Neutral Citation Number: [2006] IEHC 62

THE HIGH COURT

[2003 No. 974 JR]

BETWEEN

INDEPENDENT NEWSPAPERS (IRELAND) LIMITED, EXAMINER PUBLICATIONS (CORK) LIMITED, RADIO TELIFIS ÉIREANN AND THE IRISH TIMES

APPLICANTS

AND
JUDGE DAVID ANDERSON

RESPONDENT

AND
JOSEPH CONDELL

FIRST NAMED NOTICE PARTY

AND
(BY ORDER OF THE COURT)
THE DIRECTOR OF PUBLIC PROSECUTIONS

SECOND NAMED NOTICE PARTY

Judgment of Mr. Justice Clarke delivered 15th February, 2006.

1. Introduction

1.1 These proceedings relate to an order made by the respondent District Judge in the course of a criminal prosecution brought by and on behalf of the second named notice party ("The Director"). In those criminal proceedings the first named notice party is charged with the possession of images of child pornography contrary to the Child Trafficking and Pornography Act 1998.

1.2 On 4th July, 2003, when the case was first brought before the respondent District Judge, the first named notice party was remanded on bail and the District Judge further ordered that no publication of the identity of the first named notice party was to be made by the media and further that no information tending to identify the first named notice party was to be published by the media ("the restrictive orders").

1.3 Subsequent to the making of the restrictive orders a hearing was arranged whereby submissions on behalf of the applicants could be made to the respondent District Judge seeking that the restrictive orders should be discharged. That hearing took place on 12th September, 2003. The respondent District Judge reserved his decision until 8th October, 2003 and on that date refused to vary his orders for the reasons set out in a transcript of his decision on that date ("the discharge refusal").

1.4 The applicants are major publishers in the print and broadcast media and had joined together for the purposes of making the application to discharge to which I have referred. The applicants bring these proceedings before this court for the purposes of seeking an order quashing the restrictive orders of the respondent District Judge together with certain alternative orders to the like effect. Leave to seek judicial review was given by this court (O'Neill J.) on the 15th December, 2003. The first named notice party opposed the application. The Director adopted a neutral position.

2. The Facts

2.1 The first named notice party is a clergyman in the Church of Ireland. It would appear that in January 2002 his home and the church in which he worked were searched and a certain amount of material, principally computer equipment, was seized. A number of articles appeared in the media between that time and July 2003 when the first named notice party was charged with the offences to which I have referred. Articles appeared in the Star newspaper on 26th January, 2002 and 26th June, 2003. Furthermore articles appeared in the Phoenix magazine on 1st February, 2002 and 21st June, 2002. The articles concerned intimated that charges of the type ultimately brought were to be brought against an unnamed person. However details are given which would at least go some way towards identifying the first named notice party as the individual intended to be charged or, at a minimum, identifying the person to be charged as being one of a small group of persons of whom the first named notice party was one. In addition one of the articles in the Star newspaper appears to suggest that other charges involving indecent assault were to be brought against the same unnamed individual. No such charges have, in fact, been brought.

2.2 On 4th July, 2003 when the proceedings against the first named notice party were first before the District Court sitting in Portlaoise it would appear that there was a very significant media presence. It is contended by the first named notice party that at least some members of the media in attendance acted in a hostile and aggressive manner.

2.3 In all those circumstances it is said that the first named notice party feared that he would be the subject of grossly prejudicial, unfair and inaccurate media reporting from that time onwards. In those circumstances an application was made by counsel on behalf of the first named notice party to the respondent District Judge based upon the reporting which had taken place prior to the bringing of the charges and to which I have referred above.

2.4 While there was, in the course of the exchange of affidavits in these proceedings, some slight confusion as to the role played by the State Solicitor acting on behalf of the prosecution on the occasion in question, it is now clear, and I am satisfied, that that State Solicitor concerned confined himself to assisting the respondent District Judge by informing him of the principles applicable to the making of restrictive orders and, in particular, accurately informed the respondent District Judge that there was a jurisdiction to make such an order provided that the District Judge was satisfied that it was necessary to ensure a fair trial.

2.5 On the basis of the evidence before me I am also satisfied that the respondent District Judge expressed himself, on the 4th July, 2003, as being satisfied that it was necessary to make the orders sought in order to ensure a fair trial. He then proceeded to make the restrictive orders.

