Neutral Citation: [2014] IEHC 303

THE HIGH COURT

[2013 No. 476 J.R.]

BETWEEN

MICHAEL GRANGE

APPLICANT

AND

COMMISSION FOR PUBLIC SERVICE APPOINTMENTS

RESPONDENT

JUDGMENT of Mr. Justice Barrett delivered on the 30th day of May, 2014

1. There are two key issues in this case. The first is whether certain decisions of the Commission for Public Service Appointments are amenable to judicial review. The second is whether, assuming such decisions are amenable to judicial review, the particular decisions of the Commission in issue in these proceedings should be allowed to stand.

Facts

2. This application is brought by Mr. Grange, the disappointed applicant for a position within the Civil Service. The decisions of the Commission which it is sought to impugn were taken from 2012 onwards. To understand the context of those decisions it is necessary to look back further in time, starting in 1991. In that year Mr. Grange successfully completed a degree in business studies at Dublin City University. Just over a decade later, in 2003, he was awarded the degree of Barrister-at-Law by King's Inns. Between October 2007 and August 2008, Mr. Grange 'devilled' for a year in the Law Library. Four years later came the events that have led directly to these proceedings. In January 2012, the Public Appointments Service ran a competition for the position of Administrative Officer in the Civil Service. On 26th January, 2012, Mr. Grange, then a serving civil servant, applied for the position of Administrative Officer (Economics). This application was not successful. On 23rd May, 2012, Mr. Grange applied for the position of Administrative Officer (Human Resources). On 30th May, 2012, he was advised that he had not been short-listed for this role. On 11th June, 2012, Mr. Grange requested a review of the decision of the short-listing board. On 14th June, 2012, Mr. Grange was advised that the short-listing board had made its assessment of applications under three headings, viz. 'Qualifications/Training', 'Work Experience', and 'Range and Depth of Experience'. Under the heading 'Qualifications/Training', Mr. Grange was found to have 'somewhat relevant undergraduate experience'. Under the heading 'Work Experience' Mr. Grange was deemed not to have any relevant experience. Under the heading 'Range and Depth of Experience' he was deemed to have 'no relevant qualifications and experience'. On 29th June, 2012, Mr. Grange was provided with a copy of the short-listing board's assessment. On 9th July, 2012, Mr. Grange requested, pursuant to section 8 of the Code of Practice on Appointment to Positions in the Civil Service and Public Service, as published by the Commission for Public Service Appointments in 2007, a formal review by the Public Appointments Service of the short-listing board's decision. On 24th and 25th July, 2012, Dublin City University confirmed to the formal reviewer that the degree awarded to Mr. Grange in 1991 was primarily a general business degree, that Mr. Grange had specialised in the HR area but that it was not specifically a HR degree. The university left it to the formal reviewer to decide if the degree could be treated as a HR qualification. On 1st August, 2012, the formal reviewer issued her formal decision, stating, *inter alia*, that:

> *"The Board regarded your Business Degree somewhat relevant as it is a general Business Degree with elements of Human Resources. However, for the purposes of this competition, only specific Human Resources qualifications were considered relevant, in line with the essential requirements of this post. Your legal qualifications were deemed 'not relevant' by the Board as Employment Law is a module of the legal degree course and is therefore not considered a Human Resource qualification."*

3. On 13th August, 2012, Mr. Grange lodged a complaint with the Commission for Public Service Appointments alleging that in the operation of the competition for the position of Administrative Officer (Human Resources) there had been breaches by the Public Appointments Service of the Code of Practice on Appointment to Positions in the Civil Service and Public Service. In essence, he contended that the Public Appointments Service had failed to apply the merit principle, that its conclusion regarding him had been irrational, and the formal review unsatisfactory. The 'merit principle' is set out in Section 2.2 of the Code which states in this regard that, *inter alia*:

> *"Appointment on merit means the appointment of the best person for any given post through a transparent, competitive recruitment process where the criteria for judging suitability of candidates can be related directly to the qualifications, attributes and skills required to fulfil the duties and responsibilities of the post. This fundamentally fair and just approach to dealing with applicants results in the selection of individuals whose competencies, abilities, experience and qualities best match the needs of the organisation in question. Merit is therefore an integral principle which must underpin all appointment practices.*
>
> *Throughout any merit-based process, it is essential to ensure that the selection process does not provide unjustifiable advantage or disadvantage to any particular candidate or group of candidates. The selection process should embrace genuine equality of opportunity, and this should be integral to the processes by which appointments are made."*

4. From August 2012 onwards, the Commission for Public Service Appointments moved centre-stage in the events that preceded these proceedings and it is, of course, the Commission's actions that are the subject of these judicial review proceedings. By way of general note, the Commission was established pursuant to section 11 of the Public Service Management (Recruitment and Appointments) Act 2004. It consists of An Ceann Comhairle, the Secretary General to the Government, the Secretary General of the Department of Public Expenditure and Reform, the Chairperson of the Standards in Public Office Commission and the Ombudsman. It is responsible for regulating recruitment and appointment processes in, *inter alia*, the Civil Service. Its key statutory responsibilities, as set out in section 13 of the 2004 Act, can be summarised as follows: (i) establishing standards of probity, merit, equity and fairness for recruitment and selection procedures and publishing those standards in Codes of Practice; (ii) safeguarding those standards by monitoring, auditing and evaluating appointment processes; (iii) publishing procedures for persons to make a complaint about an

appointment process; (iv) examining complaints alleging breaches of a Code of Practice; (v) granting licences to public bodies to carry out recruitment; and (vi) maintaining order in the public service recruitment market. As will be seen hereafter, the instant application is concerned with the fourth of these responsibilities.

