Neutral Citation Number: 2007 IEHC 39

THE HIGH COURT
JUDICIAL REVIEW

2006 No. 64 J.R.

BETWEEN

FRANK WARD

APPLICANT

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
THE IRISH PRISON SERVICE AND
THE ATTORNEY GENERAL

RESPONDENTS

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgment of Mr. Justice McGovern delivered the 25th day of January, 2007.

1. This is an application for judicial review for an order of *mandamus* requiring the respondents to afford the applicant an opportunity of meeting his legal advisers privately. Leave was granted by order of Johnson J. on 24th January, 2006. On 3rd May, 2006 a notice of motion was brought to amend the statement of grounds dated 18th January, 2006. The original grounds had been drafted by the applicant in manuscript form. By order dated the 17th day of July, 2006 MacMenamin J. ordered that the Director of Public Prosecutions be joined as a notice party to the proceedings and gave the applicant liberty to amend his statement of grounds by the addition of the following reliefs:-

> (i) A declaration by way of application for judicial review that by failing to afford the applicant facilities or any opportunity to consult privately with his legal advisers when brought in custody before Dublin Circuit Criminal Court his constitutional right to a fair trial was violated contrary to Article 38.1 of Bunreacht na hÉireann.
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> (ii) If the court should so hold that the plaintiff is so entitled, to damages.

2. He also gave liberty to add the following grounds upon which the relief is sought namely:-

> The refusal to facilitate the applicant's request to privately consult with his legal advisers –
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> (a) violates the applicant's right to a trial in due course of law contrary to Article 38.1 of the Constitution;
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> (b) is unfair and unjust to the Applicant;
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> (c) has prejudiced the Applicant in his defence of the criminal proceedings and has rendered any trial which might proceed unfair;
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> (d) has prejudiced the Applicant's chance of obtaining a fair trial;
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> (e) violated the Applicant's right to a fair trial in contravention of article 6(3)(b) of the European Convention on Human Rights as annexed to the European Convention on Human Rights Act, 2003.

The Facts

3. The plaintiff is facing criminal charges relating to an armed robbery at the Goat Grill public house and car park at Goatstown, Dublin, 14 on 6th October, 2003. The plaintiff is due for trial before the Circuit Criminal Court. On 16th July, 2006 the plaintiff attended at an interim hearing in advance of the trial. He complains that on that date his solicitor and counsel went downstairs to the cells below the corridor at Circuit Court 8 for the purpose of consulting with him. He was handcuffed to a prison officer and the Applicant asked his solicitor if it would be possible to speak to counsel and herself without the presence of the prison officer. The solicitor, Ms. Clare Naughton, spoke to the officer handcuffed to the applicant and asked if herself and counsel might be allowed consult with the Applicant in private and was advised that the consent of the Assistant Chief Officer would be required. She was given the name of the officer on that date and went upstairs to speak to him. It seems the Assistant Chief Officer was not available and the other prison officers informed the Applicant's solicitor that she and counsel would not be able to talk to their client except while he was handcuffed to a prison officer.

4. In the course of the hearing I was told by counsel for the Applicant that these events took place after the interim hearing in the Circuit Criminal Court.

5. The Applicant claims that the refusal to facilitate his request to consult privately with his legal advisers was a violation of his constitutional rights, is unfair and unjust to him, and has prejudiced his right to a fair trial. He also claims that it was a violation of his rights under article 6(3)(b) of the European Convention on Human Rights as annexed to the European Convention on Human Rights Act, 2003.

6. The respondents have put in two statements of opposition. The second one was delivered after the Applicant was given leave to amend the statement of grounds. The Respondents state that the applicant has the right to have a consultation with his legal advisers at any reasonable time in Portlaoise Prison, in sight but out of the hearing of prison officers. This right has been exercised by the Applicant on a number of occasions during his custody in Portlaoise Prison. They deny that he is entitled to a similar facility in the environs of the Criminal Courts and say that there is a high risk that the plaintiff would escape with a consequent threat to the public if he was not handcuffed to a prison officer while in the area where the Applicant and his legal advisers sought to have their consultation. The Respondents state that they will facilitate such consultations with the Applicant's legal advisers as are reasonable and appropriate but that the applicant must remain handcuffed to a prison officer during any such consultations in the environs of the court. They also point out that if it is practical from a security viewpoint the Applicant will be allowed to consult with his legal team out of the hearing of prison staff and that this can happen by allowing the applicant and his advisers to be seated in a pew in the court with the officers protecting the points of exit from the Court. But they say this will only take place if the officers are satisfied that the area is not an escape risk and there are no persons in the area who could facilitate an escape attempt. If this is not possible the Applicant can communicate with his advisers but prison officers will be in his immediate vicinity.

