Neutral Citation Number: [2012] IEHC 1

THE HIGH COURT

2011 972 JR

BETWEEN/

A. O.

APPLICANT

AND

MINISTER FOR JUSTICE AND LAW REFORM, IRELAND AND THE

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on 6th January, 2012

1. On 13th October, 2011, I granted an interim injunction restraining the deportation of the applicant, a Nigerian national, until 2pm the following day. While that interim injunction was granted on an *ex parte* basis, the order has been continued from time to time by consent.

2. On 14th December, 2011, the respondents issued a motion whereby they sought to have the interim injunction discharged on the ground that the applicant had failed to make disclosure of a highly material fact, namely, that the applicant had previously made an unsuccessful application for an injunction in September, 2011 on the same or similar grounds before my colleague, Mr. Justice Herbert.

3. The applicant is a Nigerian national who, by his own account, has a chequered immigration history, having been excluded from the United Kingdom following his conviction for possession of a stolen passport. He arrived here by air from Bratislava in March, 2009 and he was in possession of a Nigerian passport and an Austrian identity card. The passport was in the name of a Mr. X. and it contained a valid Irish entry visa.

4. On his arrival, the applicant originally presented himself to immigration officials as Mr. X. He later claimed asylum in Ireland under his true name. Subsequent Garda investigations established that Mr. X.'s passport had been stolen from him at a bank in Vienna. The applicant was subsequently charged with the offence of handling stolen property (i.e., the stolen passport) and he pleaded guilty to this offence before the Cloverhill District Court in May, 2009 whereupon he received a six months sentence.

5. As just noted, the applicant had claimed asylum in the State following his arrival from Slovakia. The basis of the claim was that he had fled Nigeria as a result of threats from third parties following his engagement to a Muslim woman whilst he was Christian. He contended that his fiancée had been murdered. The asylum process came to an end following the determination of the Refugee Appeal Tribunal on 25th November, 2009, that the applicant's account was not credible.

6. On 12th January, 2010, the Minister informed the applicant of an intention to deport him. The applicant then applied for subsidiary protection, but he was informed on 9th August, 2011, that this application had been rejected. The applicant was also informed that the Minister had made a decision to deport him.

7. At the end of August, 2011 the applicant then made an application under s. 3(11) of the Immigration Act 1999, to revoke the deportation order on the basis that he had two Irish citizen children. While this application was rejected by letter communicated to the applicant on 14th September, 2011, it nevertheless is appropriate to describe the circumstances pertaining to the Irish citizen children.

8. According to Mr. O.'s own account, the first child, Ms. A, was born in Belfast in August, 2004 and now resides with the applicant's former partner, Ms. B., in Dagenham, London. The applicant avers that Ms. A. has visited him here and, further, that he provides some financial assistance to Ms. B. to assist her with child rearing. It would seem probable, however, that Ms. A. will live permanently in the United Kingdom under the care of Ms. B.

9. At some stage following his application for asylum, Mr. O. became romantically involved with a Ms. Y. Ms. Y is an Irish national who resided in the border region and in Dublin. She is professionally qualified and she is currently in the process of moving to practice her profession in the United Kingdom.

10. She maintains that she was cruelly deceived by Mr. O. During this period he had managed to lead an affluent lifestyle and she contends that he led her to believe that he was previously a male model who was now working for a UK property firm. At no stage did Mr. O. disclose that he had a criminal record or that he was currently in the asylum process. She found herself unexpectedly pregnant in April, 2010 and the relationship foundered shortly thereafter after she discovered what she claims were compromising messages from another female on his mobile telephone. In fairness to Mr. O., it should be stated that this general account is emphatically denied by him, not least the contention that the pregnancy was unplanned.

11. Ms. Y. gave birth to a baby daughter in late 2010, but she says that Mr. O.'s request for access in respect of the child first came some three months later. Mr. O. then issued proceedings under the Guardianship of Infants Act 1964, in late March, 2011. Ms. Y. avers that she believes that this was simply a tactical and opportunistic ploy on his part so that his paternity of the child could be used to his advantage for immigration purposes, prompted by the publicity which surrounded the decision of the Court of Justice of the European Union in Case C-34/08 *Ruiz Zambrano* [2011] ECR I-0000. This judgment had been delivered on 8th March, 2011.

12. While the full parameters of that decision and its implications for immigration law generally are matters for further argument, the general effect of that decision was that the parent of a child holding EU citizenship could not be deported from the Member Sate in question where this would mean that the child would also have to leave the Union territory. In the words of the Court of Justice:-

> "42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyments of the substance of the rights conferred by virtue of their status as citizens of the Union…
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> 43. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
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> 44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union."

13. As to whether the applicant could bring himself within the scope of this decision is a matter of controversy which remains to be argued in this case, I will abstain from any further comment on this point at this juncture.

14. These custody proceedings are at present ongoing before the District Court. It is, of course, that court alone which has seisin of those proceedings and nothing in this judgment should be understood as expressing any view in respect of these issues which are entirely a matter for the District Judge.

