Neutral Citation No: [2007] IEHC 464

THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 849 J.R.]

BETWEEN

JAQUELINE BYRNE

APPLICANT

AND

THE OFFICIAL CENSOR AND THE CENSORSHIP OF FILMS APPEALS BOARD AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of O'Higgins J. dated the 21st day of December, 2007

1. By order of Peart J. dated the 26th July, 2006, the applicant was given leave to apply by way of an application for judicial review *inter alia* for an order of certiorari quashing the decision of the second named respondent up holding a decision of the first named respondent in refusing to certify a video work entitled 'Anabolic Initiations'#5' pursuant to the provisions of the Video Recordings Act, 1989. Although leave was given to apply for other reliefs as well in these proceedings the applicant is applying solely for an order of certiorari and costs.

The Background

2. Section 3 (1)(a)(iii) of the Video Recordings Act, 1989 provides as follows:-

> "The official censor shall, on application to him in relation to a video work, grant to the person making the application … a certificate … declaring the work to be fit for viewing unless he is of the opinion that the work is unfit for viewing because the viewing of it … would tend, by reason of the inclusion in it of obscene or indecent matter, to deprave or corrupt persons who might view it."

· The applicant is the owner of an 'adult' shop in the city of Dublin. The word 'adult' refers to the age of the customers.

· On the 10th March, 2004, through her solicitor she presented a video work with the curious title of "Anabolic Initiations #5" to the Official Censor for certification pursuant to s. 3 of the Video Recordings Act.

· By letter dated the 19th April, 2004, she was informed that the certificate had been refused. The letter enclosed a copy of the prohibition order which published in Iris Oifigiúil. The grounds given were that he was of the opinion that the said work "is unfit for viewing because the viewing of it would tend, by reason of the inclusion in it of obscene or indecent matter, to deprave or corrupt persons who might view it".

· By notice of appeal dated the 11th June, 2004, she appealed the said decision to the Censorship of Films Appeal Board in accordance with the provisions of the Act.

· Following the lodgment of the appeal the applicant obtained the services of a Mr. Denis Howitt who is a reader in applied psychology at Loughborough University and Association for Criminology. He has written extensively and was the co-author of a study commissioned by the U.K. Home Office Commission entitled "Pornography; Impacts and Influences (1990)" of the psychological and social scientific research on the effects on of pornography, with special reference to sexual violence against women. Mr. Howitt was provided with a copy of the video work at issue in this case along with other videos and produced a report on the 7th November, 2005, which was subsequently submitted to the Censorship of Films Appeal Board.

· An oral hearing took place before the appeal board in which it was submitted on behalf of the applicant that she was prejudiced in not knowing the grounds upon which the Official Censor had based his decision. It was further submitted that she was unaware of the material in which he had relied or what criteria he had regard to in reaching that decision.

3. Section 10(3)(a) of the 1989 Video Recordings Act provides as follows:-

> "where an appeal is brought under this section, the official censor shall if so requested by the Appeal Board, furnished to it a statement in writing of the reasons for the making of the prohibition order…"

4. On foot of the submissions made on behalf of the applicant, the Censorship of Films Appeals Board in exercise of its discretion under this section requested the Official Censor to furnish his reasons for arriving at his decision.

· The Official Censor, by letter dated the 3rd May, 2006, replied as follows:-

> "Dear Chairman,
>
> I refer to your letter of the 26th April requesting, under s. 10(3) of the Video Recordings Act, 1989 a statement from me in writing of the reasons for the making of the Prohibition Order in respect of the above application.
>
> Having examined the video work, I am of opinion that, under s. 7(1)(c) of the Video Recordings Act, 1989, it is unfit for viewing because it would tend, by reason of the inclusion in it of obscene or indecent matter, to deprave or corrupt persons who might view it.
>
> Yours sincerely,
>
> John Kelleher
>
> Official Censor."

