Neutral Citation: [2015] IEHC 218

THE HIGH COURT

[2008 No. 9446P]

BETWEEN

ANTHONY KELLY

PLAINTIFF

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Kearns P. delivered on the 27th day of March, 2015

The plaintiff in these proceedings was charged with the offence of murder on the 17th October, 2006. He subsequently stood trial for that offence before the Central Criminal Court sitting at Cloverhill Courthouse in 2007, which said trial concluded on the 19th November, 2007 when he was acquitted by a jury on the single count which was before them.

The defence of the plaintiff had been funded from the plaintiff's own resources and at the conclusion of the trial the plaintiff, through his counsel, indicated his intention to make an application to recover the costs of such defence. A hearing for that purpose was heard by the learned trial judge (Charleton J.) who, by written judgment delivered on the 19th December, 2007 refused the application for the plaintiff's costs. Subsequent to that refusal, appeals were lodged in both the Supreme Court and the Court of Criminal Appeal for leave to appeal the said decision.

However, no such appeal was possible. In the first instance, s.11 of the Criminal Procedure Act 1993 removed the general right of appeal from the Central Criminal Court to the Supreme Court. Secondly, s.31 of the Courts of Justice Act 1924 confers only a right of appeal to the Court of Appeal on a person who has been convicted. Thus, in circumstances such as those obtaining in the instant case, the plaintiff has no right of appeal before either the Court of Appeal or the Supreme Court.

While obviously no order for costs was made *against* the plaintiff, a right of appeal from an order for costs made against the DPP is provided for by s.24 of the Criminal Justice Act 2006 which provides as follows:-

> *"(1) Where a person tried on indictment is acquitted (whether in respect of the whole or part of the indictment) the Attorney General or the Director of Public Prosecutions, as may be appropriate, may appeal against an order for costs made by the trial court against the Attorney General or the Director of Public Prosecutions in favour of the accused person to the Court of Criminal Appeal.*
>
> *(2) An appeal under this section shall be made, on notice given to the accused person, within 28 days, or such longer period not exceeding 56 days as the trial court may, on application to it in that behalf, determine, from the day on which the order is made."*

In these circumstances the plaintiff claims that s.24 is unconstitutional. His claim is formulated as follows in the statement of claim:-

> "9. The plaintiff contends that the failure of the first named defendant herein to provide him with parity of access to the courts and more particularly its appellate jurisdiction is:
>
> (a) Inconsistent with Bunreacht na hÉireann and in particular with Articles 38.1, 40.1, 40.3.2, 40.4.1 in that the Act fails to comply with the constitutional imperative to provide an indigenous accused with adequate access to the appellate jurisdictions of the Courts of Justice;
>
> (b) It is a breach of the right to be treated equally before the law;
>
> (c) The failure to provide equal access to the appellate jurisdictions in such circumstances and distinguishing between that access afforded to the DPP is a distinction which is not justified on the basis of social exigencies or the common good;
>
> (d) The said distinction between the plaintiff herein and the DPP is irrational and offends against the concept of equal access to the courts to include the appellate jurisdictions and the principle of equality of arms;
>
> (e) The section places an accused person or a defendant such as the plaintiff herein at a disadvantage vis-à-vis the DPP;
>
> (f) This section does not ensure that the plaintiff would receive fair and equal access to the appellate jurisdictions of the courts;
>
> (g) The distinction in the section between the DPP and the plaintiff herein is not justified on any capacity of social functions ground;
>
> (h) The section fails to defend and vindicate the personal rights of the citizens as far as practicable;
>
> (i) The section fails to protect from unjust attack the good name and property rights of the plaintiff;
>
> (j) The section fails to ensure that the plaintiff will not be deprived of his right to a good name and associated rights in accordance with the law."

While the plaintiff also seeks a declaration that s.24 of the Criminal Justice Act 2006 is incompatible with the State's obligations under the European Convention on Human Rights, this claim was not argued or pursued in any way in the hearing before this Court.

