Neutral Citation Number: [2004] IEHC 374

THE HIGH COURT

2002 9652 P

BETWEEN

LOUIS BLEHEIN

PLAINTIFF

AND
THE MINISTER FOR HEALTH AND CHILDREN, IRELAND
AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Mella Carroll delivered the 7th day of December, 2004.

1. This is an action challenging the constitutionality of s. 260 of the Mental Treatment Act, 1945 as amended (the 1945 Act). Section 260 of the 1945 Act as amended by s. 2(3) of the Public Authorities Judicial Proceedings Act, 1954 provides as follows:

> No civil proceedings shall be instituted in respect of an act purporting to have been done in pursuance of this Act save by leave of the High Court and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the person against whom the proceedings are to be brought acted in bad faith or without reasonable care.
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> Notice of an application for leave to the High Court under sub-section 1 of this section shall be given to the person against whom it is proposed to institute the proceedings, and such person shall be entitled to be heard against the application.
>
> Where proceedings are by leave granted in pursuance of sub-section 1 of this section, instituted in respect of an act purporting to have been done in pursuance of this Act, the court shall not determine the proceedings in favour of the plaintiff unless it is satisfied that the defendant acted in bad faith or without reasonable care.

2. The plaintiff, who was diagnosed as suffering from paranoid schizophrenia, was admitted to St. John of God Hospital, Stillorgan, County Dublin on three occasions from 25th February, 1984 to 16th May, 1984, from 29th January, 1987 to 16th April, 1987 and from 17th January, 1991 to 7th February, 1991. He applied for and was refused leave to challenge his committal.

3. The most recent judgment of the Supreme Court was delivered by McGuinness J. on 31st May, 2002 (unreported) (*Blehein v. St. John of God Hospital and Anor.*). The background facts are set out in that judgment as also in an earlier reported judgment of the Supreme Court (*Blehein v. Murphy & Ors*. [2000] 3 I.R. 359).

4. In the proceedings against St. John of God Hospital, the plaintiff sought at a very late stage to amend his pleadings to include a constitutional challenge to s. 260. However, McGuinness J. said at p. 27 that to amend an application for leave to appeal under s. 260 to include a constitutional challenge was not a satisfactory form of procedure. She said his correct course would be to commence new proceedings by plenary summons in order to challenge the constitutionality of the section. That is what he has now done.

5. The plaintiff argues:

> that the presumption of constitutionality does not apply if the impugned statutory provision plainly shows on its face a repugnancy to the Constitution (*Loftus v. AG* [1979] I.R. 221 at 238).
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> Each citizen has a right of access to the courts pursuant to Article 40.3 of the Constitution. To deny leave to institute proceedings is to deny access to the courts and is to deny access to justice. Article 34 provides:
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> > "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution …"
>
> The High Court and on appeal the Supreme Court have a duty to protect rights guaranteed by the Constitution. It is impossible that the High Court should have a peremptory duty to administer justice and at the same time a statutory duty under section 260 to deny access to justice. The two are mutually exclusive and cannot co-exist in the same office. It must follow that section 260(1) is an unwarranted interference by the Oireachtas in the operation of the courts in a judicial domain.
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> Section 260 is a legislated denial of justice contrary to Article 6 of the Constitution. Article 6 provides:
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> > "These powers of government (i.e. legislative, executive and judicial) are exercisable only by or on the authority of the organs of State established by this Constitution."
>
> The imposition of conditions (acted in bad faith or without reasonable care) is a disability imposed by statute for those seeking redress against the provisions of the 1945 Act. Those affected by the Act are already disadvantaged and the provision is there for legislated prejudice.
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> No objective criteria have been laid down by the courts whereby bad faith can be established. You cannot look into a person's mind to see what their motives were. In the absence of defined objective criteria it is an impossible condition. Reasonable care in relation to matters arising under the Act may only be established with the aid of psychiatric evidence which in this country is unavailable if the profession is under attack. Lack of reasonable care has to do with the tort of negligence and has no part in the vindication of personal human rights under the Constitution. The conditions are therefore impossible. For the courts to deny justice based on them is an act *ultra vires* the courts as the courts cannot act contrary to justice.
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> The nature of the guarantee in Article 40.3.1 is according to the Irish version: "Gan cur isteach" i.e. "not to interfere with" rather than "to respect", which is the English version. And the phrase "sa mhéid gur féidir é" means "as far as it is

possible" rather than "as far as practicable", which is the English version. He claims that these rights are absolute or almost absolute.

He claims he is entitled to sue for the enforcement of his constitutional rights and is also entitled to sue for damages.

The plaintiff can only enforce his constitutional rights on fulfilment of either of two conditions, bad faith or negligence to the satisfaction of the court. The imposition of these impossible conditions is an unwarranted interference with and negation of his rights as a citizen.

Denial of access to the courts is *ultra vires* judicial power. By refusing him access to justice on diverse dates the court failed in its constitutional mandate and violated his right to justice. The subordination of the courts to the legislature is not countenanced by Article 6 of the Constitution. The independence of the courts from the legislature is an essential cornerstone of democracy.

6. "This court cannot in deference to an act of the Oireachtas abdicate its proper jurisdiction to administer justice in a cause whereof it is duly seized" per *Gavin Duffy J. Buckley v. The Attorney General* [1950] I.R. 67 at p. 70.

7. "No court under the Constitution has jurisdiction to act contrary to justice" per O'Higgins C.J. State *(Healy) v.O'Donoghue* [1976] I.R. 325 at p. 348.

