THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 188JR]

BETWEEN

THOMAS BEBENEK

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

AND

IRELAND AND THE ATTORNEY GENERAL

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

(No. 2)

Judgment of Mr. Justice Keane delivered on the 14th March 2019

Introduction

1. In *Bebenek v Minister for Justice and Equality & Ors* (Unreported, High Court, 30 May, 2018) [2018] IEHC 323, I concluded that it was necessary to consider the exercise of the court's inherent jurisdiction to protect its own process from abuse since, *prima facie*, there had been a failure on the part of the applicant's legal representatives to conduct the proceedings in accordance with proper standards of professional behaviour and the duty each owes to the court.

2. To that end, I directed the applicant's solicitor and junior counsel to show cause why each should not be found to have conducted these proceedings in breach of those standards and that duty.

3. In particular, I invited those legal representatives to respond within 14 days to 10 specific matters of concern and I directed the applicant's solicitor to furnish to the court, within the same period, all documentation on her file touching upon or concerning the fee arrangements between her firm and the applicant.

4. Further, having ordered that the applicant's solicitor indemnify him in respect of the Minister's costs, I indicated that I would hear any submissions that the applicant's solicitor may wish to make on whether it is appropriate to make a further order pursuant to O. 99, r. 7 of the Rules of the Superior Courts ('the RSC') disallowing the costs of the proceedings as between her firm and the applicant.

5. On that basis, I adjourned the matter to 27 June 2018. On 13 June 2018, both the applicant's solicitor and junior counsel sought an extension of time to respond to the court's concerns and I granted a forty-eight hour extension to close of business on 15 June 2018. On 14 June 2018, on the application of counsel for the applicant's solicitor and in the absence of any objection, I brought the hearing forward to 20 June 2018.

Representation

6. When the matter came before me again on that date, the applicant's solicitor was represented by Patrick Leonard S.C. and Joe Jeffers B.L., instructed by Cahir O'Higgins & Company, Solicitors. The applicant's junior counsel was represented by Eileen Barrington S.C. and James Dwyer B.L., instructed by McDowell Purcell, Solicitors. The Minister was represented by Kilda Mooney B.L., instructed by the Chief State Solicitor. I had directed that the Minister be placed on notice of the application solely to assist, if possible, in the resolution of any factual controversy that might arise. In the event, none did. I am very grateful to counsel for their assistance.

Submissions

7. On behalf of the applicant's solicitor, Mr Leonard makes broadly three submissions. The first is a procedural one. It is that, having already found for the purpose of the application of O. 99, r. 7 of the RSC that the applicant's solicitor was grossly negligent and in breach of her duty to the court in commencing and continuing these proceedings, I am precluded from again addressing the same issue for the purpose of considering any further steps necessary to protect the integrity of the court's own processes with the result that I should either take no further action or refer the matter to another judge.

8. Mr Leonard's second submission is a jurisdictional one. It is that the court is seeking to exercise an inherent disciplinary jurisdiction over solicitors that it does not have. Mr Leonard argues that the High Court of Ireland has no inherent jurisdiction to hold to account the behaviour of lawyers whose conduct of litigation falls below the minimum professional and ethical standards demanded of all lawyers who appear before it.

9. Finally and without prejudice to his first two arguments, Mr Leonard makes a submission on the merits of the case to the effect that no further order against the applicant's solicitor is warranted in all of the circumstances.

10. On behalf of the applicant's counsel, Ms Barrington adopts the jurisdictional and procedural submissions of Mr Leonard in so far as they are material to her client, before addressing the specific mitigating circumstances of her client's conduct.

Analysis

i. jurisdiction

11. It is convenient to deal with Mr Leonard's second argument first. The premise underlying it is that the inherent jurisdiction of the court to discipline solicitors no longer exists in the wake of the decision of the Court of Appeal in *ACC Loan Management Ltd v Barry* [2015] 3 IR 473.

12. In my judgment, that is a mistaken premise.

13. In giving judgment for the Court of Appeal in that case, Hogan J first had regard to the jurisdiction of the court in relation to undertakings (at 483-4), acknowledging the controlling authority of the Supreme Court decision in *Bank of Ireland Mortgage Bank v Coleman* [2009] IESC 38, [2009] 3 IR 699.

14. In *Coleman* (at 721), Geoghegan J cited the decision of Lardner J in *IPLG v Stuart* (Unreported, High Court, 19 March 1992), as a clear affirmation that the inherent jurisdiction of the court in respect of solicitor's misconduct still exists.

15. In *IPLG* (at p. 25 of the transcript), Lardner J explained that the jurisdiction is based upon the court's right to require its officers to observe a high standard of conduct and that it is exercised where a solicitor acting for a client in a professional capacity gives a personal undertaking whether to the client, a third party or the court.

16. In *Coleman* (at 724), Geoghegan J cited, with evident approval, a passage from the speech of Lord Wright in *Myers v Elman* [1940] AC 282 (at 319) that reaffirmed the right and duty of the court to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, following Abinger C.B. in *Stephens v. Hill (1842) 10 M. & W. 28.*

17. In *ACC Loan Management* (at 484), Hogan J cited the same passage from Lord Wright's speech, before emphasising a later portion of it identifying the relevant jurisdiction as 'not merely punitive, but compensatory' and describing the court's power to make an order against a solicitor for costs thrown away as one frequently exercised in order to compensate the opposite party in the action, before concluding that the jurisdiction of the court to enforce an undertaking is 'fundamentally compensatory'. Whether the exercise of those powers as part of the inherent jurisdiction to supervise the conduct of solicitors is best described as 'not merely punitive, but compensatory', 'frequently compensatory', or 'fundamentally compensatory', it is perfectly plain that the jurisdiction still exists.

