court orders are not made for the making; they are made with a purpose in mind and that purpose must be honoured, most of all by the High Court itself. The general purpose of *Isaac Wunder* orders was outlined by Keane C.J. in *Riordan v. Ireland* [2001] 3 I.R. 365, 370, and demonstrates the type of misbehaviour in which Mr Lavery must have been perceived to have engaged in the past for an *Isaac Wunder* order ever to have issued against him. Per Keane C.J:

> "[T]*here is vested in this court, as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly groundless and vexatious. The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public offices as well as by private citizens. This court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation."*

2. The reference to "[the] *right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public offices as well as by private citizens*" is perhaps especially notable in the context of the within proceedings.

3. Given that the *Isaac Wunder* order made against Mr Lavery has been extant since 4th July, 2016, it is notable that the within proceedings commenced by way of notice of motion dated 16th January, 2017, without leave being obtained of the President of the High Court to their being brought and without the President, upon application for such leave being made, deciding the application himself or nominating another High Court judge so to do. It is true that, as appears from the pleadings now before the court, a number of incidental administrative matters have been dealt with by a couple of judges of the High Court in the context of the within proceedings since they commenced. What is not clear is whether at any point those High Court judges were expressly advised or otherwise knew of the fact that there is an *Isaac Wunder* order extant against Mr Lavery. In this regard, it is notable that in his affidavit grounding the within proceedings, Mr Lavery, most surprisingly, never once makes mention of the fact that he is the subject of an *Isaac Wunder* order. The court does not consider in any event that the issuing of a number of orders of an administrative nature by the judges aforesaid yields the happy consequence for Mr Lavery that the within proceedings should now be deemed to enjoy some form of implicit *Isaac Wunder*-related leave. It is before this Court that the existence and consequence of the *Isaac Wunder* order has expressly been raised, and it is from this Court that an adjudication must now issue as to what is to be done about the commencement of the within proceedings in breach of the *Isaac Wunder* order that was and is extant against Mr Lavery.

4. In this last regard, the reasoning of the court may be stated simply: Mr Lavery knew that the *Isaac Wunder* order was extant; Mr Lavery knew that a certain process was required as regards commencing the within proceedings; and Mr Lavery failed to observe that process. Why then should Mr Lavery get to side-step the consequences of his own actions simply because his proceeding in disregard of the *Isaac Wunder* order was not immediately noticed and/or not expressly adjudicated upon? There is no reason why. To the President of the High Court Mr Lavery must, consistent with the *Isaac Wunder* order extant against him, go and make application for leave to bring such proceedings as he now wishes to bring, which application will be decided by the President or such other judge of the High Court as the President nominates to determine that application. Were the court otherwise to proceed, were it to adjudicate now upon Mr Lavery's application for leave to bring his judicial review proceedings, it considers that it would, to borrow from the above-quoted extract from the judgment of Keane C.J. in *Riordan*, be "*failing in its duty*…[not to allow] *its processes to be repeatedly invoked in order to…pursue groundless and vexatious litigation*."

II. The Matters in Respect of Which Judicial Review is Now Sought

(i) *Overview*.

5. Notwithstanding the conclusion just reached, and mindful of the possibility that despite standing in breach of the requirements of the *Isaac Wunder* order extant against him, Mr Lavery may yet continue to proceed in breach of that order and seek to bring an appeal against the within judgment, the court explains hereafter why, even if it had been minded to give judgment on Mr Lavery's application for leave to bring his judicial review proceedings, and again the court is not so minded, it would in any event have declined to grant such leave.

(ii) *Bad Faith*.

6. Mr Lavery alleges that, in certain District Court proceedings, the learned District Judge was guilty of bad faith (*mala fides*) in convicting Mr Lavery of various road traffic offences, including certain offences in respect of which Mr Lavery maintains that he did not receive fixed penalty notices or summonses. Mr Lavery also appears to have taken offence at the demeanour of the learned District Judge when considering his case and ruling against him.