8. A statute cannot give the court such jurisdiction (*The Educational Company of Ireland v. Fitzpatrick* [1961] I.R. 345 per Budd J. at pp. 361, 368 and 397.

9. The plaintiff also sought to argue the effects of ss. 185 and 186. Following objection by the State I disallowed the argument as this case is not concerned with the constitutionality of ss. 185 and 186. I was informed that other proceedings are still extant dealing with the interpretation of the statutory scheme under ss. 185 and 186 and this is a case waiting to be called on.

10. The State contests the application on the basis that s. 260 is a legitimate restriction of the personal rights of the plaintiff having regard under Article 40 to his difference in capacity.

11. Reference was made to a similar requirement that the High Court be satisfied that there are "substantial grounds" for contending in certain applications for leave to apply for judicial review that various Acts, Orders and Directions are invalid or ought to be quashed.

12. In the Local Planning and Development (Act), 1992, s. 19(3)3B(a)(ii) referring to an application for leave to apply for judicial review, provides:

> "And such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed."

13. Similar provision is provided in s. 12(2)(b) of the Transport (Dublin Light Rail) Act, 1996 and in s. 43(5)(b)(ii) of the Waste Management Act, 1996, among others.

14. The Illegal Immigrants (Trafficking) Bill, 1999 (reported [2000] 2 I.R. 360) was referred by the President to the Supreme Court as to whether certain sections (including s. 5) were repugnant to the Constitution or to any provision thereof.

15. Section 5(2) referring to an application for leave to apply for judicial review, had a provision in sub-para. (b):

> "Such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed."

16. In relation to the question of "substantial grounds" the Supreme Court said per Keane C.J. at p. 394:

> "The court is of the view that the imposition of a requirement to show substantial grounds in an application for leave to apply for judicial review is one which falls within the discretion of the legislature. It is not so onerous either in itself or in conjunction with the fourteen day limitation period as to infringe the constitutional right of access to the courts or the right to fair procedures."

17. Reference to English statute law (s. 141 of the Mental Health Act, 1959 similar to s. 260) or reference to English case law was not in my opinion helpful as this case is based on an interpretation of the Irish Constitution.

18. The State referred to the judgment of Finlay C.J. in *Murphy v. Green* [1992] I.R. 566 where he said at p. 572:

> "Section 260 of the Mental Treatment Act, 1945 is *prima facie* a curtailment of the constitutional right of every individual of access to the courts to the extent that it requires a precondition of leave of the court for the bringing by him of a claim for damages for an asserted wrong.
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> It seems reasonable, as was stated by O'Higgins C.J. in *O'Dowd v. North Western Health Board* ([1983] I.L.R.M. 186) that one of the reasons for this curtailment is to prevent a person who is or has been thought to be mentally ill from mounting a vexatious or frivolous action or one based on imagined complaint."

19. He also referred to In *Re R Limited* [1989] I.L.R.M. 757 in which it was emphasised that the section constituting an expressed legislative exception to the general provision contained in Article 34 of the Constitution for the administration of justice in public must be strictly construed in the sense that it must not be availed of except where it was essential to do so.

20. He said "The application of a similar principle to the interpretation of s. 260 of the 1945 Act appears to me to be mirrored (though not expressly referred to) in that portion of the judgment of O'Higgins C.J. which I have already quoted which states:

> "As the action deals with the mentally ill or those thought to be so, it does not seem to me that this limitation is unduly restrictive or unreasonable (*O'Dowd v. North Western Health Board* [1983] I.L.R.M. 186 at 190)."

21. The State emphasised that the presumption of constitutionality applied. It was not a prohibition but a curtailment of access to the courts confined to civil proceedings and did not apply to judicial review or *habeas corpus*.

22. In my opinion there is as a very real difference between the provisions of the various Acts quoted by the State which provide that leave to apply for judicial review shall not be granted unless the High Court is satisfied there are "substantial grounds" for contending a decision (etc.) is invalid or ought to be quashed and Section 146 of the 1945 Act which provides that leave to institute civil proceedings shall not be granted unless the High Court is satisfied that there are "substantial grounds" for contending specific grounds exist. In the former the High Court is at large to decide what grounds would justify an application provided they are substantial. Under s. 146 the High Court is confined to considering two grounds (i.e. acting in bad faith or without reasonable care) and its only discretion is in determining whether either of those grounds is substantial.

23. In my opinion the limitation of access to the courts on two specified grounds constitutes an impermissible interference by the legislature in the judicial domain contrary to Article 6 of the Constitution providing for the separation of powers and Article 34 providing for the administration of justice in the courts.

24. The legislature is permitted to provide that whatever grounds are deemed by the High Court in its discretion to be worthy of consideration in deciding whether to grant leave to apply to court should be substantial (see In *Re Illegal Immigrants (Trafficking) Bill* [2000] 2 I.R. 360). But in my opinion the legislature is not entitled to limit access to the High Court on specific grounds as provided in s. 146. This provision is apparent on the face of the section therefore the presumption of constitutionality does not apply (see *Loftus v. A.G.* [1979] I.R. 221).

25. Since the relief sought by the plaintiff basically consists of seeking a declaration setting out his arguments, it seems to me the appropriate order is a declaration that s. 260 of the Mental Treatment Act, 1945 (as amended) is unconstitutional having regard to Article 6 and Article 34 of the Constitution.