The application before Herbert J. in September, 2011

15. On 12th September, 2011, the applicant's then solicitors applied to this Court for an interim injunction in respect of intended proceedings. The applicant thereby in effect sought to restrain his deportation on *Zambrano* grounds. Herbert J. initially directed that any such application be made on notice to the respondents. At the resumed hearing, Herbert J. refused to grant the interlocutory injunction sought on the basis that the *Zambrano* issue was too far removed from the facts of the present case.

16. As Mr. Nicholson, solicitor for the respondents, explained in his affidavit, Herbert J. gave further directions which are of some considerable importance to the present application:-

> "Mr. Justice Herbert directed that if new circumstances arose, a fresh injunction could be sought so long as it was on notice to the State and that the Court must be informed that Mr. Justice Herbert had refused such an application. It appears that the intended proceedings were not filed in the Central Office."

17. It is not in dispute but that neither the fact of this application nor the result was disclosed to me when the application of 13th October, 2011, for an interim injunction was made *ex parte* to this Court. This material was not exhibited in the applicant's grounding affidavit and nor was it disclosed orally by counsel when moving the application. It should be stated immediately that the October application was moved by fresh counsel and a fresh team of solicitors, neither of whom had appeared before Herbert J. The application was also made under conditions of some urgency and, indeed, pressure of time, as counsel was also required to attend another court.

18. It should also be stated that the applicant's solicitor has filed a full affidavit explaining this omission. The applicant's solicitor was not physically present when the application was moved and the agent who attended counsel was not aware of the earlier September application or the directions given by Herbert J.. It is clear from this affidavit that under pressure of time counsel simply forgot to mention the earlier application. I accept that this was an inadvertent omission and that there was absolutely no intention to mislead the court. Both legal representatives in question have tendered their apologies which, needless to say, are fully accepted.

The jurisdiction to set aside the interim injunction

19. While it plain that there was absolutely no intention whatever to mislead, the fact remains that the fact that there had been a previous application for an injunction ought objectively to have been disclosed to the court. There is absolutely no question but that the fact that Herbert J. had already refused to grant an interlocutory injunction and, furthermore, had given directions with regard to any future applications for an injunction were hugely material facts of which the court should have been made aware at the time of the October, 2011 application.

20. This Court's jurisdiction to set aside an order made *ex parte* is expressly recognised by O. 52, r. 3 RSC which provides that:-

> "In any case the Court, if satisfied that the delay caused by proceeding by motion on notice under this Order would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise and subject to such undertaking, if any, as the court may think just; and any party affected by such order may move to set it aside."

21. The Court has, in any event, an inherent jurisdiction to set aside orders obtained *ex parte*: see, e.g., *Voluntary Purchasing Groups Inc. v. Insurco Limited* [1995] 2 I.L.R.M. 145, *Adams v. Director of Public Prosecution* [2001] 2 I.L.R.M. 401, *Adam v. Minister for Justice, Equality and Law Reform* [2001] 3 I.R. 53 and *Fitzpatrick v. K. (No.2)* [2008] IEHC 104, [2009] 2 I.R. 7. Principles of fair procedures would, in any event, require that the court must have a jurisdiction to review *de novo* any such order made *ex parte*: see, *e.g.,* by analogy *DK v. Crowley* [2002] IESC 66, [2002] 2 I.R. 712 and *Re Custom House Capital Ltd. (No.1)* [2011] IEHC 298. Moreover, as Laffoy J. pointed out in *Fitzpatrick*, the jurisdiction of the court under O. 52, r. 3 must be applied in a constitutionally appropriate manner and in a manner compatible with the State's obligations under Article 6(1) ECHR.

22. The rationale for this rule was well explained by McCracken J. in *Voluntary Purchasing*, a case concerned with an application to set aside an *ex parte* order made pursuant to s. 1 of the Foreign Tribunals Evidence Act, 1856. The order had directed that a firm of accountants be represented before an examiner to give evidence in aid of the execution of a default judgment granted by a court in the United States in a civil matter. In dealing with the question of jurisdiction, McCracken J. in his judgment ([1995] 2 I.L.R .M. 145,147) pointed out that, while O. 39, rr. 33 – 34 RSC dealt with the procedures under the 1856 Act and provided for an *ex parte* application, it made no express provision for any further application to set aside the *ex parte* order. He also concluded that the application did not come within O. 52, r. 3, so that the application to set aside could not be made under that provision. He went on to say:-

> "In my view, however, quite apart from the provisions of any rules or statute, there is an inherent jurisdiction in the courts in the absence of any express statutory provision to the contrary, to set aside an order made *ex parte* on

> the application of any party affected by that order. An *ex parte* order is made by a judge who has only heard one party to the proceedings. He may not have had the full facts before him or he may even have been misled, although I should make it clear that is not suggested in the present case. However, in the interests of justice it is essential that *anex parte* order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the court. It would be quite unjust that an order could be made against a party in its absence and without notice to it which could not be reviewed on the application of the party affected."

