Neutral Citation Number: [2011] IEHC 51

THE HIGH COURT

JUDICIAL REVIEW

2010 665 JR

BETWEEN/

TIERNAN SALAJA (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, EMMANUAL SALAJA) AND EMMANUEL ABIODUN SALAJA
APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 10th day of February, 2011

1. The second applicant is a Nigerian national who arrived in this State in September, 2007 having been granted a visa by our Embassy in Abuja to enable him to pursuant a course of study here. Mr. Salaja registered with the Garda National Immigration Bureau and was registered under stamp 2 conditions. This permission has been renewed from time to time and he currently has permission to reside here until September, 2011. I will return shortly to the significance of the stamp 2 form.

2. Sometime after he arrived in Ireland, Mr. Salaja fell in love with a young lady who resided in Northern Ireland. A relationship formed and they had two children as a result. The elder child, Tiernan (who is the first applicant and was born in October, 2008) has joint Irish and British citizenship and the younger child, Cara, (who was born in May, 2010) is a British citizen. The Northern Irish courts have made a joint residence order in respect of the young boy, the terms of which provide that Mr. Salaja is to collect his son from his mother every Friday afternoon and return him every Monday afternoon. It is only proper to record that, judged from the various documentary exhibits filed in these proceedings, Mr. Salaja appears to be an exemplary father who seems to be wholly dedicated to the welfare of his children.

3. The stamp 2 permission enables Mr. Salaja to study and to work for a maximum of 20 hours a week during term time and 40 hours a week outside of term. He is, however, anxious to change his status from stamp 2 to stamp 4, the effect of which would be to enable him to work. To that end Mr. Salaja has made a series of applications for such a change of permission and in respect of the latest of which a decision has yet to be made.

4. The first of these applications was made in the autumn of 2009 and culminated in a refusal dated 2nd February, 2010. Mr. Salaja made two further subsequent applications of this nature in June, 2010 and August, 2010 respectively. In both of these applications he drew attention to a new development, namely, the birth of Cara. In the August, 2010 application the second applicant also drew attention to what w as described as "new supporting documentation." The Minister refused the first of these applications and a decision is awaited in respect of the second.

5. The second applicant maintains that the decision of 2nd February, 2010, violates the rights of his family under Article 41 of the Constitution, Article 8 ECHR and Article 24 of EU Charter of Fundamental Rights on the ground that by restricting his right to earn a living, the Minister has thereby compromised the rights of the family, bearing in mind that he is by law legally obliged to support the two dependent children. The Minister has, however, brought a preliminary motion whereby he seeks to have the proceedings dismissed by reason of (i) mootness and (ii) alleged lack of candour on the part of the second applicant. This judgment addresses the issues arising by reason of this preliminary motion.

Mootness

6. The Minister maintains that these proceedings are moot on the basis that it is said that the entire proceedings amount to a purely academic exercise given that the information on which those applications were based has been superseded by the information contained in the June, 2010 and August, 2010 applications. It was contended that the effect of these new applications has been to render moot the question of whether the first refusal was valid, given that these latter applications have superseded the earlier one which gave rise to the refusal which is impugned in these proceedings.

7. The mootness doctrine is a rule of judicial practice which is designed to ensure the proper and efficient administration of justice. It thus shares a close affinity with other judicially created rules of practice, such as the rules relating to *locus standi*, the rule of avoidance and the doctrine of justicability. These doctrines and rules of practice may all said to be constitutionally inspired - in particular, by the doctrine of separation of powers reflected in Articles 6, 15, 28 and 34 of the Constitution - even if they are not actually constitutionally mandated in express terms. As Article 34.1 of the Constitution provides that the administration of justice is committed to the courts, the courts must endeavour to fulfil that mandate by confining themselves to the resolution of actual legal controversies. If they were to do otherwise, then the courts would stray beyond that proper constitutional role of administering justice as between parties to a legal dispute, inasmuch as such decisions would amount to purely "advisory opinions on abstract propositions of law": see *Hall v. Beals* 396 U.S. 45 (1969)(*per curiam*). Outside of the special confines of Article 26 (which, in any event, provides for a binding decision - and not merely an advisory opinion - by the Supreme Court on the constitutionality of a Bill following a reference by the President), the provision by judges of such advisory opinions would not, at least generally speaking, serve the proper functioning of the administration of justice, since if unchecked or not kept within clearly defined limits, it would involve the judicial branch giving gratuitous advice on legal issues to the Oireachtas and the Government, a function which was never conferred on it by the Constitution.