The defence of the defendants contends that the plaintiff is not entitled to the relief sought for reasons which, *inter alia*, are set out in the defence as follows:-

> *"2) The plaintiff only has standing to litigate based on his own facts and circumstances and is not entitled to invoke a jus*

tertii. The plaintiff was refused an application for his costs. Section 24 of the Criminal Justice Act 2006 does not deal with the situation where a party is refused costs but merely provides that where a costs order is made against the Attorney General or the Director of Public Prosecutions then they have a right of appeal against such an order. In the present case no costs order was made against the plaintiff. Thus insofar as the said s.24 does draw a distinction between an accused person and the Attorney General/Director of Public Prosecutions, it is not a distinction that affects the facts and circumstances of the plaintiff's case and the plaintiff is not entitled to rely on it so as to challenge the legislation.

3) The plaintiff is not entitled to the relief sought on the basis of standing and/or the principle of futility. Even if the plaintiff succeeded in striking s.24 down that would not affect his position since s.24 only deals with the situation where a costs order is made against a party and so it has nothing to do with the situation that the plaintiff finds himself in which is that he has been refused an application for his costs.

4) The plaintiff has been refused an application for his costs. Were the prosecution to have made an application for its costs and been refused it, it would have had no right to appeal that order pursuant to s.24 of the Criminal Justice Act 2006. Thus there is no inequality of position between the defence and the prosecution.

5) Without prejudice to all of the above, it is denied that s.24 of the Criminal Justice Act 2006 is inconsistent with the provisions of Bunreacht na hÉireann. In this regard the defendants rely on, inter alia, the presumption of constitutionality.

6) It is denied that the plaintiff paid for his defence and proof of same is awaited.

7) It is denied that there has been a failure to provide the plaintiff with parity of access to the courts.

8) There is no principle that requires there to be exact identity of procedures open to the defence and to the prosecution in criminal law. The defence and the prosecution are not similarly situated.

9) It denied that the failure to provide the plaintiff with parity of access to the courts and more particularly their appellant jurisdiction is:

(a) Inconsistent with the Constitution;

(b) In breach of the right to be treated equally before the law;

(c) A distinction which is not justified on the basis of social exigencies or the common good;

(d) Irrational or one that offends against the concept of equal access to the courts;

(e) Such as places an accused person or a defendant at a disadvantage vis-à-vis the DPP;

(f) Does not ensure the plaintiff would receive fair and equal access to the appellant jurisdiction of the courts;

(g) Is not justified in any capacity of social function grounds;

(h) Fails to defend and vindicate the personal rights of the citizen as far as practicable;

(i) Fails to protect from unjust attack the good name and property rights of the plaintiff;

(j) Fails to ensure that the plaintiff will not be deprived of his right to a good name and associated rights in accordance with the law."

THRESHOLD ISSUE

As is apparent from the formulation of this claim in the statement of claim, the gravamen of the plaintiff's case is that s.24 of the Criminal Justice Act 2006 offends against the concept of equal access to the courts and the principle of equality of arms.

The plaintiff has not brought a wider claim beyond his attack on section 24. For example, the plaintiff has not pleaded that the failure of the Oireachtas to provide him with a right of appeal in this case of itself (and regardless as to what s.24 does or does not say) amounts to a breach of some free-standing constitutional or convention right. To succeed the plaintiff must show that there is something in the terms of s.24 which makes it incompatible with the provisions of the Constitution on the basis of its failure to provide for parity of access with the Director of Public Prosecutions.

The plaintiff has been refused an application for his costs in this case. However, had the prosecution made an application for *its* costs and been refused, it too would have had no right to appeal that order pursuant to section 24.

It is thus argued that, on the facts of the present case, there is no inequality of position between the defence and the prosecution as regards s.24 of the Criminal Justice Act 2006 on the question of being **refused** costs.

