THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 619 J.R.]

BETWEEN

JOSEPH LAVERY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

(No. 3)

[2016 No. 228 J.R.]

BETWEEN

JOSEPH LAVERY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

[2016 No. 346 J.R.]

BETWEEN

JOSEPH LAVERY

APPLICANT

AND

A JUDGE OF THE DISTRICT COURT

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 13th day of March, 2018

1. The applicant in these three judicial reviews applies for liberty to issue notices of motion seeking to revisit orders previously made in these proceedings. In order to explain the background, it might be helpful if I were to summarise the eleven High Court actions already brought by this applicant. These fall into essentially three groups. Firstly, applications made prior to the proceedings with which I am now dealing, secondly, the proceedings directly relevant to the present motions, and thirdly, proceedings subsequently instituted.

2. The actions pre-dating the proceedings that are directly relevant are as follows:

(i). *Lavery v. Judge McBride* [2012 No. 746 J.R.], a judicial review in relation to criminal proceedings involving the applicant which apparently was dismissed.

(ii). *Lavery v. Judge McBride* [2013 No. 682 J.R.], again apparently also dismissed.

(iii). *Lavery v. Judge McBride* [2014 No. 301 J.R.], again the applicant informs me this was dismissed.

(iv). *Lavery v. Judge McBride* [2015 No. 4819 P.], a damages claim arising out of the applicant's difficulties to which the previous litigation related. I understand from the applicant that this was also unsuccessful.

3. The second group then is the proceedings with which the current application is concerned. Those are as follows:

(i). *Lavery v. D.P.P.* [2015 No. 619 J.R.]. This was a judicial review in which the applicant claimed an entitlement to represent himself in District Court criminal proceedings and essentially claimed that a legal aid solicitor had been forced upon him contrary to his wishes. In that regard, I made an order on 9th May, 2015 substituting the D.P.P. as a respondent in lieu of Judge Clyne and ultimately on 21st December, 2015 dismissed the leave application (see *Lavery v. D.P.P. (No. 1)* [2016] IEHC 866 (Unreported, High Court, 21st December, 2016)). That order was appealed to the Court of Appeal, Record No. 2016/8, which dismissed the appeal on 8th July, 2016.

(ii). *Lavery v. D.P.P.* [2016 No. 228 J.R.]. This was an application which related to a challenge to a decision by Judge Lucey to adjourn criminal proceedings against the applicant while the appeal in relation to judicial review 2015 No. 619 J.R. (no. (v) above) was pending. In dealing with that matter, I made an order on the 11th April, 2016 substituting the D.P.P. as a respondent in lieu of Judge Lucey and ultimately I refused leave (see *Lavery v. D.P.P. (No. 2)* [2016] IEHC 332 (Unreported, High Court, 15th June, 2016). I then went on to make an *Isaac Wunder* order against the applicant on the 4th July, 2016.

(iii). *Lavery v. A Judge of the District Court* [2016 No. 346 J.R.]. This was a challenge to a prosecution of the applicant on a separate matter on the grounds that the applicant claimed not to have received a summons. In that matter, on 13th June, 2016, I gave liberty to the D.P.P. to seek an *Isaac Wunder* order (which was ultimately granted in the no. (vi) proceedings above) and on 15th July, 2016 I refused leave (see the *Lavery v. D.P.P.* (No. 2) judgment).

4. The third category relates to the judicial reviews subsequent to the matters with which the present applications are concerned. Those are as follows:

> (i). *Lavery v. Judge Faughnan* [2017 No. 37 J.R.]. In this matter, Barrett J. refused leave to the applicant to issue further judicial review proceedings pursuant to the *Isaac Wunder* order (see *Lavery v. Judge Faughnan* [2017] IEHC 661 (Unreported, High Court, 1st November, 2017)).
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> (ii). *Lavery v. G.S.O.C.* [2017 No. 39 J.R.], in which leave to seek judicial review was refused.
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> (ii). *Lavery v. Judge McLoughlin* [2018 No. 5 J.R.]. In this matter Noonan J. refused leave to seek judicial review. The applicant has appealed that refusal to the Court of Appeal, Record No. 2018/27.
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> (iv). *Lavery v. Judge McLoughlin* [2018 No. 53 J.R.]. Again this was an *ex parte* refusal of leave to seek judicial review which has been appealed to the Court of Appeal, Record No. 2018/39.

