Neutral Citation: [2016] IEHC 55

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 50 JR]

BETWEEN

FRANK AGRAMA

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY AND DISTRICT JUDGE JOHN O'NELL

RESPONDENTS

(No. 3)

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

1. It is alleged by Italian prosecution authorities that during the period 1999 to 2005, various frauds were committed in connection with the Mediaset Communications Group and related companies. One strand of alleged fraud occurred in relation to companies referred to as Mediatrade/RTI. The applicant became the subject of this investigation, together with Mr. Silvio Berlusconi, of whom the applicant is said to be an associate, and a number of other individuals.

2. Pursuant to the Council of Europe's European Convention on Mutual Assistance in Criminal Matters of 20th April, 1959, as implemented by s. 51 of the Criminal Justice Act 1994, provision is made for the receipt by the Minister for Justice and Equality of letters of request for the taking of evidence for purposes of criminal investigation or criminal proceedings. Where such a letter is received, the Minister may, in accordance with the Act, nominate a judge of the District Court to take the evidence.

3. On 17th July, 2006 a first letter of request was received from Italian prosecution authorities in relation to evidence said to be relevant to the investigation of the applicant. That letter was superseded for the purposes of this application by a second letter of request dated 11th January, 2008, which sought the taking of evidence for the purposes of a criminal investigation into the alleged offences by the applicant.

4. In March, 2008 the Minister appointed Judge Bridget Reilly to take evidence for the purposes of this letter of request. That decision gave rise to a first set of judicial review instituted by the applicant, in which leave was granted on 7th April, 2008. An issue arose in the High Court procedures related to discovery, which occasioned the first in a number of written judgments in this matter, which I will refer to as *Agrama v. Minister for Justice, Equality and Law Reform (No.1)* [2009] IEHC 476 (30th October, 2009), in which certain categories of discovery were ordered.

5. At some point during the course of the first judicial review, the applicant was charged with offences arising from the investigation. The precise date on which the applicant was charged consumed unnatural attention in this case for reasons that will shortly appear.

6. The respondents contend that the date of charging was 9th March, 2010 (having initially suggested January, 2010 during the course of the hearing). The applicant contends that the relevant date was 18th October, 2011.

7. In the meantime the first judicial review was progressing through the High Court. Peart J. finished hearing the judicial review proceedings on 29th July 2011. He delivered a ruling on 14th October, 2011, dismissing relief sought in connection with the first letter of request. That ruling was not delivered in the form of a full written judgment but rather a written note of a decision. It was not circulated as a judgment. He then reserved judgment on the balance of the case.

8. On 25th January, 2013, Peart J. gave judgment dismissing the balance of the first judicial review in a judgment I will refer to *Agrama v. Minister for Justice, Equality and Law Reform (No.2)* [2013] IEHC 15, in which it was held that the nomination of Judge Reilly was lawful. This judgment incorporated the informal written ruling of 14th October, 2011.

9. On 8th July, 2014 the applicant was acquitted of the charges against him, namely aggravated misappropriation and tax fraud.

10. The applicant, having appealed to the Supreme Court in the *Agrama (No.2)* proceedings, then brought a notice of motion in that appeal dated, 16th October, 2015, seeking to amend the proceedings to include the claim that the evidence was being sought not for the purposes of investigation but for those of prosecution. That motion was adjourned to the hearing of the Supreme Court appeal. Judgment was given by the Supreme Court in *Agrama (No.2)* on 9th December, 2015 ([2015] IESC 94), dismissing the appeal and refusing to permit an amendment.

11. The Minister then moved to nominate a different District Court judge, Judge John O'Neill, to take the evidence pursuant to the second letter of request, by nomination dated 18th January, 2016. Judge O'Neill issued four summonses on 19th January, 2016 to two relevant witnesses, Joseph Kenny and Gerard Hayes, requiring them to attend for this purpose.

12. These steps led to the institution of the second judicial review application, the present proceedings, on 1st February, 2016. Mr. Paul Gardiner S.C. (with Mr. Marcus Dowling B.L.) appeared for the applicant, and pursuant to an advance request by the State, very properly made the application on notice to the respondents, for whom Mr. Patrick O'Reilly S.C. appeared. On that date the respondent undertook to hold off on further processing the letter of request until I determined the leave application.