The defendants point out that this is no mere technical objection, because had the plaintiff wished to attack the absence of an appeal in and of itself, then he would have had to challenge entirely different pieces of legislation, including s.11 of the Criminal Procedure Act 1993 and/or s.31 of the Courts of Justice Act 1924 which only confers a right of appeal to the Court of (Criminal) Appeal on a person who has been convicted.

It has been well settled in many cases that a plaintiff seeking to impugn the constitutional validity of legislation, must do so based on his own facts and circumstances. Otherwise, it would be an "open season" for the bringing of litigation in which any citizen could bring a challenge to any law, or any section of any law, which for purely subjective reasons - divorced from any actual detriment - seemed a good idea from the litigant's standpoint. Every claim has to have a factual basis and the plaintiff cannot litigate the constitutionality of legislation against a hypothetical background or based on asserting the case of persons who are in a different position to him.

In the words of Hardiman J. in *A. v. Governor of Arbour Hill Prison* [2006] 4. I.R. 88 at 165:-

> *"… a person who seeks to invalidate a statutory provision must do so by reference to the effect of the provision on his own rights. He cannot seek to attack the section on a general or hypothetical basis and specifically may not rely on its effect on the rights of a third party: see Cahill v. Sutton [1980] I.R. 269. In other words, he is confined to the actual facts of this case and cannot make up others which would suit him better."*

The leading case in this area is *Cahill v. Sutton* [1980] I.R. 269 where the plaintiff challenged the statutory limitation period of three years on the basis that it did not contain an exception for an injured person who did not become aware of the relevant facts in which her claim was based until after the three year period had elapsed. However the Supreme Court held that she had no standing to bring such a challenge since, even if there was a date of discoverability provision included in the legislation, it would not avail the plaintiff on the particular facts of her case since she had known the relevant facts within the three year limitation period.

Clearly Ms. Cahill was obliquely affected by the statutory provision since if it were struck down her personal action would not be statute-barred as there would then be no limitation period at all in existence. However although she was prejudiced by the existence of the statutory provision, the reason she advanced as to why it was unconstitutional did not relate to her own personal circumstances. She was seeking to conjure up the right of a hypothetical third party by reference to whose situation the statutory provision might appear unfair and might be struck down. The Supreme Court held that she was not permitted to do this.

In this case the plaintiff was refused an application for his costs. Section 24 of the Criminal Justice Act 2006 does not deal with the situation where a party is *refused* costs but merely provides that where a costs order is made against the Attorney General or the Director of Public Prosecutions then they have a right of appeal against such an order. In the present case no costs order was made against the plaintiff. Thus, insofar as s.24 does draw a distinction between an accused person and the Director, it is submitted on behalf of the defendants that it is not a distinction that affects the particular facts and circumstances of the plaintiff's case and the plaintiff is not entitled to rely on that distinction so as to challenge the legislation.

Contrariwise, if the DPP had applied for and been awarded costs against the plaintiff, then in **those** circumstances, the plaintiff would have standing to challenge s.24 on the basis that it does not provide "parity of access" since it would deny him a right of appeal in circumstances where if costs had been awarded against the DPP, the DPP alone would have enjoyed a right of appeal.

In support of their main contention that this claim must fail *in limine*, the defendants have also made reference to the "doctrine of futility". This principle arises from the fact that even if the plaintiff succeeded in striking down s.24, that would not affect his position since s.24 only deals with the situation where a costs order is made against a party and so it has nothing to do with the situation that the plaintiff finds himself in which is that he has been refused an application for his costs.

In support of this proposition, the defendants relied on the decision of the High Court (Keane J.) in *Somjee v. Minister for Justice* [1981] I.L.R.M. 324, where the High Court refused the applicant relief on the basis *inter alia*, that if impugned sections of the Irish Nationality and Citizenship Act 1956, were struck down, that would not be of any benefit to the applicant. Keane J. stated as follows (at p.325):-

