THE COURT OF APPEAL

Neutral Citation Number IECA 206

Court of Appeal Record No. [2017/305]

High Court Record No. [2014/185JR]

Baker J.
McGovern J.
McCarthy J.

BETWEEN/

DONA SFAR

APPLICANT/APPELLANT

-AND-

THE MINISTER FOR AGRICULTURE,
THE ATTORNEY GENERAL, AND IRELAND

RESPONDENTS

JUDICIAL REVIEW

BETWEEN/

DONA SFAR

APPLICANT/APPELLANT

-AND-

THE MINISTER FOR AGRICULTURE, THE ATTORNEY GENERAL
AND IRELAND

RESPONDENTS

-AND-
HUMAN RIGHTS COMMISSIONER

NOTICE PARTY

JUDGMENT of Mr. Justice McCarthy delivered on the 28th day of February, 2020

1. This is one of three associated appeals which it was appropriate to deal with together but in which separate written judgments are delivered. The other two appeals were given the record numbers 2018/126 and 2018/120 (High Court Record No. 2014.185JR and 2014/614JR), Orders were made relating to them on the 20th June, 2016 and might shortly be described as the proceedings dealing with substantive disputes between the parties ("the substantive proceedings"). This judgment concerns the judgement and Order of Twomey J. of 30 May 2017 by which he granted a so-called "Isaac Wunder" order against the appellant.

2. On the 30th May, 2017 Twomey J. gave judgment on the defendants' motion seeking such an *Isaac Wunder* order in the following terms: -

"It is ordered that the applicant be restrained from instituting any proceedings in any jurisdiction against the respondents herein except with the prior leave of the President of this Court or any judge nominated by him. Such leave to be sought by application in writing addressed to the Chief Registrar of this Court."

3. After the delivery of the first judgment and after the order derived therefrom was drawn up in the foregoing terms, the trial judge by his second order of the 6th July, 2017 pursuant to Order 28, rule 1 (the "Slip Rule") directed an insertion to the order as originally drawn up, by which he extended the restrictions imposed upon the appellant and, in particular, made provision to the effect that such restraint be against the institution of proceedings without leave of proceedings:-

"… against any person holding the office of Judge of the Supreme Court, Court of Appeal, High Court, Circuit Court or District Court or against the Director of Public Prosecutions or Government Minister."

4. For the reason that will now be elaborated I am of the view that the making of the Orders constituted a breach of the principles of constitutional justice by the judge and accordingly I would allow this appeal and remit it to the High Court for further hearing.

The background facts

5. The application ultimately giving rise to the impugned order was made by motion on notice of the 3rd November, 2016 grounded on the affidavit of John P. Moloney. In his affidavit he referred not merely to the substantive proceedings but to the fact that the appellant has taken issue with the actions of the respondent Minister, Louth County Council and others (such as An Garda Síochána) on other occasions and he says that: -

"… The applicant has a long history of dealings with the respondent minister. I say that these dealings have arisen in the context of the applicant being in possession of animals and the minister, through his officers, have had serious concerns in respect of the welfare of animals held by the applicant. As a consequence of these matters the respondent minister acting through his officials has sought to ensure that the welfare of animals in her possession and control was safeguarded. Unfortunately these actions have been met by consistent failure by the applicant herein, Dona Sfar, to cooperate with the statutory authorities and ultimately the respondent has been forced to seize the animals in question."

He goes on to say that similarly, the applicant has what he describes as "a history" with Louth County Council as a consequence of the fact that it had sought to apply the Control of Dogs Act, 1986 to her in relation to dogs in her possession.

6. A list was exhibited by Mr. Moloney of proceedings commenced by the appellant, the first of which was commenced in 1999 (it would appear against the Director of Public Prosecutions), and the most recent proceedings, apart from the present, being commenced in 2014. None were had between 1999 and 2005.

7. The substantive proceedings involved certain challenges to the actions of the Department of Agriculture, including the seizure of animals from the appellant's lands in Co Louth under the provisions of the Animal Health and Welfare Act 2013 ("the Act") and in relation to certain criminal proceedings against the appellant under that statute - and arising from the facts and matters giving rise to the civil proceedings. It will suffice for the present purpose if I say that if and insofar as more elaborate information may be sought reference should be had to my judgment of even date in those cases. There is an extensive history of litigation between the appellant and the respondent (and indeed other parties) in connection with repeated disputes of what might shortly be termed events or actions (including criminal proceedings) connected directly and indirectly with the operation of the Act.

8. In his judgment in the substantive proceedings dated June 20th 2016, the High Court judge (at para. 51) made reference to the applicant's present litigation and his determination that it amounted to an abuse of process: -

> *"It is also relevant that the action by the applicant before this Court is in effect an attempt by her to challenge the Welfare Notice in the High Court after she failed in her challenge to the Welfare Notice in the District Court. She also failed in her challenge to the Welfare Notice in the Circuit Court. She also failed in her challenge to the professional conduct of the vet that issued the Welfare Notice before the Veterinary Council. For this reason, her two judicial review applications in this case are in essence a fourth and a fifth attempt by her to challenge the Welfare Notice. Since there are only so many appeals and challenges, which a person should have, to a decision with which they disagree, it is this Court's view these two judicial review applications verge on an abuse of process by the applicant.*
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> *52. In some cases of serial litigants, it will be relevant that the person is a lay litigant. This is because a lay litigant does not have the cost of instructing lawyers and for this reason it will often be a financially easy decision for such an applicant to institute proceedings against the State. It can also be relevant that the serial lay litigant does not have significant financial resources, since the prospect of having a costs order against them if they lose is not a significant deterrent to litigating. For such serial litigants therefore, the strength of their case may not be a factor in their decision to sue the State, since the cost of taking the action is low and the cost of a losing an action against the State may be non-existent. However, while the decision for some serial lay litigants to institute proceedings against the State can be an easy one, the consequences for the taxpayer of defending multiple High Court actions can be enormous, running into tens if not hundreds of thousands of euro and sometimes even more. …*
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> *53. Applying this public interest to cases of serial lay litigants, it is this Court's view that, where there is lay litigant, with a long history of mostly unsuccessful litigation against the State and where the costs of those cases have not been recovered by the State from that lay litigant, it may be appropriate in certain circumstances for*