5. Continuing with the chronology of events that preceded these proceedings, on 3rd September, 2012, pursuant to a request made by Mr. Grange, the Freedom of Information Officer at Dublin City University made available to him the records concerning the exchanges between the Public Appointments Service and Mr. Grange regarding his business studies degree. Mr. Grange forwarded this information to the Commission for Public Service Appointments. On 16th October, 2012, two members of the Commission for Public Service Appointments met with two of the three members of the short-listing board and made various enquiries as to how the short-listing board had discharged its functions. On 25th October, 2012, three of the five Commission members met to consider Mr. Grange's complaint. At their meeting they were presented with a report by the Office of the Commission on Mr. Grange's complaint. They were not referred to the information that Mr. Grange had procured from Dublin City University. On 26th October, 2012, the Secretary of the Commission advised Mr. Grange that the Commission did not consider that the merit principle contained in the Code of Practice had been breached during the short-listing process operated by the Public Appointments Service. On 6th November, 2012, Mr. Grange wrote to the Secretary of the Commission stating that he believed the report which had been presented to the Commission was materially flawed in that it did not refer to the Dublin City University materials, nor had these been placed before the members of the Commission. He asked that the report be withdrawn, that a report by an independent person be prepared, and threatened judicial review proceedings. Though not the next step in the sequence of events that preceded these proceedings it is worth quoting at this point the explanation that the Commission offered to Mr. Grange on 14th May, 2013, for proceeding as it had on 25th October, 2012:

> *"I have asked [a member of the CPSA staff] to explain his rational for excluding this information. He has confirmed that following an examination of your complaint, including the DCU material he met with the shortlisting board and put questions to them in relation to your qualifications…They responded that they assessed all candidates on the basis of the information provided in the application forms and any additional material received after the shortlisting stage was nor relevant to their deliberations. Candidates were required to provide all relevant information on their application to be assessed by the board based on pre-determined selection criteria. The role of the Commission in examining complaints is to ensure all candidates were treated fairly and in line with the principles in the Code of Practice. On the basis of this discussion Mr. Smith did not consider the DCU material relevant to the complaint which examined the process employed by the shortlisting board to assess candidates."*

6. Returning to the winter of 2012, on 29th November, 2012, the Secretary of the Commission met with Mr. Grange to discuss his complaint further. At this meeting the Secretary advised Mr. Grange that essentially the short-listing board had dismissed his application on the ground of lack of qualifications. Mr. Grange furnished the Secretary with a copy of a human resources management qualification then being offered by another third-level institution and which he asserted had strong similarities with his qualification from Dublin City University. The Secretary undertook to liaise with the members of the Commission as to how they wished to proceed with matters. In a memorandum of 5th December, 2012, the Secretary to the Commission briefly summarised for the Commission how matters then stood with Mr. Grange and recommended that a letter issue to Mr. Grange stating that there was no basis for the Commission to withdraw its report or its examination of matters, that the Commission's decision was final and that should Mr. Grange commence judicial review proceedings the Commission would seek recovery of its legal costs from him if Mr. Grange was unsuccessful in those proceedings. The Secretary did not furnish the Commission with the details of the course which Mr. Grange had provided to him at their latest meeting. At a meeting on 27th February, 2013, the members of the Commission adopted the course of action recommended to them by the Secretary. On 4th March, 2013, a letter duly issued to Mr. Grange in which the Commission stood over its earlier decision. On 15th March, 2013, Mr. Grange sent a reply letter seeking a fresh investigation. On 26th March, 2013, the Commission reiterated in writing its view that there was no reason to commence a fresh investigation. On 28th March, 2013, Mr. Grange's solicitors sent a letter to the Commission seeking the quashing of various of its decisions and threatening judicial review proceedings. On 4th June, 2013, the Secretary of the Commission sought an internal meeting to discuss how best to deal with the issues presenting and on 7th June, 2013, such a meeting was held. On 2nd July, 2013, leave to apply for judicial review was granted by the court. The judicial review hearings proceeded in February and March of 2014.

