Neutral Citation Number: [2010] IEHC 449

THE HIGH COURT

JUDICIAL REVIEW

2009 1070 JR

BETWEEN

JOHN BURKE

APPLICANT

AND

DISTRICT JUDGE HAMILL AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Ms. Justice Irvine delivered on the 23rd day of November, 2010

1. The applicant in the within proceedings is a farmer who resides at Duncumin House, Emly, Co. Tipperary.

2. By order of the High Court made on 22nd October, 2009, the applicant was granted leave to apply for judicial review in respect of an order made by the first named respondent ("the District Judge") on 2nd October, 2009. On that date, the applicant was convicted by the District Judge and fined in respect of four animal welfare offences prosecuted by the Minister for Agriculture, Fisheries and Food. He was also convicted and sentenced to one month's imprisonment for a criminal damage offence prosecuted by the second named respondent.

3. Peart J. granted the applicant leave to apply for judicial review on three grounds which are set out in his order. These may be summarized as follows:-

> (i) That the District Judge should not have heard the cases as his colleague Judge Mary Martin had seizen of them.
>
> (ii) That the summonses should have been postponed until after the determination in the High Court of other proceedings brought by the applicant (*inter alia*) challenging the constitutionality of the statutory provisions forming the basis of the summonses.
>
> (iii) That the District Judge acted *ultra vires* in directing that he receive psychiatric treatment in his order and that consequently the convictions should be quashed.

4. The application for judicial review is supported by an affidavit of the applicant dated 19th October, 2009. The second named respondent delivered a statement of opposition on 27th January, 2010. In addition, two affidavits have been delivered in support of the respondent's defence of these proceedings namely the affidavit of Inspector Paul O'Driscoll sworn on 26th January, 2010, and the affidavit of Paul Fitzpatrick, State Solicitor for Tipperary sworn on 18th January, 2010.

The Applicant's Submissions

5. The applicant maintains that the District Judge should not have heard the five cases which were determined by him on 2nd October, 2009. He maintains that on 5th August, 2009, he received correspondence from the County Registrar informing him that the cases had been listed for hearing before Judge Mary Martin. He maintains that Judge Martin had considered a large amount of documentation in relation to these cases on 3rd June, 2009 and that accordingly she had seizen of them. He maintains that the District Judge therefore acted without jurisdiction.

6. The applicant's second complaint is that the proceedings before the District Judge should have not have been embarked upon until after the final determination of certain High Court proceedings commenced by the applicant wherein he has sought, *inter alia*, to impugn the constitutionality of the statutory provisions pursuant to which four of the cases against him had been brought.

7. The applicant's third complaint is that the District Judge acted *ultra vires* in that in imposing a one month's prison sentence upon him in respect of his conviction on the charge of causing criminal damage, he is also alleged to have directed that the applicant receive psychiatric treatment without first of all directing a psychiatric assessment to determine if that treatment was required. Further, the applicant maintains that he was not afforded natural justice and fair procedures in circumstances where he had previously undergone psychological assessment at the direction of District Judge Malone and that Consultant Psychologist, Brian V. O'Keeffe had reported that he had no psychiatric condition. This report could have been brought to the court's attention had the applicant been allowed make submissions in this regard.

The Respondent's Submissions

8. The second named respondent submits that the applicant has produced no evidence to support his contention that Judge Martin had seizen of the relevant cases. He submits that Judge Martin's involvement in these cases was confined to dealing with procedural matters such as the fixing of dates or the hearing of an application made by the applicant to set aside dates which she had fixed for the hearing of the summonses. Counsel submitted that the hearing before Judge Martin on 3rd June wherein Judge Martin considered documents submitted by the applicant in support of his application to vacate dates already fixed by Judge Martin for the hearing of these summonses was purely procedural and not such as to afford the applicant any grounds to contend she had seizen of the cases. He further relied upon the decision of Edwards J. in *Burke v. Judge Mary Martin and Director of Public Prosecutions* [2009] IEHC 441 wherein the applicant unsuccessfully argued that Judge Anderson had seizen of these very same cases.