13. I am also told that the hearing of the prosecution appeal against acquittal will take place in March, 2016. I draw the inference in the circumstances that whatever value the evidence may have as part of the investigation will be likely to be significantly diluted if it is not made available before that appeal, because prosecutors will lose the opportunity to consider applying to adduce the fruits of

the investigation into the criminal process before its conclusion.

The question of revision of the unapproved judgment
14. It is now necessary to discuss an issue that arose in connection with the unapproved judgment relating to the present application.

15. This application for leave was further heard on 2nd February, 2016. In the course of that hearing, the issue of when precisely the applicant had been charged arose. The applicant's lawyers were not possessed of instructions in that respect other than to point out the necessary fact that it was at some point prior to 8th July, 2014. On behalf of the respondents, I was given to understand that he was charged in 2010, a date subsequently refined in submissions as being understood to be in or about January, 2010. I delivered an unapproved version of the present judgment at 10.30 a.m. on 4th February, 2016 reflecting that information. At 1 p.m. on that day Mr. Gardiner appeared and contended that the date of the indictment was in fact in October, 2011, the inference being that certain elements of the unapproved judgment should be revisited on that basis.

16. As the order had not been perfected by that time, there was no issue as to my ability to retain seisin of the matter for the purpose. Even if the order had been perfected, the present sort of issue comes well within the court's power to review such an order. *Ainsworth v. Wilding* [1896] 1 Ch. 673 at 677 as cited with approval in *Re Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514, established that even where an order has been perfected, it can be reviewed "*(1) in special or unusual circumstances, or (2) where there has been an accidental slip in the judgment as drawn up, or (3) where the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended"* (per Hamilton C.J. at p.527). In *Lawrie v. Lees* (1881) 7 App. Cas. 19 at 35, cited with approval by Dunne J. in *D.P.P. v. G.K.* [2014] IECCA 35, Lord Penzance took the view that there was power to vary perfected orders "*in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain. I think that power is inherent in every Court.*"

17. Accordingly I heard the parties further on 8th February, 2016. As noted above, the parties now respectively contend that the date of charging was October, 2011 or March, 2010. The respondents supported their version by an affidavit of David Fennell sworn on 8th February, 2016. The applicant sought an adjournment to reply to that affidavit, if it was to be relied on by me (but not otherwise), despite having failed to deal with the issue in his original application or by way of affidavit since the handing out of the unapproved judgment on 4th February, 2016. Ultimately, the applicant was seeking a revision of the unapproved judgment, whereas the respondents considered that no revision was required.

18. It seems to me that to resolve the debate about this matter at this stage would require a degree of further delay that is disproportionate to any benefit to the interests of justice. I will therefore assume in favour of the applicant that it is arguable that the date of the initiation of criminal proceedings (as opposed to investigation) for the purposes of the Convention was October, 2011. To do so of course involves revising the unapproved judgment, as I am now doing. On one view, this could be seen as a massive concession to the applicant, given that there is not a perceptible material difference between the date offered by the State during the hearing (January, 2010) and that now contended for (March, 2010), whereas the applicant did not put forward any date at all during the hearing so, arguably, should not be allowed to do so now. However with a view to ensuring both the substance and the appearance of as much fairness as possible to the applicant I will make the assumption in his favour that the date he now contends for is arguably correct.

19. The present judgment is therefore a revised version of the unapproved judgment originally given on 4th February, 2016. The revisions are directed towards dealing with the further information and consequential rival contentions now being furnished to the court, and the consequential changes in terms of the judgment and order, as well as the general entitlement of the court to make reasonable adjustments prior to circulation of an approved judgment which applies in any case following an unapproved judgment being made available.

Arguability of the claim that the evidence is being taken for an improper purpose.
20. Mr. Gardiner submits that there is an important distinction in s. 51 of the 1994 Act between information sought for investigation and that sought for prosecution. Under s. 51(1), a request may be made for assistance in relation to either "*criminal proceedings*" or "*criminal investigation*". Under sub-s. (2), the Minister may nominate a judge of the District Court to receive evidence in relation to that request. By virtue of sub-s. (5), the Minister by not exercise the power conferred on her by sub-s. (2) unless the information will not, without her consent, be used for "*any purpose other than that specified in the request*".

21. Mr. Gardiner submits that we are "*involved in a fiction*" that an investigation is ongoing, whereas in reality a prosecution has already commenced, concluded to an acquittal, and is now the subject of a prosecution appeal.