8. The mootness doctrine further serves the interests of the proper administration of justice by conserving scarce judicial resources. As Hardiman J. observed in *G. v. Collins* [2005] 1 I.L.R.M. 1, 13 "proceedings may be said to be moot where there is no longer any legal dispute between the parties." In this respect, the doctrine of mootness may be said to constitute a sub-set of the broader *locus standi* rules, since if a legal dispute has been resolved and the issue thereby becomes moot, the litigants no longer have any proper

interest in seeking to have the issue judicially resolved, even if they had such an interest at some point in the proceedings. In such instances, the public interest generally requires that the judicial branch of government refrain from deciding such questions. As Henchy J. remarked in the context of the general *locus standi* rules in *Cahill v. Sutton* [1980] I.R. 269, 283:

> "To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented."

9. It may be true that not all of these comments apply with quite the same force and effect in the case of mootness - as distinct from a lack of *locus standi* generally - since in the vast majority of cases which ultimately transpire to have become moot the litigants will have had the appropriate *locus standi* at some point. But the critical point is that at the time the court is called upon to adjudicate upon the issue, the litigant no longer has such an interest by reason of intervening events which have ended the litigation as a live controversy.

10. Perhaps the most wide-ranging examination of the mootness doctrine is to be found in the judgments of the Supreme Court in *G. v. Collins* [2004] IESC 38, [2005] 1 ILRM 1 and *O'Brien v. Personal Injuries Assessment Board (No.2)* [2006] IESC 62, [2007] 1 I.R. 328.

11. In G. the applicant's husband had obtained *ex parte* a protection order against her under the terms of the Domestic Violence Act 1996. That order was later discharged by agreement and it was further agreed that the husband would withdraw criminal charges against the wife, which subsequently occurred. Shortly after the *ex parte* protection order had been obtained by the husband in September 2002, the Supreme Court gave judgment in *DK v. Crowley* [2002] 1 I.R. 744 where the barring order procedure contained in s. 3 of the 1996 Act was found to be unconstitutional. Ms. G. then commenced proceedings in December, 2002 contending that the parallel provisions of the 1996 Act dealing with protection orders were likewise unconstitutional. Shortly thereafter, the agreement between the husband and wife was put into effect.

12. The question before the Supreme Court was whether the proceedings had been rendered moot by reason of these developments. Hardiman J. answered this question affirmatively, saying ([2005] 1 I.L.R.M. 1, 18) "that there is no reasonable expectation that the applicant will again be subject to the same action, i.e. the making against her of a protection order *ex parte*." Nor could it be said "that any consequential or collateral *sequelae* of the *ex parte* protection order have damnified her in the manner alleged."

13. In passing, it may be observed that the present case is different in that Mr. Salaja has been clearly affected by the refusal to grant the stamp 4 visa. Likewise, there is every expectation that the Minister will continue to refuse to grant this permission.

14. We may turn next to consider *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2006] IESC 62, [2007] 1 I.R. 328. Here a claimant sought and obtained from this Court (MacMenamin J.) granted various declarations regarding the duties of the Board with regard to communications with his legal advisers. About a year after that decision, the Board relinquished jurisdiction in the claim in favour of the civil courts and the question then arose as to whether the Board's appeal to the Supreme Court against the decision of MacMenamin J. was now moot.

15. Murray C.J. noted that as a result of the High Court decision the respondent had been "sanctioned or disadvantaged" as a result, since it affected the operation of their functions, along with an order for costs. Applying the test in *G. v. Collins*, Murray C.J. continued ([2007] 1 I.R. 328 at 333-334):

