Judgment Title: S. -v- Minister for Justice, Equality & Law Reform & Ors

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Composition of Court: Keane C.J., Denham J., McGuinness J., Geoghegan J., Fennelly J.

Judgment by: Fennelly J.

Status of Judgment: Approved

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THE SUPREME COURT

Keane C.J.
Denham J.
McGuinness J.
Geoghegan J.
Fennelly J.
107 & 115/01
BETWEEN

B

APPLICANT

AND

THE GOVERNOR OF THE TRAINING UNIT, GLENGARIFF PARADE, DUBLIN

RESPONDENT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM
NOTICE PARTY/RESPONDENT

AND

164/01
BETWEEN

S

APPLICANT/APPELLANT
AND
THE MINISTER FOR JUSTICE, EQUALITY & LAW REFORM INTERIM REFUGEE APPEALS AUTHORITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT delivered the 30th day of January, 2002 by FENNELLY J.

I agree with the judgment of Geoghegan J. These additional remarks concern the nature of the right of appeal with which this case is concerned.
Section 5(1) of the Illegal Immigrants (Trafficking) Act, 2000 restricts to fourteen days the period within which a person wishing to challenge one of the measures there listed must apply for judicial review. This is, without question, a severe restriction on the constitutional right of access to the courts of affected persons. I do not understand the judgment of the Court on the reference to it by the President pursuant to Article 26 of the Constitution (*In the matter of the Illegal Immigrants (Trafficking) Bill, 2000*) to have questioned this proposition as it was advanced to it in the arguments of counsel assigned by the Court (see page 389 of the judgment). Counsel had placed particular reliance on the judgment of Costello J in *Brady v Donegal County Council* [1989] I.L.R.M. 282. In that case the plaintiff had challenged the constitutionality of the two month time limit imposed by section 82 (3A) of the Local Government (Planning and Development) Act, 1963 as amended by section 42 of the Local Government (Planning and Development) Act on the bringing of proceedings to question the validity of planning decisions. Costello J said:

"A law which imposes a very short time limit which may well deprive a plaintiff of a judicial remedy before he knew he had a cause of action can obviously cause considerable hardship. But if the plaintiff's ignorance of his rights during the short limitation period is caused by the defendant's own wrong-doing and the law still imposes an absolute bar unaccompanied by any judicial discretion to raise it there must be very compelling reasons indeed to justify such a rigorous limitation on the exercise of a constitutionally protected right. The public interest in (a) the establishment at an early date of certainty in the development decisions of planning authorities and (b) the avoidance of unnecessary costs and wasteful appeals procedures is obviously a real one and could well justify the imposition of stringent time limits for the institution of court proceedings. But if the statute now being considered contained the suggested saver these objectives could be achieved in the vast majority of cases. Certainly the public interest would not be quite as well served by a law with the suggested saver as by the present law, but the loss of the public interest by the proposed modification would be slight while the gain in the protection of the plaintiff's constitutionally protected rights would be very considerable. I conclude therefore that the present serious restriction on the exercise of the plaintiff's constitutional rights imposed by the two-month limitation period cannot reasonably be justified. Unmodified, the subsection is unreasonable; being unreasonable it is unconstitutional, and I will so declare."

Referring to the restriction as so described, the Court in the Article 26 reference accepted that where *"a limitation period is so restrictive as to render access to the courts impossible or excessively difficult it may be considered unreasonable in the sense Costello J. found the rigid rule in Brady v Donegal County Council... to be unreasonable, and therefore unconstitutional."*(page 393).
The Court had pointed out, however, that, as Costello J had also emphasised, the legislation impugned, in that case, contained *" no provision permitting the courts to extend the time for the bringing of judicial review proceedings by affected persons who, through no fault of their own, were unaware of relevant facts until after the expiration of the limitation period."* The presence in the section of the act under review of such a power to extend time was, it appears to me, crucial to the Court's conclusion that the limitation was, in spite of *Brady*, constitutional. The Court continued (page 393):

"In applying that test in this case, the court acknowledges that there are likely to be cases, perhaps even a very large number of cases, in which for a range of reasons or a combination of reasons, persons, through no fault of their own, (as in Brady v. Donegal County Council), are unable to apply for leave to seek judicial review within the appeal limitation period, namely fourteen days. This is a situation with which the courts deal on a routine basis for other limitation periods. The fourteen day time limit envisaged by the Bill is not the shortest with which the courts have had to deal.