18. In this context, it is particularly important to note that the court's inherent jurisdiction to discipline its own officers is expressly preserved by s. 14(3) of the Solicitors Act 1954, which states that, notwithstanding anything in that Act, any judge of the High Court may exercise any jurisdiction over solicitors which he or she might have exercised had it not been passed.

19. The principal relief claimed by the plaintiff bank in *ACC Loan Management*, the refusal of which was under appeal, was a declaration that the defendant solicitors were guilty of misconduct in failing to comply with the undertakings they had given. Hogan J noted (at 486), that the Court had been informed in the course of the appeal that the jurisdiction to grant a declaration that a solicitor is guilty of misconduct by reason of a failure to honour an undertaking 'was a new development which had simply evolved as a matter of practice in the High Court in recent years.'

20. Holding that the creation of a such a jurisdiction would be tantamount to usurping the disciplinary functions of the Law Society under the Solicitors Acts, and applying the established line of authority, represented by *Tormey v Ireland* [1985] IR 289 and *Grianán an Aileach Centre v Donegal County Council (No. 2)* [2004] 2 IR 625, that the statutory allocation of responsibility for the determination of certain rights and liabilities to another court, tribunal or administrative body can displace the full original jurisdiction of the High Court under Article 34.3.1° of the Constitution (at 485-6), Hogan J concluded (at 487) that there is no proper legal foundation for purporting to make such a free-standing declaration and the practice should cease.

21. Hogan J drew support for that conclusion (at 487), from the enormous implications for a person's good name, protected by Article 40.3.2° of the Constitution, that a finding of professional misconduct by a court (or, one might add, by an administrative body) may have. Hogan J drew an analogy with the finding of the Supreme Court in *Corbally v Medical Council & Ors* [2015] 2 IR 304 that a threshold of 'seriousness' applies to a finding of poor professional performance as well as to professional misconduct, in questioning whether it could be said that a single isolated error by a solicitor in effecting the registration of a security document in accordance with the terms of an undertaking to do so could in itself amount to professional misconduct, that might, in turn, be made the subject of a formal declaration of professional misconduct. Finding that the exercise of that novel jurisdiction in that way would create a 'harsh or even ruthless regime' that would fail to vindicate the good name of the solicitor concerned as a citizen, Hogan J reasoned, perhaps surprisingly (on that point, at least), not that a threshold of seriousness should be applied to the exercise of any such jurisdiction but that it underscores why no such jurisdiction exists. But all of that is far away from the situation that arises here.

22. In this case, as in the recent train of English decisions from *Hamid* to *Sathivel* (cited below), there is no question of the court making a declaration of professional misconduct. Nor does the court rely on its inherent jurisdiction to discipline a solicitor. A more fundamental constitutional and common law value is at stake.

23. The jurisdiction that, unhappily, is engaged in the circumstances of this case is the inherent jurisdiction or power of the court to prevent an abuse of its own process. In *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] A.C. 909 (at 977), Lord Diplock identified a general power inherent in the constitutional function of the High Court of England and Wales to control its own procedure so as to prevent its use to achieve injustice, before concluding 'it would stultify the constitutional role of the High Court as a court of justice if it were not armed with a power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.'

24. As Murray J observed in *G. McG v D.W. (No. 2)* [2000] 4 IR 1 (at 26-7), the court's inherent jurisdiction or power arises either from the very nature of its judicial function or its role in the administration of justice under Article 34 of the Constitution of Ireland.

25. The inherent power of a court to prevent the abuse of its process by any person, including a solicitor or barrister, is quite separate from the inherent jurisdiction of the court to supervise the conduct of a solicitor as an officer of the court.

26. Thus, I reject the submission made on behalf of the applicant's solicitor that the court has no jurisdiction to consider her carriage of these proceedings.

27. On behalf of the applicant's junior counsel, Ms Barrington advances a parallel argument that the court has no inherent jurisdiction to discipline or admonish a barrister, citing *Halsbury's Laws* (5th edn, 2015) vol 66 (Legal Professions), para. 913, as authority for the proposition that 'for at least the last 300 years the courts have left all matters of professional discipline and conduct to the Inns of Court, the Inns in conjunction with the Bar Council and latterly to the Bar Standards Board.' However, as Ms Barrington fairly states, that paragraph goes on to acknowledge that the judges retain their inherent powers to prevent abuse of the court's procedure, instancing the power to refuse to hear an advocate for reasons that apply to him as an individual or to restrain him from representing a party where his continued participation in a trial might invalidate the outcome.

28. Ms Barrington relies on the decision of the England and Wales Court of Appeal in *Geveran Trading Company Ltd v Skjevesland* [2002] EWCA Civ 1567; [2003] 1 All ER 1, which is the authority for the last proposition in the extract from *Halsbury* just quoted, although in truth I do not believe it assists the case advanced on behalf of the applicant's junior counsel. It concerned an appeal against a decision of the High Court, dismissing an appeal from an order of the registrar, refusing to set aside a bankruptcy order. In the course of the bankruptcy petition hearing, the appellant's wife recalled that she had known the petitioning creditor's counsel and it was then submitted on the appellant's behalf that, through this acquaintance, counsel for the petitioner might consciously or unconsciously have obtained information about the appellant's family that might give rise in the mind of a lay observer to the view that justice might not be done or be seen to be done and thus undermine public confidence in the administration of justice. Counsel for the appellant relied on a provision of the Code of Conduct for the Bar of England and Wales whereby counsel should not accept instructions if doing so would cause professional embarrassment.

