APPROVED

THE COURT OF APPEAL

Court of Appeal Number: 2024/100
High Court Record Number 2018/361P
Neutral Citation No: [2024] IECA 283

Faherty J.
Binchy J.
Pilkington J.

BETWEEN/

VLADAMIR KRJIWIZKI AND ZOYA KRJIWIZKI

APPELLANTS/
PLAINTIFFS

- AND-

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT/
DEFENDANT

JUDGMENT (*ex tempore*) of Ms. Justice Faherty delivered on the 15th day of October 2024

1. This is an application on the part of the applicants to extend the time in which to appeal the order of the High Court judge dated 16 November 2023 (as perfected on 1 December 2023). That is why the applicants are here, namely, to persuade this Court to extend the time and obviously I will go through the Court's reasoning now.

2. As I have said, the order of the High Court was perfected on 1 December 2023. In accordance with the provisions of O.86A of the Rules of the Superior Court "RSC"), the applicants had in the ordinary way 28 days in which to appeal the order and it is common case that the applicants did not appeal within the requisite timeframe. It appears on 16 April 2024 they issued a notice of motion albeit I didn't see an actual notice of motion in the papers, but there was certainly an affidavit sworn by the first applicant and filed in the Office on 16 April 2024 in which a case was made by the applicants to seek an extension of time in which to appeal the decision of the High Court.

Background

3. The applicants are a married couple, and they reside in Dublin. They arrived in Ireland with their son in September 1997. Their daughter was born in this jurisdiction, as I understand it, in 1998.

4. Upon their arrival in the jurisdiction, they made an application for asylum which was in the process of consideration, it would appear, when their daughter was born. Following the birth of their daughter they withdrew that application. Now, the applicants received residency in Ireland in August 1999. In January 2023, as I understand the position, the first applicant had a stamp 4 visa renewed for a period of five years.

5. The within proceedings issued on 15 January 2018. It is instructive to look at the general endorsement of claim to the plenary summons – this is what the pleading says:

> "The Department of Justice knew and has been hiding the fact that our family is suffering from hepatitis B + C.
>
> The Department of Justice has been hiding from us that they were giving my wife hormone-containing contraceptives to prevent my wife from having a child.
>
> I have been provided a job with highly toxic materials, which is not recommended for people with hepatitis (otherwise I would have been refused social payments).

By this latter plea I understand the first applicant to be saying that he was told to undertake a job albeit he claimed to have hepatitis, and that had he not taken the job he would have been denied disability payments. The endorsement of claim goes on to allege or claim that all this caused the first applicant's liver to malfunction. It is pleaded that the applicants possessed the evidence to prove that the Department of Justice was responsible for all of the foregoing.

Paragraph 4 pleads negligence and paragraph 5 malfeasance.

6. An appearance was filed in February 2018 and the applicants then delivered a statement of claim on 5 June 2018.

7. Again, the case as set out in the statement of claim can be fairly summarised as follows:

- That the Department of Justice knows that the first applicant is infected with hepatitis, but instead of treating his family it decided to hide their illness.
- That the first applicant's family was terrorised by what is described as "provocateurs" of the Department of Justice, or its employees, and that the Department tried to prevent the second applicant from becoming pregnant (a repeat of the general endorsement of claim on the plenary summons).
- That the applicants' initial application for housing was lost. The statement of claim then goes on in other regards in relation to that particular claim.
- That in 2001, the Department of Social Welfare referred the first applicant to FÁS. There is, again, an expansion on what was asserted in the general endorsement of claim.
- The first applicant maintains that he was provided with an incorrect diagnosis by a named medical practitioner. He further refers to an article published in the Irish Independent on 20 May 2000 and accuses the respondent (here, the Minister) of malfeasance in failing to respond to that article.

- The first applicant maintains that from 2004-2009 he was denied disability allowance. He alleges that the "social services" sent a fake medical report, which led to this refusal, again, it is claimed, at the provocation of the Department of Justice.
- The first applicant blames two named medical professionals for those issues.
- The first applicant pleads that the respondent "made his family disabled" and that the respondent was "trying to get rid of them".
- It is maintained that the respondent changed the initials in the applicants' names and changed their nationality, and that the respondent is trying to deprive them of human status.