Moreover, the discretion of the court to extend the time to apply for leave where the applicant shows "good and sufficient reason" for so doing is wide and ample enough to avoid injustice where an applicant has been unable through no fault of his or hers, or for other good and sufficient reason, to bring the application within the fourteen day period. For example counsel assigned to the court have argued that the complexity of the issues, or the deficiencies and inefficiencies in the legal aid service, may prevent the applicant from being in a position to proceed with his application for leave within the period of fourteen days.

However, where this has occurred through no fault of the applicant, it may be advanced as a ground for extending the time for applying for leave for judicial review.

The court is satisfied that the discretion of the High Court to extend the fourteen day period is sufficiently wide to enable persons who, having regard to all the circumstances of the case including language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, have shown reasonable diligence, to have sufficient access to the courts for the purpose of seeking judicial review in accordance with their constitutional rights."
The power of the court to extend the time for the bringing of a judicial review application is, as is clear from the above passage, of potentially

decisive importance for the protection of the constitutional right of access to the courts of persons affected by decisions vital to their interests.
The Court did not, however, consider the question which is now before the Court. That question - whether the right of appeal to the Supreme Court is restricted by being made subject to the need for the leave of the High Court - is, however, closely linked to the Court's conclusion that the fourteen-day limitation is not so unfair and unreasonable as to be unconstitutional because it is rescued by inclusion in the legislation of what Costello J., in the passage quoted above, described as a "saver." That is so because the power to extend the time is the key by which an affected person may gain access to the court in the form of a right to make an application for judicial review.
I do not think it is straining language to say that the refusal of an extension of time is not a "*determination [by] the High Court of an application to apply for judicial review...*" for the purposes section 5(3)(a) of the act. There is, I would agree, considerable force in the view of the Chief Justice that a decision to refuse an extension of time has the effect of determining the application, where, as here, the application is made out of time and cannot succeed unless the High Court agrees to enlarge the time. However, several considerations of principle demonstrate that the application for an extension of time is distinct from the substantive application for leave to apply for judicial review. The need to apply for an extension of time does not, as a matter of principle arise in every case. It arises only where the applicant has been or perceives himself as being unlikely to be in a position to make the leave application in good time. In practice, of course, it is the former situation which almost invariably occurs. It is rare indeed that an application for an extension is made within the permitted period. Where that period is a mere fourteen days, it will be extraordinarily unlikely. It is interesting to note, however, that the standard rule of the European Court of Justice is that an application for an extension of the time within which to make an application or to file a pleading will not be entertained outside the time.
The fact that the extension of time application is, in principle, distinct is illustrated by the fact that the Court accepted in the Article 26 reference, as the Chief Justice noted, that a separate application could be made for an extension within the fourteen day period. This point is further underscored in the judgment of Geoghegan J., where he points to the distinct character of the matters which will need to be considered on such an application an extension of time. This view gains further support from the remark of Hardiman J. that this "*is a special statutory jurisdiction which is in [his] view sui generis"*. (*GK, MM and ZM v PK*, Supreme Court, 17th December 2001). There is a further decisive consideration. As Geoghegan J. also points out, where the respondent objects to an order which is made granting an extension, there is nothing to prevent that party from appealing such an order. Section 5(3)(a) does not apply. The reason is that the order granting the extension of time does not determine whether leave will be granted. Some troublesome anomalies flow from treating the refusal of an extension of time as a determination of an application for leave. Firstly, it is clear, that an

order grantingan extension is not to be treated as amounting to the determination of an application. It seems equally clear that an order refusing an extension will be treated as not determining the application for leave, if the extension application is made within the fourteen days.On the other hand, an order refusing leave after the expiry of the time will be treated as determining the application for leave. In my view, that interpretation of the section is both inconsistent and discriminatory. It is not an acceptable approach to the interpretation of a provision claimed to limit the right of an affected person to access to the courts.

It is not necessary for me to repeat the references made by Geoghegan J. to the decided cases on the interpretation of Article 34 section 4 subsection 3 of the Constitution. These cases show that this Court has been correctly vigilant in its interpretation of this important constitutional guarantee of access to the court, whose establishment is mandated by the Constitution as the final appellate court. This is not to preserve some institutional prerogative of the Court itself, but to protect the constitutional right of litigants to bring an appeal against judicial decisions affecting them. The notion that double degree of jurisdiction is an important part of the normal judicial system is widespread in modern legal systems. It is not necessarily a fundamentally guaranteed right (see*Toth v Austria* 14 EHRR 551 (1991)). It is, however, recognised throughout the legal structure of this State. It should not be lightly encroached upon or invaded by ambiguous language. The least that is required is that, if the right is to be excluded, this should be done by clear and unambiguous words.

I agree, therefore, with Geoghegan J that the appeals should be entertained..