

**THE HIGH COURT
JUDICIAL REVIEW**

[2010 No. 35 J.R.]

BETWEEN

MARK NASH

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Moriarty delivered on the 17th day of December, 2012

Introduction

1. In a written judgment delivered on the 10th August, 2012, this Court refused the applicant the primary relief sought by him, namely an injunction restraining the respondent from proceeding with murder charges resulting from a double killing at Grangegorman, Dublin, in March 1997. The Court afforded the parties a further opportunity to be heard on the question of ancillary relief. In this regard, the applicant sought damages for alleged breach of his rights under the Constitution and the European Convention on Human Rights Act 2003, and costs. This aspect of the applicant's claim was heard on the 4th October, 2012 and I now give judgment as follows.

Applicant's Submissions

2. The applicant seeks damages for the alleged breach of his right to trial with due expedition. This claim is made in the first instance in reliance on his constitutional rights as protected under Art. 38 of the Constitution but, in the alternative, on Arts. 6 and 13 of the European Convention on Human Rights (ECHR) through the machinery created in section 3 of the European Convention on Human Rights Act 2003. Section 3(1) obliges all organs of the State to perform their functions in a manner compatible with the State's obligations under the ECHR. Section 3(2) provides that:-

"A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate."

3. The applicant contends that there has been a breach of Art. 6 ECHR which reads as follows:-

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The applicant also refers to Art. 13 ECHR which provides that:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

4. The applicant relies upon *McFarlane v. D.P.P.* [2008] 4 I.R. 117 to support his claim. That case also involved an unsuccessful application for prohibition on grounds of delay, however damages were not claimed. On appeal to the Supreme Court, Fennelly J. referred to the question of damages, with reference to a case of the European Court of Human Rights, *Barry v. Ireland* [2005] ECHR 865 (18273/04), which was also concerned with delay in proceedings. He stated as follows:-

"88 ... It appears that [in *Barry*] the representatives of Ireland had submitted to the court that judicial review, which was available to the applicant in that case, provided an effective remedy in domestic law and that 'damages might have been available as a remedy in the judicial review proceedings, if the applicant had sought them'. The court's response to that argument at para. 53 was:-

"There is no evidence that such proceedings would have been capable of providing damages and the Government accepted that there was no domestic legal provision for an award of damages in following proceedings. Although the Government argued that the common law might be flexible enough to provide such a remedy, they did not refer to one precedent even tending to support this argument. Moreover, the judgment of the Supreme Court made it clear that Convention case law would not cause the domestic courts to fashion any remedies that would not otherwise have been available"

89. I would remark that, in [*Barry*], as in the present case, no claim for damages had been made. Nor, so far as I am aware, has any such claim ever been made in such a case. In every such case, the accused person, in practice, seeks the remedy of prohibition of his trial. It is clearly not possible for this court, having an appellate function only, to pronounce in the abstract on whether damages would be available as a remedy, if they were claimed. Any such claim would have to be made in the High Court in the first instance. The [European Convention on Human Rights] Act of 2003 might be relevant."

5. The applicant submits that it is therefore an open question as to whether damages would be available as an alternative remedy to prohibition in a case where it was sought for breach of the right to trial with reasonable or due expedition. The applicant emphasises Fennelly J.'s point that the rights protected under the ECHR might be relevant in a determination of that issue.

6. The applicant also refers to the dicta of Kearns P. in *Barry*, who stated at para. 142:-

"I would accept that a distinction may require to be drawn between breaches of the right which give rise to an entitlement to obtain prohibition and lesser transgressions which may conceivably give rise to some other remedy, such as one in damages. However, any entitlement to a remedy in damages for breach of a constitutional right to an expeditious trial is a matter that will require very full and careful consideration in an appropriate case. This is not such a case. The court is here concerned only with a claim for prohibition."

7. Following the refusal of the Supreme Court to prohibit the trial, Mr. McFarlane appealed to the European Court of Human Rights under Arts. 6 and 13 ECHR. An expert legal opinion was proffered by the State which said that it was "highly probable" that an accused could sue successfully for damages for such a breach. To support this view, the opinion relied heavily on "relatively developed jurisprudence" which established the principle of compensation for a breach of a constitutional right and the right to seek damages for such a breach where no other effective or sufficient remedy existed.

8. The applicant submits that damages for breach of constitutional rights are actionable per se without proof of special damage, but that in the instant case, he can point to heightened levels of anxiety, difficulties in presenting his defence and prolonged detention in an Irish prison as a British national, as a consequence of the repeated refusals of his applications to transfer.

9. The applicant also contends that he should be entitled to his costs, whether or not he is successful in his damages claim, and notwithstanding that he has been unsuccessful in securing an order restraining his further prosecution. In the event that he is unsuccessful in his damages claim, the applicant refers to a significant line of authority allowing for costs to be awarded to the losing party where the case raises a point of public importance. It is submitted by the applicant that this is one such case.

Respondent's Submissions

10. The respondent submits that the applicant's claim for damages for the alleged breach of his rights cannot be sustained. In the first instance, the respondent points out that as there was no finding of a breach of the applicant's constitutional or ECHR rights in the judgment given by this Court on his substantive claim, an award of damages cannot now be made for a breach of same.

11. The respondent referred in general terms to previous cases that have been prosecuted on foot of scientific advances or new evidence, after long delays. The cases relied upon by the applicant - *McFarlane* and *Barry* - are contrasted with the present on the grounds that they were concerned with delay that occurred in the criminal proceedings, post arrest. The respondent submits that the date of charging is the critical factor for the purposes of calculating delay and that there was no delay from the time that the applicant in this case was charged.