Reliefs sought

7. In his notice of motion Mr Grange seeks, *inter alia*, the following reliefs: (1) an order quashing the decision of the Commission on 25th October, 2012, to adopt a report into his appeal; (2) an order quashing the decision of Commission on 27th February, 2013, to order a fresh investigation into his case; (3) an order quashing the decision of the Commission on 27th March, 2013, refusing all further consideration of his appeal; (4) a declaration that the decision of the Commission to refuse the appeal is *ultra vires* and of no effect; (5) an order compelling the Commission to conduct a fresh appeal of the decision of the short-listing board of the Public Appointments Service that Mr. Grange had no relevant qualifications or experience for the position of Administrative Officer (Human Resources); and (6) such further order as the court may consider appropriate.

Justiciability

8. The Commission has referred to the fact that the purpose of an investigation done under section 8 of the Code of Practice on Appointment to Positions in the Civil Service and Public Service (2007) is not to confer a benefit on a complainant but to enable the Commission to make recommendations to office-holders with a view to addressing any shortcomings identified during its investigation. The Commission has also adverted to the fact that it does not have any power under the 2004 Act to alter a recruitment decision once it has been made. The Commission has referred in this regard to section 48 of the 2004 Act which states, *inter alia*, that:

> *"(1) Where the Commission is of the opinion that an aspect of the recruitment process has been or is likely to be compromised, then the Commission may–*
>
> *(a) issue instructions to the licence holder concerned, and*
>
> *(b) issue a copy of those instructions to any other person it considers appropriate to issue a copy to.*
>
> *(2) Nothing in subsection (1) shall be read as permitting an instruction to be issued which has the result of affecting any particular appointment or purported appointment or the recruitment process relating to that appointment or purported appointment."*

9. Having regard to the foregoing, and relying on decisions such as *The State (Stephen's Green Club and Anor.) v. The Labour Court [*1961] I.R. 85 and *Ryanair Ltd. v. Flynn and Anor.* [2000] 3 I.R. 240, each of which are considered further below, the Commission contends that there is no justiciable controversy arising in these proceedings for the court to adjudicate upon. However, it is worth noting that during the hearings it was contended for Mr. Grange, and appears to have been accepted by the Commission, that there

is anecdotal evidence of instances in which investigations and findings of the Commission have been relied upon by persons to whom those findings and investigations relate, to advance their interests successfully with particular government departments, not because those departments are obliged to vary whatever decision may previously been made but because, in light of the Commission's findings, it is reasonable for those departments so to do. Indeed in the course of oral argument, counsel for the respondent offered a hypothetical example in which such corrective action might ensue. So it appears that in practice the Commission's decisions do have the potential to impact materially on the position of persons to whom its investigations and findings relate, at least when those decisions are favourable to such persons. One further point which might be made before proceeding to a consideration of the case-law is that the overall trend of modern jurisprudence runs somewhat counter to the position propounded by the Commission in this regard. Thus in Hogan and Morgan's definitive text, *Administrative Law in Ireland* (4th ed., 2010), one finds the following observation made by the learned authors in respect of the three former state side orders of certiorari, prohibition and mandamus:

> *"It was traditionally understood that these three public law remedies shared certain restrictive features. For instance, they would only lie to review something in the nature of a decision. It was not required to have been absolutely final, but there are older cases which held that a requirement that the decision be approved by another person or body prevents the orders from issuing. Allied to this was the notion that the public law remedies would not lie to a body whose sole function was to make a recommendation, and that the impugned determination had to affect rights or impose liabilities or that 'a probable, if not inevitable, next step,' will be that 'some legal rights will, in fact be infringed'. [The quoted text is from the judgment of Kearns J. in Ryanair Ltd. v. Flynn, op. cit., a decision that is considered further hereafter.] The modern tendency, however, is to eschew a rigid classification of whether a determination is 'binding', 'conclusive' or whether the 'legal rights' of the citizen have been affected. The courts are apt to examine whether the applicant has suffered a real or possible prejudice and to see whether he has a sufficient interest in the matter."*

10. By way of supporting case-law, the learned authors refer, *inter alia*, to the judgments in *MacPharthalain & Ors. v. Commissioners of Public Works & Anor.* [1994] 3 I.R. 353, *Maguire & Ors. v. Ardagh & Ors.* [2002] 1 I.R. 385 and *De Róiste v. Judge-Advocate General & Ors.* [2005] 3 I.R. 494. The court considers these and other leading precedents of relevance hereafter.

11. In *The State (Stephen's Green Club and Anor.) v. The Labour Court*, Walsh J, had to consider, *inter alia*, whether the remedy of prohibition lies in respect of the powers exercisable by the Labour Court by virtue of s.67 of the Industrial Relations Act 1946. Writing in this regard, Walsh J. stated, at 94, that:

> *"It is well established in this country that prohibition may issue to any body which has the duty to act judicially and which on consideration of facts and circumstances has power by its determination within its jurisdiction to impose liability or to affect rights. By this is meant that liability is imposed, or the right affected, by the determination only, and not by the fact determined, so that the liability will exist or the right will be affected although the determination be wrong in law or in fact."*

12. In *Murtagh v. Board of Management of St. Emer's National School* [1991] 1 I.R. 482, the applicants sought judicial review by way of certiorari to quash the respondent's decision to suspend a primary school pupil for certain indiscipline. They were unsuccessful before the High Court and also the Supreme Court, the latter being particularly unimpressed by the proceedings brought. In the High Court, Barron J. stated, at 485, that:

> *"The cases in which certiorari lie have not been clearly defined. In general the body whose decision it is sought to quash must be discharging a function of a public nature affecting private rights and be under a duty to act fairly in coming to that decision. The public element is essential…"*

13. In *MacPharthalain & Ors. v. Commissioners of Public Works & Anor.*, the applicants sought an order of certiorari quashing the decision of the Commissioners of Public Works designating a particular area of bogland as an area of scientific interest. The High Court granted the relief sought. The respondents appealed to the Supreme Court on the basis that, *inter alia*, the designation did not constitute a decision of the Commissioners. Delivering the judgment of the Supreme Court, Finlay C.J. stated, at 357 et seq. that:

> *"I have no doubt the learned trial judge was quite correct in coming to the conclusion that, where an officer of a department carrying out what appears to have been within the ambit of a government decision made some time before receives various different types of expert advice and adjudicates upon them and reaches a decision to implement them…that is a decision and a decision capable of being judicially reviewed.*
>
> *The next question then is was it a decision which affected the rights of the first two applicants…[The trial judge] came to the conclusion that it did and he did so quite specifically and quite exclusively on the basis that it affected their rights because it reduced the value of their holdings of land if they wanted to sell them by reason of the fact that they would ordinarily not expect to obtain a grant for afforestation…*
>
> *…I am satisfied the learned trial judge was right in finding as a fact that it was the actual designation by the Wildlife Service [a section of the Commissioners of Public Works] that made the impediment or block to the granting of a forestry grant."*

14. In *Ryanair Limited v. Flynn & Anor.*, Ryanair, a corporate entity not entitled to the same rights under the Bunreacht as the natural individual in the instant proceedings, sought judicial review of a study of pay and conditions that had been carried out by the notice party to the proceedings at the behest of a Government minister. Refusing the various reliefs sought, Kearns J. stated, at 264, that:

> *"[T]here are, quite apart from the public law dimension…two other requirements which must be fulfilled before the court can intervene by way of judicial review, namely, there must be a decision, act or determination and it must affect some legally enforceable right of the applicant. If the right is not a 'legally enforceable right', it must be a right so close to it as to be a probable, if not inevitable, next step that some legal right will, in fact, be infringed."*

15. There is no question that there is a public law dimension to the proceedings now before the Court. Whether the other criteria enunciated by Kearns J. are satisfied is considered further below.

16. In *Maguire & Ors. v. Ardagh and Ors.*, the applicants sought by way of judicial review proceedings to quash certain directions of an Oireachtas sub-committee which was convened to inquire into an incident that had occurred in Abbeylara, County Longford, in April 2000, during which a man was shot dead by the Gardaí. In the Supreme Court, Hardiman J., at 668ff., made the following observations:

> *"If, in relation to one of the applicants, it was found as a fact by this parliamentary group that he or she had unlawfully killed the deceased man, I do not believe that the alleged technical status of such finding as being (contrary to its obvious and natural meaning) merely an opinion would at all avail him or her in the eyes of the ordinary reasonable member of the community. It would strike such persons as a quibble….The arguments of the respondents draw heavily on the proposition, undoubtedly correct, that the findings of a tribunal of inquiry are said on high authority to be 'legally sterile' in the sense of having no strictly legal consequences….I have to say that I find the phrase 'legally sterile' extremely unattractive in any realistic human context….One is therefore left with an entity described as a 'finding of fact or conclusion' which, it is agreed, could in practice have an adverse affect on an individual. But that, the respondents contend, does not take away from the central truth that 'in law' it is of no effect at all.*
>
> *I do not find appealing a line of argument which sets up a distinction between a universally accepted state of fact in real life and a quite contrary state of law. If this is the law then it can only be described as a legal fiction…It is true that even the most adverse imaginable finding of fact or conclusion by the sub-committee will not amount to a conviction and will not determine any persons rights and liabilities in civil law and will not expose him to any penalty or liability. But that is not the same as saying it has 'no' effect."*

17. Clearly any judgment emanating from a member of the Supreme Court necessarily carries a particular weight, regardless of whether the comments are binding precedent or obiter dicta.

18. In *De Róiste v. Judge-Advocate General & Ors*., the court held that an inquiry into the reasons for the applicant's dismissal could not be regarded as a simply inquisitive process and therefore unamenable to judicial review. Per Quirke J., at 512:

> *"The instant proceedings concern a process established by statute by the government of a sovereign State. It was conducted by a statutory personage entitled 'The Judge Advocate General'. The process was concerned directly with matters relating to the reputation and good name of the applicant. The report which resulted from the process was adopted on behalf of the government and published.*
>
> *It is inescapable that the findings and conclusions resulting from the process had the capacity to affect the applicant's reputation and good name…*
>
> *[I]ts findings and outcome affected his constitutionally protected right to his reputation and good name. Accordingly, he had a legitimate, fundamental significant interest in the process and is entitled to seek the relief which he has sought in these proceedings."*