22. Denham J., as she then was, in *Brady v. Haughton* [2006] 1 I.R. 1 at p. 48 noted that if evidence gathered for investigation was to be subsequently used for a prosecution "*further steps would be required"*. Those further steps appear from the judgment of Murray C.J. in that case at p. 15 to involve the giving of ministerial consent under s. 51(5).

23. The point being made by the applicant in the present proceedings is based on an assertion that there is no criminal investigation in being. This appears to me to be a false premise. In principle, an investigation can co-exist with a prosecution, and may be effective even up to the finalisation of criminal proceedings. It may, and normally will, be significantly less effective if carried out after such finalisation. The fact that a prosecution was initiated against the applicant, or that it concluded at first instance, does not derail the investigation or render it "*a fiction*" as submitted by Mr. Gardiner.

24. I therefore conclude that the point being advanced by the applicant in the present application for leave to seek judicial review is not arguable because it is founded on a fundamental misconception. The letter of request relates to an investigation, and any evidence gathered can only be used for an investigation, in the absence of ministerial consent under s. 51(5), which does not yet exist.

25. I note in passing that the Supreme Court majority in *Brady* decided that fair procedures rights for a foreign criminal suspect do not arise at the evidence-taking stage in the case of an investigation, and left opened the question of what rights if any might arise at the stage when evidence might be proposed to be used in a prosecution. I would be inclined to think that the normal venue to make any complaint in relation to evidence would be within the criminal process in the country in which an individual was to be tried. To infer a right to cross-examine into s. 51, or sub-s. (5) in particular, could be to give a defendant greater rights than he or she would enjoy by virtue the law of the country carrying out the trial. Mutual assistance in criminal matters is not a mechanism to export features of the Irish criminal justice system to other Council of Europe member states, or non-member states who are contracting parties to the convention. If those countries have a mechanism for upholding the rights of defendants other than by way of cross-examination at the time of the taking of the evidence abroad, then their procedures should, in principle, be respected. In short, I do

not immediately see the basis for importing fair procedures into s. 51, even for the purposes of prosecution, as this appears to be a matter for the state carrying out the prosecution. However, I fully acknowledge that this question remained undecided by the Supreme Court in *Brady* and the foregoing observations are of course subject to hearing argument if the matter arises at any future point.

Is this complaint raised too late, particularly given the first judicial review?
26. Independently of the foregoing, the issue as to whether the information was to be used for mere investigation or for prosecution first arose as soon as a prosecution came into being, which was not later than October, 2011. At that date, the applicant had live judicial review proceedings before the High Court that were, at that stage, undetermined, although they had got to a fairly advanced stage in that final judgment had been reserved.

27. A situation whereby in the course of existing proceedings, a new point arises which did not exist as of the date on which the proceedings were commenced does, it probably needs to be said, put an applicant in a difficult position. The more advanced the proceedings are, the more acute the difficulty probably is.

28. There seem to be a number of options in that situation: to raise the point in the existing proceedings if no amendment is required, to seek to amend the existing proceedings, to bring fresh proceedings within the limitation period for such proceedings, to await the outcome of the proceedings before acting, or simply to decide not to pursue the new point.

29. Clearly one or other of these options must be pursued and it falls to the applicant to decide in the first instance. The default position, assuming that the applicant wishes to pursue it and cannot legitimately do so within the existing proceedings as pleaded, is probably to institute fresh proceedings (within the limitation period) seeing as the point did not exist as of the date of the existing proceedings.

30. Having said that, there could clearly be savings in terms of costs and time in seeking to amend the existing proceedings to encompass the point, and one might have thought that it would be appropriate to canvass with the respondents which option was appropriate in order to seek consent for a more convenient and efficient disposal of the issue than the institution of fresh proceedings. Respondents should act reasonably in relation to such requests and cannot simply sit on their hands on receipt of such a letter, awaiting a choice being made by an applicant only then to announce it was the wrong one. If, for example, any additional costs were incurred because fresh proceedings had been instituted where a respondent had refused consent to an amendment of the existing proceedings for the purpose, I would be inclined to think that a respondent should be required to show why it should not pay those additional costs.

31. In the present case, the applicant's attempt to deal with the issue came in October, 2015, rather than in or before October, 2011. He was required either to deal with the point in the first judicial review or alternatively to institute fresh proceedings.

