Neutral Citation [2016] IEHC 741

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 806 J.R.]

BETWEEN

T.D.

APPLICANT

AND

HER HONOUR JUDGE SINÉAD NÍ CHÚLACHÁIN, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION AND S.D.

NOTICE PARTIES

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 19th day of December, 2016

1. In *T.D. v. Reynolds* [2016] IEHC 410 (Unreported, 8th July, 2016), I refused leave to the applicant to seek judicial review in relation to orders made in family law proceedings between him and Ms. S.D. I also refused leave in relation to a range of further reliefs challenging the constitutionality and ECHR compatibility of the Judicial Separation and Family Law Reform Act 1989 and the Family Law Act 1995.

2. I noted in that judgment that the underlying family law proceedings had been commenced ten years ago (record no. FL23/2006 Co. Meath) and were ongoing after a large number of orders, which indicated some difficulty in carrying out the sale of the family home and lands which was ordered by Her Honour Judge Doirbhile Flanagan when she granted a decree of judicial separation on 10th July, 2008.

3. On 12th March, 2009, the applicant appealed the decree of judicial separation and ancillary orders to the High Court. Murphy J. placed a one month stay on the Circuit Court order to allow the applicant to comply with specified conditions of the order. The applicant did not so comply and accordingly the order became operative on 12th April, 2009.

4. On 20th April, 2009, the applicant applied to the High Court for leave to seek judicial review of Judge Flanagan's order as well as seeking declarations that provisions of the Family Law Act 1995 were unconstitutional [2009 No. 415 J.R.]. McMahon J. delivered a judgment on 6th November, 2009, refusing the order sought on the basis that judicial review was not the most appropriate remedy and by reason of excessive delay. The applicant did not disclose the existence of this first set of judicial review proceedings which has come to light in submissions from the State.

5. On 12th January, 2010 the applicant issued plenary proceedings (*T.D. v. Ireland* [2010] No. 236 P) signed by Mr. David Langwallner B.L. seeking declarations that provisions of the Family Law Act 1995 are unconstitutional and incompatible with the ECHR. The statement of claim, delivered shortly thereafter on 15th February 2010, is signed not by counsel but by solicitors on behalf of the applicant. After what seems to have been a very lengthy period of inactivity the applicant has now issued a notice of intention to proceed signed on 28th November, 2016.

6. The applicant has now for the fourth time brought before the High Court his constitutional and ECHR complaints against the legislation and its implementation, this time prompted by a more recent order of the Circuit Court made by Judge Ní Chúlacháin on 25th July, 2016 in order to give effect to existing ancillary orders.

7. The Central Office appears to have sought to have the applicant amend the title, on filing, so as to refer to "*A Judge of the Circuit Court*". While understandable, this does not appear to be the correct procedure because O. 84 r. 22(2A)(b) states that in such circumstances, "*the other party or parties to the proceedings in the court concerned shall be named as the respondent or respondents*". The judge should not be a respondent, either by name or indirectly in the ghostly form of "*a Judge of the Circuit Court*". The judge should just be struck out, either upon filing of the papers or when the matter comes before a court.

8. I directed that the present leave application proceed as a telescoped hearing and I have heard from the applicant in person, Ms. S.D. in person and from Mr. Robert Kearns, B.L. on behalf of the State. I did not consider it necessary to direct service on the first named notice party and have not had cause to reconsider that view given the absence of any need to consider the merits of the ECHR challenge, as will be seen.

9. The statement of grounds seeks no less than twenty reliefs which are, of course, unnumbered in the version filed on 21st October, 2016. For clarity I will refer to these grounds by a sequential number, although, as I say, no such numbering is actually provided in the applicant's pleadings.

10. Relief 1 is "*an order that the first named respondent acted ultra vires and breached this applicant's constitutional rights as well as his ECHR rights*". The nature of the order sought is unspecified. That is not a relief that can be granted. In any event, no basis for the contention that Her Honour Judge Ní Chúlacháin acted *ultra vires* or breached the applicant's rights has been made out.