The present notices of motion

5. The applicant now brings four proposed notices of motion, which he seeks liberty to issue pursuant to the *Isaac Wunder* order. Those applications are as follows.

6. Firstly in 2015 No. 619 J.R. the applicant seeks liberty to issue a motion to set aside my order of 9th May, 2015 substituting the D.P.P. for Judge Clyne as respondent to the proceedings. It seems to me that that is an inherently incidental and procedural decision which is subsumed by the final order and certainly cannot be revisited three years later. If the applicant had a difficulty with that procedural order, appeal was the appropriate remedy.

7. The second proposed motion is in proceedings 2016 No. 228 J.R. This proposes to seek the relief of setting aside my order of the 11th April, 2016 substituting the D.P.P. for Judge Lucey as respondent to the proceedings. Again, my previous comments apply to this relief as well. Appeal is the appropriate remedy and this is not a matter that can be revisited after a final order.

8. The next motion is an order in proceedings 2016 No. 346 J.R., which seeks to set aside two decisions. First of all, a decision of 13th June, 2016 giving the D.P.P. liberty to seek an *Isaac Wunder* order against the applicant. Again, that is simply a procedural motion made in the course of proceedings. If an applicant objects to such a decision it can be dealt with either by way of appeal of the procedural decision itself or appeal of any ultimate order made; but it is not appropriate to allow such a merely procedural order to be revisited after the event by way of a motion to set aside, long after the substantive order.

9. Further the applicant seeks an order setting aside the substantive decision of 13th June, 2016, which was to refuse the application for leave to seek judicial review in the proceedings. The circumstances in which such an application can be made are limited:

> (i) A court is entitled to change a judgment or order – and even simply change its mind - prior to the perfection of an order (*Re L* [2013] 1 W.L.R. 634), but this is a case where the order has been perfected long ago.
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> (ii) After perfection of the order, the court can correct material errors of fact in a judgment (*D.P.P. v. Nash* [2017] IESC 51). This does not arise here.
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> (iii) The slip rule also applies in such a situation to allow correction of clerical-type errors of any kind (O. 28 r. 11 of the Rules of the Superior Courts). Such considerations do not apply here.
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> (iv) Procurement of a judgment by fraud is another exception (*Kelly v. National University of Ireland* [2009] IEHC 484 [2009] 4 I.R 163) but that does not apply here either.
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> (v) The court can also amend a judgment or perfected order if it does not reflect what the court actually decided or intended (*Belville Holdings Ltd. v. Revenue Commissioners* [1994] 1 I.L.R.M. 29.) That is not an issue here.
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> (vi) A final order can be set aside in exceptional circumstances on grounds of bias: *R. v. Bow Street Magistrate*, Ex parte *Pinochet (No. 2)* [1999] 2 W.L.R. 272; *Kenny v. T.C.D.* [2007] IESC 42 [2008] 1 I.L.R.M. 241 [2008] 2 I.R. 40. Again that is not an issue here.
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> (vii) Apart from the foregoing, exceptional circumstances rendering revision necessary in the interests of constitutional justice and constitutional rights, such as arose in *In re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514 would be required to revisit a final perfected order. There are no such circumstances.
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> (viii) Finally, a particular order or category of orders may not be intended to be final in an absolute sense and may contain, either expressly or impliedly, a liberty to apply or to re-enter. Such orders may be intended to be variable in a way that, say, the final order here dismissing the application for leave to seek judicial review was not.

