[2015] IEHC 824

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 694 J.R.]

BETWEEN

MICHAEL CASEY

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of December, 2015

1. This application raises an interesting issue regarding a conflict between three important constitutional principles which point in different directions:

> (i) the imperative to protect against apprehended rather than simply current threats to constitutional rights,
>
> (ii) the principle that a court should reach constitutional issues last in considering any public law problem, and
>
> (iii) the principle that concluded proceedings be they criminal or civil, based on an enactment subsequently found to be unconstitutional, cannot normally be reopened.

2. The applicant in this case was charged with being drunk in a public place contrary to s. 12 of the Licensing Act 1872. He was proceeded against by way of summons in the District Court returnable for 11th November, 2015. An almost illegible photocopy of the summons is exhibited which appears to contain an allegation that the applicant was drunk at a specific public place in Limerick on 31st July, 2015. The District Court has adjourned the matter to 5th January, 2016.

3. He now seeks prohibition of his trial in the District Court on the grounds that s. 12 is unconstitutional or contrary to his ECHR rights. He submits that the expression "*drunk*" is impermissibly vague and contravenes his right to be clearly advised as to what the elements of the offence are, in breach of both the Constitution and the Convention. His solicitor, in a somewhat Spartan affidavit that contains no information (even by way of hearsay) as to the actual facts of the incident on 31st July, 2015, avers that he has "*found it impossible to properly and comprehensively advise the applicant of the fundamental ingredients of the offence and the parameters within which such is to be assessed/determined*" (para. 5 of grounding affidavit).

4. The issue of general application that arises is whether it is appropriate to grant leave to seek prohibition of a trial on the ground that the underlying statute is unconstitutional or whether the applicant should be required to submit to the criminal process and any consequent appeal before being permitted to ventilate the issue of constitutionality by way of judicial review.

5. Mr. Conleth Bradley, S.C., who appears (with Mr. Christopher Hughes, B.L.) for the applicant submits that pursuant to the decision in *East Donegal Cooperative Livestock Mart Limited v. Attorney General* [1970] I.R. 317, the court is entitled:-

> *"not merely to redress a wrong resulting from an infringement of the guarantees [of rights by the Constitution] but also to prevent the threatened or impending infringement of the guarantees and to put to the test apprehended infringement of these guarantees" (per Walsh J. at p. 338).*

6. The court in that case rejected the contention that a plaintiff had to show that an application of an impugned law "has actually affected his activities adversely".

7. Set against this principle, however, is the doctrine requiring the court to "*reach constitutional issues last*" (per Denham J., as she then was, in *Gilligan v. Special Criminal Court* [2006] 2 I.R. 389 at p. 407; see also *O'B. v. S.* [1984] I.R. 316 at p. 328, per Walsh J.). As well as having been applied on numerous occasions by the Irish courts, this approach has a venerable history in U.S. constitutional law, as discussed in *Ashwander v. Tennessee Valley Authority* 297 U.S. 288 (1936). In that case, Brandeis J. said (at pp. 346-347) that:

> "*The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."* Liverpool, N.Y. & P. S.S. Co. v. Emigration Commissioners, 113 U. S. 33, 113 U. S. 39; … Abrams v. Van Schaick, 293 U. S. 188; Wilshire Oil Co. v. United States, 295 U. S. 100. "*It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."* Burton v. United States 196 U.S. 283, 196 U.S. 295."

8. An approach requiring the court not to express a view on the constitutionality of legislation until such time as it has been finally applied to a defendant in criminal proceedings would be a more economical use of judicial resources because of the significant possibility that the issue may be capable of being resolved in any event in the course of that process. An applicant may for example

be acquitted, or alternatively, if convicted, may have that conviction overturned on appeal. Either outcome would render it unnecessary and inappropriate to make a determination on the constitutionality of the legislation concerned. Alternatively, facts as found in the course of the criminal process may deprive an applicant of standing to make particular arguments, or render those arguments clearly unsustainable, thereby reducing if not eliminating the necessity for the court to embark on what may be a quite theoretical investigation of the constitutionality of the legislation. For the court to determine the validity of that legislation in a prohibition application prior to the full ascertainment of the factual matrix in the course of the criminal process could, in many instances, amount to the determination of a moot question.