11. Relief 2 is a declaration that Judge Ní Chúlacháin failed to comply with s. 2 of the European Convention on Human Rights Act 2003. That contention has not been made out either. The applicant's argument seems to be little more than a dragnet objection to an order made by Judge Ní Chúlacháin on 25th July, 2016, in which she directed that the applicant would vacate the family home and lands by 4th August, 2016, and nominating an auctioneer to have carriage of sale, and attaching and committing the applicant with a stay on that order provided that vacate position occurs by 4th August, 2016. Motions, in this regard, were then adjourned to 26th September, 2016.

12. What needs to be emphasised is that the order of 25th July, 2016 was simply an order giving further effect to the orders ancillary

to the decree of judicial separation granted by Judge Flannagan on 10th July, 2008. Despite the antiquity of that decree, the sale of the family home and lands has not yet happened. The fact that it was necessary to make an order for the attachment and committal of the applicant speaks for itself. I have no doubt from the material presented that the applicant's obstruction and denial of the situation, of which the present proceedings are the latest manifestation, has played a significant part in that delay.

13. Relief 3 is a declaration that Judge Ní Chúlacháin failed to comply with the 2003 Act. The same points apply as to the lack of basis for this claim.

14. Relief 4 is an order of *certiorari* quashing the order made by Judge Ní Chúlacháin on 25th July, 2016. That, in principle, is a relief capable of being granted if grounds are made out and which is sought within time, but that is not saying much (and I only say it by way of contrast with the applicant's other points) because no basis for granting the relief has been established by the applicant. As noted above, the order is simply giving effect to a previous order which the applicant has clearly been failing to comply with.

15. Relief 5 is a declaration that the learned judge acted in breach of the applicant's constitutional rights. Again, this relief is symptomatic of procedural obfuscation on behalf of the applicant. It adds nothing to the order of *certiorari* sought. In any event, no basis for it has been made out.

16. Relief 6 is an order of *certiorari* quashing a separate maintenance-related order made by the Circuit Court on 17th September, 2015. That application is manifestly out of time. There is no application to extend time and accordingly, I cannot do so, but in any event, no basis for an extension of time has been made out. Even if time was extended, no basis to grant that relief has been made out.

17. Relief 7 is an order of prohibition or an injunction prohibiting payment of monies to Ms. S.D. If a proper challenge to the order requiring the payment of these monies had been made out, some form of order restraining the payment could be considered. However, the order requiring payment to Ms. S.D. predates the order of 25th July, 2016. Relief 7 is simply a disguised and collateral attack on an order which the applicant is out of time to challenge.

18. Relief 8 is a declaration of incompatibility of the Family Law Act 1995 with the ECHR. Having regard to the fact that I refused leave to apply for similar reliefs in the applicant's second judicial review, as did McMahon J. in the first judicial review, the attempt now to seek this relief appears to be an abuse of process.

19. Furthermore it is an abuse of process having regard to the fact that the applicant is simultaneously prosecuting plenary proceedings challenging the 1995 Act.

20. More generally, the constitutional and ECHR challenges are pleaded so vaguely and with such a lack of specificity that they do not amount to a basis on which the court could grant relief in any event.

21. Relief 9 is a declaration that orders (unspecified) made by the learned judge were *ultra vires* and/or unconstitutional and that she is "*consequently disentitled from continuing the applications*". The appropriate way to challenge the validity of an order is generally to seek *certiorari* rather than a declaration that the order is invalid. This relief adds nothing to the relief of *certiorari* already claimed. In any event, there is no basis on which the relief could be granted. The suggestion that the learned judge is somehow disentitled from proceeding further indicates a fundamental misunderstanding of the process.

22. Relief 10 is again a declaration that the applicant's rights have been infringed and similar points apply.

23. Relief 11 is a declaration that the Judicial Separation and Family Law Reform Act 1989 and the Family Law Act 1995 are unconstitutional.