> *"There is, in my opinion, another and fatal obstacle to the claim of both plaintiffs. It was conceded on their behalf that, if s.8 of the Act of 1956 was declared to be invalid having regard to the provisions of the Constitution, the section in its entirety would fall. Mr. O'Flaherty submitted that, in such circumstances, the court would be entitled to declare that the plaintiffs' rights had not been vindicated by the Oireachtas in the expectation that the Oireachtas would take whatever steps were necessary to ensure that their rights were in fact protected. No authority was cited in support of this proposition and I am satisfied that it is not well founded. The jurisdiction of this Court in a case where the validity of an Act of the Oireachtas is questioned because of its alleged invalidity having regard to the provisions of the Constitution is limited to declaring the Act in question to be invalid, if that indeed be the case.* ***The court has no jurisdiction to substitute for the impugned enactment a form of enactment which it considers desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment****." (Emphasis added)*

Similarly in *Todd v. Murphy* [1999] 2 I.R. 1, the applicant sought to challenge the constitutionality of s.32 of the Courts and Courts Officers Act 1995 which allowed him to apply to transfer a Circuit Court trial to Dublin. The applicant complained that there was no means by which he could appeal a decision not to transfer his trial to Dublin. The Supreme Court held that he had no standing to challenge s.32 since if the whole of the section were struck down then there would be no power to transfer a trial to Dublin at all and so that relief would be of no benefit to the applicant.

A similar approach was taken by the Supreme Court in *Norris v. Attorney General* [1984] I.R. 36 where O'Higgins C.J. indicated that the courts would not intervene to proscribe an alleged invidious discrimination where the alleged discrimination can be remedied in such a way as does not benefit the plaintiff. O'Higgins C.J. said:-

> *"Furthermore in alleging discrimination because the prohibition on the conduct which he claims is entitled to engage in is not extended to similar conduct by females, the plaintiff is complaining of a situation which, if it did not exist or were remedied, would confer on him no benefit or vindicate no right of his which he claims to be breached. I do not think that such an argument should be entertained by this court." (pp. 59-60)*

It hardly needs to be said but such precisely is the difficulty faced by the plaintiff here, since if s.24 were struck down then no one would have a right of appeal.

On this particular threshold issue, the plaintiff in the course of the hearing endeavoured to argue that his claim encapsulated more than a failure to provide parity of access and that his claim was therefore not as narrowly pleaded as the defendants suggest. It was argued that the scope of the plaintiff's claim is not only that he has been denied parity of access, but also access to appellate jurisdiction.

DECISION

While no express reference was made to this aspect of our legal system, this jurisdiction is perhaps unusual insofar as that it countenances or permits a single judge of the High Court to declare an Act, or a section of an Act, unconstitutional. Given that legislation under our Constitution enjoys a presumption of constitutionality, a heavy responsibility devolves not merely on the High Court when requested to so adjudicate, but also, when claims of unconstitutionality of legislation are advanced, on litigants so that they advance and particularise those claims with great care and precision.

Article 40.1 provides:-

> *"All citizens shall, as human persons, be held equal before the law.*
>
> *This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."*

The Court is firmly of the view that the claim as factually pleaded is one based on a claim for parity of access to court and the right to equal treatment guaranteed by Article 40 of our Constitution. It cannot be transformed at the hearing itself into a wider trawl, examination or exploration of possible infirmities in the legislation.

Nor can the Court effectively legislate to bring about a situation which would meet the plaintiff's requirements.

Neither party to these particular proceedings can appeal an order refusing costs, an order which, in this particular case, was made and given in a careful and well reasoned judgment delivered by the trial judge.

In all the circumstances the court feels it must decide this case on the threshold issue in favour of the defendants. It does not therefore need to go further to consider other issues - such as the possible requirement for equivalence of procedures (which was considered by this Court in *Brohoon v. Ireland* [2011] 2 I.R. 639), the implications of an absence of a right of appeal at common law, or even whether the distinction between the plaintiff's position and that of the D.P.P. withstands scrutiny by reference to "differences of social function" as contained in Article 40 of the Constitution. Such arguments might well arise in some other case but, in the view of the Court, do not and can not on the inescapable facts of the present case.