Neutral Citation Number: [2009] IEHC 321

THE HIGH COURT

JUDICIAL REVIEW

2008 999 JR

BETWEEN

P. V. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND A. S.)

APPLICANT

AND

THE COURTS SERVICE, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Clarke delivered on the 2nd July, 2009

1. Introduction

1.1 These proceedings concern a judicial review brought (pursuant to leave given by this Court (Gilligan J.) on the 27th August, 2008) by the applicant against an alleged refusal of the first named respondent, ("the Courts Service"), to accept an application pursuant to s. 3 of the Guardianship of Infants Act 1964 ("the 1964 Act"). Section 3 of the 1964 Act states as follows:-

> "Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration"

1.2 In reply the respondents, amongst other things, sought to argue that these proceedings are moot. I acceded to an application by counsel for the first named respondent ("the Courts Service") which was supported by counsel for the other respondents ("the State respondents") to try the question of mootness first.

1.3 My reason for so doing was that it appeared to me that the question of mootness was not, in any practical or significant way, connected with the factual issues which would fall for consideration, in any event, in the substantive hearing so that it would, if the mootness issue was found in favour of the Court Service and the State respondents, be unnecessary to embark on a consideration of the legal and factual questions, which would be necessary for a determination in a hearing of the substantive issue.

1.4 At the close of the hearing as to mootness, I took a brief opportunity to consider the matter. Thereafter, I indicated to the parties that I was satisfied that the case was now moot and that there was no proper basis for entering into the merits of the other issues which arose in the proceedings. I indicated at that stage that I would give my reasons for having reached that conclusion on today's date. This judgment is directed towards setting out those reasons.

2. Factual Background

2.1 The applicant ("P. V.") is an infant born on the island of Ireland in March, 2005. A. S. ("Ms. S"), the applicant's mother and next friend, is a Ukrainian national, who has resided in the State since 2003. These proceedings were brought on the application of P. V. while the original attempted District Court application giving rise to these proceedings was brought in the name of Ms. S. In June, 2008 Ms. S sought legal advice as she feared that P. V.'s father, an Estonian national residing in Ireland, intended to imminently remove P.V. from the jurisdiction without her consent. Under legal advice, Ms. S sought to bring an *ex parte* application to the District Court seeking the surrender of P. V.'s Estonian passport, which at the time was held by his father. The application sought to be brought was said to be pursuant to s. 3 of the 1964 Act, and was said to be designed to prevent the removal of P.V. from the jurisdiction by his father.

2.2 On the 19th June, 2008, a solicitor acting for Ms. S sought, by way of fax message, to file an application (described as an application to surrender P. V.'s passport pursuant to s. 3 of the 1964 Act), with the Office of the District Court, Dublin Metropolitan District. This document was accompanied by a covering letter indicating that it was intended to make the proposed application on the following day. The document submitted by Ms. S's legal representatives by fax was not served on P. V.'s father, although he was the named respondent to the matter in question. On the morning on which the matter was to be heard by the District Court, that is the 20th June, 2008, Ms. S's legal representatives were advised by the Distinct Court Registrar that the application would not be heard as it was not a proper application pursuant to the 1964 Act or pursuant to the District Court Rules as no summons had been issued. The representatives concerned were also informed that there was no provision in the District Court Rules for the making of an *ex parte* application under the 1964 Act.

2.3 Later on the same day, that is the 20th June, 2008, an application seeking an order restraining P. V.'s father from removing P. V. from the jurisdiction was made in this Court, where an interim injunction was granted. On 28th July, 2008, this Court made that injunction permanent and the passport of P. V. was returned to Ms. S on an undertaking from her that she would not leave the jurisdiction with P.V. other than with the consent of P. V.'s father.

2.4 Therefore, the issue in relation to P.V.'s passport, which initially brought Ms. S to the District Court, had been dealt with to completion prior to the commencement of these judicial review proceedings. There was no evidence before this Court that P.V. has any basis for apprehending that such a situation will arise again.

