Neutral Citation Number: [2010] IEHC 339

THE HIGH COURT

2009 1307 JR

BETWEEN

JOAO CARLOS SANTOS MARQUES

APPLICANT

AND

JUDGE JOHN BROPHY OF TRIM DISTRICT COURT,

JUDGE RAYMOND FULHAM OF TRIM CIRCUIT COURT AND THE ATTORNEY GENERAL

RESPONDENTS

AND

ANDREA MARQUES

NOTICE PARTY

JUDGMENT of Ms. Justice Irvine delivered on the 30th day of July, 2010

Introduction

1. The applicant in the present proceedings seeks the following reliefs:-

> (a) An order of *certiorari* quashing orders made by the second named respondent in the Circuit Court on 11th and 17th December, 2009, whereby he directed the applicant to make various payments in respect of maintenance and arrears of maintenance to the notice party; and
>
> (b) An order of prohibition restraining the second named respondent or any judge of the Circuit Court from proceeding to hear his appeal against an order made by the first named respondent in the District Court on 26th July, 2006, imprisoning him for a period of three months in respect of his failure to comply with a court order in respect of maintenance.

2. Leave to apply for the aforementioned relief was granted by Peart J. on 27th January, 2010, on the following grounds which are recited in that order, namely:-

> "a The learned judge acted without jurisdiction and in breach of fair procedures by giving short notice of an application to vary maintenance and thereafter making an Order varying a prior maintenance Order in circumstances where no application had been made in that regard by or on behalf of the Third Named Notice Party and no or no adequate notice was given to the Applicant.
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> b There has been such a delay in having the said appeal determined that it is no longer possible for the applicant to have a determination of his appeal other than one which in breach of his constitutional rights to a fair hearing and one within a reasonable period and his right in that regard under Article 6 of the European Convention on Human Rights."

Background and Facts

3. The applicant and the notice party married in the year 2000 and have one child. The notice party has two other children from a previous relationship who became dependents of the applicant following their marriage. The applicant and notice party came to Ireland in June, 2000 and separated due to unhappy differences in December, 2004. Because of an alleged failure on the part of the applicant to support the notice party and her three dependent children, she instituted proceedings to obtain maintenance from the applicant and these proceedings first came before the District Court in May, 2005. It is the ongoing dispute regarding the level of maintenance required by the notice party and her dependents and the applicant's failure to discharge those payments as directed by the court that have led to the present judicial review proceedings.

4. The applicant and notice party have filed affidavits in these proceedings. Using those affidavits for guidance, the following appears to be the chronology of the litigation which has been dealt with in the District Court and Circuit Court over the past five years, namely:-

> • On 13th May, 2005, the applicant was directed by Judge Brophy of Trim District Court, the first named respondent herein, to make a maintenance payment to the notice party of €350 per week, being €50 for her maintenance and €100 maintenance in respect of each dependent child.
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> • On 7th June, 2005, the applicant applied to vary the maintenance order made on 13th May, 2005, and was unsuccessful. He served a notice of appeal.
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> • On 19th August, 2005, the notice party made an application to the District Court for enforcement of the maintenance order under s. 8 of the Enforcement of Court Orders Act 1940, the applicant having fallen into arrears in respect of his maintenance payments.
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> • On 14th November, 2005, the first named respondent, in dealing with the proceedings under the Enforcement of Court Orders Act 1940, directed the applicant to pay the arrears of maintenance then in the sum of €2,100 within six weeks.

• On 3rd February, 2006, a warrant for the applicant's arrest was made under s. 8 of the Enforcement of Court Orders Act 1940.

• On 24th February, 2006, the applicant was arrested on foot of a committal warrant and brought before the District Court in Trim. The proceedings were adjourned by the first named respondent to facilitate payment of the arrears.

• On 15th March, 2006, the applicant's appeal against the District Court's refusal to vary the original maintenance order came before the Circuit Court. The applicant sought to rely upon recent fresh evidence as to his income and appears to have been advised by the Circuit Court Judge to apply to the District Court to vary the maintenance order.

