Neutral Citation Number: [2009] IEHC 547

THE HIGH COURT

JUDICIAL REVIEW

2008 1448 JR

BETWEEN

ROBERT CASEY

APPLICANT

AND

PRIVATE SECURITY APPEALS BOARD

RESPONDENT

AND

PRIVATE SECURITY AUTHORITY

NOTICE PARTY

JUDGMENT of Ms. Justice Dunne delivered on the 11th day of December, 2009

An application for judicial review by way of an order of *certiorari* quashing the decision of the respondent made on the 1st October, 2008, affirming the decision of the notice party made on the 31st March, 2008, refusing to issue licences to the applicant under the Private Security Services Act 2004, was sought by the applicant herein. Following the hearing before me, the applicant was successful. During the course of the hearing, the respondent took no part in the hearing and the matter of the entitlement of the applicant to judicial review was contested by the notice party herein.

Having granted the applicant the relief sought herein, an application for costs was made by the applicant herein. An issue has now arisen as to the entitlement of the applicant to an order for costs against both the respondent and the notice party. It is conceded by the notice party that costs follow the event and that the applicant is entitled to costs against the notice party. However, the respondent herein has attended the costs application for the purpose of arguing that no order should be made against the respondent given that they took no part in the proceedings.

In advance of the hearing before me, the Chief State Solicitor on behalf of the Appeals Board wrote to the solicitor for the Authority herein, explaining that it was proposed to take no part in the proceedings and indicated the view that the Appeals Board was in a position like the Labour Court analogous to a District or Circuit Judge whose decision is the subject of judicial review challenge. Reference was made in the course of the letter to the decision of the Supreme Court in the case of *Noonan Services Limited and Others v. The Labour Court and Another* (Unreported, Supreme Court, 14th May, 2004). It was further pointed out that there was no allegation of *mala fides* or impropriety on the part of the Appeals Board and that in those circumstances no order should be made against it where it did not participate in the proceedings even if the decision was quashed. Reliance was placed in that regard on the Supreme Court decision in the case of *O'Connor v. Judge Cowell and Bankers Inns Limited, Notice Party* [1999] 2 I.R. 160. The letter went on to point out that no allegation of *mala fides* or impropriety of conduct was made against the Appeals Board in the proceedings.

In those circumstances it was requested that in the event that either the applicant or the notice party disagreed with that view then it was requested that the Appeals Board be put on notice for the purpose of making submissions in relation to the issue of costs.

Mr. Barron, S.C. on behalf of the applicant made an application for costs against both parties. He argued that the Appeals Board was not in the same position as a judge and that the position whereby a judge is usually immune from costs in judicial review proceedings relates to the constitutional position in relation to the independence of the judiciary. It was argued that the Appeals Board is not in the same position and that it is in a position which is analogous to that of the Refugee Appeals Tribunal or An Bord Pleanála.

Mr. Hogan S.C. on behalf of the Authority took the view that the appeals Board is not entitled to some form of immunity akin to what was described in the course of the hearing before me as judicial immunity. He noted that once the matter comes before the Appeals Board, the Authority is *functus officio*. It has no role before the Appeals Board save to furnish a report of the proceedings before it to the Appeals Board. He contended that the form of immunity relied on herein does not apply to the Appeals Board.

Mr. McDermott on behalf of the Appeals Board argued that in reality what was at issue was not in truth an immunity. His client did not participate in the proceedings and indicated this in advance. It is provided in s. 40 of the Private Security Services Act 2004, as follows:-

> "1. There stands established a body to be known as the Private Security Appeal Board (in this Act referred to as "the Appeal Board"), or in the Irish language An Bord Achomhairc um Shlándáil Phríobháideach, to hear and determine appeals against decisions of the Authority.
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> 2. The Appeal Board shall be independent in the performance of its functions."

He referred to the decision in the case of *Noonan Services v. The Labour Court*, referred to above and emphasised that as his client had not participated in the proceedings it was not appropriate to make an order for costs.

By way of reply Mr. Hogan pointed out that the bodies at issue in the cases referred to by Mr. McDermott i.e. *Noonan Services Limited v. The Labour Court, James Cullen v. Employment Appeals Tribunal Respondent and Connaught Gold*, (Unreported, High Court, 14th April, 2008), related to bodies which are similar to a court in that the Labour Court and the Employment Appeals Tribunal are both bodies in which an individual or party appears before the body, the body considers oral evidence and makes a decision thereafter. It was argued that this was akin to the position of a court. He sought to distinguish the position in such a case from that of the body at issue herein.

Finally Mr. Barron on behalf of the applicant pointed out that s. 6(2) of the Act, also says that the Authority is independent in the performance of its functions. However, that did not put the Authority in the same position as judges. He pointed out that if the respondent's arguments were correct then an applicant who is entitled to judicial review would be left with no remedy as to costs. Applicants in that situation would find themselves left with a costly remedy. The fact that somebody does not participate in the proceedings of itself does not mean that they are not liable to costs.

