

**THE HIGH COURT  
JUDICIAL REVIEW**

[2006 No. 39 J.R.]

**BETWEEN****PHILIP CLARKE****APPLICANT**

**AND  
SOUTH DUBLIN COUNTY COUNCIL**

**RESPONDENT****Judgment delivered by Mr. Justice Hanna on the 7th day of March, 2008**

1. This case arises from an intended prosecution of the applicant by the respondent for an alleged offence under bye-laws prohibiting the consumption of intoxicating liquor in a public place. The offence allegedly occurred on 1st May, 2005. The prosecution was brought by way of summons and the offence is said to be contrary to the Local Government Act 1994, s. 40(1) and the South Dublin County Council (Prohibition of Consumption of Intoxicating Liquor in Public Places) Bye-Laws 2001, more specifically Bye-Law 2(1), made by virtue of s. 37(1) of the aforesaid Act. The applicant faces a fine not exceeding €1,269.74 if convicted.

2. The prosecution arises from a complaint by one Garda Michael Groarke of Tallaght Garda Station, who states that he witnessed the applicant consuming alcohol in Butler McGee Park which is within the administrative area of South Dublin County Council. The applicant denies that he was consuming alcohol at the time and in the place alleged although one of his two male companions was so engaged. It should be noted that this is the only charge facing the applicant. Other than the act of allegedly consuming alcohol in a public place, no allegation of any public order offence is advanced against the applicant.

3. The applicant seeks but one principle relief. He wishes to obtain an injunction restraining the prosecution. He was given leave to proceed by way of judicial review by order of Peart J. on 16th January, 2006. The ground for seeking this relief is stated as follows:-

"(i) The promulgation of the said South Dublin County Council (Prohibition of Consumption of Intoxicating Liquor in Public Places) Bye-Laws, 2001 is *ultra vires* the respondent as it is in breach of the Article 15.2.1° which vests in the Oireachtas the exclusive right to make legislation. The respondent cannot effectively usurp the role of the Oireachtas in prohibiting the consumption of alcohol in a public place especially when the Oireachtas has pointedly declined to do so in the Intoxicating Liquor Acts. Nor can the Respondent purport to avail of its bye-law making power (whether under the Local Government Act 1994 or Local Government Act 2001) to turn itself into a local version of the Oireachtas and through the guise of bye-laws to pass what amounts to the equivalent of a public general Act for the South Dublin County Council functional area.

(ii) The South Dublin County Council (Prohibition of Consumption of Intoxicating Liquor in Public Places) Bye-Laws, 2001 are not within the principles and policies of the Local Government Act, 1994"

4. A somewhat unusual feature of this application is that it was grounded on a rather short affidavit sworn by the applicant's solicitor which, she avers, is sworn on her own behalf. Mr. Gallagher S.C., for the respondent, pointed out that no affidavit in support of the application had been filed by the applicant. As such, he complained, there was no evidence before the court that the applicant even knew about the case. However, an affidavit was sworn by the applicant in reply to the respondent's affidavit challenging the respondent's version of what occurred on the occasion in question and this certainly represents full engagement by the applicant in the proceedings. It would, of course, be more appropriate if a preliminary affidavit albeit only in short form, had been sworn by the applicant.

**The Bye-Laws**

5. The bye-laws were made by the County Council in 2001 with effect from 9th August, 2001 for the following express reason:-

"Whereas the Council is of the opinion that behaviour consisting of the consumption of intoxicating liquor in public places is contrary to the proper use, operation, protection regulation or management of such public places under it's control or management in that such behaviour seriously detracts from the proper purpose, amenity and enjoyment of public places"

6. The bye-laws describe s. 37(1) of the local Government Act 1994 as giving authority to the respondent to promulgate them:-

"Whereas South Dublin County Council, (hereinafter called the Council) has power by virtue of s. 37(1) of the Local Government Act, 1994 to make Bye-Laws for or in relation to the use, operation, protection, regulation or management of any land, services, or any other thing whatsoever provided by or under the control of the Council or in relation to any matter connected therewith."

7. The bye-laws define a public place as follows:-

"'Public place' includes roads, streets, lanes, cul-de-sacs, squares, passageways, alleys, bridges, tunnels, or footpaths, open spaces, public parks, cemeteries, green spaces and amenity areas together with such areas or space as it contiguous with any of the foregoing places AND which is under the control or management of the Council."