29. Giving judgment for the Court of Appeal, Arden LJ stated (at para. 42):

> 'Where a party objects to an advocate representing his opponent, that party has no right to prevent the advocate from appearing based on the Code of Conduct as the content and enforcement of that Code are not a matter for the court. However, the court is concerned with the duty of the advocate to the court and the integrity of the proceedings before it. The court has an inherent power to prevent abuse of its procedure and accordingly has the power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal.'

30. Quite rightly in my view, there was no question in that case of the disciplinary function of the Inns, the Bar Council or any other regulator ousting or displacing the inherent jurisdiction of the court to prevent or inhibit an abuse of process. Equally, the decision is strong authority for the proposition that the court's powers in protecting the integrity of the proceedings before it are not limited to a closed category but are as flexible and adaptable as may be necessary for that purpose, subject always to the requirements of natural and constitutional justice and of fair procedures.

31. Both Mr Leonard and Ms Barrington acknowledge that I have the power to refer the conduct of their clients to the disciplinary body to which each is accountable. The kernel of Ms Barrington's objection to the invocation by this court of inherent powers analogous to those identified in *Sathivel* is that I do not have an inherent power to admonish counsel.

32. In considering that proposition, assistance can be gleaned from the following passage in *Halsbury's Laws* (5th edn, 2015) vol 11 (Civil Procedure), para. 23:

> 'Unlike all other branches of law, except perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedural law and is commonly called the 'inherent jurisdiction of the court'. In the ordinary way, the Supreme Court, Court of Appeal, and the High Court, are superior courts and as such no matter is deemed to be beyond their jurisdiction (including the general administration of justice within their territorial limits, and powers in all matters of substantive law) unless it is expressly shown to be so…..
>
> The jurisdiction of the court which is comprised within the term 'inherent' is that which enables it to fulfil, properly and effectively, its role as a court of law. It has been said that the overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to any one, whether a party or not, and in relation to matters not raised in the litigation between the parties; it must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court (although a claim should be dealt with in accordance with the rules of court, rather than by exercising the court's inherent jurisdiction, where the subject matter of the claim is governed by those rules). The term 'inherent jurisdiction' is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court. Even in an area which is not the subject of statute or statutory procedural rules, the court's inherent jurisdiction to regulate how proceedings should be conducted is limited because (subject to certain established and limited exceptions) the court cannot exercise its power in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice.
>
> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.'
>
> (footnotes omitted)

33. As the equivalent, inherent powers in Ireland now find their source both in the common law and, more significantly, in Article 34.1 of the Constitution, I hope it is not hubris to suggest that they cannot be less extensive than those recognised under the common law of England and Wales.

34. In *R (Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin) ('*Sathivel*'), the Divisional Court (Sharp LJ and Green J) considered it just and equitable to draw on its reserve fund of powers in the following way (at para. 2):

> 'There are before the court three cases referred because of concerns that the legal professionals acting in these proceedings have in their professional behaviour fallen far short of the standards required of those conducting proceedings on behalf of clients. The Court has an inherent jurisdiction to govern its own procedure and this includes ensuring the lawyers conduct themselves according to proper standards of procedure: See *R (Hamid) v Secretary of State for the Home Departmen*t [2012] EWHC 2070 (Admin) ("*Hamid*"). When a Judge concludes that a lawyer has acted improperly that may be recorded in a court order. The papers are then referred to the High Court Judge having responsibility for this jurisdiction. A "Show Cause" letter may then be sent to the lawyers concerned who are invited to respond addressing the matters of concern raised in the Show Cause letter. If the judge in charge considers the response to be inadequate the case may be referred to the Divisional Court. In the event that the Court finds that the conduct in question falls below proper standards the Court can admonish a practitioner. Alternatively, the Court can refer the file to the relevant regulatory authority, usually the Solicitors Regulation Authority ('SRA'), for further investigation and if appropriate the imposition of sanctions. The Court is aware that in relation to previous references to the SRA solicitors have been struck off the roll.'

35. There is no suggestion that, in the judgment of the Divisional Court in *Sathivel*, Green J was using the word 'admonish' as a term of art or a word with a defined legal meaning. *The Oxford Dictionary of English* (2nd edn, revised) defines 'admonish' as 'reprimand firmly'. *The Chambers Dictionary* (13th edn) defines the same word as 'to warn; to reprove mildly; to counsel earnestly.'

36. While I note that, under s. 7 of Solicitors (Amendment) Act 1960, as amended, and Rule 17 of the Solicitors Disciplinary Rules, 2017, the Solicitors Disciplinary Tribunal can 'advise or admonish or censure' a solicitor found to have engaged in misconduct; that under the *Disciplinary Code for the Bar of Ireland* (5 July 2010), the Barristers' Professional Conduct Tribunal can admonish a barrister found in breach of the Bar of Ireland Code of Conduct or a breach of proper professional standards; that under the *General Rules of the Honorable Society of King's Inns* (December 2017), the Disciplinary Committee may admonish or censure a barrister found to be in breach of the Professional Code of the Society; and that under s. 82 of the Legal Services Regulation Act 2015 (when commenced) the Legal Practitioners Disciplinary Tribunal will be empowered to impose 'an admonishment' as a sanction upon a legal practitioner culpable of misconduct, the existence of such powers cannot oust the inherent power of the court to admonish a solicitor or counsel, since the former powers exist to assist in the regulation of professional conduct in the provision of legal services and the latter to inhibit or prevent the abuse of the court's process and, thus, to aid in the administration of justice.