I now want to look at the decisions relied on in the course of the arguments by counsel on behalf of the Appeals Board. The first of those is the decision of the Supreme Court in the case of *Noonan Services Limited and Others v. The Labour Court, and SIPTU*. The judgment in that case which is to hand is an ex tempore judgment of the court. The applicants in that case were a number of contract cleaning companies. They sought to challenge the legality of two employment regulation orders made by the Labour Court which provided statutory minimum rates of remuneration and statutory conditions of employment for workers employed in the contract cleaning sector and included in particular provisions in regard to overtime being paid both to full time workers, who were largely male, and to part time workers who were largely female. The employment regulation orders arise from proposals made by joint labour committees under s. 48 of the Industrial Relations Act 1990. During the period before a regulation order is made, representations are made and negotiations are carried out and the matter goes back and forth between the joint labour committee and the Labour Court. Thereafter the court indicates its intention to make an employment regulation order and thereafter makes it. Once it is made it is a binding regulation. The Labour Court indicated it would make the order on the 18th July, 2003 and thereafter the order was made on the 28th July. It was indicated that the order would come into effect on the 1st January the following year. An *ex parte* application was made for judicial review on the 15th December, 2003, by the applicants. Ultimately in the High Court the question of delay was central to the application for judicial review and was found to be fatal to that application. The matter was appealed to the Supreme Court where it was held that the learned High Court Judge had correctly exercised his discretion in refusing the reliefs sought. There was also a cross appeal on the issue of costs and McGuinness J. in the course of her judgment made the comments which are now relied on by Mr. Hogan on behalf of the Appeals Board. She stated:-

> "With regard to the cross appeal on costs I think quite briefly in my view the notice party was an appropriate party to be brought into the case. The Labour Court as the respondent was in the position of a tribunal which corresponded to the position of a District Judge in many judicial review proceedings. The Labour Court was not a legitimate *contradictor*. The notice party was represented in the Labour Court and represented a large number of the workers who would be affected by the orders or by the ruling that the orders were void and therefore I consider that SIPTU was an appropriate party. As such I think they should have been granted their cost. I would allow the costs appeal."

It should be noted that in that instance it was the notice party who was seeking its costs against the unsuccessful applicant. That case is relied on by Mr. Hogan on the basis of the comment to the effect that the Labour Court was in a position which corresponded to the position of a District Judge in many judicial review proceedings.

The other case opened in the course of argument was in the case of *Cullen v. Employment Appeals Tribunal, Respondent and Connaught Gold Limited Notice Party*. An ex tempore judgment was given by O'Neill J. in that case on the 14th April, 2008 and I was furnished with counsel's note of the ex tempore judgment of O'Neill J. In that case the applicant had brought proceedings against the Employment Appeals Tribunal and a Notice Party. There was an issue as to the jurisdiction of the Employment Appeals Tribunal which was determined in favour of the notice party. The applicant then commenced judicial review proceedings. The respondent (the EAT) adopted a neutral position on the basis that it had no interest to defend and therefore it did not defend the proceedings. As it happened, the notice party also chose not to defend the proceedings. Accordingly, the applicant succeeded in his application for judicial review. The applicant then sought costs against both the respondent and the notice party. It was the view of O'Neill J. in the course of that decision apparently that:-

> "When a statutory body like the EAT makes a decision which is challenged and then decides not to participate in the proceedings. The EAT must act judicially. They are a quasi judicial body. It did not take a partisan position in relation to the matter and that is appropriate. They decided to leave it to the contesting parties to contest the issues. That is the approach and adopted by lower courts and statutory quasi judicial bodies when the decisions are challenged and that is an appropriate approach. That is what happened here. It is submitted that in the absence of *mala fides* that no order should be made against the respondent and I accept that is the general legal policy adopted by the courts in relation to these matters and I will follow the approach and accordingly I make no order for costs as against the respondent."

That decision is one relied on by Mr. McDermott on behalf of the Appeals Board.

For completeness I also want to refer briefly to the decision in *F. and Others v. Judge O'Donnell and Others* [2009] I.E.H.C. 142. That was a judgment of the High Court given by O'Neill J. on the 27th March, 2009. In that case a number of costs applications were made in relation to separate proceedings that had taken place before the court. The issues raised were set out by O'Neill J. at p. 6 of his judgment as follows:-

> "(i) Is there a prohibition on making an order for costs against a judge, where a judge has not intervened in the proceedings and there is no allegation of *male fides* or impropriety on his or her part?

(ii) Where no allegation of *male fides* or impropriety is made against him or her, is a judge a proper party to judicial review proceedings in which his or her orders are impugned?