5. By letter dated 11th July, 2006, to her solicitor, the applicant was informed 'that the unanimous decision of the Censorship of Films Appeal Board is to affirm the decision of the Official Censor in the appeal of "Anabolic Initiations # 5".

6. It will be noted that in the above letter the reasons given by official Censor follow the exact wording of s. 3(1)(a)(iii) of the Act and do not give other reasons for the decision.

7. Initially Mr. Collins S.C. on behalf of the applicants indicated that the decision was impugned on four grounds:

> (1) There were no or no adequate reasons given to justify the decision;
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> (2) That there was an absence of any evidence to justify the decision;
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> (3) The decision was unreasonable; and
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> (4) That there was lack of proportionality in arriving at the decision. In the course of the hearing however, counsel indicated that he was relying on the first ground only and that the reliefs other than *certiorari* were not being sought.

8. In those circumstances it is not necessary to consider the report of the psychologist presented to the Appeal Board. It is worth observing however that the Court was not referred to any portion of that report in which the view was stated that the opinion of the Censor was incorrect, still less it was that not open to him to form his opinion on the basis of the evidence.

9. This case accordingly revolves around a net issue of law. The applicant argues that the alleged failure of the respondent to give reasons for its decision to refuse to certify the video recording as fit for viewing, and the decision of the Appeals Board to affirm that decision, amounts to a denial of fair procedures and accordingly the order should be quashed. The respondent takes issue with that contention and maintains that the applicants were at all times aware of the reasons for the decision taken by the Official Censor and later affirmed by the Appeal Board for the following reasons:

> (1) The respondent contends that it is clear from paragraph 2 of the affidavit of the applicant that the applicant considered this to be a test case even prior to the making of any decision, and furthermore that she anticipated the grounds of refusal. I was referred to the letter from the applicant's solicitor to the Official Censor's Office dated the 10th March, 2004, in which the applicant's solicitor *inter alia* states:-
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> > "You will be aware that on previous occasions works containing material of an explicit sexual nature have been refused certification on the grounds that they would tend, by reason of the inclusion in them of obscene or indecent matter to deprave or corrupt persons who might view them.
> >
> > We are instructed that our client the applicant for certification pursuant to s. 3 wishes to be heard before you, in the event that you are mined (sic) to refuse the certification sought. The reason for our client's desire to be heard before you is to make submissions regarding the following:-
> >
> > > (1) the fact that viewing of the video work in question does not deprave or corrupt persons;
> > >
> > > (2) that are (sic) the refusal to certify constitutes the breach of our clients constitutional rights;
> > >
> > > (3) that are (sic) refusal to certify constitutes a breach of the principle of proportionality as acquired by the European Convention on Human Rights;
> > >
> > > (4) that in coming to a decision as to whether to certify, in the event that you are of the view that certification is not to be made, that you want have before you evidence of a specialist and expert nature."

10. It is clear from the above that even prior to the decision being made the applicant anticipated the actual grounds for the Official Censor's refusal to certify the work fit for viewing.

> (2) The respondent also points to the decision detailed in the prohibition order which specifically states the reason why the censor refused to certify the video as fit for viewing (albeit in the form of the words of the Act).
>
> (3) The applicant relies on the fact that a legal submission submitted to the Appeal Board under cover of letter dated the 30th November, 2005, made it clear that the applicant knew why the video in question had been refused a certificate "in the instant case the purported reason given as to why a certificate was not granted was on the basis of s. 3(1)(a)(iii) i.e. that it would tend, in the opinion of the censors by reason in the inclusion in it of obscene or indecent manner, to deprave or corrupt persons who might view it".
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> (4) The respondent relies also on the fact that in response to the request made on the 26th April by the Appeal Board under the provision of s. 10(3) of the Act the reply of the Official Censor made it clear the reason for the refusal to certify the video work as fit for viewing to because he was of opinion that it was unfit for viewing because the viewing of it would tend, by reason of inclusion in it of obscene or indecent matter, to deprave or corrupt persons who might view it".
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> (5) The respondent relies on paragraph 11 of the affidavit of the applicant to show that she was aware of the reasons for the refusal to certify the video. The relevant part of the affidavit reads as follows:
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> > "By letter dated the 3rd May, 2006 from the Official Censor, the Censor asserts that the video work had been prohibited by reason of the obscene and indecent content tending to deprave or corrupt persons that might view it. I beg to refer to a copy of the said letter… 'No reasons are given - the Official Censor simply recites the provision in the Act. While this, on its face may be the reason for the prohibition, the nature of the requirement made by the Board was to ascertain the reasons as to how the censor had come to that decision that the material would tend to deprave or corrupt persons who might view it'."