19. In *De Burca v. Wicklow County Manager & Anor.* [2009] IEHC 54, the applicant sought, *inter alia*, the quashing of a report that had been prepared into the ethics of the actions of a member of Wicklow County Council. In the course of his judgment, Hedigan J., at para. 23, *et seq*., stated:

> *"The respondents and the notice party argue that the report does not constitute a decision by a public body which is amenable to judicial review…The main basis on which the respondents and the notice party make this contention is that the report had no material effect on the rights of any party, in particular the applicant. They contend that such a lack of legal consequences amounts to a state of 'legal sterility' in the context of which judicial review would be a futile and inappropriate exercise…This argument is contested by the applicant who submits that the repo4rt did in fact have serious implications for her legitimate interests. Firstly, she points to the criticism to which she was subjected both in the report and in the general media subsequent to its release, which she suggests was unjustified and acutely injurious to her reputation as a publicly elected representative. She places particular importance on the fact that the report occurred in the context of an ethics investigation, during which reputations are necessarily subjected to scrutiny, and also on the fact that the report is now a matter of public record. Secondly, the applicant submits that she has an entitlement to ensure that her complaint…should be dealt with in accordance with law. In this regard she submits that the deficiencies in the methodology adopted mean that inadequate consideration was given by the respondents to her concerns."*

20. Hedigan J. concluded that the report in issue was justiciable, stating in this regard, at para. 50 *et seq*., that:

> *"It is well established that formal reports or other investigative determinations reached by public bodies may be subject to judicial review in certain circumstances. The fact that a report such as that in the present case is portrayed as a mere fact-finding exercise does not, of itself, prevent it from impacting upon the rights of the parties involved…As a public representative, the reputational rights guaranteed to the applicant by Article 40.3.2 of the Constitution maintain particular importance. It seems to me that, following the publication of the report, much of the criticism which was levelled against her in the print and audiovisual media was unfair and vitriolic. The findings of the report, especially its criticisms of her, were at the foundation of this assault on her reputation…The fact that the criticisms contained in the report now form part of the public record of the State serves only to amplify the ramifications for her, in particular should she wish to continue her career in public office. To allow such undue criticism of a conscientious local councillor to go unconsidered on the basis that it is of no consequence, or that it has no implications, would in my view involve a kind of legal fiction with potentially far-reaching consequences for the public service as a whole. In my view, therefore, the report did have material implications for the applicant."*

21. The various cases considered above are merely a representative sample of the extensive jurisprudence in this area. However, they do identify certain key issues as regards determining the issue of justiciability. At the risk of over-simplification of a comprehensive body of law, it appears to the court that the following key principles can be distilled from the above judgments:

22. *First principle: Judicial review is available against any body which has the duty to act judicially and which on consideration of facts and circumstances has power by its determination within its jurisdiction to impose liability or to affect rights*. (*The State (Stephen's Green Club and Another) v. The Labour Court*).

23. In the present case it appears to the court that the Commission for Public Service Appointments, when discharging its functions under the Act of 2004, was not acting judicially in the manner contemplated by Walsh J above.

24. *Second principle: Judicial review is available where the body whose decision is impugned is discharging a function of a public nature affecting private rights and is under a duty to act fairly in coming to that decision. (Murtagh v. Board of Management of St. Emer's National School*)

25. In the present case it is not disputed that the Commission for Public Service Appointments in performing its duties under the 2004 Act was discharging a function of a public nature. Could the performance by the Commission of those duties affect Mr. Grange's private rights? It seems to the court that there are at least two ways in which they could potentially do so. Thus it appears that in practice the Commission's decisions have the potential to impact materially on the position of persons to whom its investigations and findings relate. At least, this is so if those decisions are favourable to the interests of such persons whereas in Mr. Grange's case they were not. On a related note, Mr. Grange's personal rights include the constitutional right to basic fairness of procedures, first referred to by the Supreme Court in *Re Haughey* [1971] I.R. 217 and referred to extensively throughout case-law since that time. So if the Commission followed a flawed process in the manner in which it discharged its duties then the resultant decisions would appear to be inherently tainted by the breach of Mr. Grange's constitutional entitlements in their formulation, not least if the effect of any such flaw was to deny him the fruits of a positive decision by the Commission. Moreover. it is clear from the decision of the Supreme Court in *Dellway Investments Limited and Ors. v. National Asset Management Agency and Anor.* [2011] IESC 14 that it suffices that rights 'could' be impacted by a particular process for that process to be justiciable. Thus Denham J., as she then was, states in her judgment in *Dellway*, at para. 148, that:

> *"This judgment addresses the issue of fair procedures. The decision in this case is based on a fundamental constitutional principle. When an order could affect the rights of a person in that it might restrict his existing right to trade or his right to enjoy some benefits contracted for, such a possible result is sufficient to require that the procedure which can lead to that result must conform to the principles of constitutional justice, which includes the right to be heard."*

And, it might be added, it necessarily follows that whether such a procedure did so conform is justiciable.

