



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 397

Record No. 2017/74

**Peart J.  
McGovern J.  
Costello J.**

**BETWEEN/**

**M.C.**

**APPLICANT/APPELLANT**

**- AND -**

**THE LEGAL AID BOARD, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Mr Justice McGovern delivered on the 19th day of December 2018**

1. This is an appeal from an order of Noonan J. delivered on the 17th January 2017 dismissing the appellant's application for judicial review of a decision by the first named respondent, who refused civil legal aid to him in respect of a prosecution under s. 5 of the Courts (No. 2) Act 1986 on the grounds that it was not within the first named respondent's remit as the s. 5 proceedings were criminal in nature and did not come within the scheme. The applicant also failed to obtain various ancillary declarations including declarations that his constitutional rights and his rights under the European Convention on Human Rights were breached. His claim for damages was also dismissed by the High Court judge.

2. The three principal issues that arise on this appeal are:-

- (i) an interpretation of s. 27 of the Civil Legal Aid Act 1995 ("the 1995 Act") (as amended) and in particular a consideration of whether the s. 5 prosecution is a matter which is "...ancillary to or in connection with" the Family Law civil proceedings which form the background to the application for legal aid;
- (ii) Whether the appellant's constitutional rights or ECHR rights were infringed; and
- (iii) whether these proceedings are moot.

3. There is no dispute among the parties that the family law proceedings were civil in nature and the appellant had been granted civil legal aid in those proceedings. Section 27 of the 1995 Act defined legal aid in the following terms:-

"27. (1) In this Act "legal aid" means representation by a solicitor of the Board, or a solicitor or barrister engaged by the Board under s. 11, in any *civil proceedings* to which this section applies and includes all such assistance as is usually given by a solicitor and, where appropriate, barrister in contemplation of, and *ancillary to or in connection with, such proceedings*, whether for the purposes of arriving at or giving effect to any settlement in the proceedings or otherwise". (Emphasis added)

4. Section 27 applies to all civil proceedings other than those designated in s. 28 of the 1995 Act. None of the proceedings designated in s. 28 have any relevance to this application.

5. Section 5 of the Courts (No. 2) Act 1986 ("the 1986 Act") (as amended) provides for enforcement of certain orders under the Guardianship of Infants Act 1964 and s. 5(2) states:-

"Without prejudice to the law as to contempt of court, where the District Court has made an order under section 7 or section 11 of the Act of 1964 containing a direction regarding-

- (a) the custody of an infant, or
- (b) the right of access to an infant,

any, person having the actual custody of the infant who, having been given or shown a copy of the order and-

- (i) having been required, by or on behalf of a person to whom the custody of the infant is committed by the direction, to give up the infant to that person, or
- (ii) having been required, by or on behalf of a person entitled to access to the infant in accordance with the direction, to allow that person to have such access,

fails or refuses to comply with the requirement *shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding [€1,500] or, at the discretion of the Court, to imprisonment for a term not exceeding six months or to both such fine and such imprisonment.*" (Emphasis added)

### **Is the s. 5 prosecution “ancillary to or in connection with” the family law proceedings?**

6. In written submissions the first named respondent maintained that the appellant was not refused a legal aid certificate for representation in the s. 5 prosecution. This is based on correspondence from Mr. John Cooke, a solicitor in the Legal Aid Board on the 15th May 2015 wherein he wrote to the appellant stating, *inter alia*:

“As such your next step is to prosecute [Ms. W.] for breach of this Access Order and unfortunately I cannot act for you in relation to same as there is an element of criminal proceedings in it. I note your instructions that I should forward your file to MacGuill and Co. solicitors. This will be done directly on receipt of your written instructions.”

7. At the hearing of the appeal it was accepted that for all practical purposes the appellant had made an application for legal aid in relation to the s. 5 prosecution notwithstanding the failure to apply for a certificate, and the appeal proceeded on that basis.

8. The appellant accepted that proceedings under s. 5 were criminal proceedings but argued that nonetheless they came within the scope of s. 27 as they were a means, indeed the only means, for enforcing compliance with orders in the family law proceedings. The appellant drew the Court’s attention to the fact that the margin note referred to the enforcement of certain orders under the Guardianship of Infants Act 1964 which would be civil family law proceedings.

9. Order 58 of the District Court Rules which deals with custody and guardianship of infants refers at r. 4 to a s. 5 prosecution and requires that:

“...the summons which may be issued and served upon the person against whom the offence is alleged shall be in the Form 58.28 or 58.29 Schedule C, as appropriate...”