The Issue

11. It is quite clear that the applicant was quite aware of the fact that the refusal of the Official Censor to grant a certificate to the video was because he was of opinion that it fell within the parameters of s. 3(1)(a)(iii) of the Act, and that the decision of the Appeal Board was on the same basis. The net issue is whether the reiteration of the grounds set out in s. 3(1)(a)(iii) of the Act was

sufficient. The respondent maintains that the recital of such grounds was adequate and that the applicant in seeking further information was not looking for reasons for the decision but was seeking something more, or "reasons for the reasons" as it was put by Mr. Bradley S.C., counsel for the respondent. The respondents also rely on the fact that there was an oral hearing at which the applicant was represented by counsel and made submissions as further support for their contention that the applicant was aware of the decision, and the reasons for it and that she was at no disadvantage. There is at this stage no complaint in relation to the quality of the decision or the basis on which it was arrived at.

12. The applicant however maintains that the employment of fair procedures at the hearing and in arriving at the process are not of themselves sufficient, and submits that the giving of reasons or adequate reasons is an integral part of fair procedures. She contends that even if the proceedings were conducted totally in accordance with proper and fair procedures the failure to give reasons or sufficient reasons is procedurally unfair and constitutes grounds for quashing the order made.

The Law

13. The legal principles to be applied in this case are not really an issue and may be stated as follows:

> (1) Statutory expressions which to convey a discretion do not confer an absolute or an absolute or unqualified power. The decision maker is obliged to act in a fair and judicial manner in accordance with the principles of natural and constitutional justice (*East Donegal Co-Operative Ltd v. Attorney General* [1970] I.R. 317, 343, 344):
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> > "All the powers granted to the Minister by s. 3 which are prefaced or followed by the words 'at his discretion' or 'as he shall think proper' or 'if he so thinks fit' are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will. Therefore, he is required to consider every case upon its own merits, to hear what the applicant or the licensee (as the case may be) has to say, and to give the latter an opportunity to deal with whatever case may be thought to exist against the granting of a licence or for the refusal of a licence or for the attaching of conditions, or for the amendment or revocation of conditions which have already attached, as the case may be."
>
> (2) Fair procedures require the decision maker exercising statutory powers that effect the exercise of legal rights and obligations of the applicant to give reasons for the decision, see *The State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] I.R. 51, where Finlay C.J. said at p. 55:-
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> > "… I am satisfied that the requirement which applies to this Tribunal, as it would to a court that justice should appear to be done, necessitates that the unsuccessful applicant before it should be made aware in general and broad terms of the grounds on which he or she has failed. Merely, … to reject the application and when that rejection was challenged subsequently to maintain a silence as to the reason for it, does not appear to me to be consistent with the proper administrations of functions which are of a quasi judicial nature."

14. In *International Fishing Vessels Ltd v. Minister for the Marine (No. 1)* [1989] I.R. 149, Blayney J. stated at p. 155 as follows:-

> "It is common case that the Minister's decision is reviewable by the court. Accordingly, the applicant has a right to have it reviewed. But in refusing to give his reasons for his decision the Minister places a serious obstacle in the way of the exercise of that right. He deprives the applicant of the material it needs in order to be able to form a view as to whether grounds exist on which the Minister's decision might be quashed. As a result, the applicant is at a great disadvantage, firstly, in reaching a decision as to whether to challenge the Minister's decision or not, and secondly, if he does decide to challenge it, in actually doing so, since the absence of reasons would make it very much more difficult to succeed. A procedure which places an applicant at such a disadvantage could not in my opinion be termed a fair procedure."