32. At one level, it was still open to the applicant to seek to introduce the point into the first judicial review proceedings, despite the fact that judgment had been reserved. The fact that within 3 hours of my having given judgment in the present application, the applicant was back asking me to revise it, illustrates that it would not have been too late in principle for application to be made to Peart J. to seek to include the point in those proceedings.

33. In *J.K. v. Minister for Justice and Equality* [2011] IEHC 47, Hogan J. took an important point of his own motion after having reserved judgment, and reconvened the hearing to invite further submissions on it.

34. On the other hand, I can imagine that the State probably would have objected to such a late application. While habit frequently trumps self-interest, perhaps they would have moderated that objection if it were explained to them that the alternative was a fresh judicial review application. Either way it is probably too much to expect that the applicant would necessarily have been successful in amending the proceedings at that point. It is fair to say that while amendment of proceedings may be somewhat easier in the early stages, and indeed while there are circumstances in which a tolerant view of amendments can be taken, even at a later stage (see *Keegan v Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570; and my judgment in *B.W. v Refugee Appeals Tribunal (No. 1)* [2015] IEHC 725), the more advanced the stage at which an amendment is sought the greater the risk of resistance to that application. Whether the court should necessarily uphold such objection in the absence of irremediable prejudice is another matter. But in circumstances such as obtain here, the applicant would have had to either obtain leave to amend or else institute fresh proceedings, and in this case he did neither.

35. Given the advanced stage of the judicial review proceedings when I am assuming for the purposes of the present application that the point arose, I would not in the circumstances hold it against the applicant that he did not seek to amend his proceedings at that point, but that does not get away from the difficulty that not only did he not apply to incorporate the point in the High Court proceedings (he waited to do so until the Supreme Court appeal when it could not conveniently be introduced, not having been the subject of decision at first instance), but in addition he failed to bring fresh proceedings within the time limit.

36. As of 2011, rules of court required such an application to be made "*promptly*" and in any event, at most within six months from "*the date when grounds for the application first arose*" (O .84 r. 21(1) prior to its amendment on 1st January, 2012 by the Rules of the Superior Courts (Judicial Review) 2011 (S.I. No. 691 of 2011)).

37. For the reasons referred to above, the issue of investigation versus prosecution first arose when the applicant was originally prosecuted, at the latest in October, 2011. The applicable time limit therefore expired not later than April, 2012. The present application is therefore out of time. I do not consider that there are adequate grounds for an extension of time, even if one had been sought in the statement of grounds, which it was not.

Is the present application a filibuster?
38. Mr. O'Reilly submits that that this second judicial review is merely the latest leg of the applicant's "*filibuster*", which began with a nearly eight-year judicial review in the first instance, has continued to the present instalment, and indeed harbours the prospect of a third judicial review if and when the Minister considers her function under s. 51(5). Mr. O'Reilly submits that this amounts to an abuse of process.

39. At one level, the applicant cannot be faulted for having had recourse to the courts, as he is entitled in principle to do. Having said that, it is clear from the judgment of O'Donnell J. in *Agrama (No. 2)* that the Supreme Court was distinctly unhappy with the level of delay that had occurred up to the date of that judgment (see para. 27). In those circumstances, further delay appears to be highly undesirable, particularly where matters are coming to a head in Italy and there is a prospect of an appeal hearing in or about March, 2016.

40. In that sense, the applicant has objectively speaking been engaged in a filibuster. If, through protracted or repeated court proceedings, he can postpone the taking of evidence until the final conclusion of the substantive criminal process, he will have succeeded, without merits, in substantially defeating the Minister's entitlement to operate the statute, simply by reason of having generated delay due to setting the machinery of the courts in motion. As Professor C. Northcote Parkinson has observed, "*delay is the deadliest form of denial*" (The Law (Harmondsworth, 1981 ed.) p. 158).

41. Should courts composed of judges who have taken on a duty to "*uphold … the laws*" (Art. 34.6.1° of the Constitution) lend assistance to an exercise whereby laws duly enacted are in effect set at nought simply in order to facilitate an individual's right of access to the court? While the right of access to the court is of course crucial in a democracy, it is not an unlimited right. If its mere exercise would or could in practice carry the ultimate event in favour of an applicant, independently of merits, a court is not bound to give priority to that right and is entitled and I think obliged to engage in a balancing exercise as to where the justice of the case lies as between allowing executive action to proceed, or permitting it to be permanently frustrated by the mere making of a challenge.