37. How anomalous (and, I venture to suggest, unworkable) it would be if, in the administration of justice, the court could admonish for misconduct in court any litigant, witness, juror or member of the public but not a solicitor or counsel.

38. Thus, I reject the submission that I do not have the inherent jurisdiction to admonish counsel.

ii. procedure

39. In the separate written legal submissions filed on behalf of the applicant's solicitor and the applicant's junior counsel, each argues that the approach I have adopted is procedurally flawed because I have not referred their conduct for consideration by another judge of the High Court.

40. That argument is based on the proposition that the specific *Hamid* application procedure adopted by the High Court in England and Wales, whereby a High Court judge who concludes that a lawyer has acted improperly refers the matter to another High Court judge with responsibility for that jurisdiction who may, if the lawyers concerned fail to show cause why he should not do so, refer the case to the Divisional Court, which can - if it concludes that the conduct in question falls below proper standards, admonish the practitioner or refer the file to the relevant regulatory authority, is a fundamental fair trial requirement and not simply a consequence of the idiosyncratic way in which the organisation and practice of the Queen's Bench Division of the High Court of England and Wales has evolved since its inception.

41. The Queen's Bench Division is one of the three Divisions of the High Court of England and Wales, now provided for by the Senior Courts Act 1981; *Halsbury's Laws* (5th edn, 2015) vol 24 (Courts and Tribunals), para. 696. For historical reasons, it is commonly referred to as the Divisional Court. The Crown Office side of the Queen's Bench Division was renamed the Administrative Court in 2000 (*ibid*, para. 707). The Queen's Bench Divisional Court is not a court of first instance, neither is it a court of appeal; it has a unique and multipurpose function and is, generally speaking, a court of review (*ibid*, para. 698, fn 2). It must be constituted of not less than two judges (*ibid*), normally a High Court judge and a Lord Justice of Appeal. A Queen's Bench judge is on duty 24 hours a day every day to hear applications for judicial review which cannot be delayed until normal hours of business, whereas Administrative Court work is organised so that urgent applications can be dealt with during the day time by a judge of the Administrative Court. I conclude that the various steps envisaged under the *Hamid* application procedure flow from the particular structure and practice of the High Court of England and Wales and are not the product of any perceived fair trial requirement.

42. That conclusion is strengthened by a consideration of the cases. In *R (Butt) v Secretary of State for the Home Department* [2014] EWHC 264 (Admin), the Queen's Bench Divisional Court (in the persons of Sir Brian Leveson P and Cranston J) dealt with four separate *Hamid* applications. In the first of those, Cranston J was also the judge who had refused permission to apply for judicial review. In *Sathivel*, the Divisional Court expressly concluded (at para. 97) that, in future, the High Court judge who had directed the lawyers concerned to show cause might, if the response was unsatisfactory, forward a complaint directly to the appropriate professional regulator, rather that first referring the matter to a Divisional Court. Thus, I cannot reconcile either of those cases with the argument that the practice in the High Court of England and Wales represents the application of the principle that an alleged abuse of process in legal proceedings before one judge must be dealt with by another judge as a matter of fair procedure. Nor do I accept that any such principle exists.

43. If it did, the case of *O'Connor v Power (In Trust)* [2011] 4 IR 379 would have to be considered wrongly decided and I do not accept that it was. In that case, Kelly J found (at 393) that counsel had: abandoned a trial when it was not open to her to do so; refused to accept the rulings of the court; constantly interrupted opposing counsel and the court; and persistently flouted the ordinary rules of courtesy and behaviour in the conduct of litigation in a manner that was quite unacceptable. Having found that counsel had engaged in unacceptable conduct, Kelly J expressed his intention to furnish a copy of his judgment to the Chairman of the Bar Council to consider its contents, without acknowledging any requirement to refer the matter instead to another judge of the High Court to determine whether that was the appropriate course of action. For my part, I do not accept that any such requirement exists.

44. The applicant's solicitor and junior counsel argue that I must refer the question of whether their conduct amounts to an abuse of process to another judge of the High Court to avoid a breach of their right to an impartial tribunal under Article 6 of the European Convention on Human Rights, relying upon the decision of the European Court of Human Rights in *Kyprianou v Cyprus (No. 2)* (73797/01) (2007) 44 EHRR 25. *Kyprianou* concerned what the Grand Chamber of the European Court of Human Rights described as a 'functional defect' in the legal process whereby a criminal court that had been the direct object of a lawyer's courtroom invective about its ongoing conduct of a criminal trial summarily convicted that lawyer of contempt in the face of the court and sentenced him to 5 days imprisonment. The situation here is quite different. I am not dealing with any conduct or criticism directed towards me. I am not the complainant in this case in the sense of being the alleged victim or object of the impugned conduct. Indeed, the conduct with which I am principally concerned is that involved in the preparation and presentation of the application for leave to seek judicial review that was made before Barrett J on 16 March 2016. While I do not underestimate the potential significance of admonishment or referral to a professional regulator, I am not here concerned with the potential imposition of any criminal sanction, such as imprisonment or a fine. Accordingly, I do not accept that the fair trial rights enshrined in Article 6 of the European Convention on Human Rights, require me to recuse myself from any necessary inquiry into whether there has been an abuse of process in the conduct of these proceedings.

