[2018] IEHC 530

THE HIGH COURT

2016 No. 768 JR

Between:

Shane Devlin

Applicant

– and –

The Minister for Justice and Equality

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 1st October, 2018.

1. Sergeant Devlin is a retired garda sergeant. He was formerly stationed at Cavan Garda Station. On 19th July, 2013, he was performing prisoner escort duties at Virginia District Court. During the court-sitting, Mr O'Doherty, a prisoner, created a disturbance which necessitated his removal from the courtroom to another room by Sergeant Devlin and a Garda Dolan. When brought to that other room, Mr O'Doherty engaged in quite disturbing behaviour: he began hitting himself in the face with his fists and even started hitting his head off a table. Sergeant Devlin and Garda Dolan intervened to restrain Mr O'Doherty. At this point, it seems that Mr O'Doherty went out of control and violently resisted the intervention of the two gardaí. In the course of this episode, Sergeant Devlin suffered and sustained significant personal injuries. The fact that Sergeant Devlin suffered those injuries is not disputed. Nor does the court understand the events which led to the injury to be in dispute. Nor is it contended that the injuries sustained by Sergeant Devlin were minor.

2. By September 2013, Sergeant Devlin continued to be in considerable pain and it became necessary for him to take recuperative sick leave. In a memorandum to the Cavan Garda Station superintendent written, it seems, on 20th September, 2013 (it is mis-dated 20th September, 2012), Sergeant Devlin recounted the substance of the afore-described events, the critical portion of which text reads as follows:

> *"[Mr] O'Doherty became disruptive at the Court and we brought him into a consultation room to calm him down and prevent him from disrupting the Judge. We managed to calm him down but he suddenly started to strike himself with his clenched fists and banged his head on the table. When standing beside him his weight shifted and landed on the side of my right knee. I do not believe this was a malicious act on O'Doherty's part. I felt pain in my knee but continued to calm O'Doherty….The case was called before lunch and O'Doherty was remanded in custody.*
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> *I worked for the remainder of the tour [of duty] and the following three days. My knee was painful but I believed it would pass and I was going into rest days.*
>
> *Unfortunately my condition has not improved and I visited my GP today. He has prescribed medication and rest.*
>
> *I will be on sick leave for one week. Medical Certificate attached".*

3. By letter dated 9th October, 2013, Sergeant Devlin's solicitors submitted a standard form seeking compensation for their client under the Garda Síochána (Compensation) Acts 1941 and 1945. Those Acts govern the circumstances in which a member of An Garda Síochána is entitled to claim compensation for personal injuries suffered in the course of their duties. In respect of non-fatal injuries, s.2(1)(c) of the Act of 1941 provides that the Acts apply "*to personal injuries (not causing death) maliciously inflicted after the date of the passing of this Act on a member of the Garda Síochána…(i) in the performance of his duties as such member while actually on duty*". There is no doubt that what happened on 19th July, 2013, to Sergeant Devlin was the infliction of "*personal injuries (not causing death)…after the date of the passing of* [the Act of 1941] *while actually on duty*". It is whether they were "*maliciously inflicted*" that is at the centre of the within application.

4. Returning to the text of the Act of 1941, s.6 of same confers certain powers on the Minister for Justice, etc. in relation to applications for compensation, providing, inter alia, as follows:

> *"(1) Whenever an application is duly made to the Minister for compensation under this Act, the following provisions shall have effect, that is to say…*
>
> *(b) if the application is in respect of injuries not causing death, then –*
>
> *(i) in case the Minister is of opinion that such injuries are of a minor character and were sustained in the course of the performance of a duty not involving special risk, the Minister shall refuse the application.*
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> *(ii) in case the Minister is of opinion that, although such injuries are of a minor character, they were sustained in the course of the performance of a duty involving special risk and that a sum not exceeding one hundred pounds would be adequate compensation therefor, the Minister may, with the consent of the Minister for Finance, pay the applicant such sum not exceeding [a stated sum]…as he thinks proper,*
>
> *(iii) in any other case, the Minister shall authorise the applicant to apply to the High Court in accordance with this Act for such compensation….*
>
> *(3) The decision of the Minister under this section on application to him for compensation under this Act shall be final and conclusive."*

5. On 13th June, 2016, an officer in the Policing Division of the Department of Justice, etc. made the internal recommendation that Sergeant Devlin's claim be refused. Her memorandum references the Acts of 1941 and 1945 and states, *inter alia*, as follows:

> *"I confirm that this application fails to meet the statutory requirements set down in the above Acts. Section 2(1)(c) of the 1941 Act states that the Act applies, inter alia, to 'personal injuries (not causing death) maliciously inflicted'. Sergeant Devlin was trying to calm and prevent a prisoner from banging his [the prisoner's] head off a table and in the process injured his knee.*
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> *In…Donovan v. The Minister for Justice [[1998] IEHC 208] it was accepted that the Minister can refuse an application on*

the grounds that there is no prima facie case of malice. Malice requires either intent to harm, or recklessness as to the possibility of harm, on the part of an assailant. On this point, Mr Justice Geoghegan stated that 'There must be some deliberate or reckless act done by the culprit which constituted a physical attack or at least a threat of a physical act on the member of the force'. There was no deliberate act by the prisoner to harm Sergeant Devlin. The statement of Sergeant Devlin states 'I do not believe this was a malicious act on O'Doherty's part'

[Court Note 1: (i) The 'statement of Sergeant Devlin' to which reference is made was not some formal statement made in the context of a compensation application (nor even, necessarily, with such an application and/or the terms applicable to such an application in contemplation); it is but the note of 20th September, 2013, to his station superintendent explaining why Sergeant Devlin's doctor had ordered a week's sick leave. (ii) It is striking that the official correctly states that "*There must be some deliberate or reckless act…*" but then concludes that "*There was no deliberate act…";* she does not appear to address her mind to the "*reckless*" dimension.].

In addition Justice Geoghegan stated 'If on the face of the application before the Minister the injuries were quite clearly not maliciously inflicted upon the member of the force, then the Minister is acting intra vires in rejecting the application.' I therefore recommend that this applicant be refused authorisation to apply for compensation to the High Court as the injuries were not maliciously inflicted as required by Section 2(1)(c) of the Garda Síochána (Compensation) Act 1941".

6. The Department appears to operate a 'four eyes' system of administering compensation applications. So at some point after the above-quoted consideration was completed, another Department official came to the file and added an un-dated case-note which reads as follows:

"I agree with the recommendation on case file. According to Mr Justice Geoghegan in…Donovan…'If on the face of the application before the Minister the injuries were quite clearly not maliciously inflicted upon the member of the force, then the Minister is acting intra vires in rejecting the application.' He also stated that 'The expression 'maliciously inflicted' can only mean deliberately or recklessly inflicted' and that 'there must be some deliberate or reckless act done by the culprit which constituted a physical attack or at least a threat of physical attack on the member of the force.'

I believe it is clear from the details revealed in the reports relating to this application that the injuries suffered by Sgt Devlin were not maliciously inflicted but arose from the applicant's own attempts to prevent a prisoner from injuring himself. Sgt Devlin does not describe any physical violence directed against him nor any threat of such and moreover in his statement reveals 'I do not believe this was a malicious act' on the part of the prisoner.

The Garda Síochána Compensation Acts 1941-45 do not entitle a member of An Garda Síochána to apply for compensation merely as a result of the duty to which he or she has been assigned but only where she has been maliciously injured. In the case of Donovan…it was decided that the Minister had the right to decide that the Acts did not apply where there was no prima facie case of malice.

I therefore recommend that the application be refused as it fails to comply with the criteria set out in section 2(1) of the Garda Síochána (Compensation) Acts 1941-45".

[Court Note 2: (i) See Court Note 1(i) above. (ii) Missing in the last-quoted text, it seems to the court, is an appreciation that, as will become clear from the consideration of the judgment of Geoghegan J. in *Donovan* that follows hereafter, the test that the Minister is required to bring to bear is not whether or not there was malice but whether or not there is a stateable case of malice. That is not a subtly different test; it is a radically different test. Nor does the judgment in *Donovan* require that there be a prima facie case of malice. That too would be a different test which would require an applicant to demonstrate that on *first impression* there had been malice; but that is not what the law, as identified in *Donovan* requires: it requires simply and solely that on the face of the application before the Minister there *is* a *stateable case of malice*.]

7. Consistent with the foregoing assessments, on 12th July, 2016, a letter of refusal issued to the solicitors for Sergeant Devlin. That letter stated, *inter alia*, as follows:

"I am directed by the Minister for Justice and Equality to refer to your client's application for compensation regarding injuries sustained on 19th July, 2013 under the above Acts.

Section 2(1)(c) of the 1941 Act relates to personal injuries (not causing death) maliciously inflicted after the date of the passing of this Act on a member of the Garda Síochána.

