Neutral Citation [2016] IEHC 410

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 206 J.R.]

BETWEEN

T.D.

APPLICANT

AND

HER HONOUR JUDGE LEONIE REYNOLDS,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION AND S.D.

NOTICE PARTIES

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 8th day of July, 2016

1. The applicant, who seeks leave to apply for a wide spectrum of reliefs by way of judicial review, has been involved in long running judicial separation proceedings, commenced ten years ago (record no. FL23/2006 Co. Meath). Over that period, a series of orders have been made by the Circuit Court, of which the following were produced to me:

> (a) an order of Her Honour Judge Doirbhile Flanagan of 10th July, 2008 granting a decree of judicial separation and directing the sale of the family home and lands and the division of proceeds;
>
> (b) an order of Judge Flanagan of 6th July, 2011 providing that the sale is to proceed by private treaty;
>
> (c) an order of Judge Flanagan of 6th December, 2011 providing that the order of 6th July, 2011 is to continue;
>
> (d) an order of Her Honour Judge Leonie Reynolds of 14th July, 2015 nominating solicitors to have joint carriage of the sale and making provision in relation to that sale;
>
> (e) an order of Judge Reynolds providing that the order of 14th July, 2015 is to be complied with and the property put up for sale immediately, and providing for the sale of the potato crop currently in storage and the transfer to the wife of that crop as a form of interim lump sum maintenance payment.

2. I very much have the impression that the orders produced to me may not be the full spectrum of orders made over a ten year period, but the orders produced would, on their own terms, suggest the existence of some difficulty in actually carrying out the sale of the family home and lands.

3. The statement of grounds, presented by the applicant in person, is a somewhat scattergun document. It seeks, as major reliefs, orders of *certiorari* quashing the orders of 14th July, 2015 (misstated as 2016 in the original statement) and 17th December, 2015. In addition it seeks a battery of declarations to the effect that a breach of the applicant's rights of various kinds as occurred. In addition there is a constitutional and ECHR challenge to the Judicial Separation and Family Law Reform Act 1989 and the Family Law Act 1995.

4. The grounds upon which relief is sought contain a litany of complaints against the applicant's wife and indeed the Circuit Court going back to 2011 if not before.

5. The essential gist of the grounds as set out in the statement of grounds is an attack on the merits of the various Circuit Court orders. This is not a matter for judicial review, which deals in general with the legality of decisions rather than their merits (see *Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July, 2014) per Clarke J. at paras. 3.8 to 3.15).

6. The declarations are inappropriate in circumstances where they are essentially on attack on the validity of orders to which no timely challenge has been made.

7. The constitutional and ECHR declarations are not supported by any grounds that appear to me to be arguable. Vague generalised assertions are not a sufficient basis to grant leave for a matter as weighty as a challenge to legislation.

8. Furthermore the legislative challenges are not in this case ancillary, as normally required in the judicial review context, to any orders made within the last 3 months, or even to the prohibition of future orders. They are more in the nature of a free-standing attack on the legislative scheme underlying the 2008 judicial separation decree, which appears more appropriate for prosecution by plenary summons in the circumstances.

9. The one matter that appears from the applicant's complaints (but that was not included in his original grounding statement) that could potentially be a proper matter for judicial review at this stage is the allegation that the applicant has brought a motion to seek to reduce the maintenance payments due to a change in his financial circumstances but has not been able to have this matter heard in the Circuit Court. He complained that the Circuit Court has repeatedly adjourned the motion without hearing it, with the result that

a continued liability for excessive maintenance has built up. In order to enable the applicant to properly make the case that leave should be granted to address this issue, I permitted him to amend his statement of grounds and directed that the State and his wife Ms. S.D. be put on notice of the application in that respect.

The adjournment of the application to vary maintenance was consented to by the applicant
10. While as stated above, in originally opening the application to me, the applicant maintained that he had been unable to actively progress an application for the variation of maintenance and essentially that the Circuit Court had refused to deal with the application, significantly further and indeed different information emerged as a result of my direction that the applicant put the State and Ms. S.D. on notice of the application.

11. Firstly, in an affidavit sworn by the applicant in family law proceedings, seemingly in or around December, 2010, he positively stated that he had not proceeded with an application to vary his maintenance because he wanted to challenge the constitutionality of the legislation. Unfortunately, the solicitor who took this affidavit (whose signature is illegible on the copy furnished) omitted to complete the date of swearing in the jurat and the omission was not noticed by the solicitors who filed the affidavit on his behalf, judging by the version of the extract from this affidavit that was presented to me as exhibited by Ms. S.D.

