

**THE HIGH COURT**

[2021] IEHC 722

[Record No. 2021/166 IA]

**IN THE MATTER OF AN APPLICATION TO LIFT AN "ISAAC WUNDER" ORDER AND  
PERMIT THE APPLICANT TO INSTITUTE PROCEEDINGS.**

**JOSEPH LAVERY**

**APPLICANT**

**Judgment of Mr Justice Barr delivered on the 18th day of November 2021.**

**Introduction.**

1. This is an application by the applicant for an order lifting an "Isaac Wunder" order, so as to permit him to institute two sets of proceedings against separate parties.
2. It is fair to say that the applicant has had a long and troubled history with the Gardaí, which has given rise to multiple sets of legal proceedings of various types. As of March 2018, eleven High Court actions had already been instituted by the applicant. All of those proceedings were summarised in a judgment delivered by Humphreys J. on 13th March, 2018 in *Lavery v DPP* (No. 3) [2018] IEHC 185.
3. Prior to the delivery of that judgment, Humphreys J. had, on 4th July, 2016, made an order that is commonly referred to as an "Isaac Wunder" order. Under the terms of that order the applicant was restrained from instituting any High Court proceedings and was restrained from issuing and serving any notice of motion on any person or party whatsoever without the leave of a judge of the High Court. It is against that background that the current applications for leave to institute two separate sets of proceedings, must be considered.

**The Present Applications.**

4. The applicant's first application is for liberty to apply to the High Court for an order to prohibit the continuance of certain criminal proceedings pending against the applicant in the Circuit Criminal Court in County Cavan, those proceedings are due to be heard on 24th November, 2021. These include a charge that is pending against him that he assaulted a member of an Garda Síochána, and two appeals brought by the applicant against orders that had been made against him in the District Court.
5. In the proposed proceedings, the applicant also seeks an order forcing Cavan Circuit Court to accept the applicant's affidavits in the above-mentioned criminal cases, which application had been refused by His Honour Judge Aylmer on 10th November, 2021, when he had ruled that the evidence which was to be tendered at both the criminal prosecution and the hearing of the District Court appeals before the Circuit Court on 24th November, 2021, was to be given by way of oral evidence. In the proposed proceedings, the applicant wishes to make the case that that ruling infringes his rights to a fair trial as guaranteed by the Constitution and by caselaw from the European Court of Human Rights.
6. The applicant's second application is for liberty to allow him to proceed with judicial review proceedings aimed at forcing one Nora Rafferty, an employee of the Courts Service, who works in the court office in Cavan, to re-enter for hearing a notice of motion

grounded on affidavit which had been filed by the applicant on or about 21st December, 2020. The applicant also seeks ancillary reliefs, including an order that the Gardaí investigate the removal by Ms Rafferty of his notice of motion and grounding affidavit from the court file and an order quashing the committal warrant that had issued against the applicant for non-payment of a fine imposed by a District Court order of 10th December, 2020.

7. In order to understand this application properly, it is necessary to set out the facts as alleged by the applicant. It appears that an order was made by the District Court on 10th December, 2020 that certain bail moneys be estreated for failure to comply with the conditions of a recognisance that had been entered into by the applicant on 24th October, 2019. In that order, the applicant was informed that should he wish to have the order varied or discharged, he should instruct his solicitor to issue the necessary application and lodge same in the District Court Office, The Courthouse, Cavan, within 21 days. He was further informed that if he was not represented by a solicitor, he should make his application personally in the office of Cavan District Court within the said 21 days.
8. The applicant maintains that on 21st December, 2020 he attended personally at Cavan District Court office for the purpose of lodging a notice of motion and grounding affidavit seeking to set aside or vary the order that had been made by the District Court on 10th December, 2020. The applicant states that he had lodged the papers with Ms Rafferty in the District Court office; she gave him a copy of the notice of motion which contained both the record number that had been assigned to his application and a court stamp indicating the date, being 21st December, 2020.
9. The applicant states that he heard nothing further in the matter, until he received a letter from Ms Rafferty dated 30th March, 2021, which was in the following terms:

"Re-: District Court orders dated 10 December 2020

*Dear Mr Lavery*

*I refer to the above-mentioned matter and to your notice of motion regarding same.*

*The first paragraph of your notice of motion seeks to set aside the order of Judge McLoughlin dated 10th of December 2020. If you wish to apply for a setaside, please complete and return the enclosed form, and notification of the hearing date for your application will be sent to you and an Garda Síochána, when it is processed.*

