Neutral Citation Number: [2009] IEHC 596

THE HIGH COURT

JUDICIAL REVIEW

2009 483 JR

BETWEEN

SHERIFAT AJIBADE IDRIS AND SAMAAD ODEYEMI BOLARINWA IDRIS (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND SHERIFAT AJIBADE IDRIS)

APPLICANTS

AND

THE LEGAL AID BOARD AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGEMENT of Mr. Justice John Cooke delivered the 10th day of December, 2009.

1. By order of Peart J. of the 20th April 2009, leave was granted to the applicants to apply for: 1) a mandatory injunction directing the first named respondent, ("the Board",) which had previously (through the Refugee Legal Service,) represented the first named applicant in her asylum proceedings to furnish its client file to her present legal representatives; and, 2) an injunction restraining the second named respondent from deporting her.

2. When the substantive hearing of that application was called on for hearing before this Court on Friday the 27th November 2009, the positions of the parties had been changed by a series of intervening steps and events with the result that the applications before the Court were effectively as follows:

> A. An application by the first named applicant's current solicitors, Niall Sheerin & Co., to come off record as her solicitors;
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> B. In consequence, an application by the Minister to dismiss the application with an order for the costs of the proceeding on the basis that the substantive application had been set down for hearing and was not now proceeding;
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> C. An application on behalf of the Board that the proceeding against it be dismissed with costs but with a further application, as notified to the applicant's solicitors by a letter of the 23rd June 2009, for an order pursuant to O. 99, r. 7, of the Rules of the Superior Courts fixing all or some of the costs incurred by the Board to be paid by the applicant's solicitors upon the ground that the proceedings ought never to have been brought or that, at least from the date the Board had transferred its client file, the costs incurred had been wasted because the Board should have been released from the proceeding.

3. Having heard the submissions of the parties, the Court indicated its intention to rule as follows: 1) As the application had been proceeded with and listed for substantive hearing and was not now to be proceeded with, the respondents were entitled to have the proceedings dismissed with an order for payment of their costs against the applicants. (The Court was informed that the applicants had been told that the matter was listed for hearing that day; that the legal representatives proposed not to represent them and would apply to come off record; and that the significance of this had been explained to the applicants; and, 2) in view of the fact that no motion had been brought to come off record and no affidavit filed by way of the proof of the information thus given to the Court, prior to permitting the solicitors to withdraw, the Court would require affidavit evidence to be filed as to:

> • The dates upon which the solicitor had been in contact with the first named applicant since June 2009 and the address at which she could be contacted;
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> • Confirmation of the information and advice given to the applicant as indicated in paragraph 1 above, including the reasons given to her for ceasing to act; and
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> • Confirmation that the solicitors had advised the applicants of the obligation to sign on as required by the terms of the deportation order; and 3) it would reserve its decision on the application of O. 99, r. 7, and adjourn the matter until the 8th December for the filing of that affidavit.

4. When the matter was listed on the 8th December 2009, an affidavit was filed, sworn by Mr. Niall Sheerin in which he confirmed that he had contacted his client immediately upon receiving the letter of the 20th November, 2009 from the Chief State Solicitor's office which warned that, as the applicant had failed to report to the Garda National Immigration Bureau at Burgh Quay, Dublin, as required by the terms of the deportation order, and that if she failed to do so on 25th November, a motion would be issued to have the proceedings struck out. The affidavit confirms that Mr. Sheerin met with his client on the 23rd November and that he advised her of the necessity of reporting to the Garda National Immigration Bureau and gave her a copy of the letter of 20th November. He says that he explained that he would be unable to continue to represent her if she failed to report. When he learned that she had not done so, he attempted to contact her on the mobile phone number he had previously used but found that it was no longer operating. He had been unable to contact her since.

5. As Mr. Sheerin clearly has no further instructions from the applicant, he is unable to continue to represent her and will therefore be permitted to come off record. Because the application has not been proceeded with, the proceeding will be dismissed with an order for costs in favour of each respondent against the applicants.

6. It remains then to consider the Board's application for an order under Order 99, rule 7. In seeking the order fixing the applicant solicitors with all or some of the Board's costs pursuant to O. 99, r. 7, reliance is placed upon the judgment of Finnegan P. (as he

then was,) in *Kennedy v. Killeen Corrugated Papers* [2007] 2 I.R. 561, and on the further authorities that are cited in that judgment.

7. The material part of Rule 7 reads as follows:

> "If in any case it shall appear to the Court that costs have been improperly or without any reasonable cause incurred or that by reason of any undue delay in proceeding under any judgment or order or of any misconduct or default of any solicitor, any costs properly incurred may nevertheless prove fruitless to a person incurring the same, the Court may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client and also, if the circumstances of the case shall require, why the solicitor should not repay to his clients any cost which the client may have been ordered to pay to any other person and thereupon make such order as the justice of the case may require."

8. On the face of it, this rule is directed primarily at the relationship between a solicitor and his own client against whom an order for costs has been made; with disallowing his reimbursement of improperly incurred costs from his client and with ordering to repay to the client any such costs which the client has been ordered to pay to the third party. In effect, in practical terms, it would apply so as to require the applicant's present solicitor to reimburse the applicant's costs unnecessarily incurred by the Board which the applicants are required to pay to the Board. The Board however goes further and argues that the words "and thereupon may make such order as the justice of the case may require", enable the Court to order the solicitor to pay directly to the Board all or some of the costs for which the applicants will be liable on the dismissal of the proceeding.

