THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 649 J.R.]

BETWEEN

EUGENE CAFFERKY

APPLICANT

AND

JOHN KELLY

RESPONDENT

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18th day of March, 2016

1. At some point prior to October, 2004 (and perhaps some years before, according to a report in the Roscommon Champion exhibited by the applicant) a dispute arose between the applicant and a Ms. Margaret Creaton and her son as to the adequacy of, or possibly the removal of, a fence standing between their respective lands at Driney, Loughglynn, Co. Roscommon. Whether because of that dispute or not, the applicant then took objection to an intoxicating liquor licence at Creaton's Bar, Loughglynn, held by Ms. Creaton.

2. That licence was renewed by Judge Geoffrey Browne on 28th October, 2004 sitting at Ballaghaderreen District Court, despite objection from the applicant.

3. The renewal of the intoxicating liquor licence arose again on 28th September, 2006. On that occasion, the applicant appears to have launched an objection that inaccurate evidence had been given in the 2004 application. His objection was not upheld.

4. The 2006 renewal gave rise to an appeal to His Honour Judge Anthony Kennedy in the Circuit Court, which affirmed the renewal. Judge Kennedy's decision was then the subject of judicial review application in 2007 by the applicant. Leave was granted by the High Court (Peart J.) on the apparent basis that leave would be given to challenge the District Court order but not the Circuit Court order affirming it (on this aspect, Murray J. on appeal appears to have had a contrasting view as to which order was the appropriate one to challenge (*Cafferky v. Kennedy*, unreported, Supreme Court, *ex tempore*, 9th March, 2015, at para. 2)) and the proceedings were then defended by Ms. Creaton.

5. On 18th May, 2007, the respondent swore an affidavit in those proceedings to clarify that Ms. Creaton's evidence in 2004 was not, in fact, inaccurate.

6. The applicant's 2007 judicial review proceedings were dismissed by the High Court (MacMenamin J.) on 30th October, 2008, and Supreme Court (Murray J. for the court) on 9th March, 2015.

7. Following the failure of his Supreme Court appeal, the applicant continued to assert dissatisfaction with the correctness of the affidavit sworn by the respondent in the 2007 proceedings. This dissatisfaction gave rise to an application to Judge Kevin Kilraine made at Carrick-on-Shannon District Court on the 17th November, 2015 to issue a summons in relation to proposed criminal proceedings which the applicant sought to institute as a common informer against the respondent alleging that the affidavit of 18th May, 2007 was inaccurate.

8. The applicant says that having sought to make this application, he was led to the judge's chambers on 17th November 2015, was handed a bible, and was asked to take an oath in chambers prior to being questioned by Judge Kilraine. His application was then refused.

9. The applicant now seeks an order of *certiorari* quashing the order of Judge Kilraine. A formal order to this effect is not exhibited because it does not appear to have been drawn up. The applicant has exhibited an email sent to the District Court in Carrick-on-Shannon seeking a copy of the order and has averred that he has not received a reply.

10. It will be seen that the present application is a classic instance of "satellite litigation", and exists solely as a spin-off from an earlier case.

11. Mr. Kelly has averred that the complaint placed before Judge Kilraine is "*entirely without foundation"* and "*bound to fail*" (affidavit of 18th January, 2016, para. 16).

12. He also says that the applicant is a "*serial litigant*" (para. 13) with six sets of proceedings before the Court of Appeal at present relating one way or another to Ms. Creaton's licensed premises, and that in each case the appeals relate to the dismissal of his actions by the High Court.

13. The present application is advanced on two grounds, which appear from the applicant's amended statement of grounds dated the 4th December, 2015; a complaint that there was a refusal to sign the summons, and a complaint that the application for the issue of the summons was not dealt with in "*open court*".

14. The applicant at first mistakenly sought to name Judge Browne (rather than Judge Kilraine) as a respondent, but in accordance with rules of court, I directed that the proceedings be amended to refer instead to the other party to the proceedings, being Mr. Kelly, as respondent. It is clear from the latter's affidavit that he did not propose to get involved in the case to the extent of becoming liable to costs, and submitted an affidavit *"for the sole and exclusive purpose of assisting the court"* (para. 3). Mr. Desmond Dockery, B.L., on behalf of the respondent, expressly confirmed that, if leave was granted, he did not propose to oppose the application for substantive relief. In those circumstances, I directed that Ireland and the Attorney General be made notice parties in order to have a *legitimus contradictor*. Subsequently, Mr. Anthony McBride, B.L. appeared for the notice parties, and indicated that the State would not be opposing the application either and had no difficulty with treating the leave application on a telescoped basis. Mr. Dockery had by that stage excused himself from further appearance in the matter, which necessarily involves consent to the court dealing with it in his absence. Of course, the fact that other parties are not opposing a leave application does not mean that the applicant is automatically entitled to relief; he or she must still satisfy the court (see *Kavanagh v. Healy* [2015] IESC 37 *per* Clarke J. (MacMenamin and Laffoy JJ. concurring) at para 3.10).