7. The court cannot but note that an allegation of bad faith made against any judge in the discharge of her or his official functions is a remarkably serious allegation to make. So it is right that the court should note that there is absolutely nothing before the court, apart from Mr Lavery's bald averments and un-particularised pleadings to the contrary, to suggest that the learned District Judge was

possessed of, or motivated by, bad faith in his dealings with Mr Lavery. Indeed, it is notable that despite repeatedly referring in his pleadings to the learned District Judge's alleged bad faith, Mr Lavery singularly fails in those pleadings ever to particularise what that bad faith involved. Instead, for example, the learned District Judge's actions of refusing an adjournment and entering certain convictions are presented in and of themselves as somehow being bad faith actions. But if rulings against parties fell properly to be treated in and of themselves, without anything further, and here nothing further is offered, as acts of bad faith, then the courts would close tomorrow, for every judge in every ruling that dis-favoured one party would be found necessarily (and nonsensically) to have acted in bad faith in so ruling.

8. In truth, Mr Lavery's allegations of bad faith against the learned District Judge are so completely un-grounded in evidence, apart from Mr Lavery's own bare averments, that the court cannot but wonder whether this is not one of those very rare cases in which, especially when the case comes coupled with an *Isaac Wunder* order and a failure to seek the requisite leave for commencement of the within proceedings, Mr Lavery may not have strayed into a species of that "*flagrant abuse*" to which Barrington J refers in *Looney v. The Governor and Company of the Bank of Ireland and Morey* (Unreported, Supreme Court 9th May, 1997) as a basis on which the immunity from suit for defamation that typically applies to court utterances, should not apply. It is true that Mr Lavery cannot make the case that he now wishes to make without saying what he has said, but it does not seem to the court that that entitles him at law, whether with *Isaac Wunder*-related leave or otherwise, to advance a fantastical and un-particularised case which enjoys no support in evidence (apart from his own bare averments) and, on the basis of that 'case', such as it is, freely to assail the personal and professional reputation of the learned District Judge. All public officials are rightly subject to public criticism; but it is not a logical corollary of that uncontroversial proposition that such officials must also endure unsubstantiated vilification of their character and doings.

(iii) *Filtering*.

9. Order 84, rule 20(1) of the Rules of the Superior Courts (1986), as amended, states that "*No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule*". This requirement to obtain leave, as Delany and McGrath note in *Civil Procedure in the Superior Courts*, 3rd ed., 1021, "*is designed as a filtering process to weed out at an early stage, frivolous and unmeritorious cases*." Indeed, given the number of judicial review applications that completely fail when the mainstay of those applications comes to be heard, a question perhaps arises as to whether this filter is generally deployed with sufficient rigour when leave to make a judicial review application is sought. But regardless of what the answer to that last question may be, the court concludes that the within proceedings are proceedings which in every respect meet the criteria of being "*friviolous, vexatious or of no substance*", to borrow from the wording of Kelly J., as he then was, in *O'Leary v. Minister for Transport, Energy and Communications* [2000] 1 ILRM 391, 397, and thus are judicial review proceedings (a) in respect of which no leave to proceed would have been granted by this Court, (b) had this Court been prepared to rule on the application for leave to bring such proceeding, which application (c) for the reasons stated above and hereafter, this Court is not satisfied to rule upon.

III. Alternative Remedy

(i) Overview.

10. The learned author of Fordham on Judicial Review, 6th ed., 411 notes, inter alia, as follows under the heading "*Alternative remedy*":

> *"Judicial review is not the sole or immediate protection against legal wrongs by public authorities. The existence of other avenues of protection, and the question whether these have been or can be pursued, stands to affect whether judicial review will be available and, if so, how it will operate"*

11. Thus it seems that, at least in the United Kingdom, judicial review is something of a last resort, and generally inappropriate, where suitable alternative safeguards exist. In Ireland, the position is perhaps a little more nuanced As Barron J. observes in *McGoldrick v An Bord Pleanála* [1997] 1 I.R. 497, 509 in what has become perhaps the definitive, and certainly an often-quoted, statement of the applicable principles in this regard:

> *"The real question to be determined where an appeal lies is the relative merits of an appeal as against the granting of relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind".*

[For a recent consideration of *McGoldrick* and related case-law, see, *inter alia, EMI Records (Ireland) Limited & ors v. The Data Protection Commissioners* [2013] IESC 34.]

