THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 477 J.R.]

BETWEEN

GRAHAM ROONEY

APPLICANT

AND

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Meenan delivered on the 7th day of March, 2018.

Background:
1. The applicant joined the permanent Defence Forces in 2007 as an apprentice fitter. In August 2008 he was sent to FAS in Athlone to begin a phase of his apprenticeship to prepare him for exams. Subsequently, the applicant failed the exams and thus could not qualify as a fitter. The applicant then applied for a transfer to a different area in the permanent Defence Forces. This application was reviewed but was refused and the applicant was informed that he was to be discharged. On 9th April, 2010 the applicant's appeal on the decision to discharge him was refused. His discharge was fixed for 21st April, 2010.

2. On 16th April, 2010 solicitors for the applicant wrote to the first named respondent stating, *inter alia*, that the applicant was very anxious to remain in the Defence Forces and that he now wished to make an "application for redress of wrongs under s. 114 of the Defence Act 1954…" This letter was not responded to.

Application for Judicial Review:
3. On 19th April, 2010 the High Court, Peart J., granted the applicant leave to apply by way of an application for judicial review for:-

> (i) An order of certiorari quashing the order discharging the applicant from the permanent Defence Forces effective from the 21st day of April, 2010;
>
> (ii) An order staying the discharge of the applicant from the permanent Defence Forces, pending an inquiry pursuant to s. 114 of the Defence Act 1954, as amended.

Proceedings Prior To Judicial Review Hearing on 14th February 2012:
4. As stated at para. 2 above, the solicitors for the applicant wrote to the first named respondent on 16th April, 2010 seeking to invoke the provisions of s. 114 of the Defence Act 1954. This letter was not responded to.

5. By letter dated the 19th April, 2010 the applicant's solicitor wrote to the first named respondent in the following terms:-

> "We refer to the writer's telephone calls to your office this morning seeking confirmation that the discharge, scheduled for next Wednesday, 21st April, 2010, would not proceed pending the issues being dealt with as set out in our recent letter.
>
> You will note our indication that we had no option but to proceed to make an application to the High Court today, in the absence of such confirmation.
>
> We wish to emphasise that our client does not wish to have recourse to the Courts in relation to this matter and accordingly, we would be obliged if you would please be good enough to come back to us and confirm that the proposed application to discharge will now not proceed next Wednesday 21st April and that his proposed discharge will be deferred for a short period in order to allow his application for redress of wrongs to be submitted. On that basis, should you so wish, please note that this letter can be treated as our client's application for redress of wrongs in that regard."

There does not appear to have been a response to this letter either.

6. A notice of motion, returnable 18th May, 2010, was issued seeking the reliefs set out at para. 3 above. A statement of opposition then followed from the respondent dated 19th July, 2010, which included the following paragraph:-

> "11. It is denied that s. 114 of the Deference Act, 1954, (as amended) has any application to the circumstances of the applicant. Without prejudice to the foregoing, it is denied that the applicant has been denied any rights pursuant to s. 114 of the Deference Act, 1954, as alleged or at all, in particular since no valid and/or timely request was made of the Minister pursuant to the said provisions…"

7. In the ensuing exchange of affidavits there were a number of references to s. 114:-

> (i) In his third affidavit, sworn 21st February, 2011, the applicant stated:-
>
> > "15 A decision was taken to discharge me for reasons that are clearly confused, inconsistent and based on false/incorrect information. The procedure adopted by the first named respondent denied me fair procedures. Prior to my discharge I sought to avail of a statutory redress of wrongs, as per s. 114 of the Deference Act, 1954. The first named respondents have continued to deny me access to this statutory remedy…"
>
> (ii) In response, Lieutenant, Aisling Regan, in her affidavit, sworn on 14th March, 2011, stated:-

"9 Furthermore, having written the said letter on 16th April, 2010, and without waiting for any reply thereto, the applicant proceeded to apply for judicial review by means of an application to court on 19th April, 2010. As such, I believe that the applicant has chosen an alternative remedy and cannot now pursue parallel approach. It was not necessary for the applicant to seek judicial review of the proceedings in order to maintain a compliant under s. 114.

10 At all events, the applicant, notwithstanding having received legal advice in this specific issue, did not make a complaint in the manner proscribed under s. 114 and the relevant Regulations thereunder. I appreciate that that (sic) as a matter of law.