7. The Respondents also state that the Applicant did not, in fact, seek a consultation while inside a courtroom so the issue of the procedure that would be adopted inside a courtroom did not arise. This does not appear to be challenged. They argue that any relief in respect of access to legal advice during the course of the criminal trial is premature and would be a matter for the trial judge who will be obliged to discharge his legal and constitutional duties with justice and fairness. They also claim that the applicant has not discharged the onus placed on him of proving that there is a real and substantial risk that he will not obtain a fair trial in accordance with law and that the arrangements which were put in place by the second named respondent in relation to the provision made for the Applicant to consult with his lawyers did not infringe any of the Applicant's constitutional rights.

8. I have read the papers in this matter and the affidavits which have been sworn and filed. I have also received written submissions from all of the parties and extensive oral submissions from counsel. I have been referred to many legal authorities. Counsel have informed the court that the issues arising in this case are somewhat novel insofar as the authorities which exist in this jurisdiction on the question of an accused person's right to consult with his lawyers have arisen in the context of an accused in custody in a garda station or an accused in a prison situation. It appears that the question of the extent of an accused person's right to consult with his legal advisers in a court building (but not in a courtroom) during an interim hearing has not been considered before.

The law

9. I am satisfied from the authorities which have been opened to me that a person detained in a garda station or in a prison has a constitutional right to access to his legal advisers in privacy and out of the hearing of An Garda Síochána or the prison staff as the case may be. See In *re Article 26 and the Emergency Powers Bill*, 1976 [1977] I.R. 159; *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 at 355; *The People (Director of Public Prosecutions) v. Shaw* [1982] 1 I.R. 1; *The People (Director of Public Prosecutions) v. Conroy* [1986] 460; *The People (Director of Public Prosecutions) v. Healy* [1990] 2 I.R. 73 at 81; *The State (Harrington) v. Garvey* (unreported judgment, 14th December, 1976); *The People (D.P.P.) v. Finnegan* (unreported judgment, 15th July, 1997) at p. 1009; *The State (McGowan and Walshe) v. Governor of Mountjoy* (unreported, Supreme Court, December 12th 1975); *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 I.R. 390 at 395; *The People (D.P.P.) v. Peter Pringle* 2 Frewen 57.

10. While these cases deal with persons being detained in a garda station or in prison they do offer some assistance in the present case. In *Lavery v. The Member in Charge (Carrickmacross Garda Station)* [1999] 2 I.R. 390 at 395 O'Flaherty J. refers to the case of *People (D.P.P.) v. Pringle* where the Court of Criminal appeal stated:

> "The Court is satisfied that the Garda Síochána have a right to interrogate a person in lawful custody provided that such interrogation is carried out in a fair and reasonable manner. The court is also satisfied as has been clearly established, that a person in lawful custody is entitled to reasonable (emphasis added) access to his lawyer or solicitor. These two rights must, to some extent, be balanced and there are no grounds for holding that either right can or should be exercised to the unreasonable exclusion of the other."

11. In *The People v. Madden* [1977] I.R. 336 at 355 O'Higgins C.J. stated:

> "This Court is satisfied that a person held in detention by the Garda Síochána, whether under the provisions of the Act of 1939 or otherwise, has got a right of reasonable access to his legal advisers and that a refusal of a request to give such reasonable access would render his detention illegal. Of course, in this context the word 'reasonable' must be construed having regard to all the circumstances of each individual case and, in particular, as to the time at which access is requested and the availability of the legal adviser or advisers sought."

