Neutral Citation Number: [2012] IEHC 429

THE HIGH COURT

[2012 No. 1314 SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN/

MICHAEL FARRELL

APPLICANT

AND

GOVERNOR OF ST. PATRICK'S INSTITUTION

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 19th day of October, 2012

1. Order 84, r. 20(8)(b) RSC (as inserted by the Rules of the Superior Courts (Judicial Review) 2011, S.I. No. 691 of2011) provides that where the High Court grants leave to apply for judicial review, then the Court may also:-

> "....(b) where the relief sought is an order of prohibition or *certiorari*, make an order staying the proceedings, order or decision to which the application relates until the determination of the application for judicial review or until the Court otherwise orders."

2. It is the meaning of the words "make an order staying the proceedings" that is at issue here in this application under Article 40.4.2 of the Constitution. While this issue has arisen by reason of the somewhat complex interaction of two sets of criminal prosecutions, in essence the question is whether the District Court was entitled to make an order remanding the applicant, Mr. Farrell, in custody (albeit with consent to bail), the existence of a stay order which had been made by this Court relating to one set of those very proceedings notwithstanding.

3. The stay itself had been granted in separate judicial review proceedings (2012 No. 554JR). In those proceedings the applicant, Mr. Farrell, first secured leave *ex parte* from Birmingham J. to apply for judicial review on 18th June, 2012. The applicant was then facing a miscellany of charges arising under the Road Traffic Acts which were then pending in the District Court. In the judicial review proceedings the applicant sought to restrain his trial in respect of those charges on the ground, *inter alia*, that he had been refused legal aid. The original order of 18th June, 2012, granting leave made no reference to a stay, even though such relief had been included in the grounding statement made.

4. A week later the applicant renewed the application for a stay in respect of these Road Traffic Act offences and on 25th June, 2012, such a stay was granted *ex parte* by Birmingham J. The curial part of the order made on that date was that:-

> "IT IS ORDERED that the proceedings currently pending before Trim District Court on foot of [the Road Traffic Act charges] be hereby stayed pending the determination of this application for judicial review or until further Order. ..."

5. In addition to the Road Traffic Act charges, the applicant had been separately convicted on 27th April, 2012, of an offence under s. 15 of Misuse of Drugs Act 1977, and he received a three month sentence. It is accepted that once the statutory remission was taken into account the applicant was scheduled to be released in respect of this offence on 4th July, 2012.

6. As it happens, however, he was not released on that day by reason of events which took place in Trim District Court in respect of the Road Traffic Act charges. The applicant had originally been remanded in custody on 1st May, 2012, with consent to bail on these charges and similar orders had been made on a number of occasions over the following six weeks or so. On 21st June, 2012, the applicant had been remanded in custody with consent to bail to 28th June.

7. On the 28th June the applicant was produced in custody before Judge Brennan in the Trim District Court. The stay order which had been made by Birmingham J. some three days earlier was laid before the District Court and counsel for the applicant submitted that the Court had no jurisdiction to make an order remanding the applicant in custody on these charges once the proceedings had been stayed by that order.

8. This submission was not accepted by Judge Brennan, since he remanded the applicant in custody with consent to bail to Cloverhill District Court on 5th July, 2012. As it happens, the warrant did not correctly reflect the order actually made by the District Court inasmuch as no reference was made to the consent to bail. When the matter came before the District Court in Cloverhill on 5th July, no further order was made by the presiding judge, Judge McHugh, and the applicant was accordingly released.

9. The critical issue, however, was whether the applicant ought to have been released on 4th July rather than 5th July, 2012. It is agreed that the resolution of this issue turns on the antecedent question of whether the District Court had a jurisdiction to remand the applicant in custody when it did so on 25th June, the stay order granted by Birmingham J. on 21st June, 2012 notwithstanding.

10. To bring the questions at issue in this application into focus, it is finally necessary to relate that Mr. Farrell made an application pursuant to Article 40.4.2 of the Constitution on 4th July, 2012, contending that he was entitled to be released as and from that date. He was, of course, entitled to be released on that date unless the order of the District Court made on 25th June remanding him in custody until 5th July is to be regarded as valid. While Hedigan J. made an order directing the production of the applicant pursuant to Article 40.4.2 on that day, it was perfectly understandable that the Court could not actually resolve the issue on that actual day. The matter stood adjourned for further submissions and ultimately came on for hearing on October 15th.

Are the proceedings moot?