26. *Third principle. Where an officer of a department, carrying out what appears to have been within the ambit of a government decision made some time before, receives various different types of expert advice and adjudicates upon them and reaches a decision to implement them…that is a decision that is capable of being judicially reviewed (MacPharthalain v. Commissioners of Public Works*)

27. In the present case it does not appear to the court that it is correct to describe the process in which the Commission for Public Appointments was engaged under the 2004 Act as one that involved its adjudicating on a matter in the manner contemplated in *MacPhartalain*.

28. *Fourth principle. Quite apart from the public law dimension, two other requirements must be fulfilled before the court can intervene by way of judicial review, namely, there must be a decision, act or determination and it must affect some legally enforceable right of the applicant. If the right is not a 'legally enforceable right', it must be a right so close to it as to be a probable, if not inevitable, next step that some legal right will, in fact, be infringed.* (*Ryanair Limited. v. Flynn and Anor.)*

29. Here there are decisions of the Commission, but do they affect some legally enforceable right of Mr. Grange? Again, it appears to the court that if the Commission followed a flawed process in the manner in which it discharged its duties then the ultimate decisions of the Commission would be inherently tainted by any breach of Mr. Grange's constitutional entitlements in their formulation, especially if the consequence of any such breach was to deny Mr. Grange a favourable decision that he could then have sought to use to advance his interests. It is clear from the extract of the judgment of Denham J. in *Dellway,* quoted above, that the question of whether or not there has been conformity by the Commission with the principles of constitutional justice in this regard is therefore justiciable.

30. *Fifth principle. Where a finding is 'legally sterile' in the sense of having no strictly legal consequences but could in practice have an adverse effect on an individual, it is not correct to describe it as having no effect. That would be to divorce the law from reality. (Maguire & Ors. v. Ardagh & Ors.)*

31. Any decisions of the Commission insofar as Mr. Grange is concerned appear to the court to be at least potentially legally sterile in that, strictly speaking, negative decisions by the Commission, *i.e*. that there has been no breach of applicable requirements and related decisions, may have no legal consequences for him. Again, however, it appears to the court that the Commission's decisions could in practice have an adverse impact upon Mr. Grange if arrived at by a route that violated his constitutional right to basic fairness of procedures. This is because such a violation could result in Mr. Grange being denied the fruits of a positive decision that he could then seek to rely upon to advance his interests in a similar manner to that which others have apparently done when positive decisions have issued from the Commission in the past. Thus it appears to the court that it is not correct to describe the finding as having no adverse effect if the manner in which such decision was reached was improper. If such impropriety pertains then the Commission's resultant decisions are, the court considers, justiciable. For the reasons stated above, the court is buttressed in this finding by the decision of the Supreme Court in *Dellway* and in particular the observations of Denham J., as quoted above.

32. *Sixth principle. Where the findings and conclusions resulting from a statutory process conducted by a statutory personage have the capacity to affect an applicant's reputation and good name, he has a legitimate, fundamental significant interest in the process which is therefore justiciable. (De Róiste v. Judge-Advocate General & Ors.)*

33. It is not clear that the findings of the Commission have any negative consequences for Mr. Grange as regards his reputation and good name. Like many people who apply for particular employment, Mr. Grange has been unsuccessful in a competition in which he was not deemed to be among the suitable candidates. This entails no general reflection on his abilities and there is no suggestion, nor does the court find, that there are any negative consequences for him in terms of his chances of success in any future competition, whether within the civil service or otherwise, for which he is eligible.

34. *Seventh principle. Formal reports or other investigative determinations reached by public bodies may be subject to judicial review in certain circumstances. The fact that a report such as that in the present case is portrayed as a mere fact-finding exercise does not, of itself, prevent it from impacting upon the rights of the parties involved. (de Burca v. Wicklow County Manager & Anor.).*

35. In the present case the fact that the Commission's report, strictly speaking, has no direct legal consequences for Mr. Grange in terms, for example, of ensuring that he is given a further chance at getting the job for which he applied, does not, it seems to the court, prevent it from impacting on his rights if arrived at in a manner that offends against the constitutional right to fairness of procedures.

36. To the above might be added the observation of Hogan and Morgan referred to at the outset of this judgment, *viz*:

> *"[Eighth principle] The modern tendency…is to eschew a rigid classification of whether a determination is 'binding',*

'conclusive' or whether the 'legal rights' of the citizen have been affected. The courts are apt to examine whether the applicant has suffered a real or possible prejudice and to see whether he has a sufficient interest in the matter."

37. Again, if there was a breach of Mr. Grange's constitutional right to fairness of procedures in the manner in which the Commission arrived at its findings then he may have suffered a possible prejudice and, again having regard to the decision of the Supreme Court in *Dellway*, would have a sufficient interest in the matter for it to be justiciable.