• On 29th March, 2006, the first named respondent heard the applicant's application to vary the original maintenance order. The order was varied and the applicant was directed to pay maintenance of €1,500 per month, being €300 in respect of the notice party and €400 in respect of each of the three dependent children. The first named respondent then adjourned the proceedings for committal to facilitate payment by the applicant of some contribution towards the arrears of maintenance.

• On 31st March, 2006, the applicant appealed the variation order of the first named respondent made on 24th March, 2006, in respect of maintenance.

• On 19th May, 2006, the proceedings on foot of the committal warrant were adjourned with advice given to the applicant to pay a contribution towards the arrears.

• On 28th July, 2006, the first named respondent committed the applicant to prison on foot of the arrest warrant dated 3rd February, 2006. The arrears of maintenance were then €2,100. No payment had been made and an order imposed a three month prison sentence upon the applicant.

• On 7th August, 2006, the applicant lodged an appeal against his sentence whilst in custody in Mountjoy Prison. He also lodged an application to extend the time to permit him appeal the original maintenance order of May, 2005 and the variation order made on 24th March, 2006.

• On 8th September, 2006, the applicant was granted leave to appeal the aforementioned orders.

• On 31st January, 2007, the hearing of the applicant's appeal against the original maintenance order and the variation order came before Judge O'Shea in the Circuit Court. The applicant's appeal against the three month sentence was also before the court. On the basis of the evidence given by the applicant, the appeal against the severity of the sentence imposed by the first named respondent was adjourned to facilitate him bringing a fresh application to vary his maintenance obligations in the District Court.

• On 9th March, 2007, the first named respondent made an order varying the applicant's maintenance obligations and directed him to pay €54 per week maintenance in respect of his natural child, apparently due to his altered financial circumstances. The notice party was given liberty to apply to vary that maintenance order on seven days notice should there be a change in the applicant's financial position.

• On 18th May, 2007, the applicant's appeal in relation to his three month prison sentence came before Judge McCartan in the Circuit Court. He adjourned the proceedings to permit the applicant to make proposals in respect of the discharge of maintenance payments which were then in arrears to the sum of €14,000.

• On 20th July, 2007, the applicant's appeal against his three month sentence came before Judge McCartan. He adjourned the proceedings for six months to facilitate the applicant making some contribution towards the arrears of maintenance, whilst ordering him to continue to pay €56 per week in respect of maintenance and €15 per week in respect of the outstanding arrears.

• On each of the following dates, the applicant's appeal against the severity of his three month sentence was adjourned: 2nd December, 2007; 4th April, 2008; 18th April, 2008; 24th March, 2009; and 7th July, 2009.

• On 29th March, 2009, Judge O'Sullivan in the Circuit Court adjourned the applicant's appeal regarding his three month sentence for a further period to facilitate payment by the applicant of arrears.

• On 7th July, 2009, Judge O'Sullivan requested a chronology of the family law proceedings and also the formal documentation in respect of the application for committal and the proceedings were adjourned to the Circuit Court on 11th December, 2009.

• On 11th December, 2009, the second named respondent, whilst dealing with the applicant's appeal against the severity of his three month sentence, made an order permitting the notice party to apply on short notice to the applicant to vary the order of Judge McCartan, so as to increase the maintenance payable by the applicant and also to increase the instalments payable in respect of arrears and/or seek a lump sum in respect of those arrears. He directed the applicant to swear an affidavit of means.

• On 17th December, 2009, the second named respondent heard an application made by the notice party pursuant to the Family Law (Maintenance of Spouses and Children) Act 1976 (hereinafter "the Act of 1976") and directed, pursuant to s. 6 thereof, that the applicant pay €70 per week to the notice party and €30 per week in respect of the arrears outstanding. The applicant's appeal against the three month sentence was adjourned until 12th January, 2010. Judge Fulham of Trim Circuit Court, the second named respondent herein, directed the applicant to produce a detailed affidavit setting out the efforts he had made to gain employment and the position in relation to the arrears of maintenance.

• On 27th January, 2010, Peart J. granted the applicant leave to apply for the relief sought on the present application.