45. As the Law Reform Commission notes in its Issues Paper on *Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10 - 2016) (at para. 3.18), in *Robertson and Gough v HM Advocate* [2007] HCJAC 63, 2008 JC 146,

the Scottish High Court of Justiciary, sitting as an appeal court, considered the implications of *Kyprianou (No. 2).* In the judgment of the Lord Justice Clerk, Lord Gill, with which the other members of the court concurred, a clear distinction was drawn (at paras. 79-80) between a contempt in the face of the court directed at a judge personally and a contempt directed at the administration of justice. The Lord Justice Clerk concluded that, in the former case, the judge ought not to deal with the case himself whereas, in the latter, 'it is positively the duty of the presiding judge to decide whether it is contemptuous.' I respectfully agree with that analysis.

46. The applicant's solicitor separately argues that, having already determined that she has been guilty of misconduct - in the sense of a breach of her duty to the court or, at least, of gross negligence in respect of that duty - for the purpose of making a wasted costs order against her, pursuant to the power to do so conferred on the court by O. 99, r. 7 of the Rules of the Superior Courts ('RSC'), I am precluded from going on to address whether she conducted these proceedings in breach of proper standards of professional behaviour or in breach of the duty she owes to the court, for the purpose of considering the exercise of the court's inherent power to ensure the observance of the due process of law. It is not entirely clear whether this argument is being advanced on the ground of objective bias (*nemo iudex in sua causa*) or on that of fair procedures (*audi alteram partem*). For the avoidance of doubt, I reject it on each of those grounds.

47. In *D.D. v District Judge Conal Gibbons* [2006] 3 IR 17, Quirke J observed that judges are frequently required to hear and determine *ad interim* applications before proceeding to make final determinations and orders concerning similar issues and involving the same parties. The determination of an application in a manner unfavourable to a person's interests, in and of itself, cannot give rise to a sustainable claim of judicial bias where the same court is required to consider some or all of the same issues involving the same person at a different time or for a different purpose in the same or subsequent proceedings. As Quirke J explained (at 25), 'Judges are required to bring detachment and impartiality to the performance of their judicial duties. They have taken an oath to do so.' Thus, I find no breach of the *nemo iudex* principle in the circumstances of this case.

48. In my earlier judgment (at paras. 163-168), I described at some length the circumstances in which the issue of wasted costs arose in this case and the various opportunities that the applicant's solicitor was given to address it. In this judgment (at paras. 1-6), I have described the procedure that I adopted for the purpose of the present inquiry, permitting the applicant's solicitor every reasonable opportunity to adduce any evidence, provide any information and make any legal submissions that she may wish. I do not accept that, in the conduct of what is by definition a summary process, there has been any breach of the entitlement of the applicant's solicitor to natural and constitutional justice and fair procedures.

49. Counsel for the applicant, complains that the form of the questions the court has raised 'is not confined to factual issues but seems more akin to a judicial cross-examination with a view to drawing conclusions as to professional competence or ethics.' To the extent that I understand that argument, I respectfully disagree. I have invited solicitor and junior counsel to respond to matters that give rise to a concern that there has been an abuse of the process of the court. All of the matters raised are issues of fact, some more concrete (*i.e.* what steps did those lawyers take, or not take, as a matter of fact), some perhaps more abstract (what did those lawyers do, or not do, to comply with the duty of candour or the duty of inquiry that each was under, as a matter of fact). That is not cross-examination. The court is seeking information. Those persons were under no compulsion to provide it. They could give as much, or as little, assistance to the court as they might wish. If they believed that any of the court's requests was misconceived or based on a mistaken premise, they were each at liberty to make that submission.

50. Hence, I reject the submission that there has been a breach of the *audi alteram partem* principle in the course of the present procedure.

51. Lawyers and judges are often obliged to explain to curious members of the public that, despite the obligation upon the State under Article 40.3.2° of the Constitution to protect the good name of every citizen, persons (whether parties, witnesses, or others) can have their reputations assailed in public court proceedings that may be widely reported upon under the umbrella of absolute immunity from proceedings in defamation as long as those reports are fair and accurate, even if the attack concerned proves to be baseless or malicious (as long as the report does not). The explanation is that 'it is an important aspect of public policy that those involved in the administration of justice should be freely able to speak their minds without fear of legal challenge'; see, for example, the Law Reform Commission Issues Paper on Priv*ilege for Reports of Court Proceedings Under the Defamation Act 2009* (LRC IP 16 - 2018) (at pp 6-7). I have already noted that the court has a general power arising from its constitutional function to control its own procedure to prevent or inhibit an abuse of process. Against that background, I am bemused by the criticism on behalf of junior counsel that I have sought to have him address the court's concerns in that regard in open court, rather than in private correspondence.

Should the court exercise its inherent (or *Hamid*) jurisdiction in this case?
i. responses of the applicant's solicitor to the court's concerns

52. The applicant's solicitor provided written responses to the 10 numbered concerns that I raised in my earlier judgment. In summary, her position is as follows.

53. She has no recollection of speaking to the applicant prior to the morning of 16 March 2016, the day that the application for leave to seek judicial review was made to Barrett J. Although she accepts that the applicant's letter was received at her office on 2 March 2016, she was not aware of it until 16 March 2016 for a reason or reasons that she does not explain. The applicant's partner delivered the removal order and other unspecified documentation to the office of the applicant's solicitor on the morning of 16 March 2016 in circumstances that are not elaborated upon or explained. The applicant's solicitor agreed to act for the applicant and a file in his name was opened at 10.05 a.m. on that date. Shortly afterwards, she received a telephone call from the applicant. She does not remember ever speaking to him before that.