8. A definition of 'intoxicating liquor' is also given:-

"Intoxicating liquor means spirits, wine, beer, porter, stout, cider, perry and any fermented, distilled or spirituous liquor which cannot according to any law for the time being in force, be legally sold without a licence from the Revenue Commissioners or any drink or other liquid containing alcohol."

9. Paragraph 2 of the bye-laws provide for the offences of consuming (or attempting to consume) intoxicating liquor in a public place and possessing intoxicating liquor with intent to consume or supply:-

"2. Subject to Paragraph 8 hereof a person shall not –

(1) consume or attempt to consume intoxicating liquor in a public place within the functional area of the Council or

(2) possess intoxicating liquor in a public place within the functional area of the Council with the intention to consume it in a public place or to supply it to any person for consumption in a public place within the functional area."

10. The contravention of the bye-laws is described as an offence punishable on a summary conviction to a fine of up to €1,269.74 (£1,000).

11. The bye-laws confer on members of An Garda Síochána powers of seizure and destruction of the intoxicating liquor. Powers are given to gardaí and authorised persons to direct suspects to leave the vicinity where there are reasonable grounds to believe they have contravened the bye-laws and provide for offences of failure to comply and preventing or attempting to prevent such a direction.

12. The bye-laws purport to empower gardaí to demand the name and address of a person suspected of contravening the bye-laws. Refusal to comply with such a direction is an offence. Paragraph 6 of the bye-laws purports to give gardaí power to arrest, without a warrant, a person suspected to be (or have been) in breach of the bye-laws. Paragraph 7 provides that a person suspected of having contravened the bye-laws can be sent a fixed charge notice (pursuant to s. 41 of the Local Government Act 1994 and regulations made thereunder) in lieu of prosecution.

### **The Material Constitutional and Legal Background**

13. Article 15.2 of the Constitution states as follows:-

"1° The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

2° Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures."

14. It was accepted by both parties that local authorities are not the "subordinate legislatures" referred to above. This provision in Article 15 has been subjected to scrutiny by the courts. In *Pigs Marketing Board v Donnelly (Dublin) Limited* [1939] I.R. 413, Hanna J. stated at p. 421:-

"It is axiomatic that powers conferred upon the Legislature to make laws cannot be delegated to any other body or authority. The Oireachtas is the only constitutional agency by which laws can be made. But the Legislature may, it has always been conceded, delegate to subordinate bodies or departments not only the making of administrative rules and regulations, but the power to exercise, within the principles laid down by the Legislature, the powers so delegated and the manner in which the statutory provisions shall be carried out."

15. In *Laurentiu v Minister for Justice* [1999] 4 I.R. 26, Keane J. citing portion of the judgment of Hanna J. above referred to, says at p. 83:-

"At an early stage in the history of the Constitution, however, it was recognised that the practice of delegated legislation then well established had not been outlawed by this Article, provided it was exercised within certain defined limits. As Hanna J. put it, in one of the earliest decisions on the Constitution, *Pigs Marketing Board v. Donnelly (Dublin) Ltd.* [1939] I.R. 413 at page 421:-

'... the Legislature may, it has always been conceded, delegate to subordinate bodies or departments not only the making of administrative rules and regulations, but the power to exercise, within the principles laid down by the Legislature, the power so delegated and the manner in which the statutory provisions shall be carried out. The functions of every Government are now so numerous and complex that of necessity a wider sphere has been recognised for subordinate agencies, such as boards and commissions. This has been specially so in this State in matters of industry and commerce. Such bodies are not law makers; they put into execution the law as made by the governing authority and strictly in pursuance therewith, so as to bring about, not their own views, but the result directed by the Government.'

The reference to 'the Government' in the last sentence might, I think, more appropriately have been to 'the Oireachtas'. Subject to that qualification, that passage still clearly represents the law and has been endorsed on more than one occasion by this Court."

16. Article 28.A of the Constitution, inserted by way of referendum on the 23rd June, 1999, offers express constitutional recognition to local governments. It provides:-

"1. The State recognises the role of local government in providing a forum for the democratic representation of local communities, in exercising and performing at local level powers and functions conferred by law and in promoting by its initiatives the interests of such communities.

2. There shall be such directly elected local authorities as may be determined by law and their powers and functions shall, subject to the provisions of this Constitution, be so determined and shall be exercised and performed in accordance with law."