The impugned decisions

38. Many grounds of objection to the impugned decisions were raised in Mr. Grange's statement of grounds. However, it appeared at the hearings that the key contentions being made were fourfold, viz. that there was (1) a breach of fair procedures, (2) a failure to take relevant information (the Dublin City University materials) into account, (3) various errors of law, and (4) an error of fact on the part of the short-listing board and the Commission as regards seeking out information as part of the selection process. There is also a suggestion in the statement of grounds that certain legitimate expectations of Mr. Grange were breached by the manner in which the Commission conducted its review. The court proceeds below to consider each of these contentions in turn.

39. *Breach of fair procedures (including procedural impropriety and fettered discretion*)

Before proceeding to consider the issue of fair procedures, it is useful to recall why the issue of fair procedures is central to administrative law. The logic, succinctly stated by Hogan and Morgan (2010, 4th edition), at 569, is that:

"[P]ublic authorities are taken to be non-partisan and open to persuasion provided that all the relevant facts and arguments are placed before them. With a fair procedure, the relevant matters are more likely to emerge and to be properly weighed by the decision-maker."

40. The notion of fair procedures derives ultimately from the procedural rules that a decision-maker must not be biased (*nemo iudex in causa sua*) and that a person should have the best opportunity to put his or her side of a case (*audi alteram partem*). In *McDonald v. Bord na gCon* [1965] I.R. 217 at 242, the principles of natural justice were transmuted by Walsh J. into what he termed "*constitutional justice*". The fact that the above principles of natural justice have been subsumed into constitutional justice was confirmed just over 20 years later by McCarthy J. in *The State (Furey) v. Minister for Defence* [1988] I.L.R.M. 89 at 99, and, just over 20 years after that judgment, the point was again confirmed by Denham J. in *Dellway* at para. 107. Although Walsh J. indicated in *McDonald* that constitutional justice embraced more than the two key principles that natural justice was perceived to entail, in practice the precise parameters of constitutional justice remain to some extent un-defined and perhaps necessarily so, their amplification and refinement being determined by the facts and parameters of the particular cases that come before the courts from time to time. One change in terminology that has occurred is that what used to be the principle of *audi alteram partem* has come to be referred to as 'fair procedure'. Thus, for example, in *BFO v. Governor of Dóchas Centre* [2005] 2 I.R. 1 at 27, Finlay Geoghegan J. indicates that:

"The requirement that there be due fairness of procedures and due and proper consideration for the rights of others… appears to require that such procedures and consideration be capable of being objectively perceived to be fair."

41. It is clear from the decision of the Supreme Court in *Dellway* that the notion of fair procedures includes but is not limited to the right to be heard. Thus, per Denham J., at para. 109: "*There is a right to fair procedures, which includes a right to be heard."* Notably, one finds neither in the *Dóchas* nor *Dellway* cases nor elsewhere in the applicable case-law any suggestion that procedural perfection is a pre-requisite to a finding of fairness. In an imperfect world, some imperfection of process is to be expected and when it arises, as it almost inevitably shall, it will not necessarily be a bar to a finding that there was nonetheless basic fairness of procedures: a flawed process may still be entirely fair. As Denham J. states in *Dellway*, at para. 114:

"[W]hat is sought is fairness, which will depend on all the circumstances of a case, and vary from one type of procedure to another."

42. In the present case, Mr. Grange has contended, in effect, that there are various respects in which the process by which his application and complaints were treated that entailed an unfairness of procedure, resulted in his case not being properly heard and/or yielded a situation in which the processes that are the subject of these proceedings could not, to borrow from the phraseology of Finlay Geoghegan J. in *Dóchas*, be perceived objectively to be fair. Thus Mr. Grange contends that the Commission for Public Service Appointments: (i) in considering his case, failed to take account of relevant material, give proper reasons and to have regard to matters of material importance; (ii) refused to consider information that was submitted by him; (iii) refused to accede to the request for a fresh investigation made by Mr. Grange in his letter of 15th March, 2013; (iv) failed to ask appropriate questions and undertake a sufficient and complete inquiry; (v) 'rubber stamped' the decision of the shortlisting board; (vi) failed to give Mr. Grange an opportunity to fully put his case forward; (vii) over-relied on assurances provided by two of the three members of the shortlisting board and did not meet with its chairman; (viii) did not adequately investigate concerns raised by Mr. Grange that his failure to succeed was attributable to ageism; (ix) in allowing reviews to be conducted as they were, occasioned procedural impropriety which included an inappropriate delegation by the Commissioners of their powers, a failure to monitor the work of Commission staff, and a failure to question alleged deficiencies in the draft report submitted to them; and (x) was guilty of fettering its discretion through the inappropriate exclusion of relevant information.