(iii) Is the non-joining of the judge in these circumstances and/or the prohibition on a costs order against the judge a potential denial of access to a court or a tribunal in breach of Article 6 of the Convention or a denial of an effective remedy in breach of Article 13 of the Convention? Is the ability to obtain an order for costs an essential aspect of access to a court or an effective remedy?

(iv) Is the existence of alternative remedies such as the right of appeal relevant? Is the possibility of obtaining an order for costs against another party relevant?

(v) If it is concluded that a judge is a proper party but costs should not be awarded against him or her and the notice parties should not have a costs order made against them, then should the State be responsible for costs on the basis that the judge, as a member of the judiciary, the judicial arm of the government of the State, is an office holder of the State, with the necessary consequence that the State is liable in respect of acts done by a judge in the discharge of judicial office?"

In the course of his judgment, O'Neill J. stated:-

> "Next this Court must consider the reason for or the legitimate aim for the rule excluding the judge from the proceedings and/or the prohibition on making a costs order in these cases. The reason for these rules is to protect and preserve the independence of the judiciary. It must be borne in mind that these rules do not apply where there is an allegation of *male fides* or impropriety. If a judge, who had not acted with *male fides* or impropriety could be sued and a costs order made against him or her, in my opinion that would be a gross attack on the independence of the judiciary. In effect, a judge would be exposed to being sued and a costs order made merely for error, albeit error as to jurisdiction, or error in the conduct of the proceedings. I see little or no difference between error of this kind and error which otherwise would be the subject matter of appeal. In both instances the judge falls into error but without *male fides* or impropriety.
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> It need hardly be said that a judiciary could not function if exposed to that kind of risk. Hence, I have no doubt that not only are these rules proportionate to the aim of protecting the independence of the judiciary, they, or to be more specific, the rule prohibiting costs is essential to maintain a functioning independent judiciary.
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> The rule excluding a judge from being sued in these circumstances, prevents the judge being drawn into dispute with one or more of the parties whose case he or she has heard and may have judged, and hence it preserves, protects and enhances the independence of the judiciary and, in particular, the public perception of that independence and impartiality. As no advantage whatsoever accrues to the applicant who seeks judicial review of a judge's order if the judge is joined in the judicial review, in the sense that the impugned order may be judicially reviewed but no order for costs may be made against the judge, conversely there is no disadvantage to that applicant if the judge is excluded from the proceedings because the order can still be judicially reviewed and there cannot be an order for costs against the judge."

He went on to hold in that context that the rules satisfied the proportionality test and do not breach Article 6.1 or Article 13 of the European Convention on Human Rights. I refer to that passage in some detail because it sets out the general principles that apply in the case of judges. The argument made in this case on behalf of the Appeals Board by Mr. McDermott hinges on his assertion that the Appeals Board in hearing an appeal under the Private Security Services Act 2004, is acting in a quasi judicial manner and therefore the principles applicable to judges in relation to costs orders as set out by O'Neill J. in the judgment in *F. and Others v. Judge O'Donnell and Others* are applicable to his client.

I have considered the other authorities opened to me. The decision in the case of *Cullen v. Employment Appeals Tribunal and Connaught Gold Limited* is not the most weighty authority, given that it is counsel's note of the judgment, but having said that, it is of some assistance. The Private Security Authority and the Private Security Appeals Boards were set up under the Private Security Services Act 2004. The Act was described as being an Act:-

> "To provide for the establishment of a body, to be known as a private security authority . . . to control and supervise individuals and firms providing private security services and to investigate and adjudicate on any complaints against them; for the establishment of a body, to be known as the Private Security Appeal Board, . . . to hear and determine appeals against decisions of that Authority; and for related matters."

It is one of a number of such bodies to have been created in recent years for the control of various professions, industries and trades.

In considering the nature of the Private Security Appeals Board it is interesting to contrast the provisions of s. 6 of the Act which deals with the establishment of the Private Security Authority and it goes on in s. 7 to deal with its membership. The position of the Appeals Board is somewhat different. It is established under the Act in s. 40 as set out previously and the manner in which the body is appointed is different to that of the Authority. The details in relation to its constitution are set out in the second schedule of the Act. Its membership consists of a chairperson and such and so many other members as the Minister with the consent of the Minister for Finance considers necessary. The chairperson and other members of the Appeal Board are appointed by the Government on such terms and conditions as the Government determines. I do not think it is necessary to go further than setting out those brief details. The representation of the authority is somewhat different and its members are appointed by the Minister who designates one as the chairperson. Bearing in mind the nature of the Appeals Board, methods of its appointment and its statutory remit, it clearly is a quasi judicial body. It is in a similar and analogous position to that of a judge. For the proper functioning of the Board, it seems to me that it is appropriate that it should generally have immunity from costs in circumstances where it has acted without *mala fides* and without impropriety. One cannot say that the Board must always be immune from an order for costs. There may be occasions when a complete immunity might be unjust but in the circumstances of this case I think it is appropriate to make no order for costs against the Board in this case.