12. In the case of *The State (Harrington) v. The Commissioner of An Garda Síochána & Ors.* (Unreported judgment Finlay P., 14th December, 1976) the President held that while the physical facilities available in a garda station may not be as ample nor the organisation as flexible as that which might exist in the remand section of a prison, arrangements would still have to be made to permit a detained person to have access to his legal adviser in privacy and out of the hearing of any member of An Garda Síochána. It is interesting to note that in that particular case the President found against the applicant on the basis that due to the "… patience and proper persistence of the solicitor …" the applicant did get an opportunity to speak to his solicitor in private and so "… was not effectively deprived of his right to legal advice nor did the delay in his securing of it, having regard to the fact that all time whilst (his solicitor) was being delayed the prosecutor, Mr. Harrington, was in his cell and was not being interviewed in any way prejudice him or restrict or curtail his rights ."

13. The authorities which I have referred to seem to establish that a detained person`s legal and constitutional right to access to his lawyers should be "reasonable access". For example if one looks at the case of *The People (D.P.P) v. Buck* [2002] 2 I.R.268 which was referred to by the respondents it was held that in the case of a person in custody who had been subjected to questioning by a Garda after he had requested the presence of his solicitor but before the solicitor arrived did not necessarily suffer a denial of his constitutional right of access to a solicitor. In that case there was evidence that the Gardaí made several attempts to contact a number of solicitors and it seems that the difficulty in contacting a solicitor was because the detained person was being interviewed on a Sunday afternoon in the summertime and there was a large sporting event on in the area where he was detained. The court held that there had been no conscious and deliberate attempt to deprive the defendant of the services of his solicitor or contact with his solicitor.

14. The Gardaí and the prison authorities should be allowed to exercise their power of detention or interrogation as they think fit provided they act reasonably and in a manner which does not infringe the prisoner`s legal or constitutional rights. See *Lavery v. Member in Charge (Carrickmacross Garda Station)* [1999] 2 I.R. 390 at 395. The opportunity for a detained person to consult in private with his lawyers not in the hearing of third parties will obviously vary from place to place. It would be wrong, in my view, to equate a request for a detained person to consult with his lawyers in a Garda Station or a prison with an *ad hoc* consultation outside the courtroom or the holdings cells in a court building where there may be large members of the public or many other prisoners, prison officers or Gardaí. At the end of the day one has to look at the reason why the courts have held that detained persons had a legal and constitutional right to consult their lawyers in private. In *The People (D.P.P.) v. Healy* [1990] 2 I.R. 73 at 81 Finlay C.J. said:-

> "The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory. The availability of an advice from a lawyer must, in my view, be seen as a contribution, as least towards some measure of equality in the position of the detained person and his interrogators.
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> Viewed in that light I am driven to the conclusion that such an important and fundamental standard of fairness in the

administration of justice as the right of access to a lawyer must be deemed to be constitutional in its origin, and that to classify it as merely legal would be to undermine its importance and the completeness of the protection of it which the courts are obliged to give."

15. In the same case Griffin J. stated:-

> "The main, if not the sole, purpose of the right of access to a legal advisor is to enable the detained person to obtain advice as to his rights, and in particular, advice as to whether, in the circumstances, it would be in his best interest to make a statement or to refuse to make one."

16. That was a case concerning the right of a detained person to have access to his lawyers at a time when he was being interrogated. But the line of authorities already referred to also make it clear that a person in a prison situation is entitled to private access to his legal advisors for the purpose of obtaining general legal advice and exchanging other information necessary for the good conduct of his defence.

17. In the present case it is clear from the affidavits which have been filed by the respondents and from the statements of opposition that the applicant did have access to his solicitors in private at Portlaoise Prison and will continue to do so on a reasonable basis. It is also likely from the information furnished to the court that if the applicant requires to consult with his legal advisors in the course of his trial that facilities may be made available for him to do so by clearing the court and allowing prison officers to stand at points of entry to and exit from the courtroom but outside the hearing of the applicant and his legal advisors.

