Neutral Citation Number: [2013] IEHC 582

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 43JR]

BETWEEN

JULIANNE McDONAGH

APPLICANT

AND

DISTIRCT JUDGE ANNE WATKIN

FIRST RESPONDENT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

SECOND RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 20th day of December, 2013

This is an application for judicial review which was launched initially to seek an order of *certiorari* quashing the issue of a bench warrant issued by the first named respondents for the arrest of the applicant on the 10th January, 2013. However, by virtue of the fact that the bench warrant had in fact been executed when the proceedings were commenced, the applicant now seeks only a declaration that the refusal of the District Judge to revoke and cancel the warrant, (a decision made later on the same day), was irrational or disproportionate to such a degree as would warrant the court, in the exercise of its judicial review discretion, to grant such relief. The respondents' position is that the judge made no error either in issuing the warrant or in refusing to revoke it and furthermore contends that, by virtue of the fact that the warrant was executed on the 15th January, 2013, some eight days prior to the bringing of the judicial review leave application, the proceedings are now entirely moot, or, alternatively, that the failure to disclose material facts in making the leave application should disentitle the applicant from relief in any form.

THE FACTS

The applicant in this case was charged with drink driving contrary to s.4 of the Road Traffic Act 2010 arising out of an alleged offence on the 10th November, 2012, at Blakestown Road, Mulhuddart in the County of Dublin. On that date she was admitted to station bail in her own bond of €100 to appear before Blanchardstown District Court on the 27th November, 2012. On that date evidence was given of arrest, charge and caution and the matter was adjourned to the 11th December, 2012. Through her solicitors the applicant had sought disclosure of documents. When she next appeared before Blanchardstown District Court on the 11th December, 2012, a hearing date was applied for and the case was set down for hearing in the Criminal Courts of Justice on the 10th January, 2013. Under the terms of her bail, the applicant was scheduled to appear in Court 8 of the Criminal Courts of Justice building at 10.30am on the 10th January, 2013. In his affidavit, Garda Ciaran Madigan deposes that he was present at 10.15am in the courthouse in order to consult with the officer from the Director of Public Prosecutions and with the accused's legal representative. He states that at that stage the accused's legal representative was unsure as to what course the applicant would take with respect to the charge against her.

He further deposes that there was a very busy list in court that day. When the case was first called, the applicant was not in court to answer her bail. Counsel for the applicant asked that the matter go to "second call" whereupon the District Judge enquired of the prosecution as to what their attitude was. In the absence of any explanation as to why the applicant was not present in court to answer her bail, Garda Madigan applied for a bench warrant and the same was issued by the District Judge at about 10.45am.

The applicant subsequently did turn up, whereupon the defence counsel asked the respondent for liberty to re-mention the matter on the basis that when the case was called the applicant had been looking for her legal representatives in the vicinity of the court and had been outside the court waiting for them. The applicant and her legal advisers then remained in court for most of the morning and were permitted to re-mention the matter at around 12.30pm at which point counsel explained to the court what had occurred and applied to have the warrant vacated. By this time, however, the prosecuting garda had left the court and the respondent refused the application.

In the aftermath of this refusal, the applicant's solicitors decided to bring a judicial review challenge. The same was brought before the High Court (Peart J.) on Monday, the 21st January, 2013, wherein leave was sought and granted to seek reliefs which included:-

> (a) an order of *certiorari* quashing the issue of a warrant for the arrest of the applicant on the 10th January, 2013;
>
> (b) an order of *certiorari* quashing the refusal by the first named respondent to vacate or cancel the warrant when requested to do so;
>
> (c) a declaration that the refusal to cancel the warrant was unreasonable and/or irrational and/or disproportionate.

The leave application was supported by a verifying affidavit sworn by the applicant's solicitor, Mr. Eddie O'Connor of Messrs. O'Connor, Buckley & Co., Solicitors, sworn on the 21st January, 2013, which, in addition to reciting the facts outlined above,

contained the following averment at para. 14:-

> *"In the circumstances, it is contended that judicial review is the appropriate remedy to seek. The applicant is in immediate risk of being arrested on foot of the aforementioned warrant, at any time of day or night, and detained pending its execution. Even if the applicant were to arrange an appointment to execute the warrant, she would be obliged unnecessarily to spend time in custody, possibly half a day in the deponent's experience, as applications to execute bench warrants are sometime taken at the end of a District Court list, sometimes even running into the afternoon. Furthermore, the applicant will be prejudiced in any application for bail in so far as the time noted on the court file for her arrival is significantly later than the time she actually appeared in court. This is potentially misleading to the next judge and could cause that court to take an adverse view of the applicant's ability to comply with bail terms. I say that a bench warrant is a significant stain on the record of the applicant, particularly considering this is the first warrant which has ever issued in respect of her and she has no previous convictions to date. It will necessarily operate against her in any future bail applications she may be obliged to make. Furthermore, I say that the applicant stands at risk of being charged with failure to appear contrary to s.13 of the Criminal Justice Act 1984 which carries a fine of €5,000 and a prison sentence of up to 12 months."*

Thereafter on the 14th February, 2013, the applicant herself swore an affidavit verifying the statement grounding the application for leave to apply for a judicial review.