10. In this case the appropriate form is Number 58.29 which is headed “Schedule: C – Forms in *civil proceedings*”. (Emphasis added)

11. In *Delaney v. Judge Coughlan & Ors* [2012] IESC 40 MacMenamin J. held (at para. 17) that s. 18(g)(ii) of the Interpretation Act 2005 precluded the court from having regard to the heading at the beginning of Part 4 of the Proceeds of Crime (Amendment) Act 2005 as an aid to interpretation. Section 18(g)(i) states that subject to s. 7 “a marginal note placed at the side, or a shoulder note placed at the beginning, of a section or other provision to indicate the subject, contents or effect of the section or provision” shall not be taken to be part of the enactment or be construed or judicially noticed in relation to the construction or interpretation of the enactment. Section 7 provides that:-

“[I]n construing a provision of an Act for the purposes of section 5 or 6, a court may, notwithstanding section 18(g) make use of all matters that accompany and are set out in –

(a) in the case of an Act of the Oireachtas, the signed text of such law as enrolled for record in the Office of the Registrar of the Supreme Court pursuant to Article 25.4.5° of the Constitution.”

12. Section 6 is not relevant and s. 5 only applies where the provisions of an Act are ambiguous or obscure. There is nothing ambiguous about the meaning of s. 5 of the 1986 Act or s. 27 of the 1995 Act.

13. I accept the submission made on behalf of the first named respondent that the DCR Committee had a limited power in matters of practice and procedure only and did not have the power to amend matters of substantive law to be found in the Statutes. See *The State (O’Flaherty) v. O’Flinn* [1954] I.R. 295. The fact that the DCR Committee is empowered to make rules governing matters of practice and procedure does not empower it to change the status of a s. 5 prosecution from a criminal to a civil proceeding. Accordingly, insofar as there is any apparent conflict between a heading on a court form and the words contained within a Statute, it is the latter that must prevail. Therefore, this Court should reach a conclusion on the meaning of the words “ancillary to or in connection with” by looking at that section in conjunction with s. 5 of the 1986 Act and without regard to the note in the margin.

14. There can be no doubt that s. 5 of the 1986 Act provides for criminal sanctions to enforce custody and access orders in respect of infants. The language used in the section is clear and states that a person who fails or refuses to comply with an order under s. 7 or s. 11 of the Guardianship of Infants Act 1964 “shall be guilty of an offence”. The section also provides for a fine or imprisonment on “summary conviction”. There is no ambiguity about these words and given their natural and ordinary meaning, they clearly describe what is a criminal offence and criminal sanctions.

15. A party who brings such a prosecution does not receive any remedy for himself/herself. The purpose of s. 5 is to punish someone who is in breach of a custody or access order. While it could be said that such a prosecution might have the indirect effect of giving a benefit to the complainant in terms of effecting compliance with the order, it does not represent a direct remedy in the same way as an order for custody or access would do.

16. I have already concluded that the s. 5 prosecution is not a civil proceeding but a summary criminal prosecution in substance and in form. Such a prosecution is not subordinate to the custody or access orders made in the Family Law proceedings and is not “ancillary” to those proceedings in the way that this would normally be understood, for example, in the case of a variation order. It is an entirely distinct procedure. The appellant argued that the s. 5 proceedings were “connected with” the civil proceedings insofar as there must be an order for access under the Act of 1964 and a subsequent breach of the order before any prosecution under s. 5 may be brought. This submission mistakenly equates the facts necessary to prove an offence under s. 5 with matters connected with the civil proceedings. As I have held, the criminal proceedings are not connected with the civil proceedings within the meaning of s. 27 and the fact that certain proofs necessary for a prosecution under s. 5 arises out of the civil proceedings does not alter this conclusion.

17. Section 27 of the 1995 Act makes provision for civil legal aid. The legal aid must be in civil proceedings and must be “ancillary to or in connection with” such proceedings (i.e. the civil proceedings).

18. It follows therefore, in my view, that the appellant is not entitled to civil legal aid for that purpose. I am satisfied that the High Court judge’s finding that a prosecution under s. 5 was not connected with the original family law proceedings was correct.

### **Constitutional and ECHR rights**

19. Insofar as the appellant claims that the failure to grant civil legal aid is a breach of his constitutional or Convention rights, I would reject that argument. There is no denial of the appellant’s right to “real and effective access” to the courts in this case. At all times

the appellant had the option of bringing applications with civil legal aid representation for further access orders and/or custody and he did so in July 2015. A distinction must be made between civil proceedings and criminal prosecutions where a party, who is accused, has the right to legal representation. There is no constitutional right to financial assistance from the State to facilitate the retention of any lawyer in civil proceedings. In *M.C. v. Legal Aid Board* [1991] 2 I.R. 43, Gannon J. at p. 55 said in the context of a civil legal aid scheme:-

*"In my opinion, the adoption of that scheme does not impose any duty on the State or on the Legal Aid Board to any litigant involved in civil litigation other than to ensure that the scheme is implemented fairly to all persons and in a manner which fulfils its declared purpose."*

20. In the case before the Court the appellant was granted legal aid in respect of a number of issues surrounding the custody of and access to his children.

