

Jurisdiction: Ireland
Court: Supreme Court
Judgment Date: 01 January 1994
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Docket Number: [S.C. No. 301 of 1993]
Date: 01 January 1994

G. v. Director of Public Prosecutions

G.

Applicant

and

The Director of Public Prosecutions and District Judge Kirby

Respondents

[S.C. No. 301 of 1993]

Supreme Court

Judicial review - Ex-parte application for leave to apply to High Court - Whether applicant entitled to apply for leave - Weight of initial burden of proof - Grounds on which leave may be granted - Prima facie case - Whether applicant has sufficient interest in matter to which application relates - Whether facts averred in grounding affidavit support a stateable ground for relief sought - Whether applicant entitled to relief on averred facts - Whether application made promptly - Whether any alternative effective remedy - Rules of the Superior Courts, 1986 (S.I. No. 15), O. 84, rr. 20 and 21 (1).

Criminal law - Offence - Whether any time limit in which to prosecute - Delay in bringing prosecution - Rule of law - Due process of law.

Practice - Procedure - Judicial review - Ex parte application for leave to apply to High Court - Weight of initial burden of proof - Grounds on which leave may be granted - Whether application made promptly - Rules of the Superior Courts, 1986 (S.I. No. 15), O. 84, rr. 20 and 21 (1).

Order 84, r. 20 of the Rules of the Superior Courts provides *inter alia*:—

"1. No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

2. An application for leave shall be made by motion *ex parte*. . .

4. The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

Order 84, r. 21 (1) provides:—

"An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."

The applicant applied *ex parte* to the High Court (Lavan J.) on the 19th July, 1993, for leave to apply by way of judicial review seeking an injunction and/or prohibition preventing either respondent from proceeding with his trial on twenty-seven charges relating to alleged offences on dates between 1967 and 1981 contained in a book of evidence served on him on the 29th June, 1993, and for a stay on the proceedings pending before the second respondent. The grounds of the application were *inter alia* that the length of time which had elapsed between the date on which the offences were alleged to have been committed and the date of any trial was so long that it raised a presumption of prejudice which could not be avoided or cured. In his grounding affidavit the applicant further averred to certain specific grounds for apprehending that a prejudiced or unfair trial would take place if it were permitted to continue. The High Court refused his application for leave to apply for judicial review finding that there was a *prima facie* case against the applicant; that there was no automatic time limit for criminal offences and that the matters raised by the applicant were essentially for the trial judge and/or jury. The applicant appealed to the Supreme Court.

Held by the Supreme Court (Finlay C.J., Blayney and Denham JJ.), in allowing the appeal, 1, that an applicant applying for leave to apply by way of judicial review must make out a *prima facie* case and satisfy the court *inter alia* (a) that he has a sufficient interest in the matter; (b) that the facts averred to support a stateable ground for the relief sought; (c) that on those facts an arguable case can be made that the applicant is entitled to the relief sought; (d) that the application has been made promptly and within the time limit provided in O. 84, r. 21 (1); and (e) that the only effective remedy which the applicant could obtain would be an order by way of judicial review or if there is an alternative remedy that an application by way of judicial review is a more appropriate method of procedure.

2. That the applicant had made out a sufficient *prima facie* case to entitle him to apply for judicial review in that (a) he had a sufficient interest in the matter being the person directly charged in the proceedings which he sought to prohibit; (b) he had a stateable case in that the facts averred to by the applicant if proved were capable of asserting a real risk of an unfair trial; (c) there was an arguable case that the mere length of time between the offences and the trial could raise an inference of unfairness and further there was an arguable case that the matters averred to by the applicant in paragraph 8 of his affidavit could amount to a risk of real prejudice; (d) the application for leave to apply for judicial review came within O. 84, r. 21 (1) of the Rules of the Superior Courts; and (e) judicial review was the appropriate remedy in the case.

