[2019] IEHC 794

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 388 J.R.]

BETWEEN

SUKHPREET SINGH PUNN

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 11th day of November, 2019

1. It is agreed that the present proceedings are moot and can be struck out; and it is also agreed that the applicant is to get costs of the proceedings up to the date of the State's open offer, apart from the costs of the leave application. The costs of the leave hearing is the only point of contention that now falls to be addressed. I have received helpful submissions from Ms. Rosario Boyle S.C. and from Mr. Aengus Ó Corráin B.L., who also addressed the court, for the applicant, and from Ms. Emily Farrell B.L. for the respondent.

2. The leave application in this case was made on 8th July, 2019 and the order was perfected on the same day. Paragraph 3 of the order requires service of the notice of motion within seven clear days of the date of perfection and para. 4 provides that the applicant shall serve the respondents with a copy of the statement of grounds, affidavits and leave submissions by 12th July, 2019 "*and in default of such service the applicant's costs of the leave application shall not be recoverable". The order states that "the costs of the application shall be reserved provided that the stipulations at paras. 3 and 4 are complied with".* Thus the costs of the leave application have to that extent already been disposed of.

3. High Court Practice Direction HC81 sets out the standard terms of the default order at leave stage but that is of course only a default order. The Practice Direction also expressly allows any applicant to apply to vary that default order. No such application was made on 8th July, 2019, so the order was drawn up in the standard terms. Paragraph 41 of the applicant's written submissions complains about the lack of a stated reason for the Practice Direction; but instruments of a general nature are normally not accompanied by detailed reasons. The explanatory note that accompanies new rules of court, for example, is generally a very summary paraphrase of the contents rather than a statement of reasons as such. Nonetheless, there *is* a reason for the default terms as set out in the Practice Direction, and that reason is that a practice had developed whereby some applicants delayed serving papers until close to the nominated return date, which then necessitated a further adjournment. The introduction of the default wording for the leave order, very much subject to the entitlement to make an application to disapply it, has contributed along with other measures, many of which are also reflected in the Practice Direction, to a very significant improvement in case processing times and consequently to significantly earlier hearing dates, to the benefit of both applicants and respondents generally.

4. The applicant's solicitor complained in correspondence that *"there was no specific pronouncement from the bench*" about times for service when leave was granted. That's entirely correct - but that is the whole point. It is clearly provided in the Practice Direction that the default terms will apply unless otherwise ordered. Thus there is no need for a specific pronouncement from the bench in each case that the default terms apply, and obviously it speeds up the leave list considerably by avoiding my having to laboriously and pointlessly pronounce all the standard terms at length in each of the normally couple of dozen leave applications every Monday. That would be both boring for all concerned and a waste of my time and that of practitioners. The standard terms are set out in the Practice Direction which is on the Courts Service website. Everyone is on notice of them and if anyone has a problem with them they are more than welcome to apply to vary those terms in any individual case.

5. While the notice of motion was served in time, the other papers were not served until 15th July, 2019. The town agents for the applicant's solicitors say in their correspondence "*we were not aware that the papers had to be filed in a shorter period that [sic] that set out in s. 8B(i) of HC 81".* That rather suggests that they had neither informed themselves of the form of the default order generally, as expressly provided for in the Practice Direction, nor of the terms of the actual order made in this case, which also set out the position expressly. Given that default, no particular injustice has been shown to the applicant. It is not disputed on behalf of the applicant that the papers could have been served in time; and indeed the papers *would* have been served in time if the applicant's solicitors' town agents had informed themselves either of the currently applicable procedures more generally, or more specifically of the terms of the order in this particular case.

6. A complaint is also made that a generic order was applied without individualised judicial consideration. That is a misunderstanding. I would have been more than willing to entertain and consider any application to vary the default terms set out in the Practice Direction. No such application was made. If it had been, it would have received individualised judicial consideration.

7. Ms. Boyle also submits that service one working day late does not make any difference to the respondents. While that submission has a sort of homespun logic, the problem is that it is in the very nature of a time limit that there can be cases that fall just outside the line. This happens to be one of them. That is inherent in any time limit, unless or until the appellate courts determine that there can be no such thing as a fixed time limit. That would of course rather create mayhem in terms of the drafting of court orders, so perhaps unsurprisingly such a doctrine has yet to be announced. It might be added by way of postscript that this isn't about whether or not I should now allow a day's grace. It's about the fact that the leave order including the order as to costs of the leave has already been made and perfected months ago. The applicant didn't do anything about it either at the time or for what it's worth within a reasonable time thereafter and is now seeking to use the present application as a sort of backdoor way of trying to re-agitate that original order, and perhaps even in effect try to appeal it out of time. In any event it isn't correct

to say that there is no prejudice to the respondent. The prejudice arises because if the time limit starts to be seen as a moveable feast, the incentive to serve papers in time (which the overwhelming majority of applicants still somehow manage to achieve) will be removed or diluted. In the event of slippage in service times starting to take hold in the list, respondents will be deprived of the time fixed by court orders and the Practice Direction to consider opposition, and would be forced to apply for further adjournments in many cases. That has a knock-on effect on all litigants. Any given list can be a delicate ecosystem; and indulgence can quickly snowball into creating backlogs affecting other litigants more widely, who are voiceless in any individual application.

