

THE HIGH COURT

JUDICIAL REVIEW
No. 699 JR 2000
BETWEEN

THOMAS GORMAN, VINCENT KEARNS AND THE NATIONAL TAXI DRIVERS UNION
APPLICANTS

AND

THE MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT, THE MINISTER FOR
STATE AT THE DEPARTMENT OF THE ENVIRONMENT AND LOCAL GOVERNMENT,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr Justice Kelly delivered the 7th day of December 2000

The applicants seek the leave of this Court to commence judicial review proceedings against the respondents.

The application was made on an *ex parte* basis late on Tuesday the 28th of November 2000. At the conclusion of that hearing I took the view that I ought not to decide the application without giving the respondents an opportunity to be heard. They were served with the papers and over the last few days an *inter partes* hearing has been conducted before me.

This procedure of adjourning an *ex parte* application to an *inter partes* hearing is one which is utilised in a small number of judicial review cases. Nobody has suggested that this was not an appropriate case in which to have adopted this procedure. Although the practice

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(2)

has been followed in a number of cases in this jurisdiction it has not been the subject of any judicial comment. It has however received the approval of the Court of Appeal in England (see the observations of Lord Donaldson M.R. in *R. v Legal Aid Board Ex parte Hughes* (1993) 5 *Adm. L.R.* 623).

At the commencement of this *inter partes* hearing Counsel on both sides agreed that, notwithstanding that the hearing was *inter partes*, the burden of proof to be achieved by the Applicants was that set forth by the Supreme Court in *G. v DPP* [1994] 1 *I.R.* 374.

In that case Lavan J. in this Court refused leave to reply for judicial review on an *ex parte* application. An appeal was taken to the Supreme Court where his decision was reversed.

Finlay C.J. at pages 3 77-8 of the report said:

“It is, I am satisfied desirable before considering the specified issues in this case to set out in short form what appears to be the necessary ingredients which an Applicant must satisfied 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.

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(3)

(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

(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.”

It is to be noted that he specified that an arguable case in law must be made by an applicant seeking judicial review.

In her judgment, Denham J. said at page 381 as follows:-

“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 stateable case, an arguable case in law. The application is made *ex parte* to a judge of the High Court as a judicial screening

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(4)

process, a preliminary hearing to determine if the applicant has such a stateable case.”

It is clear that all of these dicta were made in the context of an *ex parte* application. When, towards the end of his submissions and having regard to them, I asked Mr O’Higgins S.C. if he continued to be of the view that this standard of proof as enunciated in ***G. v Director of Public Prosecutions*** was the appropriate one here he suggested that that might not be so and referred me to two English decisions to which I will turn in a moment. At that stage of the hearing it was however too late to allow debate on this important topic since to do so would have worked injustice given the agreement at the commencement of the case as to the applicability of the ***G v DPP*** test and the fact that Mr Rogers had proceeded to open his case fully on that basis. Had this issue as to the standard of proof been raised at the outset it could have been dealt with then. As it was not I must proceed to decide the issue in this case on the standard of proof set forth in ***G. v DPP***.

I am, however, by no means convinced that this low standard is appropriate on an *inter partes* hearing. In this regard I think there is much to be said in favour of the views of Glidewell L.J. in ***Mass Energy Limited v Birmingham City Council*** [1994] Env. L.R. 298. At pp. 307-8 the Lord Justice said:-

“First, we have had the benefit of detailed *inter partes* argument of such depth and in such detail that, in my view, if leave were granted it is unlikely that the points would be canvassed in much greater depth or detail at the substantive hearing. In particular, we have had all the relevant documents put in front of us.... Thirdly, as I have already said, we have most, if not all of the documents in front of us; we have gone

through the relevant ones in detail - indeed in really quite minute detail in

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(5)

some instances - in a way that a court dealing with an application for leave to move rarely does, and we are thus in as good a position as would be the court at the substantive hearing to construe the various documents.

For those reasons taken together, in my view, the proper approach of this Court, in this particular case, ought to be - and the approach I intend to adopt will be - that we should grant leave only if we are satisfied that Mass Energy's case is not merely arguable but is strong, that is to say, is likely to succeed."