43. Insofar as the issue of age discrimination is concerned, this is a matter for the Equality Tribunal in the first instance, though the court notes, without comment and purely as a matter of historical fact, that the members of the short-listing board who were interviewed by the Commission appear to have indicated that age was not a factor in the short-listing process. As to the other contentions made, the court does not consider them to be meritorious. In fact, what is striking to the court and ought to be apparent from the detailed account of the facts given above, is the very great lengths to which the Commission for Public Service Appointments went to ensure that it not only discharged its responsibilities properly and lawfully, but also gave Mr. Grange every possible opportunity to ventilate his concerns, even to the point of arranging a meeting between Mr. Grange and the Secretary of the Commission, a notable courtesy. The court does not consider that any of the imperfections contended for by Mr. Grange, assuming for an instant that they constitute procedural imperfections arising in the course of what the court considers were entirely fair albeit not perhaps entirely perfect procedures, are imperfections of such a scale or significance as to require the court to find that the rules of constitutional justice were not observed or that the principle of *audi alteram partem* has in some way been breached, or that, the procedures employed cannot be perceived objectively to be fair. In fact, the court finds the contrary to be true in each respect. Mr. Grange clearly considers that he is right as to the superior merits of his candidacy for the position for which he applied back in 2012. However, the court cannot perceive in the processes that are the subject of these proceedings anything that is so wrong as to have denied or even been capable of denying Mr. Grange that basic fairness of procedures to which he is entitled under the *Bunreacht* and which, the court finds, he received.

44. *Failure to take the Dublin City University materials into account.* The court does not accept that there was an improper failure by the Commission to take into account the materials from Dublin City University that were supplied by Mr. Grange to the Commission. On the contrary, the Commission, and indeed the short-listing board, decided entirely legitimately to determine matters solely by reference to the application form material. Having done this they determined that Mr. Grange, prima facie, was not qualified for the position for which he had made application. There was no legal obligation on them to do anything more. As it happens, in an abundance of prudence the short-listing board sought additional information in respect of five candidates from an initial field of 1,124 applicants in circumstances where the board was not entirely satisfied that a candidate should be ruled in or out of the application process. This did not create an obligation to do so in respect of all candidates, let alone candidates such as Mr. Grange in respect of whom, having due regard to their application forms, no doubt arose on the part of the short-listing board as to whether or not those candidates were qualified for the relevant position.

45. *Errors of law.* It was pleaded by Mr. Grange that there was an error of law on the part of the Public Appointments Service in not properly assessing his applications. This is not an error of law. It was pleaded by Mr. Grange that it was not appropriate for the Commission to state in its correspondence with him that in the event of his commencing and being unsuccessful in judicial review proceedings the Commission would pursue Mr. Grange for its costs in responding to those proceedings. This is not an error of law. It was pleaded by Mr. Grange that the Commission was in error when it refused to re-open an investigation that it considered closed. This is not an error of law: there was and is no legal entitlement to a further appeal process.

46. *Errors of fact*. It was contended by Mr. Grange that there was an error of fact on the part of the short-listing board and the Commission in considering that they were not required to seek out information as part of the selection process in circumstances where information was sought in respect of five candidates. This contention has already been considered above and, for the reasons stated, the court does not consider it to be correct. It was also contended that the Commission erred to the extent that it was its view that Mr. Grange had failed to supply the Public Appointments Service with details of his qualifications. Even if the Commission erred in this regard it does not appear to the court to be a relevant issue as both the Commission, and indeed the short-listing board, decided quite legitimately to determine matters by reference solely to the application form material.

47. *Legitimate expectations*. Among the grounds mentioned in the statement grounding the judicial review application are certain legitimate expectations of Mr. Grange that, it is claimed, were disappointed, specifically that the Commission failed to source all relevant documentation from the Public Appointments Service and that it failed to conduct an investigation in accordance with its own Code of Practice, in particular as regards the issue of age discrimination. The issue of age discrimination has already been considered above. As to the issue of legitimate expectations, this was not pursued in the course of legal submissions for Mr. Grange, leaving the court in some difficulty in this regard. The court assumes that what is being contended is that Mr. Grange had a legitimate expectation as to the procedure that the Commission would follow and that it, allegedly, did not do so, and the court should now require that the Commission do so, consistent with for example, the reasoning in cases such as the Supreme Court decision in *Gutrani v. Minister for Justice* [1993] 2 I.R. 427 and the High Court decision in *Fakih v. Minister for Justice* [1993] 2 I.R. 406 in which O'Hanlon J. approved the now classic exposition by Lord Fraser in *Attorney General of Hong-Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629 of the fundamental principle that underpins legitimate expectations, Lord Fraser stating, at 638, that

> *"The justification [for the principle of legitimate expectations] is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."*

48. Taking Mr. Grange's case at its height and assuming that he did enjoy a legitimate expectation as to the form of investigation that the Commission for Public Service Appointments adopted, the court finds that the Commission acted as contemplated by the Code of Practice. It may not have acted exactly as Mr. Grange wanted, it undoubtedly did not arrive at the conclusion that he would have preferred, and to this extent it may be that Mr. Grange's personal expectations were disappointed. However, that is not the same as saying that any legitimate expectations that he enjoyed at law were disappointed. On the contrary, the court finds that they were not, that the Commission's investigation was substantively in compliance with what the Code of Practice appears to contemplate and that a basic fairness of procedures was consistently attained by the Commission in its actions.

Conclusion

49. For the reasons stated above, the court declines to grant any of the reliefs sought by Mr. Grange.