Preliminary Application

5. At the outset of the present proceedings, counsel on behalf of the third named respondent, the Attorney General, applied to have

the proceedings dismissed against his client. Counsel submitted that the Attorney General had not been a party to the District Court or Circuit Court proceedings which were the focus of the Court's attention on this judicial review application. He further submitted that there was no justification for maintaining the Attorney General as a party to the proceedings given that the applicant did not seek to challenge the constitutionality of any legislation and also in circumstances where there was, if required, a *legitmus contraditor* to the present application.

6. Insofar as it may have been the intention of the applicant to add the Attorney General to these proceedings on the basis that he might indemnify the applicant in respect of any order for costs that he obtained against the first or second named respondents in these proceedings, counsel for the Attorney General noted that the applicant in these proceedings does not allege any impropriety on the part of the first or second named respondents in respect of their management of the proceedings which are under review. This being so, it was submitted that, even if the applicant was successful in obtaining the relief which he seeks, there could be no basis upon which this Court could make an order for costs in the applicant's favour as against the first or second named respondents. In this respect, he relied upon the decisions in *McIlwraith v. His Honour Judge Fawsitt* [1990] 1 I.R. 343 and *OF and MH v. O'Donnell* [2010] 1 ILRM 198. Accordingly, it being the case that the applicant was not in a position to make any application for costs against the first or second named respondents in the within proceedings, the Attorney General should not and could not be asked to remain a party to the proceedings.

7. In the light of the submissions made on behalf of the Attorney General, the Court determined that the proceedings should be struck out against him with no order as to costs.

A. <u>The lawfulness of the order made by the second named respondent on 17th December, 2009, which had the effect of varying an earlier maintenance order</u>

8. The applicant has argued that the second named respondent did not have jurisdiction to deal with the maintenance order initially granted by the District Court and varied by Judge McCartan in the Circuit Court on 20th July, 2007. The applicant maintains that the notice party had made no application for further maintenance when she was invited by the second named respondent on the 11th December 2009 to make such an application; that he got inadequate notice of her subsequent application and that the court acted without jurisdiction.

9. From the facts disclosed on affidavit, it appears to be the case that the second named respondent, when sitting to deal with the applicant's appeal against the severity of sentence on the 11th December 2009, heard certain evidence as to the notice party's financial circumstances after which he invited her to bring an application before the court the following week to seek additional maintenance. Any such action on the part of the second named respondent was not unlawful. He merely indicated that a particular procedure was available to the notice party if she wished to avail if it, which she duly did.

10. Insofar as the applicant maintains that he did not get sufficient notice of the notice party's application for maintenance which came before the Circuit Court on 17th December, 2009, the second named respondent abridged the time provided for in the rules of court to facilitate the application being brought back before the court on 17th December, 2009. The notice party appears to have complied with this order. Thus the applicant, in the formal sense, did get proper notice of the application. Insofar as the applicant maintains that he did not have adequate notice of the application to enable him defend the application, he fails to demonstrate any prejudice to him resulting from the proceedings coming before the court in an expedited manner. In his affidavit he does not state that he sought any adjournment to facilitate him in obtaining any evidence required to defend the application. Accordingly, I conclude that the applicant's complaint in this regard gives him no right to challenge the validity of the order made.

11. As to the jurisdiction of the court, the application was made by the issue of new originating proceedings bearing Circuit Court Record No. FL89/06/DCA. Those proceedings were brought pursuant to a notice of motion dated 15th December, 2009, and sought relief pursuant to s. 6 of the Act of 1976.

12. The applicant sought to maintain that, in circumstances where proceedings for maintenance had been instituted in the District Court and the right of appeal for any order made in that court was to the Circuit Court, the second named respondent acted *ultra vires* in making the maintenance order which he made on 17th December, 2009. The applicant referred the Court to the separate and distinct jurisdiction of the District Court as set out in Article 34.3.4 of the Constitution:-

> "The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law."