12. Furthermore, the respondent argues that the reasons cited for the applicant's alleged stress and anxiety - delay, lurid publicity, refusal of requests to transfer to English prison and consequent breakdown of familial relationships - have not been pleaded or substantiated by evidence in the appropriate way. The respondent states that that there was no question of pre-trial incarceration of any length as the applicant was already serving life sentences for separate crimes. It is argued that the decisions of the High Court to uphold the decisions of various Ministers for Justice to refuse the applicant a prison transfer are beyond attack at this stage of proceedings. The respondent also points out that the question of prejudicial publicity was substantially beyond the control of the D.P.P.

13. Finally, on the basis of the respondent's contention that the applicant has not succeeded in his claim for damages, it is submitted that costs should follow the event.

Decision

14. The first point to note in determining the applicant's claim for damages for alleged breach of his rights under the Constitution and/or the ECHR is this Court, in its judgment on the substantive relief claimed, did not make any finding of a breach of either the Constitution or the ECHR. While the detrimental impact of the "substantial delay" in this case was acknowledged, it was not so unreasonable or unexplained that it give rise to the granting of an injunction restraining the applicant's trial. At para. 34 of my previous judgment, I stated as follows:-

"Although the delay was undoubtedly lengthy and necessarily bound to render any ultimate trial less satisfactory than had it, for example, proceeded in the year 2000, I have had regard to the explanations advanced, to determinations of the Superior Courts, not merely in the particularly grave and complex cases in which the prosecution appeared to have strong evidence, but to a number of sexual cases of significantly greater antiquity, in which prohibition was denied, and in all the circumstances I am of the view that the delay in itself is not such as to preclude me from allowing the trial to proceed."

15. Had this Court determined that there was a failure to implement the applicant's right to a trial with due expedition under the Constitution and/or the ECHR, it would be necessary to enter into a full and detailed analysis of the applicant's right to claim damages in the circumstances. However, I am satisfied that this necessity does not arise here. A prosecution cannot be brought until there is credible evidence upon which a case can be pursued. In this case, the crucial evidence did not surface until October 2009, the applicant was charged one week later, and matters progressed with sufficient speed therefrom.

16. There has been much argument between the parties on the issue of when criminal proceedings can be considered to have begun for the purposes of the reasonable time requirement under Art. 6 ECHR. The applicant maintains that it was at the earliest 12 years ago. The respondent argues that the length of the criminal proceedings is to be calculated from the date of his arrest in October 2009. Prior to that time, as set out in my earlier judgment, another individual had been charged with the Grangegorman murders, and the applicant himself was in lawful custody on foot of the killing of a young couple in Co. Roscommon. In light of these and other circumstances in this case, I am satisfied that it was on the latter date, the date when the applicant was "charged" that the reasonable time referred to in Art. 6 began to run. This was not a case where nothing happened that was unexplained for an extended period of time, such as would give rise to a finding that the applicant's rights under the Constitution and the ECHR had been breached. It follows that the applicant's claim for damages is without basis.

17. This leads me to consider the applicant's claim for costs. While the costs of proceedings usually follow the event, there is a judicial discretion in certain cases to award costs or a portion of the costs to the losing applicant. In *Dunne v. The Minister for Environment and Others* [2008] 2 I.R. 775, Murray C.J. stated as follows at p. 783:-

"The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law

if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction...Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are."

18. Having considered the arguments put forward by both sides on the costs issue, I am satisfied that the circumstances in this case are such that warrant a limited departure from the general rule. There is an aspect of public importance to this case. The scientific technology which was used to review the evidence, and later lead to the applicant's charge, was in fact available to be used some years prior to the review. Dr. Maureen Smyth of the Forensic Science Lab admitted as much in her evidence. While there was no question of deliberate deceit in this regard, the failure to act expeditiously sooner to the technology becoming available, is at best regrettable. I have not been satisfied that the delay in question warrants prohibiting the applicant's trial, nor does it warrant the award of damages to him. I am, however, satisfied that the delay is a factor to which regard may be had so far as costs are concerned. I am mindful of the fact that the applicant is an incarcerated man of straw and would be unable to meet the costs of the within proceedings.

19. This case is distinguishable from *Rattigan v. D.P.P.* [2008] 4 I.R. 639, in which the Supreme Court, while affirming the High Court's refusal of prohibition, nevertheless viewed delay and want of candour on the part of State agencies so gravely that it awarded full costs to the applicant/appellant. I do not accept the submission of the respondent in this matter that the case did little more than retread ground well trodden in *Rattigan*. Detailed and at least potentially statable arguments specific to the facts of an enormously grave case had to be presented and considered, and the applicant can have no complaints as to the quality and commitment of service provided by his solicitor and two counsel. In considering the interests of justice, it is no small matter that accused persons in major cases should be able to retain in their defence or in related judicial review proceedings practitioners of commensurate experience and ability. Combining that factor with the element of forensic delay noted, I am of the view that a departure, albeit a limited one, from the normal costs rule is warranted, and accordingly view it as appropriate that the applicant should be awarded one third of his costs in these proceedings. In forming the view, I have also had regard to the context of a paper presented by a senior criminal law practitioner at the 2012 National Judges' Annual Conference in Dublin Castle, which touched upon both the availability and low levels of potential remuneration for defence practitioners in judicial review proceedings, by way of legal aid and/or any discretionary involvement of the Attorney General.