



THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2017] IECA 48

Appeal No. 2015/321

**Ryan P.
Finlay Geoghegan J.
Irvine J.**

ALAN SHATTER

APPLICANT/APPELLANT

AND

SEAN GUERIN

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 2nd day of March 2017

1. This judgment is supplemental to the judgment I delivered on the 10th November, 2016 and must be read in conjunction with that judgment and the judgments delivered by the President and Irvine J. on that date.

2. At the subsequent hearing the appellant has sought in the light of the judgments delivered an order of this Court in the following terms:-

1. A declaration that the conclusions in the respondent's Report dated May 6th 2014, and entitled 'Review of the Action Taken by An Garda Síochána Pertaining to Certain Allegations made by Sergeant Maurice McCabe' critical of the applicant, when Minister for Justice and Equality, as set out in the Schedule to the statement of grounds, were reached in breach of fair procedures, and constitutional and natural justice;

2. An order of *certiorari* quashing the said conclusions;

3. An order requiring the respondent to deliver to An Taoiseach a copy of the order of this Court herein when perfected;

4. An order requiring the respondent to amend his report dated the 6th May, 2014, by deleting therefrom the conclusions the subject of the aforesaid order of *certiorari* and to deliver to An Taoiseach a copy of the said amended Report;

5. An order providing that the respondent pay the applicant's costs of and incidental to these proceedings in the High Court and on appeal to the Court of Appeal to be taxed in default of agreement.

3. The appellant is entitled to the declaration sought at para. 1 and there was no objection to same having regard to the judgments delivered. Similarly the appellant is entitled to the order for costs sought at para. 5 in accordance with the principles applicable to the exercise of the court's discretion under O. 99 of the Rules of the Superior Courts.

4. I would refuse the order sought at paragraph 3. It is not a necessary order. Any order made by this Court is a matter of public record and the appellant is entitled to deliver it to An Taoiseach when perfected.

5. I do not consider that the Court should now make either of the orders sought at paras. 2 and 4 above. I do not consider it necessary to decide, what may be a difficult question, as to whether the court has jurisdiction to make either order sought in these proceedings. On the facts of this application for judicial review against this respondent alone, I have concluded that even if the court does have jurisdiction to make either such order that by reason of the matters set out in paras. 68 and 69 of my first judgment I do not consider that the Court should exercise any discretion it has to make either such order in these proceedings. There I stated :

"68. The appellant brought these proceedings against the respondent alone. The respondent delivered the Report to the Taoiseach on behalf of the Government in May 2014. The Report is no longer under the control of the respondent nor was it at the date leave was granted. The appellant was given the Report in advance of publication and did not seek to restrain its publication. The Government published the Report by laying it before the Oireachtas. It has acted on the advice contained in the Report and established the Commission of Investigation. At the time of the High Court decision the Commission had been established in accordance with the recommendations in the Report. The appellant did not seek to restrain, by legal action, either the Government from acting on the Report or the Commission from proceeding. Rather he participated in the Commission which by statute provides for full fair procedures for a person in the position of the appellant prior to the Commission reaching its conclusions. The matters of which the appellant makes complaint in the Report are all matters included in the Commission's terms of reference. The Commission provided the appellant with an opportunity to publicly vindicate his good name in relation to the matters in the Report.

69. The appellant did not apply to quash the entire Report as was done in the cases of *De Róiste* and *De Burca*. He did not seek to quash any part of the conclusions and recommendations of the respondent in Chap. 20 of the Report (save one comment in para. 20.11). With the possible exception of para. 19.103 of the Report the conclusions of which complaint are made are not stand alone statements. In some instances the conclusions set out in the schedule to the statement of grounds are part sentences or not the actual words written in the Report such that they could simply be deleted. Any order that certain of the specified conclusions be deleted would appear to require re-writing of the relevant paragraphs of the Report. I am unclear as to the Court's jurisdiction to now make any such order."

6. In reaching my conclusion, I have taken into account the broad powers of the court to vindicate constitutional rights of an

individual as expressed *inter alia*, by Ó Dálaigh C.J. in *The State (Quinn) v. Ryan* [1965] I.R. 70 at 122:-

"It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires."

7. Nevertheless when a person seeks to have those rights vindicated in judicial review proceedings then the relief which the court may or should grant is circumvented by the scope of those proceedings and the parties to it. As already pointed out in my earlier judgment the appellant brought these proceedings against the respondent alone in the knowledge that he had already delivered the Report to the Taoiseach on behalf of the Government; that the Report was under the control of the Government; had been published by the Government and was intended to be acted upon by the Government by the establishment of the Commission of Investigation.

8. In these judicial review proceedings between the appellant and the respondent, my conclusion is that the appellant's constitutional right to fair procedures and to his good name is as between the appellant and the respondent vindicated by the declaration proposed to be made.

9. I have also considered the submission made on behalf of the appellant that the vindication of his good name requires in addition that the Report containing the adverse conclusions found to have been reached in breach of his right to fair procedures and constitutional and natural justice should not remain in its present form on any public record or otherwise be available to the public. The submission made on behalf of the appellant is understandable. However, it is not submitted that the respondent is in control of any such public record or continuing publication. That is therefore a matter between the appellant and the Government or any other person under whose control the Report continues to be published or public record maintained. I do not consider that the Court should now express a view on the obligations of third parties, who have not been heard, or make any further order in these proceedings. To do so would be to deny such persons the right to fair procedures. In the event that the appellant cannot reach agreement with any relevant person or body any such dispute would raise new and different issues between different parties and hence require the issue of new proceedings against the relevant persons or bodies. In the normal way, such proceedings would have to be first decided by a trial court.