

THE HIGH COURT

[RECORD NO. 2016/3165]

BETWEEN

SEAN FEEHAN

PLAINTIFF

AND

COMMISSIONERS OF PUBLIC WORKS IN IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 5th day of May, 2016

1. This is an application for an interlocutory injunction which was heard yesterday.
2. The plaintiff who operates three passenger boats out of Ballinskelligs, Co. Kerry seeks interlocutory relief preventing the defendants from revoking two permits which allow him to land once a day with not more than twelve passengers on two of his boats onto Skellig Michael between mid-May and mid-September. Skellig Michael was designated a world heritage site in 1996 having long been regarded as a national monument.
3. The plaintiff also uses his boats to provide trips without landing on Skellig Michael for angling, diving, eco harbour visits and whatever customers may specify and can be provided by his business.
4. Murray J. for the Supreme Court in *Casey v. Minister for Arts, Heritage, Gaeltacht and the Islands* [2004] 1 IR 402 ("the Casey judgment") sets out the fascinating history of the island before upholding the decision of the then defendant Minister, in that case to limit the number of permits following discussions with boat owners including the plaintiff.
5. Without prejudice to the plaintiff's rights at the plenary trial of these proceedings to challenge the chain of authority vested in the Minister for Finance who gave letters of consent in 1997 and 1999 to the defendant to manage and control Skellig Michael, the plaintiff through counsel did not rely on any potential challenge in this regard for the purposes of this application.
6. The principal issue relied upon by the plaintiff for establishing a fair or serious issue to be tried at the plenary hearing arose from the notification of the plaintiff by letter from the defendant dated 21st January, 2016 that each of the two permits for his boats to land visitors on Skellig Michael were revoked with immediate effect while a public competition for his two permits will be conducted. The plaintiff emphasises that he was not given any opportunity to address matters and particularly the reference in that letter to the alleged link between the plaintiff's three pleas of guilty at Cahirciveen District Court in September, 2015 and the provision of a system of safe delivery and collection of visitors to Skellig Michael. Furthermore the plaintiff was told that he would "*not be entitled to land visitors at Skellig Michael in the future*" which he understood to mean that he would be excluded effectively from consideration in any future granting of permits for landing visitors at Skellig Michael.
7. The defendants through counsel agreed during the course of the hearing to undertake that the defendants would not issue replacement permits for those held by the plaintiff in previous years until after the determination of these proceedings by way of a plenary hearing.
8. The effect of the injunctions now sought by the plaintiff may be equated to a mandatory type order for the renewal of the two permits to the plaintiff while these proceedings are determined. The plaintiff refers to some right to bring visitors to Skellig Michael outside the periods for visits which the defendants specified in the previous permits. These periods arise from the presence of the defendants' staff to monitor matters for visitor safety and conservation concerns.
9. Fennelly J. for the Supreme Court in *Maha Lingam v. HSE* (unreported 4th October, 2005) outlined how in the analogous scenario of a dismissed employee "*it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action before considering other facts when determining such an interlocutory application*". Fennelly J. referred to the trend to import for the engagement of officers or employees "*an obligation to comply with the rules of natural justice and give fair notice and a fair opportunity to reply*" before dismissing the appeal from Carroll J's refusal to grant an interlocutory injunction in that case.

Distinguishing Features

10. Unlike the typical employment injunction case which seeks to rely on the *Maha Lingam* propositions where there is a contract of employment or similar arrangement, the plaintiff in this case claims a legal right to a permit and to follow procedures by virtue of:-

(1) A legitimate expectation of a substantive right; in this regard having regard to O'Donnell J.'s succinct summary in *Lett v. Wexford Borough Council* [2012] 2 ILRM 283 at para. 16 of the essential provisional requirements to make such a claim, the plaintiff has not established a serious case and certainly not a strong case. The plaintiff's suggestion of a statement or adopted position amounting to a promise or representation runs counter not only to the sworn assertions made on behalf of the defendants but also the findings in the *Casey* judgment. There is at best for the plaintiff a tenuous exchange with a representative of the defendants which is denied and the term "*reasonable expectation*" does not spring to mind under this heading.