11 Although, again, it is a matter of law, for the purpose of making clear the respondent's position in the matter, s. 114 is not considered to be appropriate in the context of an administrative discharge as it is by nature an internal grievance procedure requiring to be initiated by a member of the defence forces. In this case, a concurrent mechanism exists in the context of any proposed administrative discharge which grants all natural and constitutional rights due recognition and was in fact entered into by the applicant. Accordingly, subsequently proposing to invoke s. 114 was and is unnecessary and superfluous on the part of the applicant…"

(iii) In response the applicant, in a further affidavit, stated:-

"3 I am advised that the scope of s. 114 of the Defence Act, 1954, is a matter for legal submissions. For the sake of clarity, I reiterate that it is the case that I sought to avail of my entitlement to a statutory redress of wrongs prior to my discharge by way of letter dated 16th April, 2010. The respondents did not respond to this letter prior to the proposed date of my discharge, let alone facilitate the ventilation of my grievance and as such I was forced to seek the protection of the courts in order to stay my discharge…"

8. The matter came on for hearing before the President of the High Court, Kearns, P., on 14th February, 2012.

Hearing on 14th February, 2012:
9. In the course of the hearing, Kearns P. indicated that the applicant had "gotten under the wire". Following this statement, and possibly sensing in what direction matters were going, counsel for the respondents sought an opportunity to take further instructions. Following this, in the words of the respondent's written submissions to this Court:-

"… The respondents agreed not to enforce the applicant's discharge, pending the commencement and determination of a redress of wrongs complaint under s. 114 of the Defence Act, 1954. The respondents agreed to this on the express basis stated to the court that:-

(a) They were not conceding that they prevented the applicant from bringing a s. 114 application;

(b) They were not conceding that the solicitor's letter of 16th April, 2010, was a valid s. 114 application and;

(c) They were not conceding that the respondent's decision to proceed with the discharge was unlawful…"

10. The applicant agreed that the proceedings should be struck out, save for the issue of costs which was reserved until 28th March, 2012. On that date, having considered the matter, Kearns P. adjourned the issue of costs until the s. 114 application had been dealt with.

11. In the following years, after a series of appeals, the applicant was unsuccessful in his s. 114 application. The matter now comes back before this Court to determine the issue of costs.

Applicable Legal Principles:
12. Order 99, rule 1(4) of the Rules of the Superior Courts provides:-

"The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

Thus the traditional rule is "costs follow the event".

13. This rule has been considered in numerous authorities. However, in particular, I refer to the decision given by Herbert J. in *Garibov v. Minister for Justice, Equality and Law Reform* [2006] IEHC 371. In this case, the applicants sought an order of certiorari quashing deportation notices issued by the respondents. Subsequently, for reasons stated, the applicants sought to withdraw their originating motion on notice as the respondents had revoked the deportation orders in question. The respondents maintained that there was no merit in the application for judicial review. The court, therefore, had to consider the issue of costs. In giving judgment, Herbert J. stated:-

"It is provided by Order 99 rule 1(1) of the Rules of the Superior Courts, 1986, that the costs of every proceeding in the Superior Courts shall be in the discretion of those Courts. Rule 1(4) of the same Order provides that the costs of every issue of fact or law raised upon any claim or counterclaim shall, unless otherwise ordered follow the event.

Though this Court has a very wide discretion in the matter of awarding costs, it is a discretion which it must exercise judicially, that is, in accordance with reason and justice and, with specific reference to the particular facts of the instant case, not merely following some general rule or private opinion or moved to by such considerations as benevolence or sympathy. In this case the fact is that the first named respondent has, since the commencement of the proceedings, conceded to the Applicants the principal relief sought by them and has thereby rendered any further proceedings in the matter by the applicants unnecessary…."

and

"What is before the court is an application to seek judicial review. Without dealing with the application fully on its merits it would be impossible and, indeed improper for the court to endeavour to predict the outcome of the application. It appears to me that the question which the court must ask in considering this application for costs is, whether in the circumstances it was reasonable for the applicants to have commenced their application for leave to

seek judicial review."

and

"..In my judgment so far as the present application for costs is concerned, the court has to consider whether:-

"the decision to commence these judicial review proceedings was a proportionate reaction in the applicants to the situation arising from the decisions and actions of the respondents, their servants and agents;"

the decision to commence these judicial review proceedings was clearly based upon identified, existing and relevant constitutional, statutory and additionally or alternatively legal rules and principles;

the decision to commence these judicial review proceedings was on its face manifestly, (as distinct from arguably) frivolous or obviously unstateable and for the purpose of delay;

any alternative course of action was reasonably available to the applicants which would not have exposed the respondents to the risk of incurring legal costs;

the applicants had afforded the respondents a reasonable opportunity, insofar as the particular circumstances of the case would permit of addressing and responding to their claims before commencing these proceedings…"

Submissions of the Parties:
14. Counsel for the respondent, Mr. Simon Boyle, S.C., maintains that the applicant is not entitled to the costs of the judicial review proceedings herein. It is submitted that it was open to the applicant at any time after the failure of his appeal on 9th April, 2010 make an application under s. 114 and no permission was required to do so. To avail of s. 114 you have to be a member of the Defence Forces, as such the applicant had some 12 days up until the 21st April, 2010, his proposed date of discharge, to make such an application.