The expression 'malicious' has been clarified by Mr Justice Geoghegan in the…Donovan…case….[He] formed the opinion that 'malice' means an intention to inflict injuries to a Garda or at least recklessness as to whether injury would be inflicted. On this point, Mr Justice Geoghegan stated that 'There must be some…reckless act done by the culprit which constituted a physical attack or at least a threat of a physical attack on the member of the force'. The injury to the applicant has not been maliciously inflicted but arose from the applicant's own attempts to prevent a prisoner from injuring himself. Sergeant Devlin says in his statement 'I do not believe this was a malicious act'.

Justice Geoghegan also stated 'If in the face of the application before the Minister the injuries were quite clearly not maliciously inflicted upon the member of the force, then the Minister is acting intra vires in rejecting the application'. Accordingly, having considered this application and the evidence received regarding the circumstances leading to your client's injuries, it is the Department's view that your client's application for compensation does not qualify for consideration under the Garda Síochána (Compensation) Acts 1941 and 1945.'

I have enclosed a copy of the documents relating to the Department's decision for your information [these being the documents from which the court has quoted previously above]."

8. The judgment of Geoghegan J. in Donovan might usefully be considered at this juncture. In that case the applicant had fallen off a wall on which he had been standing while searching for individuals suspected of breaking into a shop premises. The Minister of the day refused to grant an authorisation to bring a claim in the High Court on the basis that the relevant injuries had not been "*maliciously inflicted*". The applicant argued, *inter alia*, that the Minister had no jurisdiction to determine the issue of malice. So it is a case that is centrally focused, in this regard, on the interaction of ss.2(1)(c) and 6(1)(b) (especially s.6(1)(b)(iii)) of the Act of 1941). Geoghegan J., then in the High Court, held that the Minister did have a power to refuse to grant an authorisation where no stateable case of

malice was made out. In the course of his judgment, Geoghegan J., at 4-5, makes the following observations, by which this Court is, and accepts itself to be, bound:

> *"[I turn now to] the second and indeed main ground on which judicial review is sought, namely, that it is for the High Court and not for the Minister to consider the malice issue. There is no ambiguity in the Act on this point. [1] It is perfectly clear from any reading of the Act that the Minister is not concerned in the ordinary way with the malice issue. Nor was it argued otherwise at hearing. But what is being argued on behalf of the Minister is that if an applicant sends forward to the Department of Justice a case which quite clearly on its face does not come within the Act, the Minister cannot be bound to refer it to the High Court. [2] I have no doubt that if an unstateable compensation claim is lodged with the Minister, the Minister is entitled to refuse to entertain it. Any other view would create an absurdity especially in the context that the Minister has to bear his or her own costs under the Act. [3] In that limited sense [i.e. in the context of an unstateable claim]…the Minister can be concerned with the issue of malice. [4] If on the face of the application before the Minister the injuries were quite clearly not maliciously inflicted upon the member of the force, then the Minister is acting intra vires in rejecting the application. [5] Put simply, the Minister is concerned with the question of whether there is a stateable case of malice but if there is a stateable case, the Minister is not concerned with the question of whether there was in fact malice." [Emphasis added]*

9. It seems to the court that point [5] is the critical point in the foregoing. It is the point in which Geoghegan J. helpfully distils his observations into a simple summary observation. In that distillation, Geoghegan J. makes a shorthand reference to the issue of malice, rather than using the phraseology of s.2(1)(c) of the Act of 1941. Restating his point [5] but couching it in the phraseology of s.2(1)(c), the following overriding test arises in this regard:

> On the face of the application before the Minister is there a stateable caseA that the injuries were "*maliciously inflicted*"B upon the member of An Garda Síochána? If yes, the matter goes to the High Court to decide whether the injuries were "*maliciously inflicted*". If not, then the application can safely be refused by the Minister.
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> A It seems to the court that Geoghegan J. at point [4] offers a helpful test of what he means by stateability in this regard, *viz*. were the injuries "*quite clearly not maliciously inflicted*"? If they were "*quite clearly not maliciously inflicted*" then there is no stateable case and the application can safely be refused by the Minister.
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> B As to what is meant by "*maliciously inflicted*" within the meaning of s.2(1)(c) of the Act of 1941, Geoghegan J. offers the following observation, at 5: "*There must be some deliberate or reckless act done by the culprit which constituted a physical attack or at least a threat of a physical attack on the member of the force*."

