

THE HIGH COURT

[2016 No. 15 I.A.]

IN THE MATTER OF THE CIVIL LAW (MISCELLANEOUS PROVISIONS) ACT 2008 AND IN THE MATTER OF AN INTENDED ACTION

BETWEEN

MS. Y.

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE, IRISH FAMILY PLANNING ASSOCIATION, SPIRITAN ASYLUM SERVICES INITIATIVE LIMITED
TRADING AS SPIRASI, ADEEN HENRY, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

DEFENDANTS

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

1. The plaintiff in the above intended proceedings is applying to the court pursuant to the provisions of s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008, in effect, permitting the plaintiff to proceed and maintain the proceedings under the pseudo name, "Ms. Y." and to disclose her residence as "Dublin".

2. Following the decision of McCracken J. in *Ansbacher (Cayman) Limited* [2002] 2 I.R. 517, the appropriate solution to any party wishing to preserve their anonymity under the 2008 Act or otherwise is, without revealing their identity to apply for court permission to maintain proceedings anonymously. I note this procedure was expressly agreed to by Clarke J. in *B. Doe and R. Doe* [2008] IEHC 5 and this is the procedure correctly followed by the plaintiff in this application.

3. In the intended proceedings, the plaintiff intends to claim damages for negligence, breach of duty, trespass, assault and battery, the alleged reckless and intentional infliction of emotional harm and suffering, false imprisonment, unlawful deprivation of liberty, unjustified intentional negligent infringement of and wrongful interference with or failure to vindicate the plaintiff's constitutional rights and rights pursuant to the European Convention of Human Rights and ancillary declarations against the defendants for alleged failing to vindicate the plaintiff's constitutional or other rights.

4. In the grounding affidavits to this application, the plaintiff's solicitor averred that the plaintiff came to this jurisdiction in March 2014, as a result of alleged kidnapping and being assaulted and raped in her country of origin that when in Ireland she discovered herself pregnant and alleges that she became suicidal and sought a termination of pregnancy and that medical procedures were performed under s. 9 of Protection of Life During Pregnancy Act 2013, and resulted in the safe delivery of a child. In August 2014, the plaintiff was granted refugee status.

5. The plaintiff brought previous judicial review proceedings against the State and was granted an order under s. 27(1) of the Civil Law (Miscellaneous Provisions) Act 2008, for those proceedings, similar to that order now sought.

6. The plaintiff has relied on a number of medical legal reports by Prof. O'Keane who is now the plaintiff's treating psychiatrist. The plaintiff has been found to be isolated (partly of her own volition as she did not want to be identified in her own community and identifying herself as "Ms. Y." would prevent her from being assimilated).

7. She was also found to be depressed and traumatised and was a risk of suicide and this had diminished following the birth of her child.

8. Initially an application was made to this Court, based upon an affidavit and exhibits of the plaintiff's solicitor and at the hearing of that application I advised that further affidavit and reports would be necessary to establish whether the intended plaintiff had satisfied the requirements of s. 27 of the 2008 Act. In her report of 25th February, 2016, Prof. O'Keane states that the plaintiff remains extremely vulnerable and sad, she is currently on antidepressant medication. Prof. O'Keane stated:-

"In order to try as much as possible to move forward, put the overwhelming traumata that she has experienced behind her, it is of extreme importance that her personal identity is not revealed.

She is a very private person and only reluctantly talks to me about her traumata. She has consistently requested that her identity not be revealed. I note this is a significant source of anxiety to her.

I think revealing her identity would cause not just undue stress but irreparable damage to the delicate process of her recovery."

9. Counsel for the plaintiff advised that none of the intended defendants had objection and were not opposing the application but that counsel for the Attorney General and the Minister, wished to make a particular submission.

10. Counsel for the Attorney General submitted that it was a matter for the court to determine whether the plaintiff had satisfied the provisions of s. 27 of the 2008 Act but that in addition to that Act, she wished to bring to my attention the provisions of s. 19 of the Refugee Act 1996, which, in effect, strengthened the plaintiff's application.

The Law

11. A number of provisions in the Constitution and in statute need to be considered before I consider the case law and whether the plaintiff's application should be granted.

A. The Constitution

12. Article 34.1 of Bunreacht na hÉireann provides:-

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

13. Section 27 of the Civil Law (Miscellaneous Provisions) Act 2008, provides:-

"(1) Where in any civil proceedings (including such proceedings on appeal) a relevant person has a medical condition, an application may be made to the court in which the proceedings have been brought by any party to the proceedings for an order under this section prohibiting the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify the relevant person as a person having that condition.

(2) An application for an order under this section may be made at any stage of the proceedings.

(3) The court shall grant an order under this section only if it is satisfied that—

(a) the relevant person concerned has a medical condition,

(b) his or her identification as a person with that condition would be likely to cause undue stress to him or her, and

(c) the order would not be prejudicial to the interests of justice.