12. Furthermore, the applicant expressly agreed at the hearing, following the production of the foregoing extract from his affidavit, that he subsequently consented to the adjournment of the variation application on 27th March, 2012 and did nothing active to progress it between then and December, 2015. That is a significantly different picture to that originally presented. To that extent, this may be a case that illustrates the benefit of putting a respondent on notice of a leave application in particular instances.

The challenge to the order of 14th July, 2015
13. The challenge by way of *certiorari* to the order of Judge Reynolds of 14th July, 2015 is out of time because the present application was not filed until 4th April, 2016.

14. Furthermore the applicant did not at the *ex parte* stage inform me that he appealed the order of 14th July, 2015 (which he now seeks to challenge by way of judicial review) to Hanna J. This only emerged following my having put the other parties on notice of the leave application. Clearly leave to challenge an order is not appropriate if that order has already been appealed and the appeal has been actively pursued (as opposed to formally appealing to preserve one's position without moving the appeal forward).

15. An applicant is simply not entitled to leave to challenge, by way of judicial review, a decision which he has already appealed (other than where the appeal is simply filed to preserve the position and not actively advanced). An appeal unsuccessfully prosecuted to finality is a classic instance of a decision that cannot be subject to judicial review (see *Cafferky v. Kennedy* (Unreported, Supreme Court, Murray J., *ex tempore*, 9th March, 2015 at para. 2)).

The challenge to the order of 17th December, 2015
16. As regards the order of 17th December, 2015, the applicant claims that the order was perfected on the 6th January, 2016 and that he is therefore within time having made the application on the 4th April, 2016. However, time for judicial review purposes to challenge an order of the District or Circuit Court runs from the making of the order and not from its perfection. The correct analogy is O. 61, r. 2 which provides that time to appeal a Circuit Court order runs from its oral pronouncement (and therefore not its perfection). In the same sense, the date on which grounds "*first arose*" for the purposes of O. 84 is the date of the order, which is normally the date of the oral decision and not the order's subsequent perfection (see O. 84, r. 21(1) and (2)).

17. The applicant is therefore out of time to bring the present application. No basis to extend time has been established, particularly having regard to the established position that judicial review is not the appropriate remedy to address merit-related complaints.

18. When the applicant sought to reactivate the variation application, the learned Circuit Court judge apparently told him on 17th December, 2015 in effect that circumstances had changed, and that an updated application would be required. That seems to be a decision on the merits not to deal with an out-of-date application which had been adjourned, rather than a question of legality that is appropriate for judicial review. Even if I am wrong about that, nothing has been put forward to establish that the decision of Her Honour Judge Reynolds was arguably unreasonable or unlawful.

19. The applicant did not appeal the order of 17th December, 2015 to the High Court, although obviously he could have done so had he wished to take issue with the merits of that decision. As a matter of discretion I would decline to give him leave to challenge a decision of this nature which he could have appealed, but did not, even if he had arguable grounds to challenge the decision (which I do not accept in any event because his complaint in reality goes through merits rather than legality). The position might be otherwise if the alleged failure in legality affecting the first-instance decision was of a more fundamental or conspicuous nature.

Isaac Wunder order
20. Ms. S.D. applied for an Isaac Wunder order against the applicant, and stated that he has disrupted the progression of the family law proceedings by multiple applications to the High Court (see the decision of the Supreme Court in *Wunder v. Irish Hospitals Trust* (Unreported, Supreme Court, Walsh J., 24th January, 1967); and Anthony Moore B.L., "Isaac Wunder Orders" (2001) *Judicial Studies Institute Journal* 137). She also took issue with the extent to which I permitted the applicant to be assisted by his *McKenzie* friend, Mr. Padraig Brennan.

21. Any application for an Isaac Wunder order would need to be supported by details of all of the proceedings taken by the applicant and the outcome in each case. I do not have sufficient material at the present time to make such an order. Ms. S.D. can apply to the court at a future point if appropriate subject to supporting any such application in the manner I have referred to. As regard the applicant's *McKenzie* friend, I afforded him greater than normal latitude in this case due to what appeared to me to be the applicant's significantly greater than normal difficulty in articulating his case. I do not think that Ms. S.D. has been unduly disadvantaged as a result of my having done so.

Order
22. Applying the principles in *G. v. D.P.P.* [1994] 1 I.R. 374 to the application, this is not a case that meets the criteria for grant of leave, for multiple reasons as set out above. For those reasons I will order:

(i) that the order made under s. 45 of the Courts (Supplemental Provisions) Act 1961 be made permanent;

(ii) that Her Honour Judge Reynolds be struck out of the proceedings and that Ms. S.D. be struck out as a notice party and added as a respondent (lest the matter proceed further in any other forum); and

(iii) that the application be dismissed.