Neutral Citation Number: [2009] IEHC 167

THE HIGH COURT

2007 1479 JR

BETWEEN

L. M.

APPLICANT

AND

JUDGE SEAN O DONNABHAINN

RESPONDENT

AND

A. M.

NOTICE PARTY

JUDGMENT of Mr. Justice O'Neill delivered the 24th day of March, 2009

The applicant in this case was, by order of this Court of 19th November, 2007, given leave to pursue by way of judicial review, an order of *certiorari* of the decision of the respondent given on 11th May, 2007, whereby the respondent refused the applicant's application for a decree of nullity of marriage and refused an adjournment of those proceedings. Furthermore, the applicant was given leave to pursue an order of prohibition and/or an injunction restraining any further proceeding in respect of the notice party's application for a judicial separation.

The background to this matter is as follows.

The applicant and notice party were married to each other on 28th May, 1991. They have two children aged seventeen years and twelve years, respectively. Unhappy differences occurred between these parties, as a consequence of which the notice party commenced proceedings against the applicant by Family Law Civil Bill on 4th December, 2001, in the Cork Circuit Court. The applicant in these proceedings delivered a counterclaim in those family law proceedings on 4th December, 2002, in which he sought a decree of nullity. At paragraph 5 of that counterclaim, the applicant states his grounds for seeking the decree of nullity as being as follows:-

> *"(a) The respondent did not give a full and free and informed consent to the said purported marriage.*
>
> *(b) The applicant was incapable of entering into and sustaining a normal lifelong marriage relationship with the respondent as at the date of the celebration of the parties' purported marriage.*
>
> *(c) The respondent was incapable of entering into and sustaining a normal marital relationship with the applicant as at the date of the celebration of the parties' purported marriage."*

These family law proceedings thereafter took an extraordinarily protracted course. Up until May, 2004 the applicant was represented by a solicitor who thereafter came off record. From then on, the applicant represented himself.

On 10th June, 2002, the notice party served a notice of trial. The applicant in these proceedings failed to file a Certificate of Readiness so that the matter could be listed for trial. On 20th July, 2006, His Honour, Judge O'Donoghue, made an order dispensing with the applicant's Certificate of Readiness and appointed Mr. Eddie Hogan, a clinical psychologist, as Medical Inspector. On 18th January, 2007, Judge O'Donoghue adjourned the nullity hearing on the basis that Mr. Hogan's report was not complete. On 27th January, 2007, His Honour Judge Kenny, directed, on an application by the applicant, that the nullity action be dealt with first and separately to the judicial separation proceedings and the nullity action be listed with priority. The applicant was notified by the Courts Service on 16th April, 2007, that the nullity counterclaim was listed for trial on 11th May, 2007. The notice party did not receive the same notice because of an email failure and only learned of the trial date of 11th May, 2007, when the notice party's solicitor was on a routine visit to the Circuit Court office, on 8th May, 2007.

An application was made on 10th May, 2007, by the lawyers for the notice party to adjourn the nullity hearing, but this was refused. On the morning of 11th May, 2007, the report of Mr. Hogan, the psychologist, was made available to the parties and to the court. A draft copy of it was made available to the applicant at 8.30am, and the court and the notice party received the finished copy later but before the hearing was due to commence.

At the hearing of the nullity petition, the applicant applied for an adjournment so that he could consider the report of the psychologist, and in the course of making such an application, it would appear that he stressed his disadvantage of not having legal representation. In the course of the hearing before me, he described himself as being overwhelmed by the prospect of having to go on with the nullity matter. The respondent refused this application for an adjournment and invited the applicant to tender evidence which he refused to do. The respondent then invited the notice party to tender her evidence. She gave her evidence and the respondent invited the applicant to cross-examine, which he again declined. I am informed by both sides that Mr. Hogan, the psychologist, was in attendance at the court and was available if his evidence was required. Neither side sought to call him, nor did the respondent.