15. But in such circumstances no purpose would be served by a full hearing at some later stage in the absence of opposition and accordingly pursuant to O. 84, r. 24(2) I indicated that I would therefore treat the leave application as the substantive hearing.

16. The complaint that the applicant's right to prosecute the respondent as a common informer has been denied essentially goes to the merits of the decision, rather than its legality, and is therefore not a proper matter for judicial review.

17. As regards the complaint that the application for the issue of the summons should have been dealt with in public, it is clear that the procedure engaged by the applicant, an application for the issue of a summons in the applicant's capacity as a private prosecutor, involved the exercise of a judicial rather than an administrative function: *Kelly v. Ryan* [2015] IESC 69 per Clarke J. (Denham C.J., Hardiman, O'Donnell and Dunne JJ. concurring) at para. 4.2. That function should therefore, in principle, have been carried out in public, in the absence of a statutory provision to the contrary being invoked by the court, or arising by operation of law. No such provision has been drawn to my attention.

18. On that basis, and given the importance of the constitutional principle of administration of justice in public, I will grant the relief sought by the applicant and remit the matter to Judge Kilraine with a direction to re-hear the application for the issue of the summons in accordance with this judgment. I am by no means to be taken as rejecting the points made by the respondent, and it may well be that the application is indeed bound to fail on its merits, but that is not a matter that arises in the present application. No matter how lacking in merit a particular application may be, insofar as it involves the exercise of the judicial function, it should be dealt with in public in the absence of legal provision to the contrary.

19. I might respectfully say in passing that, leaving aside the just-mentioned point, the approach taken by the learned judge, by hearing the application in chambers, would appear to have been motivated by very practical considerations, in that, at one level, it is undesirable for unproven allegations of breach of the criminal law to be canvassed by the side-wind of an application for a summons at the suit of a person aggrieved by the outcome of previous litigation. Despite acknowledging the very legitimate concerns which perhaps motivated the learned judge in this regard, I conclude that courts must find some other way to curtail any improper impact of allegations that are considered unfounded, scandalous and embarrassing; such as by making such lack of merit clear in any ruling made on the application. The one technique that does not seem to be available, unless a statutory exception such as s. 45 of the Courts (Supplemental Provisions) Act 1961 can be brought into play, is to hear the application otherwise than in public.

20. For the foregoing reasons, and despite a number of countervailing considerations which I have by no means overlooked and which may well be matters that the District Court may have regard to (including the long delay, well beyond any summary limitation period, in making his complaint, the lack of any satisfactory evidence going to the merits of the allegation of inaccuracy, combined with the fact that the alleged inaccuracy in the evidence is fully and by no means implausibly denied, the considerable amount of scandalous material submitted by the applicant, the fact that the applicant's grievances with Ms. Creaton seem to be anything up to a decade and a half old, the fact that the present application is satellite litigation arising from his dissatisfaction with having lost previous proceedings, the possibility, to put it no stronger, of a vexatious element to his grievances in this regard, and the fact that his complaint as to what was said in Ballaghaderreen District Court on 28th October, 2004 has already been before the District, Circuit, High and Supreme Courts culminating in the first judicial review, and before the District and High Courts in the second) but which, having regard to the importance of the doing of justice in public, I consider in the circumstances do not outweigh his entitlement to have this point determined, I will order as follows:

> (i). that pursuant to O. 84, r. 27(2) of the Rules of the Superior Courts 1986, the District Court Clerk for Carrick-on-Shannon District Court be required to prepare or produce a record of the order of Judge Kevin Kilraine made on 17th November, 2015 refusing the applicant's application for the issue of a summons against the respondent;
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> (ii). that an order of *certiorari* issue removing the said order for the purpose of being quashed; and
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> (iii). that the said application be remitted to Judge Kilraine pursuant to O. 84, r. 27(4) for the purpose of considering it afresh in accordance with the judgment of this court.