> "In this case is it quite evident that the respondent has a real current interest in the issues pending on appeal before this Court for the purpose of a final determination of the controversy between the parties regarding the exercise of its statutory powers and of course the substantial question of costs. The applicant himself has insisted, that should the Court for other reasons, such as the consideration of a point of law of public importance, allow the appeal to proceed that he be permitted to participate and argue on the merits of the appeal, albeit under special terms as to the costs of the appeal, in order to defend his position concerning the costs awarded to him in the High Court.
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> Moreover, Article 34.4.3 of the Constitution provides for a right of appeal from the decisions of the High Court to this Court (subject to limitations prescribed by law). Where, as in this case, a party has a *bona fide* interest in appealing against a declaratory order of the High Court which is not confined to past events peculiar to the particular case which have been resolved in one way or another the Court should be reluctant to deprive it of its constitutional right to appeal. In this case the respondent continues to be constrained in the exercise of public powers under statute by virtue of the declaration granted in the High Court at the instance of the applicant.
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> In these circumstances I do not think it can be truly said that a decision on the appeal would not have the effect of resolving further "some controversy affecting or potentially affecting the rights of the parties". Nor do I consider that the passage of time has caused these proceedings to "completely lose 'its character as a present, live controversy'". In fact both parties, although in different forms, have an interest in the outcome of the appeal."

16. It is also pertinent to note that the Supreme Court was prepared to look to the future - and did not merely examine the past - in determining the question of mootness, for Murray C.J. further observed ([2007] 1 I.R. 328 at 334-335):

"…..another aspect of the consequence of the order of the High Court is that it defines obligations which the respondent owes under statute to the applicant, not only as regard his past claim, but as regards any future claim which he might have for personal injuries. Counsel for the applicant expressed the view that this was a rather extreme possibility but nonetheless acknowledged, as he was inevitably bound to do, that if a situation arose in the future where the applicant had a claim for personal injuries he would rely on the declaration of the High Court as regards s. 7 of the Act as one which required the respondent to deal with any solicitor appointed to act for him. I do not think it is necessary to consider simply the level of probability in the applicant being unfortunate enough to have some accident in the future whether at work or on our roads which might lead him to bring a claim for personal injuries. It seems to me sufficient to state that one cannot preclude that as a real possibility, and is not one that is so remote as to be purely hypothetical. It seems to me somewhat anomalous, to say the least, that the applicant in these proceedings would acknowledge his right to rely on the decision of the High Court at some, at least possible, future occasion but at the same time maintain in these proceedings that the appeal is entirely moot. The foregoing scenario underscores the fact that in seeking and obtaining the declaration as to the correct interpretation of s. 7 in these proceedings the applicant obtained a ruling determining how the respondent should exercise public statutory powers *vis-à-vis* him which is binding as between the parties not only as regards the

circumstances of the particular case but as regards any future event."

17. Murray C.J. also noted that in *Clarke v. Member in Charge* [2001] 4 I.R. 171 at 177 Keane C.J. appeared to doubt the correctness of cases such as *Re Zwann* [1981] I.R. 395 which in turn had suggested that the detainer was entitled to appeal an order for release under Article 40.4.2 of the Constitution, even though there was no real prospect that the applicant would ever be detained again, even if the appeal against the order for release was successful. Murray C.J. stressed, however, that no wider conclusions could be drawn from these cases ([2007] 1 I.R. 328 at 335):

> "The *Zwann* case, insofar as it might be considered applicable to the circumstances of this case, supports the position adopted by the respondent that the appeal is not moot. However, both these cases concerned orders for habeas corpus. Those cases are concerned with very specific relief concerning the liberty of the citizen and whether he or she is detained in lawful custody. Issues of mootness in such cases are coloured by the fact that the single issue envisaged by an applicant pursuant to Article 40 is whether his or her detention is unlawful, the single remedy available being his release from that particular detention. For the purposes of the present case I do not think it is necessary to take account of those cases and there was certainly nothing in them which would support the contention of the applicant in this application."

18. This issue has a bearing so far as the present case, as Mr. Moore relied heavily on the Supreme Court's decision in *Dunne v. Governor of Cloverhill Prison* [2009] IESC 43, itself another Article 40.4.2 case concerning the issue of mootness. In that case the applicant had been originally released by order of this Court (Edwards J.) pursuant to Article 40.4.2, which decision was successfully appealed to the Supreme Court. In the meantime, the applicant had been re-arrested on foot of a different charge. Peart J. in turn ordered his release pursuant to Article 40.4.2 and the State sought to appeal that decision as well. By the time this appeal reached the Supreme Court, the applicant was no longer in custody on that second charge and, indeed, the charge had been dropped.

19. In her judgment for the Supreme Court Denham J. held that the matter was moot:

> "The applicant is no longer in custody on foot of the new charge. That charge is inoperative. In relation to the new charge there is no live issue remaining between the parties. In the circumstances the issue of the new charge is not justiciable and scarce judicial resources should not be used to advance an academic analysis."