9. The second named respondent maintains that the District Judge enjoyed full jurisdiction to entertain and determine the relevant

proceedings as the applicant had not obtained an order in the High Court or the Supreme Court staying the proceedings until after the determination of his proceedings in the High Court wherein he seeks to challenge the constitutionality of the underlying statutory provisions. Further, two other sets of judicial review proceedings issued by the applicant seeking to derail the prosecutions pending before the District Judge were unsuccessful at the "leave" stage. Both decisions were appealed to the Supreme Court. A stay on the further prosecution of the proceedings pending before this Court was sought in the appeal brought by the applicant in proceedings entitled *Burke v. Minister for Agriculture & Ors* [2008] 966 J.R. which stay was refused. In the other proceedings namely, *Burke v. Martin & Director of Public Prosecutions* [2009] 933 J.R., no stay was applied for. Accordingly, the District Judge acted within jurisdiction in entertaining the proceedings.

10. The second named respondent maintains that as a matter of fact, the District Judge when sentencing the applicant in respect of the charge of criminal damage did not direct that he received psychiatric treatment but rather in his order expressed a benevolent sentiment that he receive a psychiatric assessment whilst in prison. In respect of the two slightly differing copies of the District Court order of 2nd October, 2009, the second named respondent maintains that the court should conclude that the copy order signed by the presiding judge is more likely to reflect his true order and that order refers to psychiatric assessment rather than psychiatric treatment. The second named respondent submits that if the court accepts that the order made by the District Judge was in the terms contained in the order relied upon by the applicant being the one which refers to psychiatric treatment rather than psychiatric assessment, that such a direction would be *ultra vires* the District Judge. However, it is submitted that this direction can be severed and should not contaminate the rest of the order such as to justify an order of *certiorari.*

The Court's Assessment
11. I reject the submission that Judge Martin had seizen of these cases. The background to these summonses is that on 6th May, 2009, Judge Mary Martin fixed 30th September, 1st October and 2nd October for the hearing of approximately 121 summonses concerning the applicant including the five the subject matter of these proceedings. She then listed the cases for mention on 3rd June, 2009 to allow the applicant to demonstrate to her why the cases should not be dealt with on 30th September, 2009, due to the existence of proceedings pending before the High Court. Judge Martin, having considered the documents furnished by the applicant concluded there was no reason why the cases should not proceed on the allocated date. That was an administrative ruling and did not involve making any determination in any of the 121 summonses.

12. The status of the hearing which took place on 3rd June has already been dealt with by my colleague Edwards J. in his decision in *Burke v. Judge Mary Martin and Director of Public Prosecutions* [2009] 933 J.R. In that case, the applicant contended that Judge Anderson had seizen of all of the 121 proceedings due to the fact that he had heard one witness in relation to the one charge of criminal damage. That was a submission entirely inconsistent with the submission made in these proceedings and is one which casts in doubt the *bona fides* of the argument now made that Judge Martin had seizen of these cases principally because of what occurred on 3rd June, 2009. Edwards J. dealt with what occurred before Judge Martin on 3rd June, 2009 as follows:-

> "Although it is not dealt with in either of the applicant's affidavits, there is an allegation in the applicant's statement of grounds that the first named respondent [Judge Martin] ought not to have dealt in any way with the applicant's cases on 3rd June, 2009 because another judge [Judge Anderson] had seizen of those cases… even if so much evidence had been heard as to effectively create an obligation on Judge Anderson to resume the substantive trial at a later date, there was nothing to stop the first named respondent in this matter from dealing with procedural aspects of the case in the meantime, such as the fixing of a date or dates for the resumed trial. In the circumstances I am not satisfied that there is any substance to the applicant's complaints."

13. I am satisfied that the District Judge in the present cases had jurisdiction to hear each of the cases which were listed *de novo* before him and which were concluded on 2nd October, 2009. That decision was entirely independent of what occurred on 3rd June, 2009, when the presiding judge Mary Martin engaged upon what can only be described as a procedural hearing by the applicant for an adjournment which he lawfully refused. Further, even if the applicant received a letter from the District Court thereafter indicating that Judge Martin was scheduled to hear the cases commencing on 30th September, 2009 such notification gives the applicant no ground for contending that Judge Hamill was not entitled to hear the cases on that date. Accordingly, I reject the applicant's assertion that the District Judge acted without jurisdiction or that the applicant as a result of what occurred on 3rd June, 2009, did not receive a fair hearing.