9. In the context of the criminal process, it has been held by Noonan J. that only "*in exceptional circumstances*" will the court grant an order of prohibition of a criminal trial: *M.L. v. Director of Public Prosecutions* [2015] IEHC 704 at para. 22. There is considerable jurisprudence supporting the need for restraint in interfering with the criminal process by means of prohibition. This is not simply because matters of fairness can be dealt with by the trial judge, but is also important because the criminal process impacts on the rights of third parties, particularly injured parties: see the observations of Kearns P. in *Coton v. D.P.P.* [2015] IEHC 302 and my judgment in *Nulty v. Director of Public Prosecutions* [2015] IEHC 758.

10. These considerations also have a relevance in practical terms. If it is the case that an applicant can secure a postponement of his or her trial simply by challenging the constitutionality of the relevant legislation, an avenue for the delay or frustration of the criminal process will have opened up. As I said in *Nulty* (at para. 12), the criminal trial is a mechanism to vindicate the legal, constitutional, EU and ECHR rights of a victim of crime. The strengthening of these rights has been a growing theme in recent legal developments, such as the Victims Directive, 2012/29/EU. These rights include the positive rights arising from the State's "*obligation to conduct an effective prosecution*" (*Söderman v Sweden* (Application no 5786/08) European Court of Human Rights 12th November 2013, para. 88). To allow a criminal trial to be de-railed unnecessarily by judicial review, when the matter complained of either lacks merit or could be dealt with more proportionately within the trial, creates the potential for such delay or interference with the criminal process as to bring the performance of this obligation to victims into question. I would add to the above that the performance of the State's obligation "*to conduct an effective prosecution*" could also be brought into question by the delaying of the criminal process for the purpose of constitutional or ECHR litigation which should more properly be pursued after the conclusion of that process.

11. Furthermore, if any one applicant is given leave in relation to such matters, prior to trial, this will amount in practice to a suspension of the legislation in question, because any other defendant charged with the same offence will know that they must also be entitled to a similar order for the asking. It is the function of the judiciary to "*uphold"* the Constitution and the laws (Article 34.5.1°), not to contribute to a situation where those laws can be put into suspension, or at least not without very substantial reasons going well beyond the satisfaction of the mere threshold of arguability for the purposes of the grant of leave to seek judicial review.

12. The third principle I have referred to adds yet a further layer of complexity to the picture. As Geoghegan J. put it in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 at p. 203: "*concluded proceedings whether they be criminal or civil, based on an enactment subsequently found to be unconstitutional, cannot normally be reopened*".

13. It seems to me that the constitutional principles I have referred to are ones which taken in isolation lead to radically different results. An entitlement to go to court to prevent an apprehended breach of rights, or a prohibition on overturning a conviction after the event by a constitutional challenge, would suggest that a defendant does not need to wait for his or her trial in order to seek prohibition. On the other hand, a requirement to exhaust other remedies and to reach constitutional issues last, would militate against an entitlement to challenge the legislation under which the person is charged prior to the conclusion of the criminal process.

14. Of particular importance in practical terms are the comments of Clarke J. in *Nawaz v. Minister for Justice, Equality and Law Reform* [2013] 1 I.R. 142 at p. 161:

> *"I should, however, also record my agreement with the views expressed by Barrington J. in* Riordan v. An Taoiseach (No. 2) [1999] 4 I.R. 343. *In the absence of statutory provision to the contrary, the normal procedure by which a case, in which the primary relief claimed concerns a declaration of invalidity of an Act having regard to the Constitution, should be brought is by plenary proceedings rather than judicial review. However, as was pointed out by Barrington J. in the passage from the judgment in Riordan v. An Taoiseach (No. 2) already cited, there is no rigid rule to that effect. In any event any such practice would have to yield to a contrary statutory requirement."*

15. In attempting to reconcile the foregoing principles, the court must ensure that an applicant is not caught in a catch-22 whereby he or she is accused of prematurity if moving before conviction, and delay or acquiescence if moving after it. If an applicant is to be required to submit to the criminal process before advancing a challenge the underlying legislation, then it should follow that, after that process, the court must be prepared to then facilitate the challenge, provided that it is either actually instituted before finalisation of the criminal process or, where the ultimate decision in that process is subject to judicial review and therefore does not properly become "*concluded"* until the expiry of the 3 month time-limit, it is brought after the court order ending the criminal process but before the expiry of the judicial review deadline.