12. As Prof. Delany notes of *McGoldrick* in "*The Relevance of the Availability of an Alternative Remedy in Judicial Review Proceedings"* (2009) 27 ILT 10:

> *"It is clear from the approach taken by Barron J….that the relative merits of an appeal process and the proposed judicial review must be weighed up in the light of the individual circumstances of a case in order to determine the significance of the availability of an alternative remedy."*
>
> [See also in this regard the judgments of Denham J., as she then was, in *Stefan v Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 203 and also in *Tomlinson v Criminal Injuries Compensation Tribunal* [2006] 4 I.R. 321].

13. Hogan and Morgan in *Administrative Law in Ireland*, 4th ed., ch.16, also make useful comment on the "*Availaibility of Alternate Remedies*", including, *inter alia*, the following observations at 885-889:

> *"The existence of an alternative remedy does not of itself debar an application for judicial review. The question is essentially one for the discretion of the court and regard will be had to the adequacy of the alternate remedy and to all the circumstances of the case. Where the issues in question are principally issues of fact or law not fundamentally going to jurisdiction and which can be dealt with on appeal, then the courts will invariably insist that the appellate remedy be availed of. The more difficult questions arise where – as is often the case – the errors of law in question either do fundamentally go to jurisdiction or, alternatively, can be characterised as such….*
>
> *It used to be trite law that a relief would not be granted where an alternative remedy has been invoked and is pending*

or where an applicant had deliberately pursued an alternate remedy in the belief that this course of action was in his best interests, but these now are simply factors – albeit 'weighty' factors – going to the exercise of discretion.

…

A distinct point is that there is a strong line of authority that the exhaustion requirement will not now be insisted upon where the complaint relates to a breach of fair procedures, partly because of the grievous nature of the error. This point was strongly made by Denham J. in Stefan v. Minister for Justice [op. cit.], a case where certain material information in an asylum application had been omitted in error from the translation of certain documents which had been placed before an authorised officer. When the applicant sought to quash the refusal by reason of this error, the respondent contended that an appeal should have been taken to the independent appeals authority. Denham J. would not accept this argument:

> 'The original decision was made in circumstances which were in breach of fair procedures and which resulted in a decision against the appellant on information which was incomplete. The appeals authority process would not be appropriate or adequate so as to withhold certiorari. The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing.'"

14. In *Stefan* there was a demonstrable error in what had transpired before the authorised officer. Here, by contrast, Mr Lavery does not like the rulings against him, does not like what he perceived to be the demeanour of the District Judge when ruling against him, and has constructed on those disliked rulings and purported demeanour a case of bad faith, of which bare averments are made, no particulars are provided in the pleadings, and not an iota of supportive evidence (beyond Mr Lavery's bare averments) exists. Leaving aside these unsupported, unsubstantiated and un-particularised allegations of bad faith, it seems to the court that the complaints made in the within case, being whether the convictions and ensuing punishments properly issued from the District Court are manifestly a matter for an appeal process rather than a review of procedure. If it is the case that there was some deficiency in the service of summonses, that is a matter which can be properly addressed on appeal. Buttressing the court's view in this regard is that Mr Lavery has already commenced appeal against his convictions, with the result that if he is successful on appeal a very real question as to the mootness of the judicial review proceedings would then present. At the very least, the court would be presented with a situation requiring that great caution contemplated *in NAA v Refugee Applications Commissioner* [2007] 2 I.R. 787 where Finlay Geoghegan J. suggested that a court should only exercise its discretion to grant *certiorari* of a decision which has been the subject of a decided appeal where special circumstances exist which make such late intervention necessary to do justice between the parties. That discretion would fall to be applied in this case in the context, on the one hand, of an appeal that had decided the substantive concerns that can be decided in a criminal appeal and, on the other hand, with an allegation of bad faith for which, apart from the applicant's bare averments and un-particularised pleadings, there is not a shred of supportive evidence and in respect of which there is no basis for granting leave to bring judicial review proceedings.