Conspicuously absent from the documentation by way of sworn testimony on affidavit either then or now, is any reference to the fact that the bench warrant had in fact been executed on the 15th January, 2013, prior to the date both when the affidavits filed in the judicial review were sworn and prior to the date upon which leave was sought in the High Court to seek judicial review. Following the execution of the warrant, the applicant was admitted to bail without forfeiture of the bail monies and the drink driving charge against her was adjourned to the 23rd January, 2013. On that date the matter was further adjourned.

Not surprisingly, a major point raised on behalf of the respondents in their opposition papers is the assertion that the court should at the outset refuse relief on the grounds that this material fact was not brought to the attention of the High Court when the leave application was brought.

Given that lack of candour and uberrimae fides on the part of the applicant in bringing this application was relied upon in written submissions filed on behalf of the respondent, I believe the court should first address this particular contention.

LACK OF CANDOUR
Messrs. Delaney & McGrath in *Civil Procedure in the Superior Courts*, 3rd Ed. (Dublin, Roundhall, 2012) at para. 30-59 state:-

> *"It is important to emphasise that, given that the application for leave is made ex parte, the applicant has a duty of uberrimae fides, i.e., utmost good faith, and must put all relevant factual and legal matters before the court, even if they do not support the grant of leave... If an applicant fails to comply with this obligation then this may provide a basis for an application to set aside the grant of leave."*

A lack of candour, and certainly one in respect of a material fact, may have much more serious consequences than the mere setting aside of leave. It may also, as held by Hedigan J. in *Dean v. DPP* [2008] IEHC 87 (Unreported, High Court, Hedigan J., 22nd February, 2008), be a ground for altogether refusing relief in judicial review.

A similar view was taken by O'Keeffe J. in *Buckley v. Judge Hamill* [2011] IEHC 261 (Unreported, High Court, O'Keeffe J., 15th April, 2011).

Counsel for the applicant does not contest the law in this regard, but rather seeks to circumvent the difficulty by furnishing an explanation, which was not set out on affidavit, to the effect that there was no wrongful intention on the part of the applicant or her solicitor to deceive or mislead the court in any way. This explanation was advanced only in the written submissions filed on behalf of the applicant. In those submissions it is stated that "*unfortunately, the applicant did not bring this (i.e., the fact of the execution of the warrant) to the attention of her solicitor. As a result, when the leave application was moved on the 21st of January, the applicant's legal advisors proceeded on the understanding that the warrant was still live*".

While this was a most blameworthy omission on the part of the applicant herself, I am satisfied that there was no deliberate attempt made in this instance to mislead or deceive the court. Indeed, any such attempt would, as pointed out by counsel, have been entirely futile as the true facts would inevitably have emerged on the full hearing. This 'last gasp' explanation (which in truth is no explanation at all as to the applicant's behaviour) has persuaded counsel for the respondent not to rely on the failure as manifesting lack of candour, but rather to rely upon it as an inexcusable non-disclosure of material fact which should have the same consequence, namely, that no relief should be granted.

It was also careless in the extreme of the applicant's solicitor to fail to verify the true facts with the applicant before launching the application in court. As events transpired, the applicant's solicitors only became aware of the true facts after making the leave application when the same were drawn to their attention by a solicitor in the office of the respondent. While this information was conveyed by telephone by Ms. Dara Byrne to the applicant's solicitor, Eddie O'Connor, on the 12th February, 2013, an affidavit verifying the statement grounding the application for leave to apply was nonetheless sworn by the applicant the following day at Main Street, Tallaght, in which no reference was made to the fact that the warrant had been executed. This led to further telephone calls (as the court was informed without contradiction) from the Chief State Solicitor's Office which led to the writing of a letter by Mr. O'Connor to the Office of the Director of Public Prosecutions on the 20th February, 2013 which effectively sought a remodelling of the relief claimed in the leave application so as to ensure correction of the PULSE record generated in respect of the applicant's failure to answer her bail on the original date.

Judicial review was described by O'Higgins C.J. as one of the great judicial remedies (see ruling in *The State (Abenglen) v. Corporation of Dublin* [1984] 1 I.R. 381 at p. 392):

> *"From this emergence three centuries ago of the means by which the Court of King's Bench controlled the judicial process of lower courts, the remedy of certiorari has been developed and extended to reach far beyond the mere control of judicial process in courts as such. To-day it is the great remedy available to citizens, on application to the High Court, when any body or tribunal (be it a court or otherwise), having legal authority to affect their rights and having a duty to act judicially in accordance with the law and the Constitution, acts in excess of legal authority or contrary to its duty. Despite this development and extension, however, certiorari still retains its essential features. Its*

purpose is to supervise the exercise of jurisdiction by such bodies or tribunals and to control any usurpation or action in excess of jurisdiction. It is not available to correct errors or to review decisions or to make the High Court a court of appeal from the decisions complained of. In addition it remains a discretionary remedy."