14. I reject the applicant's second submission which is that the District Judge should not have embarked upon the hearing of the summonses listed before him until after the High Court had determined his challenge to the constitutionality of the statutory provisions pursuant to which he is prosecuted under the said summonses. Indeed, the copy plenary summonses handed in to me, whilst it claims multitudinous reliefs, it is not at all clear that the proceedings challenge the constitutionality of any of the statutory provisions referred to in the relevant summonses. However, even if those proceedings do incorporate such a claim, those statutes nonetheless enjoy the presumption of constitutionality unless and until the High Court makes an order striking down the legislation.

15. In the proceedings instituted by the applicant before the High Court he has not obtained any relief by way of injunction or any order staying any proceedings against him in the District Court pending the determination of his challenge. Accordingly, there is no order precluding the lower court from dealing with any cases involving the impugned legislation. If the court were to take the view that a party who seeks to challenge the constitutionality of legislation is automatically entitled to have a stay on any proceedings instituted against them under that legislation pending the outcome of the proceedings such a ruling would be likely to lead to chaos and would be open to substantial abuse.

16. Prior to the present proceedings coming before the District Judge, the applicant had already applied to the High Court on two occasions for leave to seek relief which would have had the effect of staying the further prosecution of the proceedings heard by Judge Hamill. He was unsuccessful in both applications and no order staying the present proceedings was granted in either of those actions. Accordingly, the court rejects the applicant's second complaint.

17. The applicant's third complaint is that the sentence of one month's imprisonment imposed upon him on 2nd October, 2009 is unlawful and *ultra vires* in that the District Judge directed that the applicant receive psychiatric treatment. Two copy orders have been put before the court. The first order signed by Judge Hamill is that exhibited in the affidavit of Mr. Paul Fitzpatrick. It is signed by the Clerk of the District Court and dated by him on 2nd December, 2009. That order which is expressed to be a true copy of the original, immediately after setting out the sentence imposed upon the applicant states:-

> "And further judge recommends that the defendant receives psychiatric treatment."

That order is signed by the District Judge himself.

18. A second order has been produced to the court by the applicant. That copy order is dated 10th November, 2009, and is signed by Judge Mary Martin and dated by her dated 9th November, 2009. On that copy order there is a note which reads "orders psychiatric treatment while in prison – G.L.".

19. The aforementioned note referring to psychiatric treatment does not appear in the same place as the note on the other order and appears below the signature of both Judge Martin and that of Geraldine Lynch, the District Court Clerk. In other words, it is not, so to speak, attached to that part of the order which sets out the sentence imposed.

20. Even though I take the view that it is more likely than not that the order which is signed by the presiding judge reflects the order made by him on 2nd October, 2009, I have decided that I should in any event deal with the consequences for the applicant depending upon which order represents the pronouncement of the District Judge on 2nd October, 2009.

21. If it be the case that having imposed sentence, the District Judge recommended that the applicant be assessed from a psychiatric prospective whilst serving his prison sentence that expression of what appears to a benevolent suggestion does not render the penalty imposed *ultra vires*.

22. If the court was to prefer the alternative orders signed by Judge Mary Martin as reflecting the true order pronounced by the presiding judge, I am nonetheless satisfied that that part of the order does not form any part of the sentence and therefore is severable from the penalty of one month's imprisonment imposed. Accordingly, I have concluded the District Judge did not act *ultra vires* even if it be the case that the order pronounced by him on 2nd October is in accordance with the order which was signed by the District Court Clerk on 10th November, 2009.

23. Counsel for the second named respondent has accepted that a judge of the District Court has no jurisdiction to direct that a convicted defendant receive psychiatric treatment where he does not direct a psychiatric assessment to determine if such treatment is required. Accordingly, and for the sake of clarity only, the court will make a declaration in the following terms namely:-

> (i) That a judge of the District Court whilst dealing with an alleged offence of criminal damage contrary to s. 2(1) of the Criminal Damage Act 1991, has no jurisdiction to direct that the convicted defendant receive psychiatric treatment without first directing a psychiatric examination to establish whether or not such treatment is required.

24. I make the aforementioned declaration in the absence of concluding that the District Judge when pronouncing sentence on 2nd October, 2009, directed that the applicant receive psychiatric treatment. In this regard, the court notes that the applicant was imprisoned for one day and whilst so imprisoned did not receive any such treatment.

25. For all of the aforementioned reasons, the court will dismiss the applicant's claim.