Neutral Citation Number: [2009] IEHC 487

THE HIGH COURT

2009 415 JR

BETWEEN

T. D.

APPLICANT

AND

JUDGE DEARBHLA FLANAGAN, IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

C. M. (OTHERWISE S. D.)

NOTICE PARTY

JUDGMENT delivered by Mr. Justice McMahon on the 6th day of November, 2009

1. Background to these proceedings

In family law proceedings between the applicant and the notice party, Judge Flanagan of the Circuit Court made an order on 10th July, 2008. This order was perfected on 7th August, 2008. The applicant appealed the decision of Judge Flanagan. On 12th March, 2009, this Court heard the appeal. On that day, Murphy J. made a provisional order on the following conditions:-

"(i) That the appeal be dismissed together with a one month stay from 12th March, 2009 to enable the applicant to make two monthly repayments of the mortgage property at […].

(ii) That the request to the accounts documentation from Ulster Bank be complied with by the applicant within one month from 12th March, 2009.

(iii) That in default of the conditions – as outlined – not [being] met, [the] provisional order becomes absolute in that the applicant will not be able to pursue his appeal.

(iv) That if both conditions are complied with, the court will entertain the appeal on a peremptory basis on the next adjourned date.

(v) That costs be approved in favour of the respondent."

It was indicated to this Court that the applicant did not comply with the conditions set out by Murphy J. and, therefore, in accordance with its terms Murphy J.'s order became "absolute" on 12th April, 2009.

On 20th April, 2009, the applicant applied to the High Court for leave to apply for judicial review of Judge Flanagan's order and sought*, inter alia*, declarations that ss. 9 to 15 and s. 32 of the Family Law Act 1995, were unconstitutional. This was an *ex parte* application and was grounded on the affidavit of the applicant. In this affidavit there was no reference whatsoever to the fact that Judge Flanagan's order had already been appealed to the High Court and Murphy J.'s order in the High Court had become absolute some eight days before the application for leave to apply for judicial review. Leave was granted by Peart J. on 20th April, 2009.

Counsel on behalf of the second and third named respondents objected and made submissions under three headings:-

(i) Undue delay;

(ii) The appropriateness of judicial review in this case; and

(iii) The substantive issue relating to the constitutional challenge.

Delay

Order 84, rule 21 of the Rules of the Superior Courts provides as follows:-

"(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the Court considers that there is good reason for extending the period within which the application shall be made.

(2) Where the relief sought is an order of *certiorari* in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.

(3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

From this, it can be seen that in seeking judicial review the onus is on the applicant to move promptly and, in any event, within three months of a court judgment or six months where *certiorari* is sought. In the present case, the delay is one of nine months and ten days or eight months and thirteen days if the calculation is made from the date when the order was perfected. In either case, the applicant is clearly out of time. Counsel for the applicant submitted that there is good reason for extending the period in this case and urged the court to exercise some leniency in the following circumstances:-

(a) The delay in this case is not egregious in itself.

(b) The applicant was a lay litigant for some of the relevant period, the solicitors in the Circuit Court action having come off record.

(c) The matters in respect of which leave was granted raised serious matters of public importance involving as they do a constitutional challenge to s. 9(1)(a) and s. 15(a) of the Family Law Act 1995, in particular on the grounds that these provisions are contrary to the constitutional provisions dealing with:-

(i) the family (Article 41)

(ii) the right to earn one's livelihood recognised as falling within the protection of Article 40.3.

The applicant also claimed that these provisions were contrary to certain provisions of the European Convention on Human Rights, something which was not pursued before this Court.

(d) In considering delay in a case such as this, the court should take into account all the facts of the case and the circumstances in which it arises.