9. At paragraph 14 of the judgment, Finnegan P. said:

> "On my review of the authorities, I am satisfied that the power of the Court to make an order under O. 99, r. 7, of the rules of the Superior Courts 1986 whether as to the costs between the solicitor and his own client or an order that the solicitor personally bear the costs awarded to his own client, depends upon the solicitor being guilty of misconduct in the sense of a breach of his duty to the Court or at least of gross negligence in relation to his conduct to the Court."

10. The Court agrees with that criterion and for the making of such an order. The Court would add that it is clearly a jurisdiction which should be exercised sparingly and only in imperative cases. This is a particularly important consideration in litigation of the present kind where it is important to the administration of justice and to the standing of the asylum process that legal representation is available to those claiming asylum and that experienced and competent practitioners should be willing to undertake the work.

11. The Court must therefore be careful not to allow an occasional sense of dismay at the way in which a particular case has been mishandled to lead to a situation in which the issue of costs in these cases, which is already a precarious one, should carry the added risk of enhanced uncertainty.

12. It is of course the primary duty of legal practitioners to ensure that the legitimate interests of their clients are secured in exercising their right of access to the Court. In asylum cases, their mandate is to see that throughout the asylum process the appropriate steps are taken to ensure that the asylum application receives a full and fair examination and results in a lawful determination. But the practitioner also has a duty to the Court to ensure that proceedings are not abused by vexatious, wasteful or speculative litigation. There is no obligation therefore to pursue litigation at all costs simply because it is possible to do so, especially when it has no purpose other than that of prolonging the process and postponing a final determination.

13. Whenever the Court has good reason to conclude that there has been a failure of this latter duty such that proceedings have been unnecessarily commenced or wastefully continued, it should be made clear that recourse can be had to O. 99, r. 7, in order to protect the integrity and effective operation of the asylum process in the interests of the proper administration of justice and of the interests of those genuinely in need of protection and whose determination is likely to be delayed by abuses of process in other cases.

14. In the present case the Court considers that a misjudgement was made when it was decided to continue the proceeding against the Board and to require it to file a statement of grounds of opposition for a substantive hearing when the Board's file had been received and when the Board might have been released from the proceeding.

15. The only remedy of potential benefit to these applicants was the quashing of the deportation orders. When this judicial review application was commenced, the only relief sought was the order of *mandamus* in relation to the file and an injunction to restrain deportation. No challenge was raised to the validity of the deportation orders and, having regard to the time limits applicable, a decision as to whether such relief could be sought was one which required to be made as soon as its feasibility could properly be assessed.

16. In reality, the decision to be made could reasonably be said to require access to the deportation orders, the analysis note giving reasons for the Minister's making of the orders, and the representations made following notification of the intention to make the orders. The RLS file could also be expected to contain for a practitioner experienced in the field, the papers relating to the subsidiary protection application and decision as well as the Tribunal decision, the section 13 report and possibly the note of the section 11 interview as well the asylum application and questionnaire.

17. If the client was not in possession of these, it was reasonable to seek their transfer from the previous legal representative. If a challenge to the deportation order was to be made it would be clear from that material whether the necessary basis for it existed. Whatever procedural confusion may have existed in this case in April and May in relation to what documents were being sought or had been given or were available elsewhere and as to what applications were made or had been made to the Court by the applicants at any particular time, it is clear that by the time Mason, Hayes and Curran wrote the two letters of 15th May 2009, the Board was maintaining that all documents on its file had been furnished and that any it did not have were either known to have been in the possession of the applicant herself or available from a public source, such as, for example, the Home Office Country of Origin Report.

18. According to the affidavit sworn on the 26th June, 2009, when the matter had been before the Court on 25th May 2009, a copy of the decision of the Refugee Appeals Tribunal of 28th February (which the Board solicitors did not have when writing on the 15th May,) was handed over in Court to the applicants' solicitors. On that occasion the application for an interlocutory injunction was refused and the judicial review proceeding was adjourned to the 15th June 2009 to enable the applicant's solicitors to consider the position. On 15th June 2009, they informed the Court that the claim against the Board was to proceed to a substantive hearing and the Board was then directed to file a statement of grounds of opposition.

19. In the written legal submissions lodged on this application, it is sought to justify this decision by saying that other documents

typically found on an RLS client file had not been forthcoming such as attendance notes, notes of the Tribunal hearing, and opinions of counsel. In the face of the Board's sworn testimony that the full file had been handed over, the Court has difficulty accepting this explanation. No detailed reason has been advanced as to the precise basis for the claim proposed to have been made by way of challenge to the validity of the deportation orders which was dependent upon the existence or obtaining of such items and would not have been possible by reference to the documents already furnished. It is not unreasonable to suspect that the decision was at least partly motivated by a desire to keep the proceeding alive so as to act a vehicle for more extended reliefs against the deportation orders, an interpretation that may be thought justified by the subsequent application to amend the grounds.

20. In the Court's judgment, there was no valid reason for incurring further costs in pursuing the application against the Board and no interest to be gained for the applicants; and by doing so, wasted costs were thereby incurred. Nevertheless, the Court is inclined to the benign view that this was a misjudgement rather than serious misconduct or gross negligence and it does not therefore meet the threshold indicated by Finnegan P. in the *Kennedy* case. As the learned President did in that case, the Court takes into account the likelihood that the misjudgement may have been attributable to the advice of counsel upon which the solicitor was acting.

21. Therefore, with some hesitation, the Court will not accede to the application made under O. 99, r. 7, in this case and the normal order for costs will be made.