20. Quite apart from the particular considerations pertaining to mootness in the special context of Article 40.4.2 to which, as we have seen, Murray C.J. alluded in *O'Brien (No.1),* the decision in *Dunne* might be thought to provide a classic example of the application of the mootness doctrine. The charge was no longer being pressed, so that there was no longer any live issue between the parties. Thus, for example, had the Minister decided to accede to one of Mr. Salaja's subsequent requests, this would undoubtedly render the present proceedings moot.

Applying the Principles in *G.* and *O'Brien*

21. The next question is whether, applying the principles in *G. and O'Brien (No. 1),* the present proceedings can be regarded as moot. It is important to stress that in *G.* the proceedings had been finally settled by the time the matter came before the Supreme Court. The only prejudice - if that, indeed, is the appropriate term - which the applicant had suffered is that a protection order had been made *ex parte*. As Hardiman J. stressed, a protection order had no further implications beyond requiring the subject of the order not to engage in violence.

22. The situation in *O'Brien* was different in that the workings of PIAB had been affected by the declarations made by the High Court and that order also had costs implications for the respondent Board. As Murray C.J. noted, the would also govern any further applications which the applicant might bring at some stage in the future in the event that he was to suffer another accident which necessitated a claim for personal injuries.

23. So far as the doctrine of mootness in administrative law is concerned, it must be recalled that, as s. 22(1) of the Interpretation Act 2005 provides, most statutory powers may be exercised from time to time "as occasion requires." For the most part, a refusal pursuant to a statutory power which may be so exercised does not serve to create a *res judicata*, save, perhaps, where the decision-maker is charged with the task of adjudicating upon the rights of competing parties in the manner of a *lis inter partes*. Nor, generally, is there any question of an estoppel *vis-a-vis* a member of the public who seeks the favourable exercise of such a power.

24. This latter point is illustrated by the judgment of Fennelly J. for the Supreme Court in *Fingal County Council v. William P. Keeling & Sons Ltd.* [2005] IESC 55. Here the defendant company had developed a site without obtaining planning permission. It was not in dispute but that it had unsuccessfully applied on three occasions for retention permission and the question was whether it was thereby precluded from raising the defence that the development in question was not exempted development by reason of its applicant for retention permission.

25. While it was ultimately unnecessary for the Supreme Court finally to pronounce on at least the wider dimension of this question, Fennelly J. all but said that the argument in favour of the existence of an estoppel was unsustainable:

> "If a proposed development is, in fact and in law, an exempted development, no principle has been identified whereby the owner of land should be estopped from asserting the exemption merely by reason of the fact, and by nothing more, that he or she has made a perfectly proper and lawful application for planning permission. That would be to deprive him of a right at law by reason of his exercise of a different right, which would require cogent justification. There could be many perfectly good and even laudable reasons for taking the course of applying for a planning permission, where there is an arguable case for exemption. It might be done through oversight or mistake or merely through an abundance of caution or to ensure that the planning situation was very clear on the sale of a property. It is perhaps better, at this stage, to say nothing more, as Mr Gallagher reserves the right to assert the right of a planning authority to rely on the doctrine of estoppel based on a more extensive factual basis.
>
> This appeal should be determined solely by reference to the very narrow point which it raises. It suffices to allow the appeal and to hold that a developer is not estopped from claiming that a development, which he has carried out without the benefit of planning permission, is in fact and in law exempted development, by reason only of having made an application for planning permission for the retention of that development."

26. If we take *William P. Keeling* one step further and suppose that the company in question had sought a judicial review of the refusal of the planning permission while at the same time maintaining, *e.g.,* for the purposes of a pending criminal prosecution for breaches of the Planning Acts, that the development in question was exempt development, could it be said that the original judicial

review application was now moot, since the defendant was now asserting that, in any event, he did not need planning permission? Surely not. As Fennelly J. pointed out, there may be many good reasons why a person so affected would be entitled to press a claim for planning permission, even if his or her ultimate position was that that such permission was unnecessary. Certainly, by reference to the example just given, it could not be said that the proceedings were rendered moot *merely* by reason of the company's adoption of (what are superficially) inconsistent positions, *i.e.*, challenging the validity of a planning permission on the one hand, while maintaining that such permission was unnecessary on the other. The critical point is that absent an acceptance by the planning authorities (or, where appropriate, a judicial determination) that the development was exempt, the applicant in this example would nonetheless derive a benefit from a judicial decision quashing the refusal to grant planning permission, so that in those circumstances those proceedings would not have been rendered moot.