In this latter context, I will refer to para. 6 of the applicant's own affidavit sworn on 9th March, 2009, in support of his leave application before Peart J. on 20th April, 2009. The full paragraph reads as follows:-

> "I say that in respect of the order made on 10th July, 2008, it was not possible to make a challenge until such a time as an engrossed and perfected order was made available to this deponent through his former solicitor, by letter posted on 3rd September, 2008, and I beg to refer to the said order which was perfected on 7th August, 2008, when produced, and this applicant has been waiting to date on the availability of the file from his solicitor given that he has asked his solicitor to come off record which he did before the court on 23rd October, 2008. This deponent wishes the court to be appraised of these reasons for delay in bringing the application for leave to seek a judicial review before this honourable Court as he wishes to be excused by the court for the delay which was beyond this deponent's control and I say this deponent acted promptly once he became aware of the first named learned respondent may have made *ultra vires* decisions in the order made herein."

I have the following comments to make in regard to this paragraph. First, the applicant made no reference whatsoever in that affidavit to the fact that the appeal of Judge Flanagan's order had been heard and a High Court order had already been made by Murphy J. on 12th March, 2009. Second, the High Court order of Murphy J. made on 12th March contained a stay of one month until certain things were done by the applicant. The applicant apparently did not comply with these conditions and, accordingly, Murphy J.'s order was in full force on 12th April, 2009.

Third, it transpired at the hearing that the affidavit, on the basis of which the applicant's application for leave to apply judicial review was granted on 20th April, 2009, was signed and sworn by him on 9th March, 2009, that is three days before his appeal to this Court was heard. This date is significant because it meant that the applicant was clearly contemplating taking judicial review proceedings against Judge Flanagan's order before he appealed to Murphy J., but chose not to do so until Murphy J. had given his decision. The fact that the applicant had a suitable affidavit sworn and ready on 9th March, also shows (whatever the situation was regarding his legal representation for some of the relevant period) that he had knowledge sufficient to apply for judicial review.

It seems to me that in these circumstances one can have very little sympathy with the applicant's application seeking the Court's indulgence in relation to initial delay of at least eight months, and more particularly, the further delay of three days, when he was ready to commence proceedings for judicial review but held off until after the hearing of the appeal in the High Court.

Further, reading the affidavit that the applicant had sworn on 9th March, 2009, especially para. 6 thereof as already quoted, one would have to say that the failure to alert Peart J. of the appeal and the order of Murphy J. was, in my view, a significant and serious omission. I have serious reservations as to whether Peart J. would have granted the order for leave in such circumstances had he been apprised of the full facts.

Apart from this, the application for leave on 20th April, 2009, in these circumstances, created serious procedural issues relating to the propriety of judicially reviewing the Circuit Court order, in circumstances where that order had been overtaken by the provisional order of the High Court of Murphy J. made on 12th March, 2009, and which had become absolute on 12th April, 2009, by that time.

To compound the matter further on 5th October, 2009, the applicant came before a different judge of the High Court seeking to withdraw his appeal which by that time had been dismissed by the order of Murphy J. on 12th March, 2009. This application, being on consent with the third party was successful in that deValera J. made orders to strike out the appeal and to lift the stay imposed by Murphy J. on 12th March, 2009, a stay that by 12th April was spent.

It is blatantly clear to me that, if the applicant was dissatisfied with Judge Flanagan's order, he could either appeal her decision or seek leave to have her order judicially reviewed on stated grounds. On 9th March, 2009, he was clearly contemplating the latter course of action as he had by then sworn a grounding affidavit for the leave application. He was clearly aware of his options at that time. He chose to go ahead with the appeal. Having made that choice in these circumstances, there is no reason whatsoever why the Court should indulge the applicant, who is, in any event, as I have already said, well out of time.

It is also important to note that there are other parties awaiting the outcome of these proceedings and whose interests in having this case finally determined are urgent. The notice party and the dependent children should not be kept in legal limbo while the applicant inappropriately prolongs the process. The applicant's wife is a notice party before this Court and, when counsel made an application to me at this hearing on her behalf to have a stay lifted in the interim, counsel for the applicant herein, agreed to the notice party's request.