17. I have already recited the bye-law under which the applicant is proposed to be prosecuted. The applicant does not seek to strike down the legislation under which the applicant has been prosecuted. On his behalf, Mr. Anthony Collins S.C. argued that the trial of the alleged offence should be prohibited on the grounds that the purported bye-law is *ultra vires*.

18. The material statutory authority conferring upon the respondents the powers to make bye-laws is the Local Government Act 1994 (hereinafter referred to as "the Act"). As already noted, the bye-law is promulgated under s. 37(1) of the Act which provides as follows:-

"(1) A local authority may, subject to subsection (8), make a bye-law for or in relation to the use, operation, protection, regulation or management of any land, services, or any other thing whatsoever provided by or under the control or management of the local authority or in relation to any matter connected therewith."

19. Section 37(2) goes on:-

"(a) A local authority may, subject to this subsection and subsection (8), where in its opinion it is desirable in the interests of the common good of the local community that any activity or matter should be regulated or controlled or that any nuisance should be controlled or suppressed, make a bye-law for that purpose.

(b) A bye-law may not be made under this subsection for a purpose as respects which provision for that particular purpose is made by or under any other enactment or may be made under such enactment.

...

(4) A bye-law may include such provisions as the local authority considers appropriate for its effective application, operation and enforcement and generally to achieve the purposes for which it is made, including:-

(a) its application at all times or at specified times;

(b) its application throughout the functional area of the local authority or in any specified part of that functional area;

(c) the prohibition of any activity, matter or thing;

(d) the prescription of specified standards or requirements for specified matters or things;

(e) the exception of classes of persons or things from the bye-law either subject to or without compliance with specified conditions;

(f) the conduct of persons at specified places or in specified circumstances;

..."

20. Section 37(8) provides that the appropriate Minister may, by regulation prescribe matters or classes of matters in respect of which local authorities shall not be entitled to make a bye-law. No such material regulation has been brought to the attention of this Court.

21. The central thrust of this case is whether or not the 2001 bye-laws infringe Article 15.2 of the Constitution in that they fall foul of the "principles and policies" test as applied to s. 37 of the Act.

22. In *Cityview Press v An Chomhairle Oiliúna* [1980] I.R. 381 at pp.398 to 399 O'Higgins C.J. said:-

"The giving of powers to a designated Minister or subordinate body to make regulations or orders under a particular statute has been a feature of legislation for many years. The practice has obvious attractions in view of the complex, intricate and ever-changing situations which confront both the Legislature and the Executive in a modern State. Sometimes, as in this instance, the legislature, conscious of the danger of giving too much power in the regulation or order-making process, provides that any regulation or order which is made should be subject to annulment by either House of Parliament. This retains a measure of control, if not in Parliament as such, at least in the two Houses. Therefore, it is a safeguard. Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution. In discharging that responsibility, the Courts will have regard to where and by what authority the law in question purports to have been made. In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits - if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power."

23. The applicant contends that the bye-laws offend both the Constitution and the common law. They go beyond their authority as prescribed by law. The respondent seeks to infringe the rights of the applicant by promulgating bye-laws not only not envisaged within the general scheme within the Act, but, further, by visiting an area upon which parliament has already spoken, namely the consumption of alcohol in a public place. Further, the applicant's liberty is compromised in that the bye-laws provide for extensive power of arrest and seizure by a member of An Garda Síochána. Conviction of an offence under the bye-law can result in a substantial monetary fine. It is of note that no penalty of imprisonment may be imposed although a right to arrest and detain is envisaged.

24. As regards the common law, Mr. Collins S.C. opened an extract from Butler, *Keane on Local Government*, 2nd Ed., (First Law, 2003) at p. 56 which states:-

"A bye-law cannot make lawful that which the general law has already made unlawful and the converse thereof equally applies, that it cannot render unlawful an act, which the general law has already made lawful. Furthermore where a matter has already been addressed by legislation bye-laws may not deal with the same objective."

## Conclusions

25. In my view, the extracts from s. 37 indicate a broad area of principles and policies empowering the local authority in question to make bye-laws encompassing the wide range of the scope of its governance. Part VII of the Act sets out the statutory framework governing the bye-laws, the very broad scope of the areas which those bye-laws may embrace, the powers of arrest conferred upon An Garda Síochána and the rights of the person authorised in writing by the local authority to request persons to refrain from prohibited activity and remove them, if necessary, from local authority land. Drinking alcohol in a public park is one activity the respondent seeks to prohibit.