As appears from the plenary summons and the statement of claim, the reliefs being sought by the applicants are as follows:

> "Negligence, misfeasance, that the Department of Justice take responsibility for the treatment of our family and foremost the full restoration of the documents of our family by the Government of Moldova."

8. The matter was before the High Court on 16 November 2023. On that day there were two matters before the court. The first, it appears, was an appeal by the applicants against an order of the Master made on 11 July 2018 refusing their application to join some eight further defendants to the proceedings. These additional eight defendants or putative defendants are individuals who had been involved, it appears, in the medical care of the applicants. These individuals were sought to be added as people who had falsified the medical history of the first applicant. In the view of Ferriter J, the High Court judge ("the Judge"), there was no legal error in the Master refusing that application as the basis of the application *"did not reveal any arguable case in respect of the joinder of those additional defendants to the action"*.

9. The second application, which is really at the heart of what this Court is largely concerned with today, is the application brought by the respondent (the Minister) in the High Court seeking to dismiss the applicants' proceedings pursuant to O.19, r.28 RSC or, alternatively, seeking a dismissal pursuant to the inherent jurisdiction of the court.

10. As regards the Minister's application, as his *ex tempore* judgment shows, the Judge first had regard to the legal test applicable to such applications. He considered that a useful summary was contained in the judgment of Simons J. in *Clarington Developments v. HCC International Insurance Company* [2019] IEHC and he quoted Simons J. at paras. 24-25 as follows:

> *"24. For the reasons explained by the Supreme Court in Lopes it is important to distinguish between the jurisdiction to strike out and/or to dismiss proceedings pursuant to Order 19 of the Rules of the Superior Courts, and to the court's inherent jurisdiction.*
>
> *An application under the Rules of the Superior Courts is designed to deal with the circumstances where the case as pleaded does not disclose any cause of action. For this exercise, the court must assume that the facts—however unlikely that they might appear—are as asserted in the pleadings.*
>
> *25. By contrast, in an application pursuant to the court's inherent jurisdiction, the court may to a very limited extent consider the underlying merits of the case. If it can be established that there is no credible basis for suggesting that the facts are as asserted, and that the proceedings are bound to fail on the merits, then the proceedings can be dismissed as an abuse of process. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings."*

11. In his *ex tempore* judgment, the Judge made it clear that striking out proceedings, under whatever test, was something to be exercised "in very exceptional circumstances", and something to be exercised "sparingly".

12. He goes on then obviously to address the claims made in the proceedings bearing in mind obviously the tests to which he was required to have regard. The first pleading that the Judge looked at was that the Department of Justice was hiding the family's illnesses instead of treating them, and the applicants' desire, as set out in the pleadings, that the Minister take responsibility for the family's medical case treatment and healing. The Judge stated that *"even if there was a valid cause of action disclosed, which there is not, for reasons which I will come to, this defendant [the Minister] could not be responsible for such matters, given that it's the Department of Justice".*

13. The Judge found no credible basis (having regard especially to the second test for the strike out of proceedings) for suggesting that the facts were as asserted by the first applicant. Having read the papers, and having listened to the submissions made in court, he was satisfied that there was simply no credible basis for suggesting the facts as asserted by the applicants. Therefore, in the view of the Judge, the proceedings were bound to fail on the merits and could be dismissed as an abuse of process.

14. As to the reasons for his findings, the Judge found support in a medical report of 3 March 2008 for his finding or reasoning that there was no credible basis for the contention that the Department of Justice had been hiding the first applicant's hepatitis condition. As that medical report showed, whilst the first applicant had hepatitis at some point, effectively there was no active hepatitis C as of March 2008.