23. Similar views were expressed by Kelly J. in *Adams* where he stated ([2001] 2 I.L.R.M. 401, 406:-

> "On any application made *ex parte* the utmost good faith must be observed, and the applicant is under a duty to make full and fair disclosure of all of the relevant facts of which he knows, and where the supporting evidence contains material misstatements of fact or the applicant has failed to make a sufficient or candid disclosure, the *ex parte* order may be set aside on that very ground. …
>
> The obligation extends to counsel. There is an obligation on the part of counsel to draw the judge's attention to the relevant Rules, Acts or case law which might be germane to his consideration. That is particularly so where such material would suggest that an order of type sought ought not to be made."

24. It is clear, therefore, that irrespective of whether the matter is viewed from the perspective of the constitutional right to fair procedures (as in *Fitzpatrick* and *Custom House Capital (No.1)*) or simply the nature of the inherent jurisdiction of the court (as in *Voluntary Purchasing*), the court has clearly a jurisdiction to set aside any order made *ex parte* which materially affects the legal rights and interests of the party thereby affected by that order. This, in any event, is what O. 52, r. 3 expressly provides.

Whether the order of 13th October, 2011, should be set aside

25. Given that the jurisdiction of the court is not in doubt, there remains for consideration the question of whether the interim order should now be set aside.

26. This question was examined by Clarke J. in *Bambrick v. Cobley* [2005] IEHC 43. Here the plaintiff obtained a Mareva injunction on an *ex parte* basis following a dispute concerning the retention of monies following a land transaction. The plaintiff had, however, failed to disclose the fact that the parties had in correspondence discussed the manner in which these monies might be retained and the amount in question. Furthermore, it appeared that the parties contemplated retained some €50,000 of the €100,000 which was in dispute.

27. The test of non-disclosure was formulated thus by Clarke J.:-

> "It is necessary to consider, in general terms, the criteria which the court should apply in the exercise of such discretion. Clearly the court should have regard to all of the circumstances of the case. However, the following factors appear to me to be the ones most likely to weigh heavily with the court in such circumstances:-
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> 1. The materiality of the facts disclosed.
>
> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
>
> 3. The overall circumstances of the case which lead to the application in the first place."

28. Clarke J. further observed that:-

> "....the test by reference to which materiality should be judged is one of whether objectively speaking the facts could reasonably be regarded as material with materiality to be construed in a reasonable and not excessive manner."

29. The judge then went on to apply these principles to the facts of the case:-

> "Applying those criteria to the facts of this case it does seem to me that the non-disclosed facts were of significant materiality. For the reasons set out above there is a very real possibility that the court would either have made no order or potentially required short service and considered an order only in respect of a significantly lesser sum had it been apprised of the full facts.
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> While I am not prepared to hold on the evidence that the plaintiff deliberately mislead the court, I am constrained to the view that as a solicitor the plaintiff, in particular, ought to have been aware to his duty to disclose all material facts and must be regarded as significantly culpable in failing to bring to the attention of the court matters which on any objective view would have had the potential to influence the court's determination."

30. These considerations apply a *fortiori* to the present case. Not only had Herbert J. refused to grant an interlocutory injunction following an *inter partes* hearing, but he also gave directions with regard to any such future applications which were manifestly not applied in the present case. While I accept fully that the applicant's legal representatives simply overlooked these facts, their objective materiality cannot be gainsaid.

31. It is true that, as Clarke J. noted in *Bambrick*, the court retains a discretion not to vacate the injunction, the failure to make appropriate disclosure notwithstanding. This would not, however, be an appropriate case in which such a discretion should be exercised, since the non-disclosure here goes to the very heart of the order which the court made *ex parte*. The exercise of the set aside jurisdiction in a case such as the present one is not intended to be punitive although, of course, different considerations might well apply where a litigant acted *mala fide.* Nor is the jurisdiction to be exercised in a formalistic or mechanical fashion: it is rather essentially restitutionary in nature. In other words, by setting aside the original order the court is acting in the interests of two fundamental constitutional values, namely, the integrity of the administration of justice itself (as reflected in Article 34.1) and the importance of fair procedures (as reflected in Article 34.1 and Article 40.3.1).

32. By thus setting aside the original order, the court thereby seeks to restore the *status quo ante* insofar as it is feasible to do so. This does not mean that the court cannot grant the applicant further relief (cf. the comments of Glidewell L.J. in *Bowmaker Ltd. v. Britannia Arrow Holdings Ltd.* [1988] 3 All E.R. 178). It does mean, however, that in the event that the court were to grant an applicant further injunctive relief, it would do so now afresh in circumstances where it has been armed with all the relevant facts and where it is not now operating under a misunderstanding or misapprehension as to those facts.

Conclusions

33. I will accordingly set aside the interim relief granted by me on 13th October, 2011, by reason of the material non-disclosure with regard to the order of Herbert J. and the directions which he gave. This, of course, is entirely without prejudice to the outcome of the applicant's application for an interlocutory injunction which remains to be heard and determined.