54. The office of the applicant's solicitor received 21 separate telephone calls from the applicant between 1 February and 16 March 2016, although the majority of those calls were of very short duration and the support staff in the office received many such calls from prisoners or the family members of prisoners. The office's electronic diary records video-link conferences with the applicant on 25 February and 11 March 2016. Another solicitor in the office was scheduled to participate in them, but cannot recall having done so, nor is there any extant record of why they were arranged or what transpired during them.

55. The applicant's solicitor offers no explanation about what, if anything, she and her support staff did to record or respond to such telephone calls in general or what, if anything, she or her support staff did to record or respond to any of the 21 separate telephone calls received from the applicant in particular The applicant's solicitor does not address a third video-link conference on 3 March 2016 between the applicant and her office that is evidenced in the relevant prison records.

56. In summary, I have been provided with no satisfactory explanation about how, despite the receipt by her office of a letter from

the applicant on 2 March 2016 and despite 21 phone calls and 3 video-link conferences between the applicant and her office during the period from 1 February 2016 and 16 March 2016, the applicant's solicitor professes to have had no meaningful interaction with the applicant before taking 'urgent' instructions from his partner on his behalf on the morning of 16 March 2016.

57. The applicant's solicitor acknowledges that the full extent of the inquiries that she made on the morning of 16 March 2016 was to seek and receive from the applicant's partner an assurance that she had provided the applicant's solicitor with 'all the relevant material', before sending a fax to the Arrangements Section of the Repatriation Unit of the Department of Justice and Law Reform at 11.18 a.m. on that date, requesting a copy of the removal order against the applicant 'and the letter underpinning the decision to issue the removal order.' The applicant's solicitor states that she understood that there was a basis to make an urgent application for leave to seek judicial review that day because the material furnished to her by the applicant's partner that morning did not include that letter.

58. The applicant's solicitor goes on to state that she knew on the morning of 16 March 2016 that an application for an extension of time in which to seek judicial review would be necessary. Although she was not present in court when the application for leave to seek judicial review was made later that day, she had assumed that the requirement for an extension of time would be addressed by junior counsel and was not aware that it had not been. I am afraid that this explanation makes no sense. The application for leave was grounded solely and exclusively on an affidavit sworn by the applicant's solicitor on 16 March 2016. There was no other evidence before the court. There is nothing in that short affidavit that purports to provide, or is capable of providing, good or sufficient reason for extending the period during which the application could be made. How, then, could the applicant's solicitor have imagined that the requirement to obtain such an extension would be 'dealt with' by junior counsel on the applicant's behalf?

59. Addressing the court's request for information about why it was considered appropriate in May 2017 to put on affidavit the applicant's allegation that his previous solicitor, who was identified by name, had reneged on an assurance to resolve the removal order matter for him and had failed to contact him in that regard, without first giving that solicitor an opportunity to confirm or deny it, the applicant's solicitor acknowledges that it would have been more appropriate to do so but does not accept that the allegation concerned is capable of amounting to one of professional misconduct against that solicitor.

60. The applicant's solicitor believed that she did have the necessary professional competence and experience to advise the applicant on his position.

61. The final enumerated concern I had invited the applicant's solicitor to address was why she had instructed junior counsel still in his devilling year (or pupillage) to advise on, and represent the applicant in, an urgent *ex parte* application to the High Court. In her response, she states that she had emailed both master and devil on the morning in question and, having been given to understand by the former that the latter had experience in the area and was sufficiently qualified to deal with the application, had decided to instruct the devil. It is not clear why the applicant's solicitor contacted only those two counsel or why she delegated the responsibility for the identification or selection of suitable counsel to the pupil master concerned. A solicitor has a duty to take care in the selection of suitable counsel and to ensure, in considering the advice of counsel, that it contains no obvious errors.

ii. information on the level of fees demanded

62. In my earlier judgment, I directed the applicant's solicitor to furnish the court with all documentation on her file touching upon or concerning the fee arrangements between her firm and the applicant. In response to that direction, the applicant's solicitor has furnished just two documents. The first is a copy of an undated, unsigned, typed letter addressed to the applicant containing standard form particulars of the basis upon which charges would be made for the provision of legal services to him, as required under s. 68(1) of the Solicitors (Amendment) Act 1994. The second is a copy of a typed document directed to the applicant by name, dated 17 February 2017, and headed 'Terms of Engagement.' It contains certain standard form terms and conditions upon which the firm of the applicant's solicitor was proposing to act for the applicant.

63. In her written responses to the court's enumerated concerns, the applicant's solicitor asserts that neither she nor her office has received any payment from the applicant in respect of these proceedings.

iii. undertaking not to seek costs

64. On behalf of the applicant's solicitor, the court has been offered her undertaking not to seek any costs in these proceedings from her client, the applicant, rendering it unnecessary to consider whether a further order should be made under O. 99, r. 7 of the RSC, disallowing those costs between solicitor and client. I accept that undertaking.

iv. the applicant's junior counsel

65. The applicant's junior counsel provided written responses to the concerns numbered (vi), (vii), (viii) and (ix) at paragraph 186 of my earlier judgment, on the basis that those were the only requests for information that touched upon his conduct.