15. Counsel for the respondent points out that despite having obtained a stay on his discharge by issuing the judicial review proceedings, the applicant nonetheless failed to make any application under s. 114.

16. The respondent relies on the decision of Laffoy J. in *O'Dea v. Dublin City Council* [2011] IEHC 100. This case concerned proceedings brought by the plaintiff seeking an order from the defendant housing authority to re-house him. The matter was resolved when alternative accommodation was found for the plaintiff. On the issue of costs, Laffoy J. stated:-

"6.1… the first question the Court must consider is whether there has been an 'event' and, if so, what it was. As I understand it, 'event', as envisaged in the Rules, is a result which determines the dispute before the Court. Without expressing any definitive view on this point, in my view, what the Rules and the authorities envisage is a result brought about by a determination of the Court on the issues before the Court, rather than by some supervening event, such as an agreement of the parties in which the Court has not been involved. In this case, there has been no determination by the Court on the issues which came before it on 16th December, 2010. That being the case, the question which arises is what function the Court has in relation to liability for costs. The answer, in my view, is that it has none."

17. Mr. Oisín Quinn, S.C., on behalf of the applicant, submits that the applicant is entitled to his costs. Counsel for the applicant submits, that, but for the judicial review proceedings, the applicant would not have had this case reviewed under s. 114. Reliance was placed on the statement of opposition and the contents of the affidavits referred to, to show that, in the view of the respondents, the provisions of s. 114 were not applicable to the applicant. The applicant relies on the decision of Herbert J. in *Garibov* set out above.

Decision
18. I have considered the submissions made by the applicant and the respondents. It seems to me that in resolving the issue the court should apply the principles set out by Herbert J. in the *Garibov* case, set out above.

19. Firstly, the decision to commence the judicial review proceedings was "a proportionate reaction" to the situation facing the applicant as a result of the decision of the respondents. There was no response by the respondents to the applicant's letters of 16th April, 2010 and 19th April, 2010. Even if these letters had been responded to there was no reason why the respondents could not have dealt with the matter at any stage prior to the date of the hearing on 14th February, 2012. What was said to the court on that date could have been communicated to the applicant at a much earlier stage in the proceedings and a court hearing would have been avoided.

20. Secondly, as I have set out at paras. 6 and 7 above, the respondents were maintaining that "s.114 is not considered to be appropriate in the context of an administrative discharge.." Given that this was the stance of the respondents, it is difficult to see how their criticism of the applicant for not bringing a s.114 application can be justified. It was only in the course of the hearing, albeit without making a concession, that the respondents accepted that an application under s.114 would be appropriate.

21. Thirdly, given the stance adopted by the respondents, their statement of opposition and affidavits, it was only by incurring the costs, including the costs of briefing counsel for a judicial review hearing, that the applicant obtained an order staying his discharge pending an inquiry pursuant to s.114.

22. The decision relied upon by the respondents, *O'Dea. v. Dublin City Council* can, in my view, be distinguished from the facts of the instant case in that there was no "supervening event, such as an agreement of the parties in which the court has not been involved.." I am satisfied that this view is correct having regard the following passage in the judgment of Laffoy J.:

"6.2 Before outlining the reasons for that conclusion, for completeness I would point out that, if the Court had a function in relation to costs where, as here*, the 'event' is brought about by the moving party accepting an offer of the respondent, on the basis of the history of the dealings between the parties,* in my view, it would be difficult to conclude that the prosecution of the application for an interlocutory injunction was necessary to produce the outcome which has been achieved for the plaintiff, but, more particularly, that it was necessary to vindicate the legal rights of the plaintiff…" (emphasis added)

23. Although the outcome of the administrative process was not favourable to the applicant in my view this is not a matter which should have a bearing on the costs of these judicial review proceedings. As has been stated on numerous occasions, judicial review proceedings are concerned with the decision making process rather than the decision.

24. By reason of the foregoing, the applicant is entitled to the costs of the judicial review proceedings herein.