*I return herewith your notice of motion and affidavit.*

*Yours sincerely*

*Nora Rafferty*

*Cavan Court Office."*

10. The plaintiff states in his affidavit sworn on 16th November, 2021, that he heard nothing further in the matter until he received a telephone call at 09.48 hours on 15th July, 2021 from Garda Eamon Brady informing him that Garda Brady needed to meet him in relation to an alleged committal warrant for an unpaid fine of €100. The applicant states that he met with Garda Brady and provided him with copies of the notice of motion and affidavit that had been returned to him by Ms Rafferty. He states that the case numbers had been removed from the documents that had been returned to him.
11. The applicant further states that at 21.15 hours on 22nd October, 2021 he received another call from Garda Brady, who informed him that the court documents that the applicant had provided to Garda Brady, did not relate to the committal warrant in his possession. Garda Brady apparently told the applicant that it was either €100 or Castlerea, meaning Castlerea Prison. The applicant says "I say and believe that Garda Brady is correct, the documents (exhibit marked JL 6 and JL 7) with the case numbers removed by Ms Rafferty don't relate to anything".
12. The applicant states that he had further communications with Garda Brady on 18th October, 2021, 19th October, 2021 and 15th November, 2021. He states that Garda Brady is adamant that he intends to bring the applicant to Castlerea Prison. It is against that factual background, as asserted by the applicant, that his application to institute the proposed proceedings must be considered.

**The Legal Test.**

13. Where an order has been made prohibiting a person from instituting proceedings save with the leave of the High Court, the test which must be applied by the court when considering an application by a person for leave to issue proceedings was set out by Clarke J. (as he then was) in *Kenny v Trinity College Dublin* [2008] IEHC 320 at para 2.5:

*"The test, as identified by O'Caomh J. in Riordan, is as to whether, on the basis of the information available at the early stage of an application for leave, it can be said that the proceedings contemplated are frivolous or vexatious. It is also clear, in that context, that it is open to the court to seek to explore, at least to some extent, the basis on which the party would seek to advance their claim with a view to assessing whether any such claim might be regarded as being frivolous or vexatious. That is the test which I intend applying in this case."*

**Conclusions.**

14. In relation to the first set of proceedings which the applicant wishes to issue, applying the test laid down in the Kenny case, I am not satisfied that there is any substance in the applicant's proceedings which attempt to force Judge Aylmer to accept affidavit evidence at the trial of the criminal matters listed for hearing before him on 24th November, 2021.
15. Judge Aylmer clearly indicated that the matter will proceed on oral evidence. That is the way in which evidence is given in criminal trials in this jurisdiction. There is no provision for an accused to defend himself by means of affidavit evidence. It is a fundamental tenet

of the criminal law in this jurisdiction, that all evidence, either for the prosecution or for the defence, be given by means of oral testimony from witnesses, which evidence can be tested by cross-examination. That is the procedure adopted in this jurisdiction, so as to ensure a fair trial to both the prosecution and the defence. The court is satisfied that the proposed proceedings are frivolous and vexatious and amount to an attempt to perpetrate an abuse of process, so as to prevent or hinder the trial of the criminal matters due before the Circuit Criminal Court in Cavan on 24th November, 2021.

16. For these reasons the court refuses to permit the applicant institute this set of proceedings.
17. In relation to the second set of proposed proceedings, it appears that the applicant's notice of motion and grounding affidavit seeking to set aside the order made by Judge McLoughlin on 10th December, 2020 was received by the District Court office in Cavan on 21st December, 2020, as the notice of motion that is exhibited at JL 2, contains a handwritten record number and is stamped with the seal of the District Court office in Cavan and is dated 21st December, 2020.
18. It appears from the letter sent by Ms Rafferty dated 30th March, 2021, that the notice of motion and grounding affidavit were returned to the applicant along with a form 10.5 Notice of Application to have Proceedings Set Aside – Courts Act, 1991 section 22 (6) (A). That notice is exhibited at exhibit JL 5.
19. Given that the core facts as asserted by the applicant appear to be supported by independent documentary evidence, this court cannot say that his proposed proceedings are frivolous or vexatious.
20. That being the case, the court will permit the applicant to commence judicial review proceedings seeking the relief set out in his *ex parte* docket dated 17th November, 2021. That is to say, the applicant may make an *ex parte* application seeking liberty to proceed by way of judicial review in the ordinary way.
21. The fact that this ruling permits the applicant to institute the judicial review proceedings, does not constitute any view on the merits of the applicant's judicial review application, or whether his case even meets the threshold to be given liberty to proceed by way of judicial review. Those questions rest solely with the judge who will hear his *ex parte* application seeking liberty to proceed by way of judicial review.
22. This ruling merely finds that the proposed proceedings are not frivolous or vexatious on the facts that have been put before the court at this time; therefore it is appropriate to lift the "Isaac Wunder" order and permit the applicant to commence a judicial review application by making the necessary *ex parte* application in the ordinary way.