8. Ms. Boyle submits that it could not be anticipated that this particular problem would arise. That argument does not stand up. The applicant's solicitors' town agents should have anticipated the need to themselves of the applicable procedure, and indeed the terms of the actual order made. In correspondence and oral and written submissions, the applicant has tried to make a the case about Practice Direction HC81 more generally (indeed I could add that I had the lurking suspicion that the current spat appeared to be an attempt to collaterally push the Practice Direction into the cross-hairs of an appellate court). But unfortunately from that point of view, this application is not in fact about the Practice Direction generally, or even at all. It is really about a particular order. Ms. Boyle complains that if the Practice Direction was not in existence then the applicant would have got the costs of the leave application. There may be a sense in which that is a valid point, but so what? The Practice Direction *does* exist and has produced extremely beneficial results in terms of improving efficiency in the list. Its only relevance to the present application is that it helpfully gave practitioners advance notice of the standard terms of the leave order which can be departed from but were not here. Indeed let me add that the applicant's solicitors benefitted from that advance notice, made themselves aware of the requirements and in fairness to them attempted to comply with them. Their town agents however don't seem to have got that particular memo, metaphorically speaking; so for the applicant's solicitors to take out their frustration on me and the Practice Direction is rather missing the target. Ms. Boyle submits that the Practice Direction is not law and can be disapplied. Of course that is correct, but that is not the issue. The Practice Direction here gave notice of the likely default order but that is superseded by the actual order made in this case or in any other case. It is thus no longer relevant. Ms. Farrell validly submitted: *"I am not relying on the Practice Direction, I am relying on the order".* Unfortunately for the ambitious and wide-ranging challenge that the applicant seems to envisage, that is the simple fact of the matter at this stage.

9. The applicant's deponent avers that the CSSO has complained about piecemeal service of judicial review papers during discussions in the Court Service User's Group. However, the CSSO has replied by correspondence indicating that the minutes of that group have been checked and the only reference to service of judicial review papers was on 10th October, 2017, long before the Practice Direction. The letter goes on to say that *"for the avoidance of doubt we confirm that no representative of the CSSO has made any statement (binding on the respondent or otherwise) to the effect that Practice Direction HC81 need not be complied with".* The letter also rather ominously went on to say: *"please note that if the*

applicant pursues the application for the costs of the application for leave despite the clear terms of the order of 8th July, 2019 we are instructed to seek the costs of that application". A further letter of 7th October, 2019, received on 8th October, 2019, stated that if the applicant continued to seek costs of the leave hearing the respondents would seek costs incurred on or after the date of that letter.

10. A theoretical argument was advanced by Mr. Ó Corráin about what would happen if there was a snowstorm and the order could not be complied with. That sort of scenario is all well and good but it does not help the applicant here because there was no *force majeure* - the applicant's solicitors' town agents do not seem to have read the order and certainly did not comply with it. Secondly, there was no application made in the proper manner to amend the order if there was good reason to do so. The issue was simply ignored until the case was over. Raising it now does not re-start the clock for appeal purposes or any purposes.

11. The punchline is that the costs of the leave application have already been disposed of. The applicant did not make any application or submission to disapply the default wording, so that default wording was adopted. The present application for costs of the leave hearing is therefore totally misconceived.

Order

12. Accordingly, the order will be:

    (i) that the proceedings be struck out; and

    (ii) that costs be awarded to the applicant to be taxed in default of agreement other than (a) costs already disposed of in the order of 8th July, 2019; and (b) costs incurred after 8th October, 2019, in respect of which I will hear specific submissions.

Costs after the State's offer

13. By way of postscript, as to the costs incurred on or after 8th October, 2019, Mr. Ó Corráin has asked for no order as to costs; but it is not clear to me what the jurisprudential basis for such an approach would be. Ms. Farrell has asked for her costs incurred on or after 8th October, 2019 on the basis they follow the event, the event in this case being the outcome of the costs hearing itself. As the only issue since 8th October, 2019 was costs of the leave hearing, and as the respondent prevailed on that issue, costs should follow that event, so the respondent then will have as against the applicant an order for the costs incurred on or after 8th October, 2019 to be taxed in default of agreement.

14. There was no objection to the principle of set-off on either side, so the two costs orders may be set off against each other such that whoever comes out ahead will receive the net balance. As the overall costs position could be altered in the event of an appeal, I will grant a stay on the entire order as to costs (it's accepted by Mr. Ó Corráin that that should apply to the favourable part of the order as well as the unfavourable part from his point of view) in the usual terms, that is for 28 days, and if notice of appeal is served within that period, until the determination of the appeal.