The State (O'Connell) v. Fawsitt [1986] I.R. 362 considered.

Per Denham J., Blayney J. concurring. That a person charged or convicted of an offence is entitled to the rule of law and has constitutional rights. Such a person is entitled to due process of law and the benefit of basic principles of justice and fairness in the carrying out of his trial.

Per Denham J., Blayney J. concurring. That the burden of proof on an applicant seeking leave to apply for judicial review under O. 84, r. 20 is light, in that the preliminary process of leave to apply for judicial review is a judicial screening process to determine if the applicant has a stateable case.

R. v. Inland Revenue Commissioners; ex parte National Federation of Self Employed and Small Businesses Ltd. [1982] A.C. 617 dictum of Lord Diplock followed.

Cases mentioned in this report:—

Cox v. Ireland [1992] 2 I.R. 503.

The State (Healy) v. Donoghue [1976] I.R. 325; 110 I.L.T.R. 9.

The State (O'Connell) v. Fawsitt [1986] I.R. 362; [1986] I.L.R.M. 639.

R. v. Inland Revenue Commissioners; ex parte National Federation of Self Employed and Small Businesses Ltd. [1982] A.C. 617; [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93; 55 T.C. 133.

Appeal from the High Court.

The facts are summarised in the headnote and are fully set out in the judgments of Finlay C.J. and Denham J., *post*.

The applicant applied *ex parte* to the High Court (Lavan J.) for leave to apply for judicial review on the 19th July, 1993. The application was refused and the applicant appealed to the Supreme Court by way of notice of motion.

The appeal was heard by the Supreme Court (Finlay C.J., Blayney and Denham JJ.) on the 6th October, 1993.

Cur. adv. vult.

Finlay C.J.	
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This is an appeal from an order made in the High Court by Lavan J. on the 19th July, 1993, refusing an application made *ex parte* for liberty to institute proceedings by way of judicial review, seeking an injunction or prohibition preventing the trial of the applicant on twenty-seven charges contained in a book of evidence served on him on the 29th June, 1993. The charges to which the application refers are a series of offences of indecency against young girls and of carnal knowledge of girls under the age of fifteen years, set in each instance on a date unknown between, in the majority of cases, a period of twelve months and in some cases lesser periods of five or six months. The earliest of the dates in respect of which the charges are laid would appear to be a charge on a date unknown between the 1st January, 1967, and the 31st December, 1967, and the latest of the charges would appear to be on a date unknown between June, 1981, and the 31st December, 1981. The charges involve a total of seven young girls.

The applicant's grounds for seeking the injunction and prohibition are, firstly, that the length of time which has elapsed between the date on which the offences are alleged to have been committed and the date of any trial is so long that it raises a presumption of prejudice which cannot be avoided or cured. Secondly, as set out in paragraph 8 of his affidavit, he alleges certain specific grounds for apprehending that a prejudiced or unfair trial would take place if it were permitted to continue. These are, in summary, as follows:—

- (a) The lack of specificity of the dates of the alleged offences.

(b) That the facts ranging, as I have indicated, from an unspecified date twenty-six years ago to one, the most recent, twelve years ago, are so long past that it would be unjust to try him.

(c) That by reason of these factors he cannot now hope to find witnesses who could reasonably be expected to give evidence as to his whereabouts or activities in the years 1967 to 1981 as would be required if he were to seek to establish an alibi in respect of all or any of the charges.

(d) That he does not have any diary or other document which would assist him in recalling his whereabouts or activities during the period and that the only defence available to him, he having stated his innocence on oath, would be a simple, unsupported and uncorroborated denial.

The learned High Court Judge in refusing to make an order on the *ex parte* application, stated that he did not accept the contents of this paragraph of the applicant's affidavit, that there was a *prima facie* case and no automatic time limit and that the matters raised were essentially for the trial judge and/or jury.