66. The first of those concerns, numbered (vi), arises from the affidavit sworn by the applicant on 19 May 2017, which included the allegation that his former solicitor had given the applicant an assurance in early 2015 that he would resolve 'the removal order' matter but had failed to act and had failed to contact the applicant again. The applicant's junior counsel acknowledges that he drafted that affidavit based solely upon the applicant's instructions and without advising his instructing solicitor that the solicitor concerned should be given an opportunity to confirm or deny that assertion. The applicant's junior counsel asserts that he did not think that it amounted to an allegation of misconduct against that solicitor, who he named in the draft affidavit because he considered it was appropriate to give as complete an account as was possible to the court. That explanation is a little bewildering, given that the inadequacy in almost all material respects of the account given to the court in that affidavit is addressed at some length in paragraphs 113 to 130 of my earlier judgment.

67. The applicant's junior counsel addresses the court's concerns numbered (vii) and (viii) together, before separately addressing the concern numbered (ix). Those concerns relate to whether junior counsel had the necessary professional competence and experience to advise and represent the applicant, in view of his complete failure to engage with the requirements of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended, or the relevant provisions of either Directive 2004/38/EC ('the Citizens' Rights Directive') or the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ('the Regulations') and in light of the fact that he was only a short number of months in practice and, hence, still in his devilling year (or pupillage) as a barrister at the material time.

68. In his written response, the applicant's junior counsel states that he 'did have the necessary professional competence to deal with the matter insofar as [he] was entitled to accept instructions' under paragraph 8.7 of the Code of Conduct of the Bar of Ireland.

Paragraph 8.7 states in material part:

> 'During the pupillage period pupils are practising Barristers within the meaning of and subject to the Code and as such are entitled to accept work on their own behalf *subject to the other provisions of the Code*.'
>
> (emphasis supplied)

69. Another provision of the Code - and one that the applicant's junior counsel does not address - is paragraph 4.4, which states:

> 'Where Barristers receive instructions which they believe to be beyond their competence they should decline to act in the matter and shall so inform the instructing solicitor without delay.'

v. the administration of justice in public

70. In *Hamid*, the Divisional Court did not name the solicitor or firm concerned because the error at issue was a failure to comply with new requirements introduced by a recent change in court practice. However, in *Butt, Akram* and *Sathivel* the solicitors and counsel were named. I have not named the applicant's solicitor or counsel in this case but neither have I sought to place any restriction on their identification. Both the applicant's solicitor and counsel submitted that I should impose such a restriction in exercise of the common law power of the court to regulate its own procedures, as identified by the Supreme Court in *Gilchrist v Sunday Newspapers Ltd* [2017] 2 IR 284 at 316. However, as O'Donnell J emphasised in *Gilchrist*, where an exception from the principle of hearing in public is sought to be justified by reference only to the common law power in the absence of legislation, then the interests involved must be very clear, and the circumstances pressing.

71. The applicant's solicitor and junior counsel argue that, if their conduct were under scrutiny by the relevant regulator exercising the appropriate disciplinary jurisdiction in each case, those proceedings would be heard in private, subject to a discretion to publish details of any adverse finding. They submit that the right of each to her or his good name and professional reputation is a clear interest warranting an exception to the public hearing principle in this case. I do not agree. I have already found that this court is not seeking to exercise any disciplinary jurisdiction, but rather is exercising its inherent jurisdiction to govern its own procedures and to hold to account lawyers whose conduct of litigation falls below the minimum professional and ethical standards which must be demanded of all lawyers appearing before the courts. As I have already pointed out, the overarching need to inhibit or prevent any abuse of the court process must be a very weighty interest in the balance. The *Hamid* jurisdiction should not be lightly invoked, but when it is, there is no reason why solicitor or counsel should be entitled to a level of reputational protection that is not available to parties, witnesses or other persons in court in litigation generally.

Conclusion

72. I regret to state that my concerns have not been assuaged by the applicant's solicitor or junior counsel. The Divisional Court in *Sathivel* identified three specific types of situation in immigration and asylum cases that give rise to particular concern (at paras. 9 - 11). In my earlier decision (at para. 55) I quoted passages from that judgment describing two of them. To briefly recapitulate all three, the first is where vulnerable clients are charged significant fees on the promise of highly skilled representation in the presentation of real issues but receive instead incompetent representation in the presentation of hopeless claims. The second is where unmeritorious litigation is deliberately brought to 'buy time' for persons unlawfully in the State to develop a 'right to respect for family life' claim to lawful residence in the State under Article 8 of the European Convention on Human Rights through marriage or parentage. The third is where 'last minute' injunction applications are brought to prevent the removal or deportation of persons in detention in which a recent change of solicitors is used to justify and explain the very scant evidence and argument upon which the court is invited to make orders urgently on an *ex parte* basis. As the Divisional Court in *Hamid* pointed out (at para. 12), many cases (including that one) involve some combination of those situations.

73. In *Sathivel*, the Divisional Court concluded (at para. 50) that the solicitors in the case had failed in their duty to ensure that a full and accurate account was placed before the court, having failed in their duty to make proper enquiries to ensure that they were fully informed before taking any steps to pursue proceedings and in their duty of candour because they failed to set out fully the serious limitations in the evidence that they were presenting as true. The Divisional Court went on to hold (at para. 51) that fault applied to all those concerned with the case, including the solicitor with the conduct of the case and the instructed advocate because:

> 'As to the former it is the duty of those instructing an external advocate to ensure that they obtain as full, comprehensive and accurate an account of the facts to put in front of the advocate then instructed as they can. They cannot hide behind the fact that they did not draft the false application in question (when in fact they took responsibility for serving it). And the instructed advocate has a duty to prepare court documentation only upon the basis of information that he or she knows has been verified.'