13. The jurisdiction of the courts under the Act of 1976 is set out at s. 23, as amended, which provides:-

> "(1) Subject to subsection (2) of this section, the Circuit Court and the District Court shall have jurisdiction to hear and determine proceedings under sections 5, 5A, 6, 7, 9 and 21A of this Act.
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> (2)(a) The District Court and the Circuit Court, on appeal from the District Court, shall not have jurisdiction to make an order under this Act for the payment of a periodical sum at a rate greater than £200 per week for the support of a spouse or £60 per week for the support of a child.
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> (b) Subject to paragraph *(d)* of this subsection, nothing in subsection (1) of this section shall be construed as conferring on the District Court or the Circuit Court jurisdiction to make an order or direction under section 5, 5A, 6, 7, 9 or 21A of this Act in any matter in relation to which the High Court has made an order or direction under any of those sections.
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> (c) Subject to paragraph *(d)* of this subsection, nothing in subsection (1) of this section shall be construed as conferring on the District Court jurisdiction to make an order or direction under section 5, 5A 6, 7, 9 or 21A of this Act in any matter in relation to which the Circuit Court (except on appeal from the District Court) has made an order or direction under any of those sections.
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> (d) The District Court and the Circuit Court may vary or revoke an order or direction made by the High Court under section 5, 5A, 6, 7, 9 or 21A of this Act before the commencement of section 12 of the Courts Act, 1981, if –
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> > (i) the circumstances to which the order or direction of the High Court related have changed other than by reason of such commencement, and

(ii) in the case of a variation or revocation of such an order or direction by the District Court, the provisions of the order or direction would have been within the jurisdiction of that Court if the said section 12 had been in operation at the time of the making of the order or direction."

14. It would seem from this section that there is an originating jurisdiction to make maintenance orders in both the District Court and the Circuit Court. The District Court cannot vary or revoke any maintenance or variation orders made by the Circuit Court exercising its originating jurisdiction. However, the District Court can vary a maintenance order made by the Circuit Court in exercise of its appellate jurisdiction.

15. The Act of 1976 is silent as to the power of the Circuit Court to make a maintenance order otherwise than on appeal, in relation to a matter in which the District Court has already made an order. It has been held in *J.E.C. v. D.O.C* (Unreported, Supreme Court, 1st March, 1982) that a spouse may institute maintenance proceedings in the Circuit Court and seek a maintenance order there even if one has already been obtained in the District Court. Not to allow such an application might leave a spouse locked into the financial jurisdictional limits imposed by the lower court, even in circumstances where it would be proper for a court to make an award in excess of the limits of the District Court jurisdiction. For these reasons, it appears to me that, even where the District Court has made a maintenance order, the Circuit Court nonetheless retains a concurrent original jurisdiction to make a separate order for maintenance. However the effect of that Order is that, with effect from the date of the making thereof any prior Order for maintenance made pursuant to the originating jurisdiction of the District Court is rendered redundant.

16. In the instant case, the order of the second named respondent records that he increased the maintenance payments which his colleague, Judge McCartan, had directed the applicant to pay when the matter was before him on 20th July, 2007. The fact that the order is so expressed does not mean that the Circuit Court was exercising a jurisdiction which involved the making of a Variation Order in respect of the original maintenance order, that being a matter for the District Court. It is undoubtedly the case that the effect of the order made by the second named respondent was to *de facto* vary the amount of maintenance provided for in the earlier order, but the second named respondent appears to have lawfully exercised his originating jurisdiction under s. 6 of the Act of 1976. In these circumstances, the applicant's arguments in relation to the jurisdictional issue cannot succeed.

B. The prohibition sought by the applicant in respect of his appeal against the severity of the sentence imposed upon him by the first named respondent on 26th July, 2006

17. The applicant maintains that, because of the time that has elapsed since the date upon which he lodged his appeal against the three month sentence imposed upon him by the first named respondent, namely 7th August, 2006, he can no longer hope to get a fair hearing on that appeal and that for this reason the Court should quash the original order.