15. In *O'Donohue v. An Bord Pleánala* [1991] ILRM 750 – 757, Murphy J. stated that as follows:

> "It is clear that the reason furnished by the Bord (or any other Tribunal) must be sufficient first to enable the courts to review it and secondly to satisfy the persons having recourse to the Tribunal that it has directed its mind adequately to the issue before it. It has never been suggested that the administrative body is bound to provide a discursive judgment as a result of its deliberation, but on the other hand the need for providing the grounds of the decision as outlaid by the Chief Justice could not be satisfied by recourse to an uninformative if technically correct formula. For example it could hardly be regarded as acceptable for the Bord to reverse the decision of a planning authority stating only that 'they considered the application to accord with proper planning and development of the area of the authority'. It seems to me that in the nature of the problems as defined by the Chief Justice it would be necessary for the Administrative Tribunal to indicate in its decision that it had addressed its mind to the substantive issue which had led the planning authority to believe that the permission would have an adverse affect on the planning and development of the area."

16. In the case of *Hurley v. MIBI* [1993] I.L.R.M. 886 the plaintiff suffered injuries in a road traffic accident and was denied an ex gratia payment by the defendant, on the grounds that the case did not fall within the accepted definition of a serious and permanent disablement. Carroll J. held that that was insufficient reason, even though the formula words under the scheme had been repeated. The court held that the applicant was not given sufficiently clear reasons to enable the court to determine how the MIBI came to its decision.

> (3) The giving of reasons by the decision maker is also a requirement of constitutional and natural justice, to ensure that the Superior Courts may exercise their jurisdiction, and that the applicant in judicial review proceeding is not disadvantaged by the absence of reasons necessary to enable the formation of a decision as to whether to challenge the decision.

17. The respondent relies on the judgment of the Supreme Court in the case of *T.B.L. v. Minister for Justice* [2002] 1 I.R. 164. In that case, Hardiman J. considered contentions that the reasons given for a decision were inadequate in the context of the Deportation Order under the Immigration Act, 1999. Section 3(3)(d)(ii) of the Act requires the applicant to notify in writing a decision to make a Deportation Order and specifically to give reasons for the decision. In arriving at the decision, the Minister was obliged to have regard to no less than eleven different matters set out in s. 3(6) of the Act. Each applicant received a communication the material part of which stated as follows:

> "I am directed by the Minister for Justice, Equality and Law Reform to refer to your current position in the State and to

inform you that the Minister has decided to make a deportation order in respect of you under s. 3 of the Immigration Act, 1999. A copy of the order is enclosed with this letter.

In reaching this decision the Minister has satisfied himself that the provisions of s. 5 (prohibition of refoulement) of the Refugee Act, 1996 are complied with in your case.

The reasons for the Minister's decision are that you are a person whose refugee status has been refused and, having regard to the factors set out in s. 3(6) of the Immigration Act, 1999, including the representations received on your behalf, the Minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration system outweigh such features of your case as might tend to support your being granted leave to remain in this State."

18. In considering the argument that the reasons contained in the communication were insufficient, Hardiman J. stated as follows at p. 172 of the report:

"I approach these contentions in the light of the authorities mentioned by the High court Judge, which I am satisfied, are appropriate to the consideration of the point made to him. This Court in *Ní Éilí v. The Environmental Protection Agency* (Unreported, Supreme Court, 30th July, 1999) surveyed the authorities in some detail and, *inter alia*, cited with approval the decision of Evans L.J. *in MJT Securities Ltd. v. Secretary of State for the Environment* [1998] J.P.L. 138. Dealing with statutory obligations to give reasons, the trial judge said at p. 144 that:-

> 'The Inspector's statutory obligation was to give reasons for his decision and the courts can do not more than say that the reasons must be "proper intelligible and adequate", as had been held. What degree of particularity is required must depend on the circumstances of each case …"

In the case of administrative decisions, it has never been held that the decision maker is bound to provide a '… discursive judgment as a result of its deliberations'; see *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750 at p. 757.