(ii) *Some General Propositions regarding Judicial Review and Alternative Remedies*.

15. What general propositions might be derived from the foregoing as regards allowing a judicial review application to proceed where an alternative remedy is available? Perhaps six propositions might confidently be asserted:

> (1) the nature of the challenge which the applicant seeks to make is the primary factor in determining the impact which the availability of an alternative remedy may have on judicial review proceedings;
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> (2) it is important not to ignore the distinction between an appeal on the merits and a review of the legality of a decision by taking a simplistic approach to the requirement that alternative remedies be exhausted;
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> (3) it may be necessary to allow judicial review to take place even where an alternative appeal procedure is open, in order to ensure that public confidence in the decision-making process is maintained;
>
> (4) a court will likely be mindful of the stage which any appeal procedure may have reached when leave is sought to bring judicial review proceedings. (In *Stefan*, Denham J., at 216, suggested that the stage that any appeal may have reached is "*relevant, though it may not be determinative*").
>
> (5) the position is less flexible once an appeal has been heard and determined, with, *e.g.*, the decision in *NAA* suggesting that judicial review will only be permissible in special circumstances once an appeal from the decision being challenged has actually been determined.
>
> (6) ever to be borne in mind, and complementing point (1), is the fact that the requirement to obtain leave to make a judicial review application is designed as a filtering process to weed out at an early stage, frivolous and unmeritorious cases.

(iii) *Application of Propositions Aforesaid to the Within Application.*

16. Were the court minded now to adjudicate upon Mr Lavery's application for leave to bring his judicial review proceedings, and for the reasons stated elsewhere in this judgment, the court declines to make any such adjudication, the conclusions it would have reached in terms of the propositions aforesaid are as follows.

17. As to (1), Mr Lavery's allegations as to the good faith of the learned District Judge are concerned are bereft of any supporting evidence (apart from his own bare averments). Insofar as his complaints as to the convictions made are concerned, those are complaints that are adequately met by way of the criminal appeals process that he has himself commenced.

18. As to (2), the court notes this point.

19. As to (3), the court does not consider this to be a point that would justify allowing the within judicial review proceedings to proceed, were the court satisfied to rule on the application for leave to bring the judicial review proceedings, and again it is not so satisfied at this time. Public confidence in the decision-making process would not be affected by a situation in which (a) an appeal against criminal convictions was allowed to proceed, but (b) frivolous and vexatious allegations of bad faith on the part of a trial judge, that are entirely unsupported by evidence (apart from Mr Lavery's own bare averments) were not allowed to proceed to hearing. In truth, the court considers that public faith in the good sense of their courts would be adversely affected if such a

frivolous and vexatious matter were to be allowed to proceed to hearing.

20. As to (4), the criminal appeal process has commenced and a stay on the disqualification order granted pending the outcome of same, so that process is well under way.

21. As to (5), this state of facts does not yet apply: the appeal, to the court's knowledge, has not yet been concluded; certainly it had not concluded as of the date of hearing.

22. As to (6), as the court noted previously above, insofar as it is sought by Mr Lavery to impugn the actions and motives of the learned District Judge, his allegations, being entirely unsupported by any evidence apart from his own bare averments and un-particularised pleadings, are in every respect frivolous, vexatious and of no substance.

IV. Conclusion

23. For the reasons aforesaid, the court, had it adjudicated upon Mr Lavery's application for leave to bring judicial review proceedings would have reached the conclusions just stated and declined to allow him to bring those proceedings. The court, however, declines to rule on the said application. Why so? Simply put, Mr Lavery is the subject of an *Isaac Wunder* order and cannot be allowed to force through the courts his application for leave to bring judicial review proceedings without first vaulting the hurdle that was established when the High Court issued an *Isaac Wunder* order against him, back in July 2016. To the President of the High Court, Mr Lavery must, pursuant to the *Isaac Wunder* order extant against him, now go and seek leave to bring such proceedings as he might wish to commence, which application for leave will be decided by the President or such other judge of the High Court as the President nominates to determine that application. No such required leave has been granted in respect of the within proceedings, the substance of which the court declines therefore to rule upon.