18. In relation to this aspect of the applicant's claim for judicial review, it should be stated that neither the applicant nor the notice party was in a position to produce a copy of the notice of appeal that was lodged by the applicant whilst he was in custody. However, the applicant confirmed to the Court in the course of the hearing that the appeal he lodged was solely against the severity of the sentence imposed upon him by the first named respondent. That being so, the hearing on the outstanding appeal, if it is permitted to proceed, will not be a *de novo* hearing but will be one in the course of which the trial judge will hear only such evidence as is necessary to adjudicate on that issue. Section 50 of the Courts (Supplemental Provisions) Act 1961, which deals with appeals against sentence only, provides as follows:-

"Where –

(a) an order is made in a criminal case by a justice of the District Court convicting a person and sentencing him to pay a penal or other sum or to do anything at any expense or to undergo a term of imprisonment or to be detained in Saint Patrick's Institution, and

(b) an appeal is taken against the order, and

(c) either –

(i) the notice of appeal states that the appeal is against so much only of the order as relates to the sentence, or

(ii) the appellant, on the hearing of the appeal, indicates that he desires to appeal against so much only of the order as relates to the sentence,

then, notwithstanding any rule of law, the Circuit Court shall not, on the hearing of the appeal, re-hear the case except to such extent as shall be necessary to enable the court to adjudicate on the question of sentence."

19. Having regard to the aforementioned provisions, it seems reasonable to assume that the evidence which the applicant would wish to produce, on the hearing of his appeal against the severity of his sentence, would relate principally to his financial circumstances at the time the sentence was imposed, his reasons for non-payment and any other evidence exculpatory of his default.

20. In relation to this aspect of these proceedings, the applicant has relied upon a significant number of reported cases which deal with the circumstances in which a defendant may ask the court to exercise its inherent jurisdiction to dismiss a plaintiff's claim for want of prosecution on the basis of delay. I have to say that I am not at all satisfied that this jurisprudence advances the applicant's right to the relief which he claims by way of prohibition. The inherent jurisdiction of the court was considered in a long line of cases, commencing with *O'Domhnaill v. Merrick* [1984] I.R. 151 and this line of authority includes the principal decision relied upon by the applicant namely, *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. These decisions deal with the court's inherent jurisdiction, on the application of one party, to dismiss the claim or appeal of the opposing party, even though the **opposing party** has commenced his/her proceedings or brought his/her appeal within the permitted statutory or regulatory period. This is to be contrasted with the present case in which the delay complained of on the part of the applicant is the delay pertaining to the hearing of an appeal which he himself has brought, rather than any proceedings being advanced against him by the notice party. Further, the relief he seeks deriving from the delay complained of is not the dismissal of the hearing of the appeal but an order to quash the earlier order of the court made by the first named respondent on 7th August, 2006, in circumstances where there has never been any challenge to the lawfulness or validity of that order.

21. Even if I were satisfied that there are circumstances in which a lapse of time between the date upon which the applicant lodged his appeal and the present time could, as a matter of law, justify the Court quashing the original order made on 7th August, 2006, which I am not, the Court would have to direct itself to the consequences which the applicant contends arise from the

aforementioned delay. If this Court was to apply the jurisprudence as set out by the Supreme Court in the *Primor* decision as best it could to the present case given its unusual circumstances *i.e.* that it is the delay on the applicant's own appeal that is under scrutiny, the Court would have to consider, *inter alia*:-

(a) whether there had been inordinate and inexcusable delay;

(b) the conduct and the contribution of both parties to that delay; and

(c) whether there is a substantial risk of an unfair hearing if the appeal is now allowed to proceed.

22. The period of time in respect of which the applicant complains is a period of four years. That is a period which, if the applicant had been trying on a regular basis to have his appeal processed and was being thwarted by the court or the notice party, would appear to be unreasonable and might well be considered to be inordinate and inexcusable. However, the jurisprudence of the court in relation to delay mandates the Court to look at litigation as a two party operation and, in deciding whether any delay could be deemed inordinate and inexcusable, consider the conduct of both parties. Having reviewed the affidavits filed by both parties, I see no evidence of any effort on the part of the notice party to impede the hearing by the Circuit Court of the applicant's appeal against the severity of his sentence. There is no mention of any application on her part to adjourn the appeal proceedings. Clearly all the notice party was concerned with was the extent of the arrears outstanding. Similarly, I note no evidence in the affidavits of any application made on behalf of the applicant, who was until March, 2009 legally represented, to demand a hearing of his appeal or to ask for same to be expedited. He appears to have been a willing participant in the extensive number of adjournments that were granted and which adjournments must be viewed as having been in his ease in that under the provisions of Order 101 rule 6 of the District Court his appeal has operated as a stay on the execution of the Order made by the first named respondent.