..."

14. Section 19 of the Refugee Act 1996, states as follows:-

"(1) The Commissioner, the Appeal Board, the Minister, the Minister for Foreign Affairs and their respective officers shall take all practicable steps to ensure that the identity of applicants is kept confidential.

(2) Subject to sections 9 (15) and 26, no matter likely to lead members of the public to identify a person as an applicant under this Act shall be published in a written publication available to the public or be broadcast without the consent of that person and the consent of the Minister (which shall not be unreasonably withheld).

..."

15. I am advised that the sections referred to at (2) above are not of relevance to this case.

16. The courts have interpreted the obligation for justice to be carried on in public to include the obligation that the names of litigants be given even where the publication of the names may well negate the purpose of the action itself. Laffoy J. in *Roe v. Blood Transfusion Service Board* [1996] 3 I.R. 67 at 71, stated:-

"The plaintiffs stated objective in seeking to prosecute these proceedings under a fictitious name is to keep her identity out of the public domain. In my view, in the context of the underlying rationale of Article 34.1, the public disclosure of the true identities of parties to civil litigation is essential if justice is to be administered in public. In a situation in which the true identity of a plaintiff in a civil action is known to the parties to the action and to the court but is concealed from the public, members of the general public cannot see for themselves that justice is done."

17. In the *Irish Times v. Ireland* [1998] 1 I.R. 359, which was a case concerning a reporting restriction imposed in respect of a then pending Circuit Court criminal trial, Hamilton J. stated at p. 383:-

"The effect of such an order in this case was to deprive the wider public, who did not have access to the court in which the proceedings were being conducted, of knowledge of the proceedings. Knowledge of the proceedings was limited to those inhabitants of the State who were able to be present in the courtroom in which the trial was being conducted.

As justice is required to be administered in public on behalf of all the inhabitants of the State, such inhabitants are entitled to be informed of the proceedings in the court and to be given a fair and accurate account of such proceedings and the media are entitled to give such an account to the wider public.

The public nature of the administration of justice and the right of the wider public to be informed by the media of what is taking place are matters of the greatest importance."

18. Clarke J. considered the effect of the *Irish Times* case in *Independent Newspapers (Ireland) Limited v. Anderson* [2006] 3 I.R. 341 at 247 and concluded:-

"...it would appear that orders restricting the reporting of proceedings in court can only be made where:-

1. there is an express legislative provision to that effect; and

2. in the event that the relevant legislative provision contains a discretion, the court is satisfied that to have the case heard in public would fall short of doing justice; or

3. in the event that there is no express legislative provision the court is satisfied that

(a) there is a real risk of an unfair trial if the order is not made; and

(b) the damage which would result from not making an order would not be capable of being remedied by the trial judge either by appropriate directions to the jury or otherwise."

19. Furthermore, in *In Re R. Limited* [1989] I.R. 126, Walsh J. stated at p. 126:-

"The issue before this Court touches a fundamental principle of the administration of justice... The actual presence of the public is never necessary but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the courts are open should themselves have any particular interest in the cases or that they should have had any business in the courts. Justice is administered in public on behalf of all the inhabitants of the State."

20. It is clear, therefore, that the requirement for justice to be administered in public in courts is a clear constitutional one which applies save in limited cases as may be prescribed by law. Prior to the decision of the Supreme Court in the *Irish Times v. Ireland* (above), it was generally regarded that there would be no circumstances other than those specifically prescribed by statute in which justice might be administered otherwise than in public.

21. The above authorities were also cited with approval by Clarke J. in the matter of an intended action in *B. Doe & R. Doe v. Revenue Commissioners* (above).

22. These authorities were, of course, prior to the enactment of the 2008 Act, but indicate that the expression that justice must be done in public includes, save in rare cases as prescribed by statute or law, the disclosure of the names of the parties. I was not advised of the evidence before my colleague in the judicial review proceedings when he made an order similar to that requested in these proceedings. Neither should knowledge of the identity of the plaintiff be regarded as being, in any way, required merely for the satisfaction of public prurience as was submitted on behalf of the plaintiff. Rather it is, as the authorities make clear a constitutional requirement.

The 2008 Act

23. I do not place much weight behind counsel's submission that I should distinguish this application from an application to hear the case *in camera*.

24. The provisions of the 2008 Act have been considered in a number of judgments referred to me by Mr. Keane on behalf of the intended applicant.