18. The applicant asserts that because he was required to remain handcuffed for security reasons on the 16th January, 2006 while consulting with his legal advisors that this is a refusal to vindicate his constitutional right and it compromised the preparation of his defence and the fairness of his trial. He has offered no reason as to how either his defence or the fairness of his trial had been compromised. It seems to me that there was a reasonable basis for the prison authorities refusing to remove the handcuffs from the applicant on the occasion of the 16th January, 2006 when the applicant sought to consult with his legal advisors. There is nothing to prevent his legal advisors making arrangements with the prison authorities in Portlaoise to have further consultations in private with the applicant. Insofar as the applicant claims that he will not be able to have a fair trial this appears to be somewhat in the nature of a *quia timet* application. In *Clune and Others v. D.P.P.* [1981] I.L.R.M. 17 Gannon J. stated that the applications before him were "… of the nature *quia timet* which, to succeed, must be founded upon a genuinely apprehended treat of irreparable harm. The Director of Public Prosecutions is invested by the Legislature with the power and authority to perform some of the constitutional functions of the Attorney General. The court must presume that the D.P.P. will conform with the principles of justice (as would the Attorney General) in the exercise of his functions. It would require very strong and convincing evidence to displace the presumption." He went on to state "an order of prohibition directed to a court will not be granted *quia time*t to prevent any court lawfully established in the state from commencing the hearing of any cause or matter entrusted to its consideration by the Legislature. There is, and must be, a presumption that a District Justice will apply himself to his functions and duties in accordance with his oath of office and within the limits of his jurisdiction with justice and fairness to the best of his ability. … For this court to attempt to prescribe procedures for a particular District Justice in relation to a particular cause or matter before him would be an unconstitutional breach of the judicial independence of the District Justice, and an unconstitutional usurpation of the powers and function of the Legislature to prescribe procedures for court."

19. In this case the Respondents say that the issue of a fair trial is primarily a matter to be addressed by the D.P.P. and that there must be a presumption that the learned Circuit Court Judge dealing with the trial will do so on the basis of justice and fairness. Both the Respondents and the notice party have referred to a number of decisions which establish that any application to prohibit a trial can only succeed if the applicant establishes that there is a real risk that by reason of the particular circumstances in this case that the applicant could not obtain a fair trial. In *D.C. v. Director of Public Prosecutions* [2005] 4 I.R.281 at 283 Denham J. stated that an application by an accused to prohibit a trial in which he is involved may only succeed in exceptional circumstances. She stated that:-

> "However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial.
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> In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial, the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial."

20. In *Z v. D.P.P.* [1994] 2 I.L.R.M. 481 at 498 Finlay C.J. stated:-

> "This court in the recent case of *D. v. D.P.P.* [1994] 1 I.L.R.M. 435 unanimously laid down the general principle that the onus of proof which is on an accused person who seeks an order prohibiting his trial on the grounds that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances… he could not obtain a fair trial."

21. The notice party argues that it is necessary for the applicant to point to some potential unfairness in relation to the actual trial which he will have to undergo. The trial is not rendered unfair by virtue of mere speculation or a theoretical possibility. *See Scully v. D.P.P.* [2005] 1 I.R. 242.

The relief sought

22. The plaintiff seeks an order of *mandamus* compelling the respondents to afford him "out of earshot" privacy of consultation with his legal advisors in the environs of the Dublin Circuit Criminal Court. I hold that on the evidence the plaintiff has been afforded all reasonable access to his legal advisors to have private consultations and that in the particular circumstances that obtained on the 16th January, 2006 the actions of the prison authorities in requiring the applicant to remain handcuffed even if he wished to speak with his legal advisors was not unreasonable or in breach of his legal or constitutional rights. I am satisfied from the evidence on affidavit, and in particular the affidavit of the Governor of Portlaoise Prison,that reasonable access will be afforded to the applicant to consult with his legal advisors in private in the prison where he is in custody. I am also satisfied that reasonable facilities will be made to afford him private consultation facilities when he is in court for the purpose of his trial. Insofar as any dispute may arise as to the adequacy of the facilities afforded when he attends court for his trial this is a matter for the trial judge to deal with. Accordingly I refuse the relief of mandamus sought.

23. I also reject the contention of the applicant that the events which took place on the 16th January, 2006 have been either unfair

or unjust to the applicant or have prejudiced him in the defence of his case or will render his trial unfair. I do not believe that his right to a fair trial has been in any way prejudiced or comprised.

24. I also reject the applicant's claim that his right to a fair trial under Article 6(3)(b) of the European Convention on Human Rights has been infringed.

25. In view of my decision on the matters outlined above the issue of damages does not arise.

26. I refuse the relief sought.