In this judicial review application, the applicant advances essentially two grounds, namely, that the refusal by the

respondent of the applicant's application for an adjournment on the morning of the nullity hearing was a breach of the applicant's right to fair procedure in that, having regard to his status as a lay litigant, and having regard to the lateness of the presentation of the psychologist's report, that he was not in a position to assess its contents and whether it was advantageous or disadvantageous to him, and whether and in what way to challenge its contents, and as a consequence of this, he felt overwhelmed and unable to present his case for nullity. Secondly, he contends that there was a breach of O. 59, r. 23(O) of the Rules of the Circuit Court in that there was a failure to record the procedures as stipulated in that Order. Additionally, it was contended by the applicant that there was bias on the part of the respondent in determining to proceed with the nullity case, regardless of whether or not the report of Mr. Hogan was available, as evidenced by his refusal of the notice party's application for an adjournment on 10th May, 2007, and then the refusal of the applicant's application for adjournment on 11th May, 2007.

For the notice party, it is contended that these judicial review proceedings were not brought promptly nor within the time prescribed by O. 84, r. 21, nor is good and sufficient reason given for an extension of time; that the decision of the respondent to refuse the applicant's application for an adjournment was neither unreasonable, disproportionate, invalid, in error, biased or in excess of jurisdiction or otherwise amenable to the judicial review of this court; that the applicant failed to establish that the conduct of the trial on 11th May, 2007, was contrary to fairness or natural justice or in excess of jurisdiction or otherwise amenable to the judicial review of this court; that the applicant had failed to exhaust his alternative remedy of appeal; and, further, in the alternative, that this court should exercise its discretion to decline relief on the basis that there had already been inordinate delay in these family law proceedings since they were commenced on 4th December, 2001.

As far back as December, 2002 the applicant, in his counterclaim in the family law proceedings, set out his case for nullity and stated his grounds for it there. The onus thereafter remained on him to establish his case for nullity. It is well settled that this is a very heavy burden and that it is necessary to prove the grounds alleged to a higher standard of proof that normally prevails in civil proceedings but not to the extent of the standard of proof prevailing in criminal proceedings, namely, beyond a reasonable doubt. As has been said, the standard of proof is of a *quasi*-criminal nature. Thus, at all times thereafter, if the applicant wished to pursue the nullity case, it was necessary for him to assemble the proofs which would have supported the case he wished to make.

The appointment of the Medical Examiner is not for the purpose of providing an applicant with the proofs necessary to make out the nullity case. The role of the Medical Examiner is to assist the court with independent expert evidence on the issues which arise in the nullity application which would in the ordinary course, in the context of the grounds alleged by the applicant, involve expertise, generally in the areas of psychiatry or psychology.

Notwithstanding this, the applicant proceeded into this nullity case without any attempt, apparently, on his part, to obtain evidence to support his case.

When the matter came on for hearing before the respondent, and, indeed, when the adjournment application was made to him on the day before, he was, in my view, entitled to be conscious of the fact that these family law proceedings were at that time in being for six years, and regardless of what determination was made on the nullity application, further proceedings would be necessary in order to bring the original application to a conclusion. Thus, in my opinion, having regard to the court's independent obligation to ensure and promote the expeditious determination of proceedings, the respondent was manifestly entitled to have regard to the extraordinary delay that had already occurred in the case, in dealing with any application for an adjournment.

It is, of course, well settled, the decision to grant or refuse an adjournment is peculiarly within the discretion of the trial judge.

The reasons put forward by the applicant for obtaining an adjournment would have to have been considered by the respondent in the context of nullity proceedings, bearing in mind the heavy onus on the applicant to prove his case, and also in the context of the manifest opportunity which the applicant had over the long period of gestation of this case to prepare and assemble a case for nullity, and to bring to court the witnesses to prove his case. In addition the respondent was entitled to have regard to the content of the report of the medical examiner. This report was shown to me and it is clear that there is no support whatever in it for the grounds of nullity alleged by the applicant.

