

Neutral Citation No: [2016] NICA 55

Ref: MOR10144

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 22/12/16

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED FROM A DECISION OF THE PRESIDING
DISTRICT JUDGE (CIVIL)

Between:

GARETH LEE

Plaintiff/Respondent;

-and-

COLIN McARTHUR, KAREN McARTHUR AND
ASHERS BAKING COMPANY LIMITED

Defendants/Appellants.

Before: Morgan LCJ, Weatherup LJ and Weir LJ

MORGAN LCJ

Applications concerning Supreme Court

Leave to appeal

[1] The appellants seek leave to appeal to the Supreme Court. The first issue is whether the court has jurisdiction to grant leave. The proceedings before us were brought by way of case stated under Article 61 of the County Courts (Northern Ireland) Order 1980 which provides:

“(1) Except where any statutory provision provides that the decision of the county court shall be final, any party dissatisfied with the decision of a county court judge upon an point of law may question that decision by applying to the judge to state a case for the opinion of the Court of Appeal on the point of law involved and, subject to this Article, it shall be the duty of the judge to state the case...”

(7) Except as provided by section 41 of the Judicature (Northern Ireland) Act 1978 the decision of the Court of Appeal on any case stated under this Article shall be final.”

[2] Section 41 of the Judicature (Northern Ireland) Act 1978 relates to criminal cases and does not arise. Section 42 deals with civil appeals and provides:

“Appeals to Supreme Court in civil cases

(1) Subject to the provisions of this section and to any restriction imposed by any statutory provision which has effect by virtue of subsection (6), an appeal shall lie to the Supreme Court from any order or judgment of the Court of Appeal in any civil cause or matter.

(2) No appeal shall lie under this section except with the leave of the Court of Appeal or the Supreme Court.

...

(6) No appeal from an order or judgment of the Court of Appeal shall, unless it involves a decision of any question as to the validity of any provision made by or under an Act of the Parliament of Northern Ireland or a Measure of the Northern Ireland Assembly, lie under this section in a case where by any statutory provision, including a provision of this Act, it is expressly provided (whatever form of words is used) that that order or judgment is to be final.”

[3] It is necessary, therefore, to determine whether the appeal involves a decision on any question as to the validity of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (“SOR”) or the Fair Employment and Treatment (Northern Ireland) Order 1998 (“FETO”). The appellants argued in respect of both that they should be read down so as to respect their convention rights. The Attorney General for Northern Ireland submitted that both offended the constitutional statutes governing Northern Ireland legislation. The appellants now wish to pursue that issue by way of application to the Supreme Court.

[4] The appellants must also establish that the relevant provision was made by an Act of the Parliament of Northern Ireland or a Measure of the Northern Ireland Assembly. Schedule 12 to the Northern Ireland Act 1998 at paragraph 3 (4) provides that the reference to a Measure of the Assembly shall be construed as including a reference to an Order in Council under paragraph 1 of Schedule 1 to the Northern Ireland Act 1974. FETO was made in exercise of the powers conferred by paragraph 1 of Schedule 1 to the Northern Ireland Act 1974 by Her Majesty in Council and accordingly in our view there is jurisdiction to refer the point which the appellants wish to pursue in respect of FETO.

[5] On the other hand the SOR were made pursuant to a power given to the Office of the First Minister and Deputy First Minister by section 82 of the Equality Act 2006. That is not a law making power falling within section 42 (6) of the Judicature (Northern Ireland) Act 1978 and accordingly no appeal lies in respect of it. The appellants submit that if they are successful in obtaining leave they will be able to pursue the appeal on all issues. We do not accept that submission. Section 42(6) only provides a right of appeal in respect of those matters falling within it. We refuse leave on the FETO point leaving it to the Supreme Court to decide whether to hear the appellants.

Referral by the Attorney General for Northern Ireland

[6] Judgment in this case was given on 24 October 2016. By virtue of Order 42 Rule 8 of the Rules of the Court of Judicature (Northern Ireland) 1980 the judgement took effect from the date on which it was given. Thereafter it had to be signed, sealed and filed. On Friday, 28 October 2016 the Attorney General lodged a notice requiring the court to refer the devolution issue which had arisen in the proceedings to the Supreme Court. The judgment was sealed and filed on Monday, 31 October 2016.

[7] The Attorney General's power to refer is contained in paragraphs 33 and 34 Schedule 10 of the Northern Ireland Act 1998:

"33. The Attorney General, the Advocate General for Northern Ireland, the Attorney General for Northern Ireland acting jointly or the Advocate General for Scotland may require any court or tribunal to refer to the Supreme Court any devolution issue which has arisen in proceedings before it to which he is or they are a party.

34. The Attorney General, the Advocate General for Northern Ireland, the Attorney General for Northern Ireland acting jointly or the Advocate General for Scotland may refer to the Supreme Court any devolution issue which is not the subject of proceedings."

[8] It was submitted that because paragraph 33 referred to "any devolution issue which has arisen in proceedings" the reference to the past tense indicated that the referral could be made at any stage. We do not accept that interpretation because the phrase "proceedings before it to which he is or they are a party" requires that there are such proceedings ongoing at the time of referral.

[9] There is no doubt that the court can recall and vary an order before it is perfected (see Paulin v Paulin [2010] 1 WLR 1057) and indeed there is authority to suggest that an appellate court can do so even after perfection (see Taylor v Lawrence [2003] QB 528). It is also clear, however, that such a power should only be used in highly exceptional circumstances. The fact that there is such a power does not mean that the proceedings in which judgement has been given are ongoing and we do not consider that there are exceptional circumstances in this case which require us to reopen the proceedings.

[10] We are also not inclined to accept that the signing, sealing and filing of the Order constitutes a proceeding. That approach is supported by Deighton v Cockle [1912] 1 KB 206 where the court held that signing judgement under the old Order 14 was not a proceeding within the Rule. In our view the proceedings ended with the giving of judgment and have not been reopened.

[11] Accordingly we do not consider that the Attorney General has power to require the court to refer under paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 because at the date on which he purported to refer there were no longer proceedings before it. That accords with our view that the power to require the court to refer is designed to enable the Attorney General to refer proceedings in which he is involved prior to judgment so that the Court of Appeal can determine the case with the benefit of the opinion of the Supreme Court. Once judgment is given the Attorney General has the appeal rights of any other litigant and can also exercise his powers under paragraph 34. The court has no role to play in relation to the exercise of those powers.

Conclusion

[12] We consider that there is jurisdiction to seek leave to appeal in respect of the FETO point. We refuse leave. We do not accept that the Attorney General can now use paragraph 33 of Schedule 10 of the Northern Ireland Act 1998 to require this court to refer the devolution issues to the Supreme Court.

Addendum

[13] Subsequent to the delivery of this determination the Attorney General submitted that we should in any event refer under paragraph 33 of Schedule 10 the issue of whether there was jurisdiction to require this court to refer this matter to the Supreme Court. That was a submission he had made in the course of the earlier

hearing. In our view the same principle applies. There is no proceeding before the court to which that application can attach. The Attorney General may want to use his paragraph 34 powers to raise the issue indirectly with the Supreme Court but that is a matter entirely for him.