15. As to the claim the applicants had been terrorised by provocateurs or secret agents in the employment of the Department of Justice, and/or that the Department tried to prevent the second applicant becoming pregnant, the Judge found that that was a contention for which

there was *"no credible basis within the meaning of the case law, and no cause of action, no reasonable cause of action…"* and so again that claim was bound to fail.

16. As to the claim that the applicants were not properly treated in terms of a housing application, the Judge noted that an application for housing had been made some 23 years prior and that the applicants were in fact housed in 2000. He opined that even accepting the facts as asserted by the applicants, there was simply no case made in the pleadings as against the Department of Justice. Even if there was, it was long since statute barred. Hence, the claim was an abuse of process within the law.

17. The Judge next dealt with the applicants' contention that the first applicant's referral by the Department of Social Welfare through FÁS for employment in 2005 had left him exposed to toxic substances to the detriment of his health. The Judge found that the medical evidence (a report of a named medical professional) did not support this claim even accepting the applicant's assertion that the medical evidence had been falsified. Taking the applicants' case at its height, the Judge found no credible evidence for the claim being made. Even if there was some basis for that claim, it was long since statute barred, in the view of the Judge, and, moreover, again, the Minister for Justice would not be the appropriate defendant.

18. As referred to earlier, in July 2018, the applicants had sought to join the named medical professional together with other medical professionals and, as I have said earlier, this was refused by the Master of the High Court in July 2018, which the Judge upheld on 16 November 2023.

19. The Judge goes on to say that insofar as the applicants had alleged that the first applicant's name was misspelt in a newspaper article of 20 May 2000 and claimed that the Department of Justice were seeking secret agents, through the medium of such an article, to effectively act to the first applicant's detriment, again, the Judge found that there was

"simply no credible basis for such a wild assertion". Nor was there any credible basis for the allegation that there was an incorrect medical diagnosis of either of the applicants.

20. The Judge next addressed the claim that the applicant was refused a disability allowance. He noted that the applicants accepted that the disability allowance in question was in fact provided from 2009. As to the claim that the first applicant was unreasonably denied disability allowance between 2004-2009, the Judge found that there was no *prima facie* or credible evidence before the court that any wrong had been committed at that time. Even if there was, the claim was long since statute-barred and, in any event, it was a claim that could not be maintained against the Minister for Justice.

21. Laterally, the Judge addressed a set of complaints in the pleadings that the Department of Justice had been responsible for changing the applicants' family name and/or their nationality. In essence, the applicants' claim is that they were wrongly described by the Department of Justice as Russian when they were in fact Ukrainian.

22. The Judge noted a number of documents in the papers relating to this issue and, in particular that in 2002, 2007, 2012 and 2017 the applicants had accepted registrations, presumably by the Department of Justice-Immigration side, that described them as having Russian nationality. Furthermore, the Judge had regard to a letter from the Department wherein it was stated that if the first applicant could provide proof of an alternative nationality the Department may be able to change the first applicant's nationality within its systems and issue him with a new registration card.

23. In those circumstances, the Judge could not discern any credible basis for the applicants' allegations.

24. The Judge next turned to the second of the reliefs claimed by the applicants in their statement of claim, namely "full restoration of the documents of our family issued by the Government of the Republic of Moldova". He found no stateable basis for the relief being

sought saying *"if indeed it is relief that could be ordered by the Court at all set out in the papers before me"*. In effect, it was not a relief *"which is cognisable to this Court"*.

25. In summary, therefore, the Judge was compelled to the conclusion that it would be appropriate to grant the relief being sought by the Minister. Whilst the Judge was, it would appear, satisfied that the case as pleaded did not disclose any reasonable cause of action, ultimately, he rested his decision on the exercise of the court's inherent jurisdiction. He thus struck out the applicants' proceedings for being an abuse of process on the basis that there was no real prospect of success and that same were bound to fail.

26. As I have said, the applicants had 28 days from the perfection of the order of 1 December 2023 within which to appeal, and, as we know, no appeal was brought in that period.