16. It is not possible to reconcile these principles in a hard and fast manner by laying down rules of universal application. However for the purposes of dealing with the present application, some synthesis must be attempted. The correct approach seems to me to be that, in general, the alternative remedy of the criminal process must be allowed to continue to its conclusion, including by way of any appeal process, before a defendant in that process can actively move a challenge the underlying legislation, but this presumption can be displaced if either there are conventional judicial review grounds for intervention during that process, or if it can be shown that particular injustice can arise. In the absence of grounds to intervene by way of judicial review, a challenge must normally proceed by plenary summons. On the other hand, a defendant must be required to actually initiate the challenge prior to the conclusion of the criminal process, in order to avoid the rule in *A. v. Governor of Arbour Hill Prison*, save where the final decision is subject to judicial review, in which case the defendant must actually initiate the challenge within 3 months from the date of the Circuit Court order affirming a District Court conviction.

17. Having regard to the foregoing, a clear procedure to reconcile these principles suggests itself, as follows:

> (i) If grounds (which are exceptional in the criminal context, normally being the *inevitability*, as opposed to the *possibility,* of unfairness) exist to intervene, by way of prohibition, in a process before its completion, the judicial review proceedings could in principle include an ancillary or fall-back challenge to the constitutionality (or ECHR compatibility) of legislation, or include that as a primary relief in exceptional circumstances if a particular injustice would arise. Therefore where the applicant is entitled to proceed by judicial review anyway, no purpose is served by requiring the constitutional part of such challenge to be by plenary summons.

(ii) If the criminal process is initiated in the District Court, or otherwise such that the final criminal appeal is determined by a court that is subject to judicial review, a challenge to that final determination may be brought within 3 months by way of judicial review. Such challenge may include a challenge to the constitutionality or ECHR compatibility of the underlying legislation, as in the circumstances the process should not be considered to be finally determined for the purposes of the A. doctrine until the expiry of the 3 month period. In that respect, a final criminal decision by a judicially-reviewable court is different to a final criminal decision by a Superior Court. Again in the context of a judicial review of a final criminal decision by the Circuit Court, it is not just and convenient to require a challenge to the constitutionality or Convention compatibility of legislation to be brought in parallel by way of plenary summons. Such a split approach can only lead to procedural confusion. An applicant therefore has 3 months from the Circuit Court affirming a District Court conviction on appeal to bring judicial review of the Circuit Court decision, which may include or even if necessary comprise a constitutional or ECHR challenge, or to initiate that challenge by plenary proceedings before the Circuit Court decision becomes "final" in what I consider to be the A. sense, namely on the expiry of the period for judicial review.

(iii) In any other circumstances, where a person is charged with an offence where he or she alleges that statute creating the offence or some other statutory provision crucial to the prosecution is unconstitutional, or incompatible with the ECHR, he or she should initiate plenary proceedings challenging the validity of that legislation prior to the final conclusion of the criminal process including any appeals against conviction. However such challenge should not be actually listed for hearing until the criminal process including any appeal process is concluded, at which point the final factual matrix will be known and the challenge can be heard on the basis of the plaintiff's entitlements and standing in the light of concrete facts. The plenary process can be availed of in the earlier-mentioned cases also, where judicial review would be an alternative remedy.

18. I have framed these principles in the context of criminal proceedings as here, although in applying this approach to civil or administrative proceedings, regard must be had to the wider scope of the judicial review remedy in the course of such a process, as compared with criminal law.

19. In order to give an effective remedy, I think it is legitimate for such plenary proceedings to include a declaration that any conviction ultimately imposed is void and of no effect. Thus, if and when a particular piece of legislation is struck down, the only convicted persons who can potentially benefit from that decision are those who initiated constitutional actions prior to their convictions being final.

20. It would seem to follow from the decision in *A.* that such an approach should not be capable of being circumvented by post-conviction *habeas corpus*. However, post-conviction relief by way of *habeas corpus* would seem to be available if prior to the conclusion of the criminal process, the applicant had actually instituted the appropriate plenary proceedings. Article 40 would then be a speedier way of delivering a decision on that issue than the plenary proceedings. Admittedly this involves the Article 40 overtaking the plenary proceedings, but the flexibility of Article 40 is such that this option must exist for an applicant. Otherwise, the Article 40 would be dismissed because the person had failed to institute a (plenary) challenge before the conviction became *"final".* There can be no catch-22 for applicants; there must be a clear route for an applicant to be able to make such a point in the context of the criminal process.