2.6 As pointed out above an application was then made on behalf of the applicants to discharge the restrictive orders which application was ruled on, on 8th October, 2003. From the transcript of that ruling it appears that, on that occasion, the respondent District Judge decided that:-

> 1. The proceedings on 4th July, 2003 did not amount to a trial process and that, accordingly, the principles set out by the Supreme Court in *The Irish Times Limited and Others v. Ireland* [1998] 1 I.R. 359 did not apply;
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> 2. The first named notice party had a right to fair procedures, a right to face his accuser, a right to know the case made

against him and the right to a good name, and these would be threatened if his identity or information tending to disclose his identity was published; and

3. The restrictive orders of the respondent District Judge of 4th July, 2003 were final orders and thus were not subject to being varied by the respondent District Judge other than within the confines of the same sitting of the District Court on 4th July, 2003.

In the light of those facts it is necessary to consider the legal principles applicable.

3. The Legal Principles

3.1 Article 34.1 of Bunreacht na hÉireann provides that:-

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public".

3.2 In *Re R Limited* [1989] I.R. 126 the Supreme Court took the view that the provisions of Article 34.1 required that justice must be administered in public save where there was an express legislative exception to that rule. The judgment went on to note that any such express legislative exception should be strictly construed. In particular where the legislative prohibition was not absolute, but conferred a discretion on the court, that discretion should be only exercised where it could be shown:-

> "That a public hearing of the whole or of that part of the proceedings which it is sought to have heard otherwise than in a public court, would fall short of doing justice".

3.3 However in *Irish Times Limited* the Supreme Court recognised that, in addition to those cases which were covered by an express statutory provision, there were certain other limited circumstances where a court had a discretion to limit contemporaneous press reporting of a trial.

In the course of his judgment in *Irish Times Limited* O'Flaherty J. said, at p. 396:-

> "The press are entitled to report, and the public to know, that the administration of justice is being conducted fairly and properly. This is not to satisfy any idle curiosity of the public. The public have both a right and responsibility to be kept informed of what happens in our courts. Since the proper administration of justice is of concern to everyone in the State, the press has a solemn duty to assure the public by fair, truthful and contemporaneous reporting of court proceedings whether or not justice is being administered in such a manner as to command the respect and the informed support of the public. As it was put by Fitzgerald J. in an Irish case of the last century, one of the many securities for the due administration of justice is "the great security of publicity": *R v. Gray* (1865) 10 Cox C.C. 184 at p. 193.
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> In my judgment the blanket ban imposed by the trial judge went too far. It was not justified. It was in order to prevent what was only a possibility of harm though made, I have no doubt, from the best of motives. The risk that there will be some distortion in the reporting of cases from time to time must be run. The administration of justice must be neither hidden or silenced to eliminate such a possibility. The light must always be allowed shine on the administration of justice; that is the best guarantee for the survival of the fundamental freedoms of the people of any country".

At p. 389 O'Flaherty J. went on to hold that:-

> "Trial judges have tended on occasion to adopt an undue tenderness towards juries in this regard. If there is an inaccuracy as regards pending or current proceedings, or a slant is put on any case that is thought not to be fair to one party or another, then in most cases this can be put right by the trial judge giving an appropriate direction to the jury either in advance of or in the course of the case as required".

3.4 Hamilton C.J., agreeing with the above observations, stated that he was:-

> "Satisfied that there was no evidence before the learned Circuit Court judge which would justify him in holding that there was a real risk of an unfair trial if contemporaneous reporting of the trial was permitted. He was not entitled to assume that such reporting would be other than fair and accurate".

3.5 Therefore it would appear that orders restricting the reporting of proceedings in court can only be made where:-

1. There is an express legislative provision to that effect; and

2. In the event that the relevant legislative provision contains a discretion, the court is satisfied that to have the case heard in public would fall short of doing justice; or

3. In the event that there is no express legislative provision the court is satisfied that

   (a) there is a real risk of an unfair trial if the order is not made and

   (b) the damage which would result from not making an order would not be capable of being remedied by the trial judge either by appropriate directions to the jury or otherwise.

3.6 Against those general principles it is necessary to consider the facts of the current case to which I now turn. For reasons which will become apparent it seems appropriate to consider first the reasoned decision of the respondent District Judge, delivered having heard argument from both sides.

4. Application of Legal Principles to the discharge refusal

4.1 The first question that needs to be addressed is the precise basis upon which the applicants are now prevented from publishing the identity of the first named notice party or material tending to identify him.