27. Now the applicants' application to extend time was made effectively on 16 April 2024. It is grounded on an affidavit sworn on 8 April 2024 by the first applicant as filed on 16 April and therein, he avers:

> "At the request of the High Court, our family was provided with a Russian-speaking translator, who disoriented our family during the translation process, she deceived us and said that our family could no longer appeal the decision of the High Court. I am firmly convinced that she did this on the instructions of the Minister of Justice's Special Services, which are obstructing justice.
>
> I want to appeal the decision of the High Court because I consider this decision to be politically motivated, and the facts presented by me and my wife on 379 pages have not been fully studied. As a result, a miscarriage of justice was committed.
>
> [F]or 20 years I have been writing to the Irish Minister of Justice to protect our family. I asked him to appoint an investigation into the actions of the Special Services of the

Ministry of Justice who physically killed our family (it was an extra judicial measure), the Court of Appeal should study my case more deeply and make a fair decision."

28. That affidavit was responded to in an affidavit sworn by Ms. Deborah White on behalf of the Minister, filed on 12 June 2024. Therein, Ms. White took issue with the first applicant's averments. In particular she avers:

"4. The Plaintiffs were assisted by a Russian speaking interpreter at the hearing of the application before Mr. Justice Ferriter. I understand that the engagement of the interpreter was arranged by the Solicitor with charge of this matter in the Chief State Solicitor's Office. The interpreter was engaged to assist the Plaintiffs in the presentation of their case to Court and to assist the Court to understand the case that the Plaintiffs sought to make. While I am a stranger to any discussions which the Plaintiffs had with the interpreter, I deny in the strongest terms that the interpreter was given any instruction by the Defendant or the Department of Justice. I further deny that there was any obstruction of justice as alleged by the first named Plaintiff/Appellant.

5. I further deny that the Defendant or the Department of Justice has any political motivation in this case as alleged by the Plaintiff or that any miscarriage of justice has occurred.

6. I say and I am advised that the Plaintiffs are out of time to bring their appeal of the decision of the High Court. Further, I am advised that the Appellants have not put any evidence before this Honourable Court to explain their delay in lodging their appeal or that they had a *bona fide* intention to bring the appeal within the permitted time which would allow the Court to extend the time for which an appeal may be brought. Further, there is no evidence of any mistake alleged against the decision of the High Court or that the Appellants have established any arguable grounds of appeal."

29. On 28 June 2024, the first applicant swore a further affidavit wherein he avers that he "categorically and completely" disagrees with Ms. White's testimony who, he alleges, "claims and tries to prove the professional cleanliness of the Russian translator". The first applicant avers that the translator was "a provocateur of the Special Services of the Irish Department of Justice whose purpose was to disorient our family, namely, to convince us that this is the final verdict and not subject to appeal". He goes on to aver that "there are a lot of such provocateurs in Ireland", citing in this regard his claim that the Minister could not deny the publication of an article in the Irish Independent newspaper of 20 May 2000 which "features a provocateur who staged provocations to our family on the instructions of the Special Services of the Irish Department of Justice". The first applicant avers that this individual's assignment "was to terminate my wife's pregnancy" and that the individual had confessed to the applicants that he was "making provocations on the instructions of the Special Services of the Irish Department of Justice…".

30. He goes on in his affidavit to request the Court "to oblige the defendant of the Minister of Justice to provide a report on the legal assessment of the article in the Irish Independent…" which, it is claimed, "will determine the degree of responsibility of the Irish Minister for Justice "whether it was negligence or it was done intentionally to hide my illness, and will also serve as a fair hearing of the case".

31. That was the last affidavit sworn by the first applicant in the application that is before this Court.

32. The legal principles to which this Court must have regard in hearing applications for leave to appeal are by now well-rehearsed in the case law. Before turning to the grounds of appeal upon which the applicant seeks to rely if granted an extension of time, it is helpful to have regard to the applicable legal principles in applications for leave to extend time. And these, as I said, are well rehearsed.