Bearing all of this in mind, and also the fact that in the course of the hearing, the respondent afforded the applicant an ample opportunity to make his case, either by oral evidence and/or legal argument, it cannot, in my view, be said that the respondent denied the applicant fair procedures or natural justice or in any way exceeded his jurisdiction in refusing his application for an adjournment.

Insofar as the applicant found himself in difficulties by reason of being without legal representation, in my view, he clearly had an ample opportunity to have rectified that situation. He dispensed with the services of his solicitor three years before this hearing on 11th May, 2007. He conducted these proceedings himself, engaging in correspondence with the solicitor for the notice party, and attending in court on various applications, apparently without difficulty. At some point in the year 2007, which is not specified, he did apply for legal aid but at no stage did he seek adjournment of the case pending the outcome of his application for legal aid. In any event, his application for legal aid was determined in August, 2007 by the Legal Aid Board, refusing his application on the ground that he had available to him assets in excess of €320,000. The applicant appealed this decision and in 2009, that appeal was rejected.

I am quite satisfied that the case which the applicant now makes to this Court to the effect that there was a breach of his right to natural justice in the matter proceeding, pending his application for legal aid, is unmeritorious.

The applicant secondly makes the case that there was a breach of O. 59,

r. 23(d) of the Rules of the Circuit Court. This assertion is made in his grounding affidavit but is not in his statement of grounds.

In any event, the applicant does not set out any facts in his affidavit which would warrant a conclusion that there had been any breach of the rule in question, hence, this ground, if it could be considered a ground, fails.

Finally, the applicant makes the case that there was bias on the part of the respondent in a pre-determination to go

ahead with the hearing of the nullity case, whether or not the report of Mr. Hogan was available. In the first place, the report of Mr. Hogan was available for the hearing, and on that basis alone, this ground must fail. Apart from this, of course, what the applicant seeks to characterise as bias is not either subjective or objective bias of the kind recognised in the legal authorities. The applicant, himself, acknowledged that there was no bias of any kind as against either of the parties. This ground, likewise, fails.

Finally, I should deal with the question of delay as that was raised by the notice party. The applicant made his *ex parte* application to this Court on 19th November, 2007. Clearly, this is approximately eight days outside the time limit expressed in O. 84, r. 21 in respect of applications for *certiorari*.

The applicant's explanation of the delay was that in researching for the purposes of making the application, he ascertained the time limit in the Rules and assumed that the six-month period was a deadline towards which he could work. In the event, he brought his papers to the Central Office on 9th November, 2007, in the mistaken belief that he could commence the application in the Central Office but was duly informed that he needed to make the *ex parte* application to the court, which he did on 19th November, 2007.

It is clear that the applicant was mistaken in his belief that he had the full six- month time period available to him in which to bring his application. He was, of course, obliged to move promptly but he failed to have regard to that obligation. For the respondent, it is contended that the delay exacerbated the prejudice suffered by the notice party in putting off the day when she could finally have the break up of her marriage and her status thereafter regulated in accordance with law as she sought to do in her application made in 2001.

There is no doubt, in my view, that there is considerable merit in the contention made on behalf of the notice party in this regard. The family law proceedings were, by May, 2007 already extremely stale and, in my view, any further proceedings in that application or connected with it such as a judicial review application, needed to be dealt with, with the utmost expedition. The notice party is not, as the authorities say, to be penalised because of the fact that the applicant was a lay litigant and in all probability content for a considerable period of time to remain as such during the course of these protracted family law proceedings. I was informed during the course of the hearing that the applicant has, since either the year 2005 or 2006, been a full-time lecturer in a third level institution. I simply cannot accept that somebody in that status is unable to obtain legal representation. Hence, I must come to the conclusion that the applicant did not act promptly and certainly did not act with the expedition which was required in the circumstances of this family law dispute and, in my view, his status as a lay litigant does not excuse that failure and, consequently, in my view, I should refuse him an extension of time for the bringing of this application. I do so with the comfort of knowing that I am not shutting out a meritorious case.

For all of these reasons, therefore, I would refuse the reliefs which are sought in these proceedings.