4.2 This issue is somewhat complicated by the fact that such limited evidence as there is concerning the basis on which the respondent District Judge made the original restrictive orders on 4th July seems to suggest that he, at least in general terms, was

informed of the basic principles set out in *Irish Times Limited* and, it would appear, came to the view that that test was met.

4.3 However the reasons set out in his recorded judgment of the 8th October, 2003 do not appear to suggest that he was of the view that the *Irish Times Limited* principles applied. On the contrary the respondent District Judge would appear to have taken the view that those principles did not apply on the basis that the hearing on 4th July did not amount to part of the trial process. Because that decision was arrived at after hearing arguments from both sides it seems to me that I should first review the reasons given in that judgment for refusing to discharge the restrictive orders.

4.4 In respect of that aspect of the respondent District Judge's view which found the *Irish Times Limited* principles did not apply, I am satisfied that the respondent was in error. Firstly it should be made clear that the provisions of Article 34.1 apply in equal measure to civil and criminal proceedings. The requirement that justice be administered in public applies, therefore, equally to any occasion when justice is being administered in the courts.

4.5 It is illustrative that in *Re R. Limited* was a hearing under s. 205 of the Companies Act 1963. Similar considerations arose in relation to proceedings under that section *in Irish Press plc v. Ingersoll Irish Publications Limited* [1994] I.R. 179. Other civil and judicial review proceedings were the subject of *Roe v. BTSB* [1996] 3 I.R. 67, *Salinas de Gortari v. Smithwick* [1999] 4 I.R. 223 and *Re Ansbacher (Caymen) Limited* [2002] 2 I.R. 517. It is manifestly clear that the strict limitation on restrictions on reporting imposed by Article 34.1 are, and have been, applied in respect of a whole range of different types of proceedings.

4.6 There is also ample authority for the proposition that a pre-trial hearing at which an accused person is remanded on bail amounts to the administration of justice as that term is used in the Constitution. *The State (Lynch) v. Ballagh* [1986] I.R. 203 and *Glavin v. Governor of Mountjoy Prison* [1991] 2 I.R. 421.

In *Glavin* Keane J. concluded at p. 439 that:-

> "For so long as the Oireachtas considers it essential that persons accused of serious crime should be afforded the important protection of a preliminary hearing, both the prosecutor and the accused are entitled as a matter of constitutional right under Article 34 to a determination of the justicable controversy between them in a court established by law by a judge appointed in the manner provided by the Constitution".

4.7 While the hearing before the respondent District Judge on 4th July was not, of course, a preliminary hearing of the type that Keane J. spoke of in *Glavin* it is clear that the question of bail was addressed. Walsh J. in *State (Lynch) v. Ballagh* classified the granting of bail as a judicial act and the comments of Keane J. in *Glavin* are therefore applicable.

4.8 In fairness it should also be noted that counsel for the first named notice party did not contest that the hearing on 4th July involved the administration of justice.

4.9 In all those circumstances it seems to me that Article 34.1 clearly applies to a hearing of the type which was conducted by the respondent District Judge on 4th July so that no restrictions were permitted to be imposed on the reporting on that hearing save in accordance with the proper exercise of a statutory jurisdiction or in accordance with the *Irish Times Limited* principles.

5. The Rights Properly taken into Account

5.1 The next matter that needs to be considered in detail is the question as to the precise rights of the applicant which are to be properly taken into account in considering whether to make an order restricting the reporting of the administration of justice. In *Re Ansbacher (Caymen) Limited*, in this court, McCracken J. expressly declined to hold that the undoubted right to privacy guaranteed by Article 40 or the right to a good name pursuant to Article 40.3.2 could give rise to an entitlement to anonymity in a court case. Such an entitlement was not, in the view of McCracken J. a practicable way for the State to defend and vindicate those rights. The only harmonious construction of those personal rights was, in the view of the court, that their exercise did not interfere with other constitutional requirements which were inserted for the public good. In those circumstances it was held that there was no harmonious construction of the Constitution whereby the applicants personal rights could be considered to give rise to any special or limited case prescribed by law as an exception to Article 34.1. In coming to that view McCracken J. placed reliance on *Roe, Irish Times Limited* and *Salinas de Gortari*. Similarly Kearns J. in *Independent Star Limited v. Judge O'Connor* [2002] 4 I.R. 166 at p. 176 noted that policy reasons cannot, as such, justify the imposition of a reporting restriction.