33. As first stated by Lavery J. in *Eire Continental Trading Company v. Clonmel Foods Limited [1955] IR 170,* there are some three questions that guide the exercise of the discretion of the court:

1. The applicant must show that he had a *bona fide* intention to appeal formed within the permitted time.
2. He must show the existence of something like mistake. Mistake as to procedure, and, in particular, the mistake of counsel or solicitor as to the meaning of the relevant rule, will not suffice.
3. He must establish that an arguable ground of appeal exists.

34. For good measure, it should also be noted, as *Brewer v. Commissioner of Public Works* [2003] 3 IR 539 makes clear, that if the conditions in *Eire Continental* are satisfied it does not necessarily mean that time will be extended. Equally if they're not satisfied, it does not mean that an application to extend time will be refused.

35. The requisite principles were reiterated by the Supreme Court in *Seniors Money Mortgages Ireland DAC v Gatley* [2020] IESC 3, [2020] 2 IR 441 where O'Malley J. emphasised that while the starting point for the determination of any application is *Eire Continental,* the Court nevertheless retains a discretion in determining whether or not to grant an extension of time having regard to the totality of the particular circumstances of the case before it, the critical inquiry, as said by Clarke J. in *Goode Concrete,* being directed to the balance of justice which requires that the discretion must be exercised having regard to where the balance of justice lies in the particular circumstances of a case. That's effectively the test.

36. As to how the justice is to be balanced, in *Goode Concrete*, Clarke J. considered the following factors to be of relevance – a recalibration, I think, of *Eire Continental.* He said:

> *"Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice, excluding parties from potentially meritorious appeals also runs the risk of injustice. Prejudice to successful parties who have operated on the basis that, once the time for appeal has expired, the proceedings (or any relevant aspect of the proceedings) are at an end, must also be a significant factor. The proper administration of justice in an orderly fashion is also of high weight. Precisely how all of those matters will interact on an individual case may well require careful analysis. However, the specific Eire Continental criteria will meet those requirements in the vast majority of cases."* (para. 4.3.3)

So, as *Goode Concrete* shows, the focus must be on the particular facts and circumstances surrounding each application.

37. The applicants' application for time to be extended for them to appeal the decision of Ferriter J. falls to be considered having regard to the legal principles to which I have just referred. The respondent here (the Minister) contends that the applicants have not surmounted the *Eire Continental* test and they have failed to surmount each individual limb of that test.

38. Turning then to the first limb of the *Eire Continental* test, that is whether the applicants have shown that they had a *bona fide* intention to appeal. The first applicant's contention is that they were told by their interpreter in the High Court that they could not do so. He asserts that it was only, effectively, as I understand it as best I can, when he was handed a letter from the Office of the Court of Appeal advising that he was out of time that the applicants realised that they could in fact appeal.

39. Whilst the applicants' contention that they were advised by the interpreter that they could not appeal is not supported by any documentary evidence, I am prepared to take what the first applicant asserts at its height, albeit that, by the same token, I entirely accept what

Ms. White says, namely that no instruction was given by the respondent to the interpreter to mislead or misguide the applicants or to obstruct justice. At its height, there may be a misinterpretation or a miscommunication between the applicants and the interpreter. But, insofar as the applicants seek to lay the blame on the respondent, I consider the applicants' contention in that regard as a further example of basically the wild allegations to which the Judge referred to in the course of his *ex tempore* judgment in November 2023.

40. As per the second limb of the *Eire Continental* test, it falls to the applicants to establish that the High Court judge erred in arriving at the conclusions he did. In essence, the Judge concluded, pursuant to the court's inherent jurisdiction, that it was an appropriate use of the court's discretion to strike out the applicants' proceedings for being an abuse of process within the meaning of the jurisprudence. Essentially, that was the ultimate decision which the High Court judge arrived at.

41. In my view, the applicants here singularly failed to establish that the Judge erred. The height of the applicants' case is that the facts presented by them were not "fully studied" by the Judge. That contention has no merit, in my view, when one has regard to the very careful analysis the Judge conducted, not just pursuant to the court's inherent jurisdiction but also having regard to the requirements of O.19, r.28 albeit, as I have said, he rested his ultimate decision to strike out the proceedings on the court's inherent jurisdiction.