the State, as the defender of the public interest to which MacMenamin J. refers, to apply for an order which requires that person to obtain the consent of the Court before he or she can institute future proceedings against a State body or party to proceedings, whose legal fees are paid for directly or indirectly by the State."

9. Twomey J. described the hearing leading to the impugned order and judgment as "a post-judgment hearing" and in the judgment he had, *inter alia*, this to say:-

> *"3. As is clear from paragraphs 48 to 60 of this Court's judgment ([2016] IEHC 348), [in the associated proceedings] this Court is of the view that Ms. Sfar's issue of the proceedings in this (sic) case and her conduct of them verged on an abuse of process by her. It is not proposed to set out in this judgment the criticisms which were made of Ms. Sfar in that judgment. In light of the terms of that judgment, an application has now been brought by the respondents to obtain an Isaac Wunder order against Ms. Sfar.*
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> *…*
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> *13. It seems clear to this Court that regardless of what this, or any other, court finds, Ms. Sfar is fully convinced that she is right and anyone who disagrees with her about the welfare of her animals is wrong. It is apparent Ms. Sfar will take whatever court proceedings are necessary to seek to thwart the actions of any State body or State employee that disagrees with her. Defending these High Court judicial review actions being taken by Ms. Sfar is putting the State to enormous expense."*

He went on to say that:-

> *"14. This Court is of the view that Ms. Sfar's actions in the proceedings heard by this Court and her actions since this Court's judgment are sufficiently vexatious to justify an Isaac Wunder Order to prevent the further waste of court resources and taxpayers' money in defending future proceedings. Accordingly, this Court will grant the Order sought and Ms. Sfar will be restrained from any proceedings in any jurisdiction, against the Minister for Agriculture, Food and the Marine, the Attorney General and Ireland except with the prior leave of the President of the High Court or any judge nominated by him, such leave to be sought by application in writing addressed to the Chief Registrar of the High Court."*

10. As can be seen from the order ultimately perfected he granted relief substantially more extensive than that sought in the motion.

11. The appellant relied upon seven grounds of appeal which may be summarised as follows:–

    (i) That the High Court judge was not seized of the Isaac Wunder Motion;

(ii) That the High Court judge erred in law in failing to consider a relevant replying affidavit submitted by the applicant;

(iii) That the High Court judge erred when he considered an affidavit of Mr Fergus Mullen the State Solicitor for Louth;

(iv) That the High Court judge misdirected himself on the necessary conditions that gave the Court an inherent jurisdiction to impose an Isaac Wunder Order on the applicant to protects its own processes;

(v) That there was evidence of objective bias and that the Court erred when it overlooked the fact that the applicant had been successful in many of her former applications before other courts;

(vi) That the trial judge did not penalise the State for failing to draft the relevant mandatory documents required when dealing with a lay litigant;

(vii) That there was a breach of the applicant's rights to a fair hearing and the right to be heard.

12. The first five grounds effectively refer to the merits of the decision, but I think that the sixth and seventh, and in particular the last, are of decisive importance on this appeal. There is therefore no need having regard to the fundamental grounds upon which I would determine this appeal to address the merits of these first five grounds.

13. I thought it right at the hearing to closely question counsel for the respondents as to what occurred before the High Court at the hearing pertaining to the *Isaac Wunder* order for the purpose of ascertaining whether Twomey J. or anyone else, had made reference to the potential for the wider limitation on the appellant's rights (in the event imposed) to that sought by the respondents, as given the seriousness of the error, one would be slow to conclude that it had been made without thorough enquiry. I was informed that there was no such reference.

14. Thus, the appellant came before the High Court on that occasion to meet an application of a given kind – as set out in the notice of motion – only to find in the judgement itself that the trial judge had of his own motion, and without application, determined to impose the wider restriction as is set out above. Thus, there was a fundamental denial of constitutional justice to her.

15. It is not appropriate, on an application of the instant kind especially when one is dealing with a litigant in person, to make an order beyond what is sought in the notice; it would have sufficed to achieve a hearing in accordance with constitutional justice to have made an order amending the motion, and thereafter to have granted an adjournment if the respondent sought this or if it was considered that she would be prejudiced. In default of that course, counsel for the respondents or the judge himself should at least have referred to the desirability that a respondent be heard.

16. Obviously a judge during the course of a hearing or when preparing his judgment might come to a view that consideration should be given to granting a more extensive form of relief to that sought by the moving party. The judge should not in my view make an order in those more extensive terms when it is not sought without hearing both parties, and if judgment has been reserved in the matter, the matter should be listed for further hearing.

17. Since there was no mention during the hearing of this matter that he had in mind the making of the more extensive order than the one on which he heard evidence and submissions, the judge fell into error when, of his own initiative, he granted the additional or wider limitation on the appellant's rights without giving her an opportunity to address him.

18. Having regard to the judge's error I would allow this appeal and remit the application to the High Court for rehearing.