Moreover, it seems clear that the question of the degree to which a decision must be supported by reasons stated in detail will vary with the nature of the decision itself. In a case such as *International fishing Vessels Ltd., v. Minister for Marine* [1989] I.R. 149 or *Dunnes Stores Ireland Company v. Maloney* [1999] 3 I.R. 542, there was a multiplicity of possible reasons, some capable of being unknown even in their general nature to the person affected. This situation may require a more ample statement of reasons than in a simpler case where the issues are more defined. Thus, in a case dealing with a response to representations of precisely the kind in question here, but given prior to the coming into force of the Act of 1999, Geoghegan J. considered the adequacy of a decision. That was in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26, where the decision was in the following form at p. 34:-

> 'I am directed by the Minister for Justice, Equality and Law Reform to refer to your request for permission to remain in Ireland on behalf of the above named and to inform you that having taken all the circumstances of his case into consideration including the points raised in your submission, it has been decided not to grant your client permission to remain.'

Considering this statement, Geoghegan J. held at p. 34 that:-

> 'I do not think that there was any obligation constitutional or otherwise to set out specific or more elaborate reasons in that letter as to why the application on humanitarian grounds was being refused. The letter makes clear that all the points made on behalf of the applicant had been taken into account and of course they were set out in a very detailed manner. The letter is simply stating that the first respondent did not consider the detailed reasons sufficient to warrant granting the permission to remain in Ireland on humanitarian grounds. It was open to the first respondent to take that view and no court can interfere with the decision in those circumstances.'

The form of the decision in the present case is somewhat different, so as to show compliance with the new statutory regime. Nevertheless I consider that the approach of Geoghegan J. is one that can be applied here, for the reasons set out below."

19. At p. 175 of the report Hardiman J. stated:-

"Where an administrative decision must address only a single issue its formulation will often be succinct. When a large number of persons apply on individual facts, for the same relief, the nature of the authority's consideration and the form of grant or refusal may be similar or identical. An adequate statement of reasons in one case may thus be equally adequate in others. This does not diminish the statements essential validity or convert it into a mere administrative formula."

20. The respondents point out that the function of the Appeal Board was either to affirm the decision of the Official Censor or to revoke it and submits that the issue was therefore not a complicated one. They contend that having regard to the nature of the decision, the reasons given were sufficient and contends It is submitted that the reasons for the revocation were clear to the applicant and that therefore, the applicant was not at a disadvantage in deciding whether to challenge the decision or not. (It is not in dispute between the parties that the reasons of the Official Censor were subsumed in the decision of the Appeal Board.)

21. Counsel for the applicant however contends that that judgment is not of assistance to the respondent in the context of the present case and pointed out that in the judgment of Hardiman J. adopted the words of the trial judge who stated "these cases take as their point of departure, the conclusion of a process under the Refugee Act, 1996 … no proceedings have been taken against the various decisions made under [that Act]".

22. Undoubtedly the fact that the applicants were at that the time of the making of the order people who were not entitled to remain within the State was a fact which "constrains the nature of the decision to be made" in this case but the observations of Hardiman J. are of assistance in this case.

The Decision

23. In my view it is useful in the determination of this case to look at the provisions of s. 3(1) of the Video Recording Act, 1989, in its entirety. S. 3(1) reads as follows:-

> 3.—(1) The Official Censor shall, on application to him in relation to a video work, grant to the person making the application (referred to in this section as the applicant) a certificate (referred to in this Act as a supply certificate) declaring the work to be fit for viewing unless he is of opinion that the work is unfit for viewing because—
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> (a) the viewing of it—
>
> (i) would be likely to cause persons to commit crimes, whether by inciting or encouraging them to do so or by indicating or suggesting ways of doing so or of avoiding detection, or
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> (ii) would be likely to stir up hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation, or
>
> (iii) would tend, by reason of the inclusion in it of obscene or indecent matter, to deprave or corrupt persons who might view it,
>
> or
>
> (b) it depicts acts of gross violence or cruelty (including mutilation and torture) towards humans or animals.