10. Absent one or other of the foregoing, none of which apply here, a final order is not something that can simply be revisited at trial court level. Appeal is normally the appropriate remedy. I would also observe in relation to the question of appeal that the applicant did in fact seek leave to appeal a number of my decisions in relation to some of these matters. Those applications were dealt with by the Supreme Court *sub nom Lavery v. Judge McBride* [2016] IESCDET 132, which related to appeals from:

> (i) an order made by Kelly P. on 29th April, 2016, appealed with Supreme Court Record No. 2016/70;
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> (ii) an order of mine on 13th June, 2016, appealed with Supreme Court Record No. 2016/87; and
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> (iii) another order of mine of 13th June, 2016, appealed with Supreme Court Record No. 2016/88.

11. Clearly a party cannot unsuccessfully seek to appeal an order and then go back to have it revisited by the trial court on similar grounds.

12. I come then to the final proposed notice of motion, which is in 2016 No. 228 J.R., and is an application for liberty to issue a

motion to set aside my order of the 4th July, 2016, the *Isaac Wunder* order itself. Going back to the point made at para. 9(viii) above, the *Isaac Wunder* order was not intended as, and I think generally such an order should not be read as, a final order in the same sense as an order dismissing a judicial review. It is an order with ongoing present-tense effects; and one may, therefore, need to leave the door open to an applicant to say that there has been a significant change of circumstances such that the order should be revisited. Just by way of example, an applicant might revert to the court to say "yes, I have learned my lesson, I have not instituted any frivolous and vexatious proceedings for several years and I now have a requirement to issue proceedings and I should be free from the stigma of being regarded as a vexatious litigant or a crank". In such a sense, an *Isaac Wunder* order does not perhaps have quite the degree of finality as an ordinary final High Court order, and indeed that is recognised in my order of the 4th July, 2016 which gave liberty to the applicant to apply on 48 hours notice to the respondent. That was also in circumstances where the order was made with no appearance by or on behalf of the applicant on the 4th July, 2016.

13. So in principle, the applicant's application to issue a motion to seek to set aside the *Isaac Wunder* order is not automatically inappropriate. However, having said that, before liberty to issue the motion could be granted, I would have to be satisfied that there was at least some reasonable prospect of the applicant succeeding in that motion and that some legitimate *prima facie* grounds for the application had been set out.

14. Unfortunately, however, when one turns to the grounding affidavit of the applicant sworn on 13th March, 2018, one finds that the grounds of the application are essentially that the order should not have been made in the first place. Paragraph 2 of the affidavit makes the allegation that I was "*aware of the fact that [the applicant] had not been served with a notice of motion in relation to the Isaac Wunder order and that [the applicant] was denied the principle of procedure (sic) to reply by sworn affidavit*". The order is very clear, and obviously I was aware, that the applicant was not present at the time of making the *Isaac Wunder* order, but that is very different to being aware that the applicant was not properly served. The situation was that I was satisfied at the time that the applicant had been properly made aware of the application but as a safeguard to the applicant I gave the liberty to apply to which I have already referred.

15. The applicant's affidavit then frivolously goes on to describe my order as amounting to "*fraud and treachery*" at para. 3 and exhibits a complaint alleging that I "*committed treason by refusing to recognise perjury*" in the D.P.P.'s affidavits, "*attempted to conceal all the perjury in the sworn affidavits with the above mentioned gardaí by refusing [the applicant's] constitutional right*", "*ignored and failed to deal with contempt of the High Court*", "*committed treason combining two cases and refused leave for judicial review 2016/228*", "*committed treason by … order case number 2016/346 J.R.*" and "*committed treason … by discharging [my] own High Court orders*".

16. While making a complaint of this nature is clearly contempt of court, all that needs to be said for present purposes is that no ground for discharging the *Isaac Wunder* order has been made out on the affidavit and indeed if anything, the case for my having made that order has been somewhat reinforced by the application now being made.

Order

17. For those reasons I will decline to give liberty to issue the proposed notices of motion.