THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 400

Birmingham J.
Sheehan J.
Mahon J.
No. 2016/306

T.C.

Appellant

V

Director of Public Prosecutions

Respondent

JUDGMENT of the Court delivered on the 21st day of December 2016 by Mr. Justice Birmingham

1. This is an appeal from a decision of the High Court (Humphreys J.) refusing leave to seek judicial review. The background to the present appeal is that the applicant for judicial review has been returned for trial on 100 charges of of indecent assault and is due to stand trial at the next criminal sessions in Monaghan in January 2017. The charges relate to ten complainants, all nieces and nephews of the appellant. They fall into two groups and the offending behaviour is alleged to have occurred between 1964 and 1984.

2. On the 18th May, 2016, the applicant sought leave to apply for judicial review by way of prohibition on the grounds that he could not receive a fair trial given the delay in the making of the complaints and the initiation of the criminal prosecution. He also argued that witnesses who might have been in a position to assist him, such as his mother, were now deceased and that he was severely prejudiced by the complainant and prosecutorial delay.

3. The judge having charge of the vacation list was told that the application was being moved nine days outside the time limits prescribed by O. 84 of the Rules of the Superior Courts. The judge having charge of the vacation list indicated that he would prefer that the matter would be dealt with in the non jury judicial review list in term time and adjourned the matter to the 30th May, 2016. However, it was indicated that the fact that an application had been moved on the 19th May, would be noted so that fact could be relied on in the context of an application for an extension of time.

4. The matter came on for hearing in the non jury judicial review list before Humphreys J. on the 13th June, 2016. He requested that the respondent, the Director of Public Prosecutions be put on notice. However counsel who appeared for the Director indicated that the Director was neither consenting nor objecting to the application for leave for judicial review, but did not otherwise take an active part in the proceedings.

5. On the 14th June, 2016, in a detailed written judgment, Humphreys J. decided that the applicant was out of time to move the application and that there were no circumstances to warrant the exercise of the Court's discretion to extend time. He also went on to conclude that this was a case where the applicant had to be in a position to establish substantial grounds in order to warrant the grant of relief and that had not been made out. He felt that granting leave would "scuttle forever the chance of the complainants having their allegations of historical criminal misconduct tested in a criminal court". This was a reference to the fact the judge was told that the applicant was 79 years of age and was suffering from terminal cancer. The judge was told by the lawyers who moved the application that their client's life expectancy had been put at six months. However, the judge concluded that even if he was wrong that substantial grounds had to be made out, and the threshold was arguability that even arguable grounds had not in fact been made out.

6. Before dealing with the approach of the trial judge to the application for leave to seek judicial review, it is appropriate to offer context by saying a little more about the background to the case. The applicant faces 100 counts of indecent assault in respect of ten complainants, all nieces and nephews. Ten charges are in respect of DH, 8 in respect of MH, 19 in respect of MtH, 1 in respect of AH, 1 in respect of MrH, 1 in respect of CH, 8 in respect of GH, 6 in respect of PH and 18 charges in respect of FK and 28 in respect of PK. The complainants really fall into two groups, the H group and the K group. The earliest alleged assault is said to have occurred between the 1st January, 1964 and the 31st March, 1964 and relates to GH. The most recent assault is between the 1st October, 1984 and the 31st December, 1984.

7. The appellant says that he has suffered both general, but also specific prejudice. Most of the allegations are alleged to have occurred at a particular location in Co. Monaghan which is the appellant's residence. The appellant resided at that address with his mother until her death in July 1994. Many witness statements make references to her. The appellant has said that his mother was ever present at the address and was very much the matriarch responsible for everything that happened on the farm and that her passing some ten years after the most recent allegation has deprived him of a valuable witness.

8. The K complainants came forward in 2011 and that was some 30 years after the alleged incidents involving them. In May 2011, the appellant was arrested, detained and questioned in respect of these allegations. The appellant denied the allegations when interviewed. No prosecution was instituted against the appellant in 2011. The H complainants came forward in 2014. Extracts from their witness statements are quoted in the grounding affidavit and it is suggested that they are particularly vague and lacking in precision. The appellant also says that the H allegations surfaced at a family meeting in 2003 and that the further delay since then is particularly objectionable.

9. When the H complainants came forward, the applicant was interviewed in September 2015 and he once more denied all allegations. In December 2015, he was charged in respect of all ten complainants and was returned for trial on the 10th February, 2016. If, as is the usual practice, the return for trial is to be regarded as starting the clock for the purposes of a judicial review application, then the application which was filed on the 18th May, 2016, was nine days out of time.

The approach of the High Court judge

10. Dealing with the question of extending time, the judge points to O. 84, r. 21(4) which provides:-

> "In considering whether good and sufficient reason exists for the purposes of sub-rule (3) the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party."

11. He went on to say that a crucial element of the prejudice to third parties that arises in a criminal context is the interference in the "obligation to conduct an effective prosecution". He says that while the applicant has put forward medical difficulties and other matters to explain the failure to move the application within time, he has failed to show that the circumstances were outside his control. Critically, the judge took the view that allowing the application to proceed would prejudice third parties, in particular the complainants, in a truly irrevocable manner. He accepted that it was true that nine days delay as such was not seriously prejudicial, but that the effect of extending the time would be to scuttle forever their chance of having their allegations tested in a criminal court. That he saw as irredeemable prejudice. The judge indicated that he also took the view that as an extension of time had not been sought in the statement of grounds that the applicant had not properly applied for such an extension.