42. In this case I have no doubt that the balance of justice is overwhelmingly in favour of allowing the Minister and Judge O'Neill to operate the mutual assistance provisions without further interference. The international obligations of the State, the will of the international community as set out in the European Convention on mutual assistance, the established statute law of the State, an executive decision that is *prima facie* valid, the public interest in responding affirmatively to a request made to the State, the fact that the applicant will enjoy the rights of defence guaranteed by the ECHR and what appear from the papers to be the ample protections of the Italian legal system, in order to assert his rights in relation to any such evidence in the course of the criminal appeal, the imminence of that appeal and the likelihood that the value of the evidence to the Italian authorities will be diluted beyond recognition unless transmitted in the immediate future, stand on one side of the equation. No real basis for arguing that any clear or irremediable injustice is being done to the applicant is apparent to me on the other side of that equation, especially where the applicant has already had a leisurely opportunity to challenge the process and has failed both in the High and Supreme Courts. In those circumstances, eight years of challenge is enough.

43. I would refuse the application as an abuse of process even if I considered it was otherwise one for which leave should be granted, which I do not. Indeed having regard to the foregoing and given the distinct prospect of a third judicial review application, I will require that unless otherwise directed by the President of the High Court, any further judicial review applications that are in any way related to this matter should be made to the judge, to whom, during the court term in which such application is made, responsibility for judicial review *ex parte* applications is normally assigned, on notice to the respondents. That direction is made for the purpose of ensuring efficient management of the court's business (see *Talbot v. Hermitage Golf Club* [2014] IESC 57), and is not to suggest that the applicant's present legal advisers need any directions in this regard; on the contrary I would commend them for having advanced the present application in a very fair and indeed skilful fashion.

Non-disclosure

44. The date on which the applicant was charged is a crucial question in this case, because that is the date when grounds for the present application first arose. That information was missing from the applicant's affidavit, and from the instructions provided by him to his lawyers. In general it is probably fair to say that the duty of disclosure is lessened, perhaps significantly, where an application is made on notice to the other side. It may also be lessened where the respondents have contributed to confusion as to the particular factual point concerned. However that does not entirely remove the discretion of the court in cases where a non-disclosed matter is of crucial importance. In this case, the non-disclosure related to a fact of such centrality that the application should be refused on that basis alone. Responsibility for that omission must, in the circumstances, lie with the applicant rather than his legal advisers. Mr. Dowling (who also addressed me on behalf of the applicant in connection with the application to revise the judgment) stated that the applicant "*didn't know the date would be an issue*" and "*did not regard it as relevant*" when instructing his lawyers and felt "*dismayed*" that he was criticised, as he saw it, for not having clarified the date in his papers or instructions. That is as may be but ultimately it is up to an applicant to put before the court all factual matters that are actually central rather than just those he or she thinks to be central. To that extent, non-disclosure is an objective matter rather than a finding that anyone intentionally held back information that they knew was relevant, and I am certainly not making a finding of the latter kind against the applicant. However, the rules of court are and have at all material times been clear that the time limits for judicial review date from the point in time at which the grounds "*first arose*". Objectively speaking, the date at which the grounds first arose is therefore, normally, a matter that requires to be disclosed. The primary obligation to do so rests on the applicant, who also obviously carries the burden of proof.

45. That omission not only would have been likely to have had the effect of directing the court's attention away from the date on which the applicant was charged as being a matter of significance, but clearly also caused considerable procedural confusion for the reasons set out, which only emphasises that the information should have been set out by the applicant from the outset. Having said that, the respondents inadvertently contributed to the confusion in the circumstances to which I have referred, so while costs will follow the event, they will be limited to the costs of the hearing on 2nd February, 2016.

Order

46. For the foregoing reasons, which are independent of each other, I will order:

(i) that the application for leave to seek judicial review be refused;

(ii) that with effect from the oral pronouncement of this judgment, the respondents be released from their undertaking not to arrange for the taking or transmission of evidence pending the determination of the proceedings;

(iii) that unless otherwise directed by the President of the High Court, any further judicial review applications that are in any way related to this matter should be made to the judge to whom, during the court term in which such application is made, responsibility for judicial review *ex parte* applications is normally assigned, on notice to the respondents; and

(iv) that costs of the hearing on 2nd February, 2016 be awarded to the respondents to be taxed in default of agreement.