(2) A legitimate expectation of fair procedures: The plaintiff complains that he did not know until he received the letter of the 21st January, 2016 that his pleas of guilty on the 10th September, 2015 to going out to sea when it was dangerous for passengers on the 7th April, 2012 and without an appropriate licence together with a further offence on the 29th

June, 2012 relating to the operation of a vessel without a certified master would have had the effect of prompting the defendants to withdraw his permits and refuse renewals. He takes exception to the reference in the defendant's letter of the 21st January, 2016 to two fatalities on Skellig Michael in 2009 and the implication of the last sentence in the letter that he would not be entitled to apply for permits to land passengers on Skellig Michael again.

(3) The letter of the 21st January, 2016 conveys to the Court that the defendants' principal concern is the safety of visitors on Skellig Michael. The plaintiff in his claim under this heading seems to expect an exactitude and detail which we might find in a complaint for a fitness to practice committee hearing for the professions. The description of counsel of despair about the necessity for constitutional justice described in para. 14-256 of Hogan and Morgan's *Administrative Law in Ireland* (4th Ed.) is quite apt. It is important to emphasise that this right to fair procedures does not arise in a vacuum – here the plaintiff had a permit akin to a commercial licence to use the facility with terms that were known to him although he does not admit that they were universally applied. The suggestion that the plaintiff could land with passengers outside the periods specified on the permits does not help the plaintiff's case whatsoever. In fact many averments of the plaintiff in his supplemental affidavit could be described as a form of bluster to divert attention away from the concerns expressed by the defendant's officer in his letter of the 21st January, 2016. The safety of visitors to Skellig Michael and the potential liability of the defendants and the State are the disclosed basis of the decision to refuse a renewal of the plaintiff's permits.

Although the plaintiff has the right to proceed to a plenary hearing on the issue of a breach of a legitimate expectation of fair procedures and transparent procedures, this Court has not been satisfied that he has a strong case, which is likely to succeed.

(4) A legal right to land passengers: Paragraphs 51-53 of the *Casey* judgment makes it clear for this Court that the plaintiff does not have a right to land passengers onto Skellig Michael. It is property in respect of which he has no legal interest. The managers being the defendants of the island in the interest of visitor's safety and the potential liability as occupiers for visitors are entitled if not obliged to control disembarkation, routes on the island and embarkations for visitors to return to the mainland. The plaintiff appears to be relying on a type of *jus tertii*. It is repeated that Skellig Michael is private property even though it may be owned or managed by an emanation of the State. The plaintiff's reference to a long held tradition giving rise to a right for him personally is bordering on the surreal. The plaintiff who does not have a legal interest in Skellig Michael is not entitled to rely on the State, a Minister or some other third party to assert his claim for landing rights on the island.

11. Even if the plaintiff could establish a serious issue to be tried whether it is likely to succeed or not, the Court finds that damages would be an adequate remedy. The plaintiff may be concerned about his convictions last year arising from his pleas, the upcoming prosecution for two further alleged marine offences off Skelligs on the 21st May, 2014, the complaint about the disembarkation incident on Skellig Michael in 2014 and "*the great embarrassment as a fall out of the decision to revoke*" the two permits. In those circumstances it is indeed far fetched to evoke the value of the squinting windows line adopted by Hogan J. in *Wallace v. Irish Aviation Authority* [2012] IEHC 178 as urged upon the court. The plaintiff tends to be precious in relation to the refusal to renew the two permits. He has these other issues and he lives abroad for many months of the year.

12. The plaintiff, if he succeeds at a plenary hearing will be able to recover the profit from the trips which he would have operated with a permit for the 2016 season while continuing his other businesses with his boats.

13. Even if the Court had to consider the balance of convenience there is little doubt that the safety of visitors to Skellig Michael trumps any reputational damage which the plaintiff may be able to establish at trial.

14. For all of these reasons the Court refuses the interlocutory relief sought by the defendant while noting that the defendant's undertake not to issue two permits in replacement of the plaintiff's previous permits until after the determination of these proceedings following a plenary hearing.

15. The Court will hear counsel about directions as to trial.