12. In a situation where the question of an extension of time was specifically canvassed with the vacation judge before whom the matter was first brought, I would not regard this last consideration as being material.

13. That the judge would have been concerned about the position of the complainants and have been very conscious that it was desirable that the correctness or otherwise of their allegations should be established in a court of law is entirely understandable. However, it does not seem to me to follow necessarily that the applicant should be denied access to the High Court to raise a point by way of judicial review. The applicant was out of time only by a very short period and there were extenuating circumstances. In particular his grave ill health, the fact that he lived at a distance from his legal advisers and the fact, as appears to be the case, that his solicitor had embarked on the task of assembling further information from both the appellant and the respondent were all relevant considerations which weighed in favour of extending time.

14. In my view it was not a question of having to decide to extend time and if doing that deciding to ignore the interests of the complainants. It seems to me that there is a half way house here, which is that if leave to seek judicial review is granted that the proceedings should be actively case managed to ensure that they come on for a hearing as expeditiously as possible and also ensuring that the criminal case should be listed for trial at a very early date if the outcome of those proceedings is that a trial can and should proceed. It is worth bearing in mind that the trial judge's anxiety that the prospects of a trial would be "scuttled forever" if leave was granted was dependent on the estimate for life expectancy that he was told about being accurate. If the estimate is broadly accurate a number of possibilities arise. It is possible that even absent any application for judicial review that by the time that the case was listed for trial, that the applicant, even if still alive, would be so ill that his state of health would as a matter of practicality prevent a trial. On the other side of the coin it may be that the prognosis will prove an unduly pessimistic one and that if the final outcome of judicial review proceedings is that Mr. TC should stand trial that he will be in a position to do so. For my part I believe the appropriate course of action here is to extend time, but then, if leave to seek judicial review is granted, to arrange for the matter to be brought before the President of the High Court at an early date with a view to having the proceedings fast tracked.

The applicable test – arguability or substantial grounds

15. The judge then proceeded to consider the question of whether the applicable test was one of arguability or substantial grounds and concluded that it was appropriate to apply the latter. In doing so he was influenced by a decision of this Court in *Agrama v. Minister for Justice and Equality* [2016] IECA 72. In my view this case and the *Agrama* case are not on all fours. *Agrama*, it will be recalled, involved a request for mutual assistance from Italy and it was a matter of virtual certainty, if leave was granted, that the effect of granting leave was that the evidence which the Italian prosecution authorities were seeking to present would never be made available to them at a time when it would be of the slightest use.

16. The situation here is quite different. It cannot be said that the effect of granting leave would be that no trial could take place ever, whereas refusing leave would see a trial taking place. The most that can be said is that granting leave, if it resulted in a trial being delayed, cast doubts over the prospects of a trial and increased the likelihood that there would not in fact be a trial. In my view that is not sufficient to justify a departure from the deeply established test of arguability set out in *G. v. DPP* [1994] 1 I.R. 374.

17. It is not unusual that defendants in historic sex cases will be elderly. It would, I believe, be unthinkable that different tests would be applied depending on whether the applicant for judicial review was in good health, poor health or very poor health indeed. Accordingly, in my view the appropriate test to be applied here is that of arguability.

Prohibition an exceptional remedy

18. The trial judge stressed that in recent years the courts have been markedly more reluctant to grant relief by way of prohibition of criminal trials. The jurisprudence of recent years has strongly emphasised that trial judges have the primary responsibility for ensuring fairness and that prohibition should only be granted in "exceptional circumstances" where a real risk or an inevitability of unfairness has been shown.

19. I agree with the observations of the trial judge about the reluctance to grant prohibition and it seems to me that this is a highly relevant consideration in assessing whether a case is in fact an arguable one. For leave to be granted the judge would have to conclude that arguably this is a case where the exceptional remedy that is prohibition would be appropriate. However, in my view that threshold has been met. I have come to that view because of the exceptionally long delays, over 52 years since the first offence, the fact that the K complainants would seem to have come forward together some 30 years after the alleged incidents and at a time that they were in their forties, but that there then was a five year delay before a decision to prosecute. In that regard though, I should make clear that I am in no sense critical of the DPP revisiting the earlier decision not to prosecute in respect of the K complainants when a decision was taken that there should be prosecutions in respect of the H complainants.

20. In the case of the H complainants there is the fact that there was a family meeting in 2003 when all these issues would seem to have been discussed. Added to these is the fact that the applicant is contending that he can establish specific prejudice. As the trial judge indicated, prohibiting a criminal trial is an exceptional response and certainly not one to be taken lightly. It is entirely possible that the arguments that would be mounted against the case advanced by the applicant will prevail but for my part I believe that to say that the points sought to be raised are not even arguable is a step too far.

21. In the circumstances, I would grant leave and in doing so, as I have already indicated would seek to ensure active and rigorous case management with a view to having the judicial review proceedings determined at the earliest possible date. I am happy to discuss with counsel what arrangements can be made in that regard.