3. The Judicial Review Proceedings and the Reliefs Sought
3.1 As pointed out earlier, an application for leave to apply for judicial review was heard by Gilligan J. on 27th August 2008, and leave was granted to the applicant to seek the following declaratory reliefs:-

> "(i) A Declaration that the refusal of the Courts Service to accept an application pursuant to Section 3 of the Act of 1964 was in breach of the First Named Applicant's Constitutional rights pursuant to Article 40.3.1, Article 41.3.2 and Article 41.1.1 of the Constitution of Ireland 1937.
>
> (ii) A Declaration that the refusal of the Courts Service to accept an application pursuant to Section 3 of the Act of 1964 was in breach of the First Named Applicant's rights as guaranteed by Article 3 of the Convention on the Rights of the Child.
>
> (iii) A Declaration that the refusal of the Courts Service to accept an application pursuant to Section 3 of the Act of 1964 was in breach of the First Named Applicant's rights as guaranteed by Article 6 of the European Convention on Human Rights Act, 2003.
>
> (iv) A Declaration that the refusal of the Courts Service to accept an application pursuant to Section 3 of the Act of 1964 was in breach of the First Named Applicant's rights as guaranteed by Section 3 of the Act of 1964.
>
> (v) A Declaration that the District Court Rules Statutory Instrument 93 of 1997 is void of any application form and / or Order or Rule in terms of the procedure to be adopted for the surrender of an infant's passport."

3.2 In the circumstances outlined earlier it was argued by the Courts Service, supported by the State respondents, that those issues were moot. As pointed out earlier, I agreed and now set out my reasons for reaching that conclusion.

4. Issues on Moot Application
4.1 The principal argument addressed in favour of the proposition that these proceedings are moot was to the effect that the substantive issue (being whether or not the alleged refusal of the Courts Service to accept an application under s. 3 of the 1964 Act was unlawful or failed to adequately protect the rights of the applicant under the Constitution, the European Convention on Human Rights and the Convention on the Rights of the Child) was no longer alive.

4.2 The Courts Service argued that the determination of the issues raised in the proceedings would confer no practical benefit on P.V. and were, therefore, moot. The Courts Service further argued that all of the declarations sought on behalf of P.V. related to prior conduct and would not benefit him in teams of the goal of the initial application. It was further argued that no other useful purpose would be served in embarking on a hearing which, even if decided in favour of P.V., would not result in any practical or concrete benefit to him. The argument to that effect is based on the suggestion that there was a final resolution to the issue of P.V.'s passport, with an *ex parte* application in relation to same being made to, and granted by, this Court on the same day as the attempted District Court application, followed by a final order of this Court in relation to the passport which leaves no issue left to be determined by the District Court.

4.3 In that context it is necessary to turn to the jurisprudence on mootness.

5. The law on Moot Proceedings
5.1 The granting of leave to apply for judicial review and the determination to grant judicial review are discretionary decisions of the court, and a court is not obliged to determine matters which raise merely hypothetical or abstract questions. The Supreme Court in *McDaid v. Sheehy* [1991] 1 I.R. 1, has emphasised that the courts should refrain from unnecessary adjudication. That this will especially be the case when the constitutionality of a statute is impugned is clear from *Murphy v. Roche* [1987] I.R. 106.

5.2 The Courts Service placed reliance on the decision of the Supreme Court in *Goold v. Collins & Ors* [2004] IESC 38, which affirmed the determination of this Court to the effect that the issues raised in a judicial review arising from the prosecution of the applicant concerned for alleged breaches of a Protection Order were moot. The relevant order, which was sought to be quashed, had been discharged on consent of the parties following an agreement between them. Criminal proceedings taken on foot of the alleged breaches of the protection order concerned were also dismissed pursuant to an agreement between the parties. In addressing the rationale for the rule on moot proceedings, the Supreme Court adopted the observations of the Supreme Court of Canada in the case of *Borowski v. Canada* [1989] 1 S.C.R. 342.

5.3 In *Borowski*, the plaintiff attacked the validity of portions of the Canadian Criminal Code relating to abortion. Subsequent to a decision, partly favourable and partly unfavourable to him, by the Court of Appeal, the entire section of which the impugned provisions were part was struck down by a decision of the Supreme Court in a separate case. The plaintiff/appellant sought to extend his grounds but the issue was found to be moot. The Supreme Court of Canada held that:-

"An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the Court is called upon to reach a decision. The general policy is enforced in moot cases unless the Court exercises its discretion to depart from it."

5.4 The Supreme Court of Canada went on to say that courts should be guided in the exercise of the discretion to hear a moot case by a consideration of the underlying rationale of the doctrine of mootness. This was expressed as follows:-

> "The first rationale for the policy with respect to mootness is that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for the Courts to be sensitive to the effectiveness or efficiency of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should

consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa."