I have little hesitation in refusing the applicant's request that the Court should overlook the delay in all the circumstances outlined above. My view, strongly held for the above reasons, on this matter determines the case and it is unnecessary, in these circumstances, for me to address the substantive arguments advanced alleging that certain sections of the Family Law Act 1995 are unconstitutional.

It would not be fair to end this judgment without complimenting the present legal team engaged by the applicant, who came into the case at a late stage, and who, at the hearing, were still being apprised by the applicant of certain matters for the first time. Furthermore, I have no hesitation in saying that the issues raised are serious constitutional questions and Mr. Langwallner, B.L., argued on the merits very forcefully, and I might say elegantly, for his client. Because of the view I have taken on the delay issue, however, a proper assessment of these arguments will have to wait for another occasion.

Choice of remedy
The question of the applicant's choice of remedy was referred to by Clarke J. in *Payne v. Brophy* [2006] 1 I.R. 560. There Clarke J. referred to Henchy J. (speaking for the Supreme Court) in *The State (Roche) v. Delap* [1980] I.R. 170 and to *Stefan v. Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 203. In the latter case, Denham J. said (at p. 215):-

> "It is clear that whilst the presence of an alternative remedy, an appeal process, is
>
> a factor, the court retains jurisdiction to exercise its discretion to achieve a just solution.
>
> The stage of the alternative remedy may be relevant, though it may not be determinative of the issue. This is a case where an appeal had been lodged but had not been opened. It is therefore a situation to be distinguished from *State (Roche) v. Delap* [1980] I.R. 170."

Denham J. later added, at p. 217:-

> "In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of *certiorari i*s not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether *certiorari* is the appropriate remedy to attain a just result."

Having examined these dicta, Clarke J. came to the following conclusion (at p. 568):-

"It seems to me clear on those authorities that the question of a defendant being debarred from challenging a conviction in a lower court by reason of having embarked upon an appeal is dependent, *inter alia*, upon the following matters:-

> 1. If the defendant has actually embarked on the appeal, by permitting an appeal on the merits to commence, the court will lean in favour of exercising its discretion so as to debar him from thereafter proceeding with a judicial review in respect of the lower court decision.
>
> 2. Where the defendant has lodged an appeal but has not proceeded with it to the point of the commencement of the hearing of the appeal, then the question will be resolved by reference to the factors identified in *Stefan v. Minister for Justice*…"

In *Payne,* the case before Clarke J. was one where the applicant had not actually embarked on the appeal concerned and for that reason he concluded that he should not be debarred from pursuing judicial review proceedings on that ground alone.

In the case before me, however, the facts are very different. The appeal has been heard by the High Court and an order has been made which had become absolute before the commencement of judicial review proceedings. Furthermore, the applicant was fully aware of his options at least three days before the High Court heard the appeal, having sworn the grounding affidavit for leave on that date, yet continued with his appeal and sat on his hands until the appeal was heard.

In *N.A.A. v. Refugee Applications Commissioner* [2007] 2 I.R. 787, Finlay Geoghegan J., in the context of refugee law, having surveyed the relevant authorities concluded at p. 809/810 that where the applicant had elected to pursue an appeal the position was as follows:-

> "However in accordance with those decisions the normal position must be that where an appeal is determined an applicant has gone too far and the High Court will not subsequently interfere with the first instance decision by way of judicial review. Whilst the court retains a discretion to do so it should only exercise its discretion to grant *certiorari* of a decision which has been the subject of a decided appeal where there exist special circumstances which make such late interference necessary to do justice for the parties. Such an approach by way of exception appears required by the principles set out above when considered in the context of the purpose of judicial review and distinction from an appeal process. It also appears consistent with the policy of the courts in relation to the non-duplication of procedures and proceedings."

I find no "special circumstances" here to cause me to depart from this general rule. Even though Finlay Geoghegan J. was

speaking in the context of refugee law, I am prepared to adopt the principle as applicable in the present case also. (See also *T.R.T. v. Minister for Justice, Equality and Law Reform & Ors* [2007] IEHC 168 (Unreported, High Court, 4th May, 2007).)

I refuse the application.