27. That is broadly the position here. It is probably safe to assume that Mr. Salaja is largely indifferent as to the precise circumstances in which such a permission might be granted. He doubtless hoped that the Minister might be swayed by the fact that he had new parental obligations following the birth of Cara and that, as a result, he would not have to pursue this litigation. It was for this and other reasons he made a fresh application for permission. None of this means, however, that he no longer has any interest from a legal perspective in litigating the validity of the first refusal, although - as we have already noted - this would change were such permission to be granted. Quite the contrary: Mr. Salaja has every interest in seeking a judicial determination as to the validity of the original ministerial decision and he would obtain a real (and not simply a purely theoretical) benefit were he to succeed in such a challenge. The fact that he has made other subsequent applications for such a permission does not take from this fact in the slightest, since were he to succeed, the Minister would be obliged to re-consider the original application, and, perhaps, re-assess the outcome of the other (as yet) unsuccessful applications.

28. In these circumstances, I consider that Mr. Salaja's circumstances are indistinguishable in principle from those of the respondent Board in *O'Brien* and that the case, accordingly, is not moot.

29. Of course, I fully recognise that there may be instances where the conduct of an applicant for a statutory permission or a licence might well be abusive. This might be especially so where the applicant persisted with multiple and repetitious applications or where totally inconsistent and confusing positions were adopted in legal proceedings, such as the form of "procedural gambling" identified by Clarke J. in her judgment in *Odulana v. Minister for Justice, Equality and Law Reform.* High Court, June 25, 2009. In such circumstances, the courts might either be prepared to strike out the relevant legal proceedings on the grounds of abuse of process. The courts might likewise be prepared in the exercise of discretion to refuse to grant relief where the applicant had deliberately pursued an alternative remedy which was inconsistent with the stance originally taken in the judicial relief proceedings: see, e.g., the judgment of Butler J. in *The State (Conlon Construction Co. Ltd.) v. Cork County Council*, High Court, July 31, 1975. But I cannot say that the applicant has engaged in abusive behaviour in this fashion. It is, perhaps, unfortunate - and probably rather tiresome for the Minister - that he has submitted repeated applications, but he doubtless felt that he was justified in bringing new material to the attention of the Minister following the birth of Cara in May, 2010.

Lack of Candour

30. It is also contended that the proceedings should be dismissed in limine by reason of alleged lack of candour on the part of the applicant in respect of his frequent visits to Northern Ireland. The Minister contends that the applicant has no permission to enter Northern Ireland. But even assuming it were to be established that the applicant lacked candour in this respect, this would not justify this Court striking out these proceedings in a summary fashion. While it is plain that this Court may refuse to grant relief to which an applicant would otherwise be entitled by reason of the latter's lack of candour (see, *e.g.*, *The State (Vozza) v. O'Floinn* [1957] I.R. 227; *AGAO v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 492), this will depend on the actual circumstances of the case. Thus, for example, a court might ultimately find that the lack of candour did not materially affect the outcome of the case, so that in such circumstances, the lack of candour was not strictly relevant to the issue as to whether relief should be granted: see, e.g., the comments of Finlay Geoghegan J. in *GD v. Minister for Justice, Equality and Law Reform* [2006] IEHC 344.

31. The Supreme Court has held that it is generally inappropriate for the court to deal with the question of undue delay in judicial review cases as a preliminary issue, because "[e]xcept perhaps in the very plainest of cases, the necessity to enquire into other matters….will render it inappropriate to deal with the matter by way of preliminary issue": see *BTF v. Director of Public Prosecutions* [2005] IESC 25, [2005] 2 I.R. 559, 564 per Hardiman J. The same is certainly true by analogy in respect of the lack of candour, since, save again "in the very plainest of cases", the question of whether relief should be withheld will depend on an examination of a number of factors.

Conclusions

32. For the reasons stated, I would refuse the relief sought by the Minister in this preliminary motion. I should add, of course, that I express no view whatever on the individual merits of the substantive proceedings.