26. In promulgating these bye-laws and this specific interdict is the respondent moving beyond the limits of its statutory

confinement? Prima facie it would appear not. I see nothing in the Act that would so curtail a local authority. It is, as I have said, seemingly broad in the ambit of the discretion it confers.

27. Even if the foregoing is correct, the applicant argues that the respondent is entering an area of regulation already inhabited by the legislature in that the Oireachtas has already sought to legislate in respect of the matters complained of against the applicant. I am not so persuaded.

28. The applicant says that this area has already been visited by parliament. Section 13(3) of the Intoxicating Liquor (General) Act, 1924 (which was in force at the material time) provides:-

"Every person who drinks any intoxicating liquor purchased from the holder of a licence to which this section applies on the premises where the same was sold, or on any highway, lane or bye-way adjoining or near such premises, shall be guilty of an offence under this section, and shall be liable on summary conviction thereof to a penalty not exceeding twenty pounds, or in default of payment of such penalty to imprisonment for a term not exceeding one month."

29. To which purveyors of intoxicating liquor does this section apply? Subsection (6) provides:-

"This section applies to licences of any description authorising the sale of intoxicating liquor by retail for consumption off the premises."

30. The offence is replaced by a new offence under s. 17(5) of the Intoxicating Liquor Act 2003 which creates an offence of drinking intoxicating liquor purchased in an off licence within 100m of the premises.

31. That part of the Act of 1924 highlighted by the applicant constitutes a portion of the framework of statutory regulation of the sale of alcoholic drink in off licences. It is as much, if not more, aimed at the licensees and prevention of abuses in this particular trade. The legislature and the respondent are dealing with two very different matters. The respondent, in prohibiting the consumption of alcohol in a public place in exercise of the powers conferred by the Act is dealing with an obvious public mischief. The offences created under the principle licensing legislation, on the other hand, are entirely location specific with reference to an off licence premises. They are designed to prevent people from availing of the relatively cheap prices to be found in off licences and, further, to prevent persons so licensed from engaging in potential abuse of their more favourable cost environment *vis-à-vis* public houses. The legislation does not go further because it does not need to. It is a matter for the local authorities, within the scope of the powers given to them, to legislate for their own areas. The Oireachtas did not and does not seek to intrude beyond the immediate environs of off licences with regard to the consumption of alcohol in a public place.

32. The applicant also points to s. 4 of the Criminal Justice (Public Order) Act 1994 which created an offence for any person to be present in any public place while intoxicated to such an extent as would give rise to a reasonable apprehension that he might endanger himself or any other person in his vicinity. Clearly, this section addresses the issue of intoxication. It does not govern the consumption of alcohol in a public place. It is not an offence under the general criminal law. To be guilty of an offence under s. 4 it is not necessary that one be drinking intoxicating liquor in a public place.

33. Article 28A of the Constitution envisages the conferring of powers to local authorities subject, of course, to the Constitution and to the general law. The Local Government Acts 1925 to 1994 are designed to promote, *inter alia*, the interests of local communities and, to this end, to confer upon local authorities necessary power and authority to do such acts and make such provisions as are reasonably and lawfully necessary in pursuit of the interest of the common good of the local community and with a view, *inter alia*, to controlling various mischiefs and nuisances. Section 37(4) of the Act sets out a list of provisions which are broad and generous in scope and a bye-law prohibiting the activity in question or involving the conduct of persons at the specified place would appear to come within its scope.

34. The discretion given to local authorities cannot be unfettered but it is wide. It must, in my view, include the power to make bye-laws of the category with which we are here concerned. It would seem absurd to suggest that the Oireachtas did not intend local authorities to have a wide area of discretion in ordering conduct, *inter alia*, in public parks. It seems to me that the Oireachtas intended, and was so entitled, to leave to the discretion and judgment of local authorities, the right reasonably to regulate and, where appropriate, to proscribe certain activities and conduct on land under their management and control. The regulations in question do not trespass upon an area visited by the legislature nor do they touch upon circumstances where the Oireachtas has declined to render specific conduct unlawful.

35. Having so found, I am of the view that the bye-laws do not step outside the constitutional or legal framework under which the respondent operates. They do not amount, for example, to a gratuitous or present interference with the applicant's rights under the Constitution or at common law (as contended for by the applicant in relying upon *Limerick Corporation v Sheridan* (1956) 90 I.L.T.R. 59).

36. Accordingly, I must dismiss the applicant's claim.