This is an application brought *ex parte* pursuant to O. 84, r. 20 of the Rules of the Superior Courts which provides *inter alia*:—

"1. No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

2. An application for leave shall be made by motion *ex parte*. . ."

The rule then provides for the form of affidavit and other documentary material necessary for making the application.

It is, I am satisfied, desirable before considering the specific issues in this case to set out in short form what appears to be the necessary ingredients which an applicant must satisfy in order to obtain liberty of the court to issue judicial review proceedings. An applicant must satisfy the court in a *prima facie* manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:—

(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).

(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.

(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.

(d) That the application has been made promptly and in any event within the three months or six months time limits provided for in O. 84, r. 21 (1), or that the Court is satisfied that there is a good reason for extending the time limit. The Court, in my view, in considering this particular aspect of an application for liberty to institute proceedings by way of judicial review should, if possible, on the *ex parte* application, satisfy itself as to whether the requirement of promptness and of the time limit have been complied with, and if they have not been complied with, unless it is satisfied that it should extend the time, should refuse the application. If, however, an order refusing the application would not be appropriate unless the facts relied on to prove compliance with r. 21 (1) were subsequently not established, the Court should grant liberty to institute the proceedings if all other conditions are complied with, but should leave as a specific issue to the hearing, upon notice to the respondent, the question of compliance with the requirements of promptness and of the time limits.

(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure.

These conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an *ex parte* application. Applying each of these proofs to the present application, I have come to the following conclusions.

(a) Quite manifestly the applicant has a completely sufficient interest in the matter, being the person directly charged in the proceedings which he seeks to prohibit.

(b) The facts established by the affidavit, consisting of the dates of the alleged offences and the nature and form of the charges brought against the applicant could, in my view, be capable of demonstrating a sufficient elapse of time and such a lack of precision with regard to dates as to constitute grounds for asserting a real risk of an unfair trial. I do not of course express any view as to whether upon the full contested hearing of this application for judicial review this conclusion will be appropriate.

(c) It is in my view arguable, and it is not desirable that I should express any further view, that as was submitted on the hearing of this appeal the mere length of time between the offences and the trial can in this case raise of itself an inference without any other matter of unfairness of trial. There is an arguable case also on the legal submissions made that the particular matters referred to at paragraph 8 of the affidavit, which I have already summarised in this judgment, could constitute proof of a risk of actual prejudice.

(d) The applicant was charged on the 6th April, 1993, with certain charges in the garda station, and on the 29th June, 1993, appeared before the District Court where further charges were preferred against him and the book of evidence served. He issued his application for leave to institute proceedings by way of judicial review on the 12th July, 1993, and I am satisfied that either he comes completely within O. 84, r. 21 (1) or, if it could be said that he did not, it could hardly be argued that he should not get an extension of time.

(e) With regard to the appropriateness of judicial review as a remedy in this case, the judgment of this Court in *The State (O'Connell) v. Fawsitt* [1986] I.R. 362, at p. 379, quite clearly endorsed the principle that if a person's trial had been excessively delayed so as to prejudice his chance of obtaining a fair trial that the appropriate remedy was a judicial review, even though the court of trial also has, of course, jurisdiction to prevent the trial.

On this review of these particular matters which fall to be established in an application for liberty to issue judicial review proceedings, I would take the view that a sufficient *prima facie* case has been made out to entitle the applicant to the order.

In so concluding, I am not, of course, reaching any decision as to what the appropriate order should be when the matter comes on for a full contested hearing before the High Court as an application for judicial review. The validity of the arguments which are put forward as a matter of law and are asserted to support a claim for an injunction or prohibition would firstly depend on the court being satisfied that the applicant was not himself in any way responsible for the delay.