23. The absence of any demonstrable effort on the part of the applicant to insist upon a hearing of his appeal before any of the relevant Circuit Court judges makes him culpable in respect of the delay of which he now complains and, in my view, he should be considered estopped from making any application for judicial review based on a period of delay in respect of which he made no contemporaneous complaint or objection.

24. Even if the Court was satisfied that there had been inordinate and inexcusable delay, which it is not, the Court would nonetheless have to go on to consider whether that delay was of such a nature as to make it unfair for the applicant now to have to face his own appeal against the severity of the sentence imposed upon him on 7th August, 2006. The applicant has contended that he is in fact prejudiced in his ability to deal with his appeal. However, in his grounding affidavit he does not set out any facts to demonstrate the nature of that prejudice. He does not refer to the existence of any witness who might have been in a position to assist him had the hearing of his appeal taken place at an earlier time and who is no longer available. Neither does he refer to the existence of documents which he might have been able to procure if the appeal had been processed at an earlier time, but which he maintains are no longer in existence by virtue of the passage of time. Further, he fails to demonstrate how he cannot at this time tell the Court what his circumstances were at the time the sentence was imposed upon him in 2006.

25. The applicant, in the course of his submissions, stated that his circumstances have changed since 2006 and that he is now a student, whereas at the time of his sentence, he had been employed. This fact, he maintained, would have the effect of making the hearing of his appeal against the severity of the sentence impossible. However, the fact that the applicant is a student now is not of any real relevance. On the hearing of the appeal what the court will principally be concerned with is whether, on the facts at the time the sentence was imposed, it was too severe. Hence, of crucial importance on the hearing of the appeal will be evidence as to the applicant's financial circumstances at the time the sentence was imposed and any other evidence relevant to his default.

26. In relation to the current ability of the applicant to give evidence to the Court on his appeal, it is clear from the chronology of the litigation that the applicant's employment status and his income have been under almost continuous scrutiny by the court since May 2005. In such circumstances, I do not believe it is unreasonable to infer, the applicant having been legally represented at all stages until March, 2009, that there is not a substantial amount of documentation noting the applicant's financial circumstances at the relevant time such as to put him in a more than fair position to give evidence at the hearing of his appeal.

27. In seeking to restrain any judge of the Circuit Court from hearing his appeal against the severity of the sentence imposed upon him by the first named respondent, the applicant has also sought to rely upon the jurisprudence of the court insofar as it relates to delay in criminal proceedings. These cases normally involve an accused person complaining that the delay between the date of the alleged offence and the formal complaint being made against them is such that would justify the court in prohibiting the impending trial. In particular, reliance was placed upon the decision of the Supreme Court in *J.O'C v. The Director of Public Prosecutions* [2000] 3 I.R. 478.

28. In my view, the aforementioned line of authority adds nothing to the applicant's case in circumstances where, in order to obtain an order of prohibition, the Court must be satisfied that the delay relied upon will result in a real risk of an unfair trial. From the evidence before me on the present application, I am absolutely satisfied that any delay which has occurred will not result in any unfairness to the applicant in the course of his appeal.

29. For the aforementioned reasons, I view the relief sought by the applicant for an order of prohibition as one which is somewhat opportunistic, legally flawed and which, in any event on its facts, is without merit.

30. Finally, the applicant, in his written submissions and indeed occasionally in the course of his oral submissions, sought to raise other points of law which are not material to the limited grounds upon which he was permitted to apply for judicial review and for this reason I have not dealt with these submissions in the course of this judgment.

31. In all of the circumstances, I will refuse the relief sought.