Neutral Citation: [2015] IEHC 644

THE HIGH COURT

[2015 No. 597 J.R.]

BETWEEN

DEREK GALLAGHER

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of October, 2015

1. The application for leave to apply for judicial review began in the usual *ex parte* manner and following a direction that it should be made on notice to the Director I have now had the benefit of hearing submissions from both parties.

2. I am going to proceed, in a sense in favour of the applicant, on the basis that the test is an "arguable case" even in a leave on notice although certainly in other caselaw there has been a suggestion made that a higher threshold might apply in relation to a leave application that is directed to be made on notice. It would seem to me that there are significant arguments for there to be a higher threshold in such a case but that will have to await clarification in some future case. For the time being, I will proceed on the basis that the question is whether this is an arguable case or not.

3. The applicant was charged on 7th November, 2013 under s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. He was returned for trial on 11th March, 2015. The application for leave was filed in the Central Office on 8th October, 2015. The grounds for the application as set out in the statement of grounds are essentially that he was never warned that should he exercise his right to silence, he would be committing an offence under s. 7 and essentially this is tantamount to an allegation that it would, therefore, be unfair to admit in evidence, the memoranda of interview.

4. After I directed that this application be made on notice to the Director, Detective Sergeant Cullen swore an affidavit on 16th October, 2015 stating that when the indictment was served, the charge would be substituted and that the new charge would allege that the applicant was concerned in converting, transferring, handling, acquiring, possessing or using property contrary to s. 7(1)(a)(ii) of the 2010 Act. Detective Sergeant Cullen also says in his affidavit that it will be contended by the Director that this permissible under s. 4M of the Criminal Procedure Act 1967, as amended.

5. The matter is now listed for trial on 27th October, 2015, next Tuesday.

6. Given that the application for leave was made more than 3 months from the return for trial, there is a time issue which was one of the major reasons why I directed that this application be made on notice to the Director. Mr. James Dwyer B.L. for the Director relies on the decision of Kearns P. in *Cotton v. Director of Public Prosecutions* [2015] IEHC 302. The applicability of that decision is not as such challenged on behalf of the applicant otherwise than by reason of the intended substitution of the charge. Given that intention to substitute the charge, I would be reluctant to base a decision on the time issue in the particular circumstances of this case.

7. Mr. Conor MacGuill, solicitor for the applicant, says there is no reality to this case proceeding next Tuesday because of the intention to substitute the charge when the indictment is served but that seems to me to be a matter entirely for the trial judge. There is no question of additional evidence in this case so it does not seem to me to necessarily follow that a trial judge would be obliged to grant an adjournment where there is some legal refinement of the statutory provisions being charged.

8. In that context, it is also noteworthy that it remains a charge under s. 7 of the 2010 Act. Essentially the allegation would be that the offence under s. 7 is committed in a different way to that originally charged.

9. However, the application as set out in the statement of grounds is framed in the context of the original charge and probably would require significant amendment in the context of the substituted charge. No application for amendment was made.

10. More significantly, what the allegation on behalf of the applicant boils down to is an allegation that the memoranda of interview or some part of them should not be admitted and that seems to me to be classically a matter for the trial judge.

11. As is clear from the affidavit of Detective Sergeant Cullen, the applicant did not completely exercise his right to silence in any event and he does seem to have given some explanations or comment.

12. Mr. MacGuill submitted – perhaps attractively at one level – that the fact that this application required a certain amount of debate demonstrated in and of itself that the application passed the arguability threshold. I do not think that this point can be well founded because if it were so then in any case where I put a respondent on notice, I would be bound to hold ultimately that the application was arguable.

13. I am basing my decision on the fact that this is a matter for the trial judge. If another reason were required, I would say that there have been a considerable number of developments over the past decade or so that underline the importance of upholding the integrity of the criminal process and therefore militating against undue interference in that process by means of prohibition applications. These include factors such as the commencement of the European Convention on Human Rights Act 2003, which amongst other things, protects the rights of victims (thereby importing decisions such as *X and Y v. The Netherlands* (Application 8978/80, European Court of Human Rights, 26th March 1985) or the adoption of the Victims Directive 2012/29/EU not yet commenced but still something that a court could have regard to.

14. However I do not have to base my decision on the need not to interfere lightly with the integrity of the criminal process. I am basing it on the fact that the admission or exclusion of evidence is a matter for the trial judge and not a proper matter for judicial review. Therefore, I hold that the application is not arguable and I refuse the application for leave.