5.5 In the United States, an issue is not deemed moot if it is capable of repetition, yet evading review. This will be the case where there is a reasonable expectation that the same complaining party would be subjected to the same action again. Likewise Irish Courts have held that proceedings may not be considered moot where the matters raised concern issues which have future ramifications for the parties involved. In *Goold*, the Supreme Court, in holding that the proceedings were moot, noted that there was no "live, concrete dispute between the parties", with a decision on the issues having no direct impact on the parties involved. The court, in reaching that conclusion, took into consideration the fact that the protection order in that matter had been discharged by agreement between the parties and the criminal proceedings taken on foot of alleged breaches of the order had been dismissed.

5.6 In *O'Brien v. Personal Injuries Assessment Board* [2007] 1 I.R. 328, this Court granted declaratory relief, having determined that the respondent concerned had acted unlawfully in the exercise of its statutory powers by refusing to deal with the applicant's duly appointed solicitor in connection with his claim for damages for personal injuries. The respondent appealed, but during the appeal the applicant received an authorisation from the respondent to institute proceedings in respect of his claim for personal injuries. Such proceedings were then commenced. As a consequence of such authorisation and the initiation of the relevant proceedings, the applicant was no longer obliged to deal with the respondent. The Supreme Court rejected the argument that the appeal was moot as the respondent Board had a real and current interest in the issues pending appeal before the court regarding the exercise of its statutory powers. Murray C.J. framed the question as whether the case was moot in the sense of being "purely hypothetical or academic" and noted that this was a case in which the respondent had a wider interest than the applicant insofar as the conclusion and declaration of the High Court affected the manner in which the respondent exercised its statutory functions not only *vis à vis* the applicant but with regard to many other applications made to it. Murray C.J. found that it was obvious that respondent Board had a real, current interest in the issues pending on appeal before the court for the purpose of a final determination of the controversy between the parties regarding the exercise of its statutory powers.

5.7 It is clear from the above authorities that the starting point of any consideration of mootness has to be a determination as to whether the issue sought to be litigated is still alive in any meaningful sense such that it can not, in the words of Murray C.J. in *O'Brien*, be "purely hypothetical or academic". In addition there may be circumstances where it may be appropriate to nonetheless determine issues even though such issues may, strictly speaking, be moot. For example, the types of issues with which the Supreme Court was concerned in *O'Brien* stemmed from a situation where the same issue was likely to arise for the respondent in very many cases, and where the respondent was faced with an adverse judgment of this court from which it sought to appeal. While the issue might have become irrelevant to the applicant in that case (given that his personal injury litigation had gone beyond the stage of the Personal Injuries Assessment Board), it was still very much alive from the perspective of the respondent. Likewise there may be cases, such as those identified in the American jurisprudence, where, in practical terms, it may be impossible to have a final determination on important legal issues unless the courts (and in particular Appellate Courts) are prepared to relax a strict application of a mootness rule.

5.8 However, it is clear that the cases where the court should depart from the general rule should be limited and the discretion to entertain moot proceedings should be sparingly exercised having regard, as the Supreme Court of Canada noted in *Borowski*, to the underlying rationale of the mootness rule in the first place.

5.9 In that context is it next appropriate to turn to the application of those general principles to the facts of this case.

6. Applications to the Facts of this Case

6.1 The Courts Service argued that even a positive determination of the proceedings in favour of the applicant would be of no practical or concrete benefit to him in circumstances where all issues surrounding his passport have been conclusively determined. The Courts Service further argued that the principle of mootness as recognised by the Irish Courts clearly indicates that the court should be disinclined to entertain an action or grant any relief where to do so would serve no useful purposes. It was submitted that there was no legitimate or live issue before the court, the issue being historic and confined to past events peculiar to the particular case.

6.2 The State respondents submitted that, as the only issue in the District Court proceedings was the question of whether or not the father of the applicant should surrender the applicant's passport and that relief was granted by this Court, the issue has been conclusively determined. The State respondents further submitted that there were no averments on behalf of P.V. to an ongoing issue in relation to his passport, nor was there any apprehension that there will be a need to reapply to the District Court for similar relief in the future. The State respondents argued that there was no decision or precedent from the District Court affecting P.V. which could have any continuing legal effect or binding effect. The State respondents described the proceedings as entirely academic or hypothetical as a result of the underlying factual situation.