5.2 It seems to me clear, therefore, that in the absence of an express statutory limitation on reporting, the general constitutional discretion identified in the *Irish Times Limited* only applies to cases where it can properly be said, in accordance with the principles set out in that case, that the accused's right to a fair trial may require the reporting restrictions. The undoubted effect which the public knowledge of the existence of criminal proceedings against an individual may have on certain other rights of such individual is not, on the basis of those authorities, a justification for departing from the clear constitutional imperative specified in Article 34.1 to the effect that justice must be administered in public.

5.3 To the extent, therefore, that the respondent District Judge would appear, in his judgment of 8th October, to have taken into account the fact that a public knowledge of the existence of the criminal charges against the first named notice party might affect his right to his good name (particularly if the proceedings never came to trial) he was clearly in error.

6. Jurisdiction to Vary

6.1 In *Irish Times Limited* at p. 400, Denham J. noted that representatives of the media were entitled to be heard in relation to the making of orders which would restrict the entitlement of the media generally to report on the administration of justice in court. The practical implementation of such an entitlement has the potential to give rise to some difficulty.

6.2 There will be many cases where there will be little point in imposing a reporting restriction after the event. Matters once reported upon cannot be unreported. It seems to me that the procedure adopted both in this case, and in other cases, whereby the judge concerned (having been persuaded that it is an appropriate case to impose reporting restrictions) makes an initial order imposing such restrictions without hearing representatives of the media but affords such representatives an opportunity to be heard thereafter meets the requirements identified by Denham J. in *Irish Times Limited* to afford media representatives an opportunity to be heard.

6.3 It does, however, follow that a court imposing a restrictive order in the absence of media representation is under an obligation to afford such representatives a reasonable and timely opportunity to be heard and, furthermore, that the court, having afforded such opportunity, must be entitled to come to a fresh view as to the appropriateness or otherwise of making the order concerned. In that regard it seems to me that such a situation would not differ significantly from a case in which the court, on the basis of hearing one side only, is persuaded to make an interim order for the purposes of preserving a situation, but is then required, at a later

interlocutory stage, with all relevant parties having been given the opportunity to be heard on notice, to give a fresh consideration as to whether the interim order should continue.

6.4 There is nothing, in my view, inappropriate about a court making, in an appropriate case, an order on foot of the jurisdiction identified in *Irish Times Limited* without giving representatives of the media an opportunity to be heard, provided that the court is prepared to permit, at an early stage, the hearing of an application by relevant media organisations to discharge or vary such order and subject to the obligation of the court to consider the merits of the making of such order afresh in the event that such an application is brought.

6.5 As a process such as the above is necessary to ensure compliance with constitutional objectives it does not seem to me that any rule (such as that identified in *Kennelly v. Cronin* [2002] 4 I.R. 292) applicable generally to the varying of orders of the District Court could have any application in a case such as this.

6.6 Therefore I am also satisfied that the respondent District Court Judge was in error in coming to the view that he did not have a jurisdiction to vary.

6.7 It would, therefore, seem that each of the reasons given by the respondent District Judge on the 8th October were incorrect. He had a jurisdiction to vary. *The Irish Times Limited* principles were applicable. He was not entitled to take into the account the right to a good name.

6.8 However having regard to the fact that it would appear that the respondent District Judge did, at least to a limited extent, address the appropriate principles on 4th July and to the extent that there is, to some extent, at least a reference to the general principles applicable to a fair trial in the course of his judgment on 8th October, it seems to me that I should go on to consider whether it would have been open to the respondent District Judge to come to the view that the restrictions were necessary to secure a fair trial.

7. Application of Principles to the Restrictive Orders

7.1 This issue comes down to a question of whether, on the assumption that the respondent District Judge came to the view that orders which he made were necessary to secure a fair trial in accordance with *Irish Times Limited* principles, there was sufficient evidence to entitle him to come to such a view. That such evidence is a necessary pre-requisite to the making of the order can be seen from the passage of the judgment of Hamilton C.J. in the *Irish Times Limited* quoted above.

7.2 In this context it is important to note that in all of the identified not statutory categories of cases where reporting restrictions apply in the context of the criminal process it is the evidence given rather than the identity of the accused which is restricted from publication. The reasoning behind the relevant restrictions are clear.