24. Again, as I refused leave to seek similar reliefs in the second judicial review, and as McMahon J. did in the first judicial review, it is an abuse of process for the applicant to now revive the same reliefs without any basis for so doing. The claim is also an abuse having regard to the plenary proceedings.

25. Relief 12 is a declaration that a document signed by the applicant on 17th December, 2015, is void. The applicant is clearly out of time to challenge that document on judicial review, and the points referred to above regarding extension of time also apply to this relief. In the second judicial review, the applicant also challenged the order of 17th December, 2015. To do so again here is an abuse of process.

26. Relief 13 is a declaration that provisions of the Family Law Act 1995 are unconstitutional. This is also an abuse of process having regard to the refusal of the first two judicial reviews and the ongoing plenary action.

27. The same applies to relief 14 which also challenge the constitutionality of the Family Law Act 1995.

28. Again, the same point applies to relief 15 which challenges the ECHR compatibility of the Family Law Act 1995.

29. Relief 16 is an order of *mandamus* directed to the learned judge or any judge assigned to hear the matter to determine the applicant's notice of motion dated 5th May, 2011, to vary the maintenance in this case. However, the applicant's difficulty in having the maintenance varied on foot of his notice of motion of 5th May, 2011, was the subject of my judgment in the second judicial review, in which I decided that Judge Reynolds was entitled to require the applicant to bring a fresh application (see para. 18 of that judgment). For the applicant to now revive that claim in the present application is an abuse of process.

30. Relief 17 seeks damages, to which the applicant is clearly not entitled.

31. Reliefs 18 to 20 seek further or other relief, liberty to apply and costs, none of which arise given the failure of the substantive reliefs.

32. Generally, insofar as the applicant is seeking to raise, against the order of Judge Ní Chúlacháin of 25th July, 2016 (which was simply a consequential or supplemental order in relation to the main order of 10th July, 2008) points which more properly arise in relation to the underlying 2008 order, the conclusion follows, as submitted in Mr. Kearns' written submissions at para. 2.010, that "*the current litigation is effectively a reopening of matters already decided and accordingly is an abuse of process*".

33. Overall, the application is frivolous and vexatious and in addition largely if not entirely amounts to an attempt to pursue matters

that are in substance res judicata in one way or another (see *Lynch v. English* [2005] 10 JIC 2002).

34. If I am wrong about any of the foregoing, an appeal to the High Court against the order of 25th July, 2016 (or any of the other Circuit Court orders complained against), would be a more appropriate remedy than judicial review (*E.M.I. Records (Ireland) Limited v. Data Protection Commissioner* [2014] 1 I.L.R.M. 225; [2013] 7 JIC 0301 per Clarke J. (Fennelly and O'Donnell JJ. concurring) at para. 4.8).

35. The applicant has in fact lodged an appeal to the High Court on Circuit in respect of the order of 25th July, 2016. That appeal was listed for hearing on 9th December, 2016. In those circumstances, in the absence of any indication that the appeal to the High Court was intended to simply preserve the position without any intention of moving it forward pending the resolution of the judicial review, to simultaneously actively appeal and seek to judicially review the Circuit Court order is an abuse of process. Taking a hearing date is not readily consistent with merely preserving the position. Indeed the applicant did actively prosecute the appeal by applying for a stay in the Dundalk sittings of the High Court on Circuit on 1st September, 2016, which was refused.

Isaac Wunder order
36. Ms. S.D. has applied for an Isaac Wunder order restraining the applicant from bringing any further proceedings without leave of the court, and the State has been given liberty to bring a similar motion. I will hear the parties on that application in the light of the present judgment.

Order
37. For the foregoing reasons I will order

(i). that there be a permanent order under s. 45 of the Courts (Supplemental Provisions) Act 1961 restraining publication of material tending to identify the non-professional parties to the proceedings;

(ii). that Her Honour Judge Ní Chúlacháin be struck out as a respondent and that Ms. S.D. be struck out as a notice party and added as a respondent, lest the matter proceed further;

(iii). that the substantive relief sought by the applicant be refused; and

(iv). that the parties be heard on the application for an Isaac Wunder order.