21. Such an approach is consistent with the approach of Kearns P. in an *ex tempore* ruling in *Cunningham v. Ireland* (24th January 2014, not circulated), in which he adjourned a constitutional challenge to s. 9(4) of the Criminal Law Act 1997, brought by plenary summons during the course of the criminal process, until after the appeal by the plaintiff to the Court of Criminal Appeal had been heard and determined.

22. The approach relied on by the applicant in *East Donegal* should not be seen as laying down a general rule allowing any constitutional action by way of judicial review where there is any apprehended threat to rights. While the approach I have outlined above can be departed from where essential in the interests of justice, and while the approach I have set out could on one view involve a certain departure from some of the language or approaches in earlier caselaw, I am obliged to give effect to the most recent jurisprudence of the Supreme Court on these matters, particularly *Gilligan v. Special Criminal Court* and *A. v. Governor of Arbour Hill Prison.* The synthesis of legal principles which I have attempted above is an endeavour to reconcile the legal policies involved in a manner that can give practical guidance insofar as that can be attained in the present judgment and also keep a door open to applicants who must be allowed to make their challenge, but at an appropriate stage of the procedure.

23. Applying that approach to the present proceedings, the sole aim of the application is to have the statute condemned. There are no other grounds advanced for prohibition. There is no inevitability of unfairness to the applicant even if there is a possibility of unfairness. Therefore prohibition should normally be refused in such circumstances. There is no particular injustice to counter that position that would be caused to the applicant in having this challenge brought by plenary summons and heard after the finalisation of the criminal appeal (or if necessary brought as part of any judicial review challenge to an ultimate order of the Circuit Court). Leave should therefore be refused at this stage on that basis.

24. Separate and apart from all of the foregoing, the applicant must "*engage with the facts*" (*per* Hardiman J. in Scully v. D.P.P. [2005] 1 I.R. 242 at p. 252; *per* O'Donnell J. in *Byrne v. D.P.P.* [2011] 1 I.R. 346 at p. 352) to demonstrate the relevance of the particular constitutional or ECHR issue. In the present case, the applicant has failed to swear the grounding affidavit. His solicitor's affidavit is hearsay insofar as it might be taken to suggest that the *applicant,* as opposed to his solicitor, does not understand what the offence involves. This is a crucial issue. There is no averment by the applicant as to his state of intoxication if any, or his state of mind as to whether he believed himself not to be intoxicated, on the occasion in question. The prejudice he allegedly suffered by not being advised as to what the law means may be entirely theoretical. If for example the applicant was merely boisterous after a single glass of sherry, he might have a complaint that the offence was capable of an unduly nebulous interpretation. If the applicant had consumed sufficiently large quantities of alcohol, he is not prejudiced by any looseness in the definition because he comes within even the most favourable interpretation of the section. How much alcohol he had consumed, of what kind and over what period, the applicant has not seen fit to inform the court. It may be that his solicitor's professed inability to advise as to what the law means may be irrelevant in terms of the facts of the case, if such facts would, on any view, come within the ambit of the offence. The Garda statements which the applicant would have received by way of disclosure are not exhibited, which would have thrown light on the actual facts in the present case, which are somewhat obscured by the form of the present application. That is separate from the question of whether the applicant was obliged to make full disclosure of such information and material in an ex parte application. Fundamentally, the point raised is not one that he has demonstrated an entitlement to pursue by means of the present application.

25. For the foregoing reasons, I consider that the appropriate order in this case is to refuse leave to seek judicial review. In doing so, I should make clear that I am not deciding that the point is not arguable at the suit of an applicant who had standing to complain that he or she fell on the borderline of the offence. In this case, the applicant has not demonstrated such standing. Furthermore,

other, wider, considerations apply which render the grant of leave inappropriate. It is clear from the decisions I have mentioned and the overall criteria for grant of leave as set out in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374, that the court is not limited to a consideration of arguability and must consider a number of other issues, such as whether judicial review, at the point in time at which the application is made, is the most appropriate remedy. In this case it is not. I therefore refuse the application.