74. On the evidence before me, I am satisfied that precisely the same position pertains in this case and that the conclusion of the Divisional Court in *Sathivel* (at para. 52) is the appropriate conclusion to draw here, which is to say:

> 'These were serious failings. They have led to the immigration and asylum system being undermined and the High Court's scarce resources being taken up with a wholly unsubstantiated case that was entirely without merit.'

75. The applicant's solicitor has not offered an apology for her conduct of these proceedings.

76. She has produced a report from a consultant who has made a number of recommendations about improvements in the systems in her new practice for: logging telephone calls and correspondence; accepting or declining new clients or business; taking instructions from clients; and instructing counsel on behalf of clients. The applicant's solicitor offered the court an undertaking to use her best endeavours to implement those recommendations. I was not impressed by that offer. A 'best endeavours' undertaking is entirely appropriate where a proposed action is to any significant degree dependent upon the co-operation or assistance of others over whom the solicitor giving it has no direct control but I fail to see how the implementation of appropriate administrative systems in her own practice is in any way outside the direct control of the applicant's solicitor. Mr Leonard stated that his client did not feel comfortable with the feasibility of an undertaking that, for example, every telephone call and letter to her practice will be logged without fail but, as I attempted to point out, all that is required is an undertaking to put in place specified systems that make it more likely that telephone calls and letters will be properly logged, always allowing for the inevitability of some human or system error.

77. The applicant's junior counsel has by now made a number of apologies to the court and he is entitled to credit for that. In a very skilful plea in mitigation on his behalf, Ms Barrington made a number of convincing arguments. First, Ms Barrington submits that, while lack of experience does not excuse lack of competence in professional work, it was almost certainly her client's lack of experience

that resulted in his failure to properly appreciate his lack of competence. When he received instructions from the applicant's solicitor he was facing an age old dilemma; how do you get work that requires experience if you can't get experience by doing that work. Of course, the only proper solution to that dilemma is to build experience and competence in appropriate increments. Nonetheless, enthusiasm and overconfidence can cloud judgment and it would be wrong not to recognise the existence of that dilemma as a mitigating factor for an inexperienced practitioner. Ms Barrington's client has now progressed almost three more years in his career at the Bar and has not come to any adverse attention during that period.

78. In his written response to the court's request for information, the applicant's junior counsel states that his errors were the result of his relative inexperience. But the issue is one of competence, not experience. Not all inexperienced counsel are incompetent and, loathe as I am to say it, not all experienced counsel are necessarily competent. You cannot give an inexperienced advocate a licence to be incompetent any more than you can give an inexperienced doctor that licence. In the law, as in medicine or - dare I say - any other profession, competence is expected to come from qualification, not post-qualification experience. As Lord Hobhouse observed in *Medcalf v Mardell* [2003] 1 A.C. 120 (at 142):

> 'The professional advocate is in a privileged position. He is granted rights of audience. He enjoys certain immunities. In return he owes certain duties to the court and is bound by certain standards of professional conduct in accordance with the code of conduct of his profession. This again reflects the public interest in the proper administration of justice…. The advocate must respect and uphold the authority of the court. He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time…. All this fits in well with an appropriate constitutional structure for a judicial system for the administration of justice.'

79. For those reasons, in the ordinary course I believe it would have been entirely appropriate to admonish both the applicant's solicitor and junior counsel in this case, even with the benefit of full credit for the mitigating factors I have already identified and for the additional one of never otherwise coming to adverse attention before or since (so far as I am aware). Indeed, if it were not for the last factor mentioned, I would have had no hesitation in referring the conduct of the applicant's solicitor to the Law Society given her greater responsibility and lesser mitigation than those of the applicant's junior counsel.

80. In the event, I do not propose to take any action against either solicitor or counsel in the particular circumstances of this case. That is because it seems to me that I am required to have appropriate regard to the principle of equality before the law. In *J.A. (Pakistan) v Minister for Justice and Equality* [2018] IEHC 343 (Unreported, High Court, 1 May, 2018), Humphreys J took the view that there had been a breach by the lawyers in that case of the duty of candour and the duty of inquiry in the context of an application for leave to seek judicial review, before stating (at para. 28):

'While the approach of the applicant's lawyers at the *ex parte* application for an injunction in this particular case would not survive the analysis of the duties set out in the *Sathivel* case I do not propose to hold that against them on this occasion, firstly, because deficiencies in the making of *ex parte* applications are unfortunately sufficiently frequent as to make it inappropriate to criticise any one lawyer at this particular point in time prior to making the requirements clear more generally; and relatedly because I do not wish to retrospectively apply the exposition of the law in *Sathivel*, as endorsed in the present judgment, to an application made prior to that.'

81. On the principle enshrined in Article 40.1 of the Constitution that all citizens shall, as human persons, be held equal before the law, as applied by the Supreme Court in *McMahon v Leahy* [1984] 1 IR 525 and by the High Court in *DPP v Duffy & Anor* [2009] IEHC 208, (Unreported, High Court (McKechnie J), 23 March, 2009), I am constrained to take the same approach as Humphreys J for the same reasons.

82. It only remains to draw attention to the concluding comment of Humphreys J in J.*A. (Pakistan*) (at para. 28) that, in the future, all *ex parte* applications, whether for injunctions or leave or otherwise and whether made to the judge in charge of the Asylum, Immigration and Citizenship List or any other judge, will be expected to comply with the strictures of *Sathivel* and the duties of candour and inquiry identified there.