10. Before the court proceeds to the last part of its judgment, it is worth making a few general observations about the nature of judicial review that are well made by counsel for the respondent in his written submissions and which the court respectfully adopts and quotes below:

> *"First, judicial review is not an appeal from the administrative decision but a review of the manner in which a decision was made. In Meadows v. Minister for Justice, Equality and Law Reform [2010] 2 IR 701, the Supreme Court (Fennelly J.) reaffirmed [at para.415] that judicial review was not a process of appeal: leaving aside the need to take account of the human-rights dimension in judicial reviews of decision-making, 'the decision is and remains at all times that of the decision-maker and not of the courts'.*
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> *Second, a court cannot substitute its opinion for that of the decision-maker because it would have reached a different conclusion to the decision-maker. In this regard, in O'Keeffe v. An Bord Pleanála [1993] 1 IR 39, the Supreme Court (Finlay CJ) [at 71] emphasised that 'the court cannot interfere with the decision of an administrative decision-making body merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision was much stronger than the case for it'.*
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> *Finally, third, and related to the foregoing, there is only a limited scope for a court to interfere with the exercise of a discretion by an administrative body. This limited scope is reflected in the reasonableness standard of review. In The State (Keegan) v. Stardust Victims' Compensation Tribunal [1986] IR 642, 658, the Supreme Court (Henchy J.) held that 'the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense'. The court explained that: 'if it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision'.*
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> *In Meadows v. Minister for Justice, Equality and Law Reform [2010] 2 IR 701, Fennelly J reaffirmed the core principles as follows [at para.449]:*
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> > *'I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word 'substantive' to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision-maker. This test, properly applies, permits the person challenging the decision to complain of the extent to which the decision encroaches on the rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. The applicant must discharge that burden by producing relevant and cogent evidence.'"*

11. As the two 'Court Notes' above indicate, it does not appear that the correct legal test was ever brought to bear by the Minister in deciding Sergeant Donovan's application. This alone would suffice for an order of *certiorari* now to issue. Additionally, it seems to the court that Sergeant Donovan has separately succeeded in any event in vaulting the high bar of showing that the decision of the Minister on his application "*plainly and unambiguously flies in the face of fundamental reason and common sense*". The definition of "*maliciously inflicted*", as propounded by Geoghegan J., requires that there be "*some deliberate or reckless act done by the culprit which constituted a physical attack or at least a threat of a physical attack on the member of the force*". With every respect, it seems to the court that it does fly in the face of fundamental reason and common sense to conclude that there is not even a

stateable case that Mr O'Doherty engaged in deliberate and/or reckless actions that constituted a physical attack or at least a threat of a physical attack on Sergeant Donovan. (The court does not need to explore the 'deliberate' dimension of matters; it suffices that the stateable case aforesaid presents; the test is "*deliberate or reckless*", not 'deliberate and reckless'). As Geoghegan J. makes clear in Donovan, at 5, "*if there is a stateable case, the Minister is not concerned with the question of whether there was in fact malice*" (because s.6(1)(b)(iii) of the Act of 1941 then comes into play). It may or may not be that Sergeant Devlin has created a future difficulty for himself with his letter of 20th September, 2013; however, the court has no view in this regard; whether or not that letter presents a difficulty will fall to be decided at a future compensation hearing.

12. Sergeant Devlin has come to court seeking the following principal reliefs: (i) an order of *certiorari* quashing the Minister's decision of 12th July, 2016, whereby the Minister refused to authorise Sergeant Devlin to apply to the High Court in accordance with the Acts of 1941 and 1945, the said decision being alleged to be *ultra vires*; (ii) in the alternative or, if necessary, a declaration that the decision communicated to Sergeant Devlin is null and void and of no effect; (iii) a declaration that the Minister's decision of 12th July, 2016, amounts to an improper and unlawful interference with Sergeant Devlin's right of access to the courts; (iv) a declaration that the Minister's decision of 12th July, 2016, is at variance with the statutory scheme as made and provided for under and by virtue of the provisions of the Acts of 1941 and 1945, in particular s6(1)(b)(iii) of the Act of 1941; (v) a declaration that the Minister has no power or function in and about the determination of 'malice' and has no power or function in and about the determination or making of any decision, concerning any injuries inflicted on a member of An Garda Síochána regarding malice, as this is a matter exclusively reserved for the High Court.

13. The court will grant an order of *certiorari* for the reasons set out in the within judgment and remit the matter to the Minister for fresh consideration in light of the within judgment.