It is a solemn process and there is thus a heavy onus on applicants when seeking to invoke this jurisdiction to place all material and relevant facts before the court at the ex parte leave stage. It is not a matter to be treated in a casual or off-hand manner as occurred in this case.

While I am satisfied that there was no lack of candour such as would disentitle the applicant on that ground alone from any relief, I am nonetheless strongly of the view that the court can, and indeed should, take the aforementioned failures on the part of the applicant and her legal advisors very much into account when considering whether or not to grant any form of relief.

The upshot of these errors, failures and omissions on the part of the applicant's advisors has prompted counsel to abandon the claim for *certiorari* and to confine the relief sought to a declaration which would have the effect of permitting the PULSE record in respect of the applicant to be expunged. He contends, I believe correctly, that he has at least *locus standi* to make such an argument and is not precluded from doing so by any contention of mootness which in his submission applies only to the relief of *certiorari*. He equally accepts that if he is unsuccessful in his contentions that the rulings of the District Judge were irrational and/or disproportionate, then the mootness issue will not fall to be considered.

ALLEGED IRRATIONALITY/DISPROPORTIONALITY OF RESPONDENTS' DECISIONS

There is no contention in this case to the effect that the applicant believed she was obliged to be in court at any time other than 10.30am on the 13th January, 2013, to answer the terms of her bail. However, she was not so present, although the prosecuting garda and her legal representatives were present.

It is common case that the District Judge had a busy list on the morning in question. It is part of the judge's function to ensure that the list moves efficiently and the effective management of any court list requires that a person who is required to answer a charge at a particular point in time be present in court at the appointed time. It is not for the accused person to control the management or operation of the court lists. Thus, I am quite satisfied that the District Judge was acting reasonably and within jurisdiction in issuing the warrant for the arrest of the applicant in circumstances where the applicant had failed to appear in the courtroom at the appointed time. There is no entitlement in any litigant to assume that a judge will afford a defendant some special consideration by dealing with a case at a time of a defendant's choosing or be in any sense "compelled" to put matters back to second or third calling to accommodate him or her. The court list would become unworkable if such slipshod practices became the norm.

The main thrust of counsel's arguments on behalf of the applicant is however directed at the refusal of the District Judge to cancel the warrant later that morning. It is contended on behalf of the applicant that she arrived into court twenty minutes after the scheduled court start time, had appeared on all previous occasions, and had apologised through her legal representatives for her delay. Despite the explanation given and apology tendered, the judge refused to cancel the warrant. As a result of the respondent's ruling, the applicant was then arrested in her home some five days later and was brought in custody before a District Court. Counsel asked rhetorically: was all this necessary? He says that the applicant was deprived of her liberty, however briefly, and was inconvenienced in her day's routine. In addition arrangements had to be made to get her out on bail – all quite unnecessary if only (as he put it) the District Judge had behaved reasonably and proportionately.

Counsel invoked the majority decision of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 to assert that the respondent's decision in these circumstances was disproportionate. The ruling had left a "stain" on the applicant's record, as the failure to answer bail was now part of the PULSE record. It meant that she had suffered a significant prejudice as a result of the particular ruling.

Again, I am satisfied that the respondent judge, obliged as all judges of the District Court are, to ensure that bail conditions are adhered to, was acting within her jurisdiction and not irrationally in making the particular determination which she did make. Another judge might have taken a different course, but I do not think the proportionality requirement in the *Meadows* case can be relied upon to convert this application into an appeal on the merits. It must be a clearly disproportionate decision when seen in context and in the light of the judge's own need to manage and dispose of her list efficiently. To put it another way, a district judge's working day should not be consumed by applications to revoke warrants where defendants have failed to turn up to court at the appointed time with the inevitable consequence that a warrant issued.

Counsel for the applicant referred this Court to its own previous decision in a case of *Lado v. District Judge Martin & DPP*, (Unreported, High Court, Kearns P., 26th April, 2010) a case in which a ruling was delivered *ex tempore* and which is not reported, to suggest that the Court might intervene. In Mr. Lado's case, he had turned up and appeared in court at the appointed time but had gone outside court to the lavatory just before his case was actually called. A warrant was issued for his arrest and an application to have the warrant vacated was made later on in the list but was refused. In that case this Court held that the refusal to vacate the bench warrant was disproportionate, because an explanation which completely excused the applicant's non presence in court when his case was called was tendered. However, the facts of that case are distinguishable from those of the present case because in this case the applicant was not in fact present in court at the appointed time of 10.30a.m. I therefore do not believe that the refusal to cancel the warrant was disproportionate or that it should be quashed.

While that disposes of the case in itself, I am also of the view that the court should not exercise its discretion to make any form of declaration in this case for reasons of culpable nondisclosure by the applicant herself of material facts. In so concluding I would repeat that I am not attributing *mala fides* or lack of candour to the applicant's legal advisors. Nonetheless, there was a non-disclosure which was of a very serious type and which arose from a lack of seriousness on the part of both the applicant and her solicitor about the process being undertaken. The failure to approach this application with due care and regard for the process further warrants in my view the decision to refuse to grant the relief now sought.