In cases in general of sexual harassment or interference with young children, the perpetrator may, if he or she is related to or has a particular relationship of domination with the child concerned, by that domination or by threats or intimidation, prevent the child from reporting the offence. The court asked to prohibit the trial of a person on such offences, even after a very long time, might well be satisfied and justified in reaching a conclusion that the extent to which the applicant had contributed to the delay in the revealing of the offences and their subsequent reporting to the prosecution authorities meant that as a matter of justice he should not be entitled to the order. This issue may well be raised and fall for determination in this case, and I express no opinion on it, other than to say it is an issue which the court would have to consider.

I would, therefore, allow the appeal and give the applicant liberty to institute proceedings by way of judicial review, and I would consider this Court should hear counsel upon the form of

proceedings which would be most appropriate and on any special provisions with regard to times or other procedural matters.

Blayney J.

I agree with the judgments of the Chief Justice and Mrs. Justice Denham.

Denham J.

The facts and issues have been fully set out in the judgment of the Chief Justice, with which I am in complete agreement, there are two matters which I wish to emphasise.

Rule of law

The law on the varying burdens of proof that arise at different stages of the judicial review process applies to all applicants.

No matter how heinous the crime, or how disturbing the facts, every man, woman and child suspected, charged or convicted of an offence is entitled to the rule of law, and has constitutional rights. See *Cox v. Ireland* [1992] 2 I.R. 503.

Such a person is entitled to due process of law.

In *The State (Healy) v. Donoghue* [1976] I.R. 325 Gannon J. at p. 335 described 'in due course of law' as:—

"a phrase of very wide import which includes in its scope not merely matters of constitutional and statutory jurisdiction, the range of legislation with respect to criminal offences, and matters of practice and procedure, but also the application of basic principles of justice which are inherent in the proper course of the exercise of the judicial function."

A trial in a court of law is not an exercise in vengeance but is a trial in due course of law in the pursuit of justice on behalf of the community.

The rule of law is the essence of a civilised society. In Ireland that concept is contained in the Constitution, it is a distinct and critical thread in the Constitution and the jurisprudence of the courts.

When women and children come to the legal system it would be a disservice to them if it were perceived that they sought vengeance rather than the rule of law and justice. Insofar as there are new developments and knowledge in our society on issues that relate to the charges laid in this case then these matters must be dealt with in a fair and just way by the courts.

Relative burdens of proof

The burden of proof on an applicant to obtain liberty to apply for judicial review under the Rules of the Superior Courts O. 84, r. 20 is light. The applicant is required to establish that he has made out a statable case, an arguable case in law. The application is made *ex parte* to a judge of the High Court as a judicial screening process, a preliminary hearing to determine if the applicant has such a statable case.

This preliminary process of leave to apply for judicial review is similar to the prior procedure of seeking conditional orders of the prerogative writs. The aim is similar - to effect a screening process of litigation against public authorities and officers. It is to prevent an abuse of the process, trivial or unstatable cases proceeding, and thus impeding public authorities unnecessarily.

Even though the ambit of judicial review has widened in recent years the kernel of the reason for this filtering process remains the same.

On the affidavit and statement filed in this case in this preliminary procedure it is clear that such a case has been established to meet this initial burden of proof

This initial process was described by Lord Diplock in *R. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617 at pp. 643 and 644 where he stated:—

"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when

all the evidence is in and the matter has been fully argued at the hearing of the application."

I am satisfied that a like burden of proof applies in this jurisdiction, at the initial *ex parte* stage, as stated by Lord Diplock. It is a preliminary filtering process for which the applicant is required to establish a *prima facie* case. Ultimately on the actual application for judicial review the applicant has an altogether heavier burden of proof to discharge. That latter burden of proof is not before this Court, but clearly at that stage reasons for the delay, which may include factors such as the relative ages of the complainants at the time of the alleged offences, the question of any dominion the applicant may have had over them, and further matters about which our society is becoming more and more aware in relation to charges such as are laid here, may be factors among others for determination.

On the issue that is before the Court, the preliminary application for leave to apply for judicial review, the law entitles the applicant to such leave. I would allow the appeal.