42. In my view, at each remove, the court took the applicants' case at its height when assessing whether the Minister's application should be acceded to. A perusal of the judgment establishes, to my mind, that every aspect of the applicants' case was engaged with by the Judge. He correctly summed up their case as made, which was that the applicants wanted the Minister to take responsibility for the treatment of their family's health, and, secondly, they wanted the restoration of documents pertaining to the family as issued by the Government of Moldova. The claims underlying the reliefs being sought by the applicants

and indeed other claims made in the pleadings were variously held by the Judge as having no credible basis, were not the responsibility of the Minister, or were effectively statute-barred. In this latter regard, I refer to the applicants' contention that the family's name was changed in 2000 and that the first applicant was denied his disability payment between 2004 and 2009.

43. As regards the third limb of the *Eire Continental* test, palpably, in my view, the applicants have not put forward any arguable ground of appeal such that this Court might be persuaded to exercise its discretion to extend time in which to appeal. The applicants' written submissions only refer to "a chronology of physical destruction of their family by the Special Services of the Minister for Justice of Ireland". The submissions go on to supplement this with what can only be described as further incredible claims for which, in my view, there is no legal basis whatsoever.

44. In oral submissions today, the first applicant points to p.24 of the Book of Pleadings and Evidence, in aid of the within application for time to be extended but again, in my view, the contents of that letter, which is a 2000 letter, the one to which the first applicant referred the Court, really only serves to underscore the applicants' total misguided view as to the respondent Minister's remit.

45. In the absence of arguable grounds, even assuming an intention to appeal was formed and that there was some good reason for the delay, (in respect of which, as I have said, the applicants have been given the benefit of doubt), to quote Clarke J. in *Goode Concrete,* it is difficult, to my mind, in this case, to envisage any circumstances where it could be in the interests of justice to allow an appeal to be brought by the applicants in respect of the judgment and order of Ferriter J.

46. So, for all the reasons I have said, I would refuse the applicants' application for an extension of time.

47. **<u>Binchy J</u>** : I have listened very carefully to the judgment just delivered by Ms. Justice Faherty and I am in complete agreement with it and I have nothing I wish to add to it.

48. **<u>Pilkington J</u>** : I too have listened to the judgment delivered by Ms. Justice Faherty and I endorse it entirely and I would simply add following on from her finding of the appellants' misguided view as to the respondent's remit to suggest that they also had a misguided view and I appreciate they are lay litigants acting with the aid of an interpreter, as to the grounds of appeal upon which this Court was required to adjudicate today, particularly in oral submissions before this Court the appellants through the first named appellant sought in very strong terms to urge upon the Court that some form of investigative function was vested in it with regard to the various complaints that have been comprehensively outlined by Ms. Justice Faherty in the judgment that she has just delivered. Those issues had no part in the legal criteria, and again fully set out by Ms. Justice Faherty, that must be employed by this Court in arriving at its decision. I endorse it with regard to her findings with regard to the second and third limb of *Eire Continental* as discussed by Mr. Justice Clarke (as he then was) in *Goode Concrete* and for these and the other grounds that she articulates I agree with the appeal and the orders that she proposes.

<u>Ruling on costs</u>

49. **<u>Faherty J.</u>** Having briefly consulted with my colleagues in relation to the Minister's application for costs, it seems to the Court in the circumstances of this case where the applicants have not been successful that it follows, in the ordinary way, that the person who has been successful in the application, namely the Minister, should get her costs.

50. The only issue for this Court is whether there are any circumstances that might persuade the Court not to make the order sought. In the circumstances of this case, in particular having regard to the fact that, albeit they were perfectly entitled to do so, having exercised their right of appeal, the applicants must appreciate that it follows, like it did in

the High Court, that there is a cost to them if they are not successful. So, in all the circumstances the Court is satisfied that costs must follow the event in this case. We are just making the order in this Court obviously – for costs – because this is an application to extend time. That's all that is before the Court.