25. In the matter of Article 40.4.2 of the Constitution between *X.Y. v. Clinical Director of St. Patrick's University Hospital* [2012] IEHC 224, Hogan J. stated:-

"17. Of course, it must here be acknowledged that this application presents questions of medical confidentiality and the protection of constitutional rights such as marital privacy and the autonomy of the family. The protection of the identity of the applicant would also serve an important constitutional value reflected in the Preamble to the Constitution, namely, the assurance of the dignity of the individual. It is, however, possible to balance these competing constitutional values in a proportionate way by making an order pursuant to the provisions of s. 27(1) of the Civil Law (Miscellaneous Provisions) Act 2008 ('the Act of 2008') which simply restricted the media from publishing the identity of the applicant or anything that would or might tend to identify her while otherwise continuing the hearing in open court. While I appreciate that I am required by s. 27 to be satisfied that the person in question has a medical condition, the disclosure of which might cause embarrassment to that person, I am also conscious that Ms. Y. maintains that she is perfectly sane and that her detention is manifestly illegal.

18. Of course, if I were to interpret s. 27 of the Act of 2008 absolutely literally, it would mean that I would have to consider and adjudicate upon the merits of the competing arguments regarding Ms. Y's mental state. Yet I rather think that I can read this section - designed as it was to protect important values such as medical confidentiality, privacy and personal dignity - more liberally so as to include the case of a person presently in involuntary detention for psychiatric treatment who is considered to be mentally unwell by her treating physicians, even if she herself stoutly maintains the contrary. Naturally, this conclusion is in no sense designed to adjudicate on the competing merits of the arguments regarding Ms. Y's present mental state.

19. It was for those reasons that I determined that the application should be heard in open court, while protecting important values such as medical confidentiality, family privacy and personal dignity by means of the making of an order under s. 27 of the 2008 Act which restricted the publication of personal details which might identify the applicant."

26. Hogan J. also in the case of in the matter of *Baby A.B. in Children's University Hospital Temple Street v. C.D. & Anor* [2011] IEHC 1, referred to the provision of the s. 27(3) and stated:-

"21. As we have seen, s. 27(3) provides that the relevant person must have the medical condition and that 'his or her identification as a person with that condition would be likely to cause undue stress to him or her'. In the present case, if one views s. 27(3) literally, then the only relevant person for present purposes is Baby AB. It is true that his parents are 'relevant persons' within the meaning of s. 27(11) insofar as they were potential witnesses, but, of course, they did not have the medical condition which would justify the making of the order. And while Baby AB did have the relevant medical condition, given that his very young age he naturally did not have any consciousness or capacity in relation to the proceedings. He thus remained mercifully oblivious to the unfolding medical emergency. Again, viewed literally, it could not be said that even if Baby AB's identity were to be revealed, this would cause 'undue stress' to him within the meaning of s. 27(3)(b), precisely because he could not have had any consciousness of this fact.

22. If this is correct, then it would mean that the court would be powerless to make an order under s. 27 of the 2008 Act where - as here - the subject-matter of the application was a baby or a very young child, even though the identification of the child might cause immense distress to the parents or other close relatives. It would likewise mean that no order could be made under s. 27 where the proceedings concerned a patient who was unconscious or in a coma. I find it difficult to believe that the Oireachtas intended to create such an anomalous state of affairs.

*23. It is clear that the literal rule remains the primary rule of interpretation: see, e.g., But given that s. 27 is essentially a remedial provision designed to complement the traditional concepts of medical confidentiality in a legal setting, it can be interpreted 'as widely and liberally as can fairly be done': see *Bank of Ireland v. Purcell* [1989] I.R. 327 at 333, per Walsh J."*

27. Hogan J. then went on to invoke the provisions of the s. 5(1)(b) of the Interpretation Act 2005, stating that the literal interpretation would fail to reflect the plain intention of the Oireachtas.

28. In *D.F. v. Garda Commissioner & Ors* (No. 2) [2013] IEHC 312, Hogan J. again referred to s. 27 as be:-

"14. ...designed to permit those litigants suffering from a medical condition to be shielded from the gaze of publicity under certain circumstances, the literal wording of the section suggests that protection is available only to those litigants (or, as the case may be, witnesses) who would actually be conscious that the revelation of the existence of the medical condition might cause them undue stress.

15. This was highlighted by the facts of D. itself. Here the question was whether the parents of a very young child who was gravely ill were justified in refusing a hospital permission to administer a blood transfusion on religious grounds. If the language of the section were applied strictly, then it would have followed that this case fell outside its parameters, because, of course, the child itself could have had no consciousness or awareness of any publicity surrounding the litigation."

29. Hogan J. then referred to his judgment in the D. case (above) and concluded:

"18. I respectfully adhere to the views. It follows that, while I accept that the plaintiff will have almost no consciousness of the potential impact of the litigation, that is not the real point. The whole object of the section was that the Oireachtas sought to protect vulnerable litigants suffering from a medical condition such as the plaintiff so that they would not become the object of public attention simply because of the fact that they happened to be engaged in litigation. In these circumstances, in line with my earlier reasoning in D., I would hold that the present plaintiff comes within the ambit of section 27."