24. It is apparent from the above that the Official Censor can only refuse to grant the certificate declaring a video work to be fit for viewing if he is of the opinion that the work is unfit for viewing on very specific grounds set out in s. 3(a) and s.3(b). The grounds are further circumscribed in the subsections which set out the criteria on which the decision must be based in which the Official Censor must base his opinion and those grounds are set out in the sections. There are three grounds in section 3(a) and further grounds in section 3(b).

25. It is clear that the section provides not only different grounds necessary for the formation of the Official Censor's decision but in addition circumscribes the basis on which he is entitled to form those grounds. It is equally clear that the Official Censor is entitled to form his opinion for many different reasons prescribed by law. For example the Censor is entitled to form the opinion that a video work is unfit for viewing on the basis that it would be "likely to stir up hatred" on account of one or more of no less than seven different matters to wit race, colour, nationality, religion ethnic or national origins, membership of the travelling community or sexual orientation. The reasons given by the Official Censor in this case gave a considerable amount of information to the applicant. It informed her of the specific grounds on which the decision was made out of all the possible grounds provided for in s. 3(1)(a) & (b) of the Video Recordings Act, 1989. The fact that it was in the words of the statutory provisions does not in my view detract from its adequacy. If a statement of reasons is adequate it is not rendered inadequate by virtue of the fact that it follows the wording of a statute: the following of the words of the statute does not turn an adequate reason into an inadequate one. Nor does it transform the reason "into an unacceptable administrative formula such as has been criticised by the courts". The purpose of giving reasons to show why the action was taken by the decision maker. In my view the Official Censor made it clear why he formed an opinion that "Anabolic Initiations #5" was unfit for viewing. If the question were asked of the applicant as to why the video work was refused a certificate she would have been able to answer, as a result of the reasons given by the Censor, that it was because of the fact that the Censor was of the opinion that it was unfit for public viewing. If she were further asked why the Official Censor formed that opinion she would have been able to answer as a result of the information supplied by the Censor, that, out of all possible statutory reasons available to him, he formed that opinion on the basis that the video work in question had a tendency to deprave or corrupt. If there were yet a further enquiry as to how he formed the view or on what basis he formed the view that the video work tended to deprave or corrupt the applicant would have been able to reply, as a result of the information given by the Official Censor, that it was by reason of the inclusion in the video work of indecent or obscene matter. It was also a fact that submissions were made on behalf of the applicant in this case with the benefit of lawyers and it was clear that the video work in question had been viewed by the Censor. It is true that the Censor did not provide a analysis of the film or discuss in detail the parts of the video which led him to form his opinion. In my view there was no necessity for him so to do, nor was it incumbent upon him to give a short analysis of the parts or the contents of the video recordings that influenced his decision.

26. In my view sufficient information was conveyed to the applicant for the refusal to certify the video recording. Enough information was supplied to direct the mind of the applicant as to why a certificate was refused. As a result of that the applicant had sufficient information on which to decide whether or not to challenge the decision (for example on the basis of it being irrational or unsupported by evidence). There is no reality therefore in the contention that the applicant was in any way disadvantaged and not by want of reason so as to make it for difficult for her to know whether to appeal or not. This is in contrast with the cases where there had been a failure to divulge which, out of a number of possible reasons, was the one on which a decision was based. For the reasons set up in my view above this challenge to the decision of the Official Censor and the Censorship of Films Appeal Board must fail. There is no basis in which the decision (affirmed on appeal) should be quashed and the matter remitted for further consideration as to whether the video work "Anabolic Initiations # 5" should be granted a certificate under the provisions of the Act.