21. In *O'Donoghue v. Legal Aid Board* [2006] 4 I.R. 204, Kelly J. stated:-

*"104. It is not enough to set up a scheme for the provision of legal aid to necessitous persons and then to render it effectively meaningless for a long period of time. The State must, per Gannon J. (in C. v. Legal Aid Board) [1991] 2 I.R. 43), ensure that the scheme "is implemented fairly to all persons and in a manner which fulfils its declared purpose."*

*105. The purpose of the Act of 1995 is that persons who meet the necessary criteria shall receive legal aid. That carries the implication that the entitlement to legal aid will be effective and of meaning."*

That was a case involving serious delay in granting a legal aid certificate and can be distinguished on that basis.

22. There is nothing in the facts of this case to suggest that the appellant was not granted effective legal aid in the custody and access hearings and I am satisfied that there is no breach of his constitutional rights. The criminal prosecution in respect of which he seeks legal aid is one in which he is the complainant, and not the defendant, who would be at risk of punishment by way of criminal sanction.

23. In *Grogan v. The Parole Board and Minister for Justice, Equality and Law Reform* [2008] IEHC 204 from p. 10, McMahon J. reviewed the authorities on the right to civil legal aid and said at p. 13:-

*"From the above it can be seen that the courts have assiduously been at pains to confine the constitutional right to free legal aid to criminal cases..."*

*From the above it is clear that although attempts have been made to extend the occasion when the State has a constitutional obligation to grant free legal aid to persons who have no means, the occasions in which the courts are willing to do so in private civil matters are very few. Where the courts have recognised the State's obligation in non-criminal situations, it was done so only in very serious situations where the constitutional rights of individuals are clearly involved and failure to grant aid in these circumstances will amount to a breach of its constitutional responsibilities."*

24. He went on to say that while there may be an obligation to provide legal aid in some cases outside the criminal sphere, such occasions will be relatively few.

25. So far as the European Convention on Human Rights is concerned the appellant's Article 6 rights have not been impaired. There is nothing to indicate that his effective right to access to the courts have been denied. In *Airey v. Ireland* (1979) 2 E.H.R.R 305, the court held that the entitlement to legal aid in civil matters is confined to areas where assistance was "indispensable" for "effective access" to the courts.

26. I agree with the High Court judge's conclusion that there was no evidence to support a finding of breach of constitutional rights or Article 6 Convention rights in this case.

#### **Are the proceedings moot?**

27. The High Court concluded that these proceedings were moot and in reaching that conclusion relied on the observations of the Supreme Court in *O'Brien v. The Personal Injuries Assessment Board (No. 2)* [2007] 1 I.R. 328. Although a s. 5 summons issued, the prosecution did not proceed because the appellant and his partner reached an agreement as to a satisfactory access regime over the course of the summer of 2015. Accordingly, the s. 5 summons was struck out. The Children and Family Relationship Act 2015 came into force on the 18th January 2016 in respect of guardianship, custody and access issues. Section 60 of the Act, which came into force on that date, amended the law so as to provide a number of options to parties in a similar position to the appellant to seek enforcement orders with civil legal aid available, subject to an assessment of means. In those circumstances it is difficult to see how these proceedings would have implications for other litigants in the future. Even though s. 5 remains on the Statute Books, the appellant did not proceed with that prosecution and settled his differences with the mother by means of a variation order under s. 11 of the Guardianship of Infants Act 1964. By the time the judicial review came on for hearing there was no remaining controversy between the parties to be determined. Even if the appellant had been granted the orders which he sought they would have been meaningless as there was simply no point in the High Court granting legal aid in respect of a prosecution which never took place.

28. In any case there were other remedies open to the appellant to achieve what he was seeking and in respect of which he would have been entitled to legal aid.

29. In my view the High Court judge was correct in determining that the proceedings were moot.

#### **Conclusions**

30. I am satisfied that the appellant was not entitled to civil legal aid for the purposes of an enforcement prosecution under s. 5 of the 1986 Act on the grounds that a prosecution of enforcement proceedings under the 1986 Act are criminal proceedings.

31. Those proceedings are not "ancillary to or in connection with" the civil proceedings in the Family Law proceedings involving custody and access.

32. There was no breach of the constitutional rights of the appellant in the manner in which the respondent interpreted the legislation and applied it, nor has there been any breach of the appellant's Convention rights.

33. The proceedings are moot.

34. I agree with the conclusions of the High Court judge and I would dismiss the appeal.