7.3 In certain cases evidence will properly be given either at a preliminary stage or in the course of a trial, where a subsequent trial of the same or other individuals is contemplated, and where that evidence would not be material or admissible at a future trial. For example evidence of previous convictions may be highly relevant in a bail application but would not be admissible at the subsequent trial.

7.4 Similarly the very point of the trial of an issue as to whether an admission by an accused is admissible in evidence is to determine whether the jury should hear that evidence. The possibility that the alleged admission by the accused will not be admitted in evidence needs to be taken into account and in those circumstances it is clearly inappropriate that there should be any publicity given to evidence of the alleged admission, which evidence may ultimately be excluded from the substantive trial. The very purpose of the court directing, in an appropriate case, that two accused should be separately tried for the same or similar offences is because of the fact that evidence admissible against one may not be admissible against another and the view may be taken that excessive prejudice might be caused by a single trial. In those circumstances a reporting restriction may properly prevent publicity being given to evidence at the earlier trial which will not be presented at the second trial.

7.5 Without necessarily coming to the view that there could be no circumstances in which an order could be made under the *Irish Times Limited* principles directed solely at protecting the anonymity of an accused, the starting point of any consideration of this issue must be that all the known forms of such non statutory reporting restrictions are directed towards preventing publicity being given to evidence which might be properly placed before a court on one occasion but might not be admissible at a subsequent trial.

7.6 While there are, undoubtedly, a number of statutory restrictions on the reporting of the identity of accused persons (none of which are applicable on the facts of this case) it seems clear that all such restrictions are designed to protect the identity of victims rather than being designed to ensure a fair trial.

7.7 On the facts of this case there was evidence of adverse pre-charge publicity by two media organisations involving four separate publications. While there may well be legitimate questions to be asked as to how the relevant information came into the hands of the media organisations concerned and as to whether it may not be likely that some state agency must have been involved to some extent in facilitating that situation, I am persuaded that counsel for the applicants is correct when he says that a limited amount of pre-charge publicity by no more than two media organisations could not give rise to an assumption that general adverse post charge publicity will take place much of which would, if it were to occur, be in breach of the *sub judice* rule.

7.8 I am therefore satisfied that, as in the *Irish Times Limited*, there was insufficient evidence before the respondent District Judge which would have entitled him to take the view that permitting the identity of the first named respondent, as the person charged with the offences before the court, to be published, would lead to a real risk of an unfair trial such as could not be remedied by appropriate action taken by the trial judge.

7.9 If any restrictive order is justified under *Irish Times Limited* principles then, in order to amount to a justified interference with Article 34.1, such an order must, in my view, comply with principles analogous to those which have been developed under the doctrine of proportionality.

Such an order should, therefore:-

> (i) be designed only to restrict the publication of material which, it is adjudged, would cause serious prejudice leading to a real risk to a fair trial; and
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> (ii) should do so in a manner which interferes as little as possible with the entitlement to report fully on all aspects of the

administration of justice; and

(iii) should do so in a way which is proportionate.

7.10 Against such a test it seems to me that the restrictive orders in this case fail. The orders seem more designed to protect the anonymity of the first named notice party rather than preventing the publication of any material that would not be admissible at a trial and where publication might, therefore, be prejudicial to such trial. The orders of themselves do not prevent the publication of material which makes any accusations against the first named notice party but which do not specify that he stands charged with offences now before the courts. The jury at the trial will, of course, know the identity of the accused.

7.11 In those circumstances it would seem to me that the making of the restrictive orders on 4th July and, also and in particular, the refusal to revoke on 8th October was in excess of jurisdiction and should be quashed.

7.12 Finally I have to consider a technical question as to the precise order which is currently in force and binding. Since the events which have been described above the first named notice party has been returned for trial to the Circuit Court. It was, at one stage, suggested that the Circuit Judge had made a separate order restricting reporting. However I am now satisfied on the evidence that the only matter dealt with by the learned Circuit Judge was to indicate that the order of the respondent District Judge, which is under challenge in this case, was to continue pending trial. In those circumstances I am satisfied that the current order which restricts publication of the identity of the first named notice party is the order of the respondent District Judge. In those circumstances once such order is quashed, there will be no valid order in being which interferes with the ordinary fair and proper reporting of any aspect of the administration of justice in respect of the criminal charges still pending against the first named notice party.