11. The first question to be considered is whether the proceedings were now moot by reason of intervening events. The starting point here is that the mootness doctrine represents the application of prudential rules of practice designed to conserve the judicial power, protect the proper administration of justice and to ensure that the judicial branch does not stray from the its constitutionally assigned mandate in Article 34.1 by delivering in effect what are in effect advisory opinions: see generally *Salaja v. Minister for Justice, Equality and Law Reform* [2011] IEHC 51.

12. In general, therefore, the courts will not adjudicate on issues the resolution of which now would be improvident by reason of supervening events. Typically, this involves cases which are no longer live or where the controversy lacks any immediacy or force of reality. An example here is supplied by *Dunne v. Governor of Cloverhill Prison (No.2)* [2009] IESC 43 where the Supreme Court declined to adjudicate on an appeal in an Article 40.4.2 application in circumstances where the applicant was no longer facing charges in respect of the matter which give rise to the application in the first place.

13. Yet the principle of mootness is subject to the exception that the court will rule on the matter if the matter otherwise affect legal rights, yet by reason of its short duration is capable of evading review. This is especially true in the personal of personal liberty. It would be intolerable if an applicant were to be held in unlawful custody- albeit for a short period of time- yet this issue could not be effectively resolved via the very mechanism, namely, Article 40.4.2, created by the Constitution for the very purpose of determining that question of the legality of a particular custody.

14. This is essentially why the present proceedings should be resolved and determined, even if this is by way of exception to the mootness doctrine. It would be totally unrealistic to expect that the legal issues presented by this application could have actually been resolved within the period of July 4th/July5th. But precisely because of the narrowness of that period and the inability of the legal system to come to a fair adjudication within that short twenty-four hour period, the legality of Mr. Farrell's detention during those hours would otherwise have escaped- or, at least, might escape - effective judicial oversight and review. In these special circumstances, we can now proceed to consider the merits of the application.

The effect of a stay

15. We now come to the critical question: what was the effect of the order made by Birmingham J. granting the stay? Here I would reject as irrelevant the arguments advanced by Ms. McDonagh S.C. on behalf of the respondent to the effect that the stay was unnecessary or that it ought not have been granted or that the respondents did not have an effective opportunity to apply to have the stay discharged. While the arguments may (or may not) be well founded, they relate essentially to the ultimate merits of the decision of Birmingham J. granting the stay.

16. Yet no application was ever brought to this Court seeking to have the order granting the stay varied or discharged. It is undisputed but that the order granting the stay was in force on 25th June. As that order bound the District Court, I cannot look behind it or re-evaluate its merits as the arguments advanced by the respondent would effectively have had me do.

17. What, then, was the nature and effect of the stay? It was in truth a form of public law injunction restraining the District Court from taking any further steps in the matter. There are, of course, certain subtle differences between the grant of a stay and an injunction both in terms of the criteria governing the grant of these reliefs, their respective scope of operation and the addressees of such relief. As it happens, many of these matters were explored by Clarke J. in his comprehensive judgment for the Supreme Court on this issue in *Okanunde v. Minister for Justice and Equality* [2012] IESC 49.

18. But whatever the differences between a stay and injunction for other purposes, these differences have no bearing on the present case. What matters here is the effect of the stay and the general coercive effect of such an order cannot be in doubt. The order stayed the criminal proceedings then pending against the accused in the District Court. This means that the District Court was not entitled to take any further steps adverse to the applicant for so long as that order was in force. Of course, the existence of the stay did not mean that the District Court would not have been entitled to make no order or even to adjourn the criminal proceedings to a named date. A step of that kind is essentially neutral in nature: it is not inconsistent with a stay order to maintain the status quo pending further order from the High Court.

19. For so long as the stay was in force in the form in which it was, the District Court was not, however, entitled to make the order which was actually made, *i.e.*, an order remanding the applicant in custody, even if there was consent to bail and even if the applicant had been previously so remanded in custody. A remand order of that kind was positively inconsistent with the nature of the stay which had been granted by Birmingham J., even if- as I am absolutely certain was the case- Judge Brennan acted perfectly *bona fide* and honourably in a difficult situation. The fact remains, however, that he had no jurisdiction to make the order which he did having regard to the terms of the stay.

Conclusions

20. In these circumstances, it is plain that the order of the District Court remanding the applicant in custody until 5th July was invalid. It follows in turn that there was no proper legal basis for detaining the applicant on 4th July, 2012. While the Court's task in an Article 40.4.2 inquiry is confined to determining the legality of the detention, in these special circumstances I will simply declare that the applicant was entitled to have been released from custody on 4th July, 2012.