That view was approved of by Keene J. in ***R. v Cotswold District Council Ex Parte Barrington Parish Council*** 75 P. and C.R. 515. At p. 530, he said:

"Before dealing with those issues, it is necessary to consider the proper test to be applied to the substantive merits on an application for leave in a case such as this. Reference has been made by the respondents to the Court of Appeal decision in ***Mass Energy Limited v Birmingham City Council***. There Glidewell LJ stated that, where there has been detailed evidence and substantial argument on an inter partes hearing, leave should not be granted merely because an arguable point has been shown, but only if the applicant shows a strong case which was likely to succeed. see page 308. As I indicated in ***ex p. Frost***, that approach seems in principle to be as applicable at first instance hearing of a leave application as in renewed leave proceedings before the Court of Appeal. . .For my part, I would prefer to put it on the basis that where the court seems to have all the relevant material and have heard full argument at the leave stage on an *inter partes* hearing, the court is in a better

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(6)

position to judge the merits than is usual on a leave application. It may then require an applicant to show a reasonably good chance of success if he is to be given leave."

That approach appears to me to make a great deal of sense and to make for a more economical use of court time than the application of the substantially lower standard of arguable case to a hearing of this sort. This question must however wait to be decided on another day and in another case where the issue can be fully debated.

I now turn to consider this application. I do so on the basis that all the applicants must do is satisfy me that they have met the ***G v DPP*** test.

The principal relief which the applicants wish to obtain if they are permitted to commence proceedings is an Order of *Certiorari* quashing the recently made Statutory Instrument 367 of 2000. A variety of different grounds are advanced in support of the alleged entitlement of the applicants. I will consider them shortly.

Statutory Instrument 367/2000 was promulgated on the 21st November 2000 shortly after Roderick Murphy J. quashed an earlier Statutory Instrument No. 3 of 2000.

The first and third applicants in this application were respondents in that case. They, unlike the other unsuccessful respondents, have appealed to the Supreme Court and that appeal awaits a determination in that Court.

Statutory Instrument 367/2000 has revoked Statutory Instrument 3 of 2000 in its entirety notwithstanding that Statutory Instrument 3 had been quashed on *certiorari*. Mr Rogers S.C. says that this has improperly interfered with his clients' entitlement to have their appeal disposed of because there is nothing left to be dealt with by the Supreme Court. He says that this is an impermissible interference with the judicial power and cites in aid of this

page break

(7)

proposition the well known case of *Buckley v Attorney General* [1950] IR 67 also known as the "Sinn Féin Funds" case.

The argument that the making of this Statutory Instrument is an interference with the applicants' rights to have their appeal disposed of in the Supreme Court is strongly contested by Mr O'Higgins S.C. He says that the *Buckley* case does no more than outlaw legislation which trespasses upon the function of the court by directing or purporting to direct the courts as to how a case before them should be decided. He cites *Re Camillo* [1988] IR 104 in which issues similar to those raised here fell to be decided. There the Supreme Court distinguished the *Buckley* case on the basis that whilst in *Buckley* there was a direct intervention by the legislature in an action before the court, that was quite different to a measure of general application which did not purport to direct the court as to how any particular proceedings should be decided. This, says Mr O'Higgins, is a powerful argument against the proposition advanced by the applicants. It may very well be but it does not result in my being able to say that the applicants' claim under this heading is unarguable. Arguability is the only test that must be satisfied here.

Three other arguments are made in support of the proposition that the Statutory Instrument should be quashed. They are (a) that it constitutes an unlawful interference with the property rights of the applicants. (b) that it is unreasonable or irrational and (c) that it was made without sufficient compliance with the rules of natural justice.

I intend no discourtesy to the arguments of Counsel by not dealing in detail with the submissions made to me in respect of each of these propositions. The reason I do not do so is because, notwithstanding the strong submissions made, I cannot hold that the propositions put forward by the applicants are not arguable. Having taken into account all of what has been said to me I have come to the conclusion that an arguable case has been made out under each

page break

(8)

of the headings identified. Having so concluded it is neither necessary nor indeed desirable that I should express any more detailed views on each of these issues.

Two matters must however be made clear. The first is one of general application. The grant of leave to apply for judicial review is not an indicator of the prospects of success at trial still less a warranty of victory. Neither is it the expression of a view as to the prospects of respondents at trial. It is a decision that applicants

have met the low standard of proof required of them namely they have an arguable case. It is nothing more and nothing less than that.

The second observation is specific to this case. This grant of leave does not in any way hinder, impede or prevent the continued operation of S.I. 367/2000 or any part of it. That Statutory Instrument continues in full force and operation unless and until such time as this Court directs otherwise. The grant of leave is not such a direction.

The order will be that leave will be granted to apply for the reliefs which are set forth in paragraph D of the statement grounding the application upon the grounds set forth at paragraph B. I will hear Counsel as to the time required to exchange documents and prepare for an early trial.