6.3 The State respondents further argued that the present case could be differentiated from *O'Brien*, as there is, it was said, no live controversy in the present case, and no party to it had any interest in the resolution of the question raised in the abstract. The State respondents further asserted that P.V. had no ongoing interest in the nature and extent of the Distinct Court jurisdiction in relation to the surrender of passports other than on a purely hypothetical or academic basis. It was argued by the State respondents that the resolution of these proceedings and the questions raised by them would not aid P.V. in relation to the question of whether his passport ought to be surrendered, as the passport had been surrendered and the matter had been resolved to a conclusion.

6.4 Against those submissions, counsel on behalf of P.V. argued that there remained a live issue for determination, being the question of whether P.V. was denied, improperly, access to the courts. On that basis it was said that the case was not, even on a strict application of the rule, moot. However, I did not agree with that submission. The question of P.V.'s undoubted entitlement of access to the courts in the sense of his entitlement to make the application then sought to be made to the District Court, is now purely hypothetical. P.V. has had access to this Court and has, in practice, obtained the relief which was the purpose for the attempted application to the District Court in the first place. Whether P.V. (or more accurately Ms. S on his behalf) had a right to apply to the District Court as well has now become an entirely hypothetical issue by reason of the fact that this Court entertained proceedings in respect of the passport concerned and has finally determined them.

6.5 On that basis, I was satisfied that these proceedings clearly came within the category of moot proceedings. The only other question which remained was as to whether there were circumstances which ought require the court to exercise its discretion to depart from a strict application of the mootness rule. I was not satisfied that any such circumstances existed on the facts of this case. There is no particular reason to believe that a similar issue concerning P.V. will arise in the future such as would make it important to determine, at this stage and, therefore, in advance, the entitlement of P.V. (or Ms. S on his behalf) to apply on an *ex parte* basis to the District Court. It is, of course, impossible to rule out the possibility that such an issue might arise again. But it is likewise impossible to rule out the possibility that any other party might not sometime have a desire to make an application of the type sought to be made by Ms. S in the District Court, such as gave rise to these proceedings. P.V. is in no different position to any other party in that regard. It would, of course, have been theoretically possible, on the facts of *Goold*, that further applications for protection orders and prosecutions for breaches of same might have arisen between the same parties. However, that theoretical possibility was not regarded as an appropriate basis for entertaining the proceedings. Likewise the theoretical possibility that the same or a similar issue might arise involving P.V. at some stage in the future is no more than just that, a theoretical possibility with no significantly higher degree of likelihood of same occurring than in relation to any other party.

6.6 Neither was I satisfied that this was the type of case where it was necessary to hear an otherwise moot proceeding, in circumstances where to do otherwise would be to render the actions of the Court Service such as they might "evade review" in the sense in which that term is used in the American jurisprudence. I can fully understand the decision taken, doubtless on the basis of very sound advice, by Ms. S to bypass the District Court and attempt to obtain the practical order which she needed from this Court. If, however, the question of the appropriateness or otherwise of the view taken by the District Court Clerk concerned was to be properly challenged then, either an application should have been made to the District Judge or immediate judicial review proceedings commenced in this Court while the issue was still alive. As I have noted I can understand the very practical reasons why that course was not adopted. However, a decision by a District Court Clerk of the type contested in this case or, indeed, a decision by a District Judge along the same lines is more than capable of review by this Court within a short timeframe in the context of appropriate judicial review proceedings. Indeed, there is no reason, in principle, why an interlocutory order could not have been made by this Court in such judicial review proceedings which would have had the effect of preserving the passport concerned pending a resolution of the question of whether the District Court had jurisdiction. This is not the type of case where a refusal to hear proceedings on the grounds of mootness would, therefore, render the actions of the Court Service immune to review.

6.7 In those circumstances, I was not satisfied that there was any proper basis for treating this case as one of those exceptional cases where it is appropriate for the court to entertain an application, notwithstanding the fact that it may be moot.

7. Conclusions

7.1 For those reasons I indicated to the parties that I was satisfied that the argument made on behalf of the Court Service and the State respondents to the effect that these proceedings were moot was well founded. I also indicated that there were no special circumstances such as would properly allow me to depart from the general rule to the effect that the court should not entertain moot proceedings.

7.2 It was for the reasons which I have set out in this judgment that I came to those views.