30. With the greatest of respect to Hogan J. in the above decisions, I am not entirely convinced that a liberal approach is necessarily correct. Where a decision maker seeks to rely on the supposed purposes of an enactment frequently more is learnt at the State of digestion of the decision maker rather than the reality of the statute itself. The purpose of the 2008 Act is to provide a statutory exception allowed by Article 34.1 which, of itself, only permits such exceptions to be in "*special and limited cases*". If a liberal interpretation is accepted then it seems to me that there is scarcely any case in which an application could not be made supported by, in particular, psychiatric or psychological evidence that says a plaintiff would be distressed by his or her identity being revealed and, therefore, should be allowed to proceed anonymously. I fear that such an interpretation would be counter to the express requirements of Article 34.1. Certainly, a liberal interpretation would, in all likelihood, produce an "*alphabet soup*" citation of cases in very many personal injury cases. This approach is, of course, required in asylum proceedings due to our obligation as a State but I believe even absent the requirements under Article 34.1 such an approach ought not to be encouraged.

Have the requirements of the 2008 Act been satisfied?

31. I am satisfied and it is clear that Ms. Y. has a medical condition and accordingly, that the requirements of s. 27(3)(a) have been satisfied.

32. I am also satisfied that an order made in the circumstances would not be prejudicial to the interests of justice. I accept the submissions by Mr. Keane on behalf of the intended plaintiff in this regard. The fact that no opposition to this application has been made is of some relevance to section 27(3)(c). The ultimate decision is for the court and my decision in relation to s. 27(3)(c) is independent of any decision as the proper and constitutional interpretation of section 27.

33. What I am less confident in, however, is whether the plaintiff has satisfied the requirements of s. 27(3)(b); "*his or her identification as a person with that condition* (emphasis added) *would be likely to cause undue stress to him or her*".

34. The medical evidence is that the plaintiff's fear is to be identified as the person who was raped and made pregnant in her country of origin, fled to this country and obtained refugee status and sought a termination of her pregnancy. Her medical condition is trauma, distress and depression, but it is not clear that it is the identification of her with that condition would be the cause of "*undue stress*" to her. Rather, I believe it is the identification of the plaintiff as someone with the history she has, that would cause her stress. I do not view the distinction as being in any way small or trifling. I fully accept that if the plaintiff were identified, the identification would indeed cause undue stress to her but I am not happy that there is evidence to support the contention that she would thereby necessarily qualify under section 27(3)(b).

35. I reiterate that to come to a conclusion based upon my analysis would be to adopt the literal interpretation which was criticised so eloquently by Hogan J. in the cited authorities and I would be naturally loath to do so. The requirements of judicial deference and adherence to the principles of *stare decises* are real and, indeed, compelling.

36. Happily, however, I do not have to, and do not adjudicate on the proper interpretation of s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008, given the provisions of the Refugee Act 1996.

37. The plaintiff is a person who has sought asylum from the State. She has applied for asylum and indeed been granted it. There is an obligation upon the State under s. 19(1) of the 1996 to take all practical steps to ensure that the identity of the applicant was kept confidential and in particular, under s. 19(2) there is an absolute prohibition on the publication of any matter "*likely to lead members of the public to identify the person as an applicant under this Act*" (subject to certain non-relevant exceptions).

38. Ms. Butler on behalf of the Minister and the Attorney General submits that this prohibition might be breached by publication of the plaintiff's name. I have no doubt that the publication of the plaintiff's name would, indeed, result in a breach of the 1996 Act. It would be impossible as a matter of practice to disentangle the plaintiff's claims from the fact that she was a successful asylum applicant and the fact of her identity as an asylum seeker would inevitably be revealed during the prosecution of these proceedings if she was compelled to use her correct name.

39. Whereas the prohibition on publication under the Refugee Act 1996, are applicable in relation to all applicants under that Act, these prohibitions are required by our obligations under the Asylum Code and are reasonable and proportionate.

40. Accordingly, given the provisions of s. 19 of the Refugee Act 1996, I believe that the plaintiff's application should be granted and an order made, not under the Civil Law (Miscellaneous Provisions) Act 2008, but under the Refugee Act 1996, prohibiting the publication or broadcast of any matter relating to the proceedings which would, or would be likely to identify the plaintiff and allowing the proceedings to proceed under the title "*Ms. Y.*".

41. I make no determination on whether the application would succeed were it not for the provisions of the Refugee Act 1996.

42. Accordingly, I will make the order pursuant to the provisions of s. 19 of the Refugee Act 1996, prohibiting the publication or broadcast of any matter relating to the proceedings herein which would or be likely to identify the plaintiff and for an order permitting the above named intended plaintiff to proceed with and maintain these proceedings under the pseudo name "Ms. Y." and to disclose her residence as "*Dublin*".