Neutral Citation Number: [2008] IEHC 177

THE HIGH COURT
JUDICIAL REVIEW

2007 No. 1607 J.R.

BETWEEN

CLARE COUNTY COUNCIL

APPLICANT

AND
HIS HONOUR JUDGE HARVEY KENNY

RESPONDENT

AND
PATRICK MONGAN, CAROLINE MONGAN AND THEIR CHILDREN MARTIN MONGAN, CHANTELLE MONGAN, STACEY MONGAN, KATEY-ANN MONGAN, NORA MONGAN AND EDWARD MONGAN

NOTICE PARTIES

Judgment of Mr. Justice John MacMenamin dated the 13th day of June 2008

1. The applicant in these proceedings ("the Council") seeks an order of certiorari to quash the decision of the respondent at a sitting of the Circuit Court, South Western Circuit on 9th October, 2007, wherein he decided that the appeals of the notice parties from a decision of the Equality Tribunal of 11th December, 2006, were properly and lawfully before the Circuit Court which therefore had jurisdiction to consider and decide the said appeals. It is not contested that the respondent did not give reasons for his decision, an issue considered later in the context of the rather complex history of the case before the Tribunal and the Circuit Court.

Background

2. On 20th November, 2003, the names of the notice parties Patrick and Caroline Mongan and their five children were listed among 139 complainants who (a) made a complaint to the Director of Equality Investigations ("the Director") seeking redress under s. 21 of the Equal Status Acts 2000 to 2004, (hereinafter "ESA"). They alleged that, on the grounds of their membership of the travelling community, discriminatory treatment had been directed against them by named officials of the Council. In another complaint to the Director they sought redress under s. 21 of the ESA 2000, alleging discrimination and harassment in court proceedings on the same grounds.

3. On 21st April, 2004, the same notice parties were among 173 complainants who, in a further complaint, sought redress under s. 21 of the ESA 2000, alleging discriminatory treatment on the same grounds, regarding the lack of provision of emergency accommodation.

4. All the complaint forms submitted to the Director of Equality Investigations were completed and submitted by a Ms. Heather Rosen, a lay representative of the complainants. The Council estimates that, while there may be some overlap between named complainants, a total of 1,000 similar and related complaints for redress have been submitted to the Director of Equality Investigations for investigation.

5. These complaints, as well as those of other persons, were scheduled for a hearing by the Equality Officer during sittings in the week commencing 16th October, 2006. Ms. Rosen, as representative for the notice parties, was notified verbally of this on Friday 22nd September, 2006. The notice parties' specific complaints were listed for hearing on 19th October, 2006. Ms. Rosen was so informed on 11th October, 2006.

What occurred in the Equality Tribunal hearing on 19th October 2006

6. The sole deponent as to what transpired before the Equality Tribunal is Ms. Lisa Walsh. She is a solicitor in Michael Houlihan and Partners, Solicitors who act for the Council. Her evidence is uncontroverted.

7. On the assigned hearing date she attended at the Equality Tribunal. There was no appearance by any of the complainants, but Ms. Heather Rosen was present. Ms. Duffy, the Equality Officer inquired of Ms. Rosen as to whether there would be an attendance by the complainants. Ms. Rosen replied that they would not be attending. She added that they wished for a new adjudicator. Ms. Rosen said that she no longer "trusted the Tribunal". This complaint appears to have been based solely on a procedural decision by Ms. Duffy in previous cases to "group" complaints so as to hear them together compositely. Ms. Rosen was apparently aggrieved at this decision, no clear reason for this was given in evidence. It may have been based on an apprehension that the making of such an order would limit the extent of redress. There is no evidence before the Court that allegation was properly made, or that this serious criticism of the Equality Officer was in any way justified. Ms. Duffy requested Ms. Rosen to withdraw these remarks. She refused an application to adjourn the hearing.

8. An argument took place. Ms. Rosen then alleged that Ms. Duffy, the Equality Officer, was biased. It is not clear why this allegation was made. It is a serious one and should not have been made without a proper basis. At this point Ms. Walsh, applied to strike out the notice parties' case. Ms. Rosen continued to insist that she wanted a different adjudicator. The Equality Officer requested confirmation that Patrick and Caroline Mongan knew about the date. Ms. Rosen did not give a definite answer. Ms. Duffy indicated that she was satisfied that the two complainants, were aware of the case and allowed Ms. Walsh's application to strike out the proceeding in the face of further protests.

9. Ms. Duffy indicated that the Tribunal would reconvene at 2.30 p.m. for another set of cases, namely those brought by Michael and Kathleen Mongan, and that if the complainants did not appear she would make a similar order to strike out those cases. At the resumption these cases were struck out.

10. In the course of these rulings, the Equality Officer made no reference to any specific section of the Equal Status Acts of 2000 to 2004. However, clearly her decision was primarily based on the failure of the complainants to participate in and pursue the claims. This is further borne out by a written ruling, enclosed in a subsequent letter to solicitors Michael Houlihan and Partners on 11th December, 2006.

Correspondence Subsequently

11. It would appear that on 1st November, 2006, Ms. Rosen had yet again lodged complaint forms in connection with these same issues which were already before the Tribunal.

12. On 13th November, 2006, Ms. Duffy, wrote a letter to Ms. Rosen. It was not a temperate letter. She severely criticised Ms. Rosen's conduct at the Tribunal, in particular her alleged failure to adhere to Tribunal procedures, or to abide by directions. She stated that Ms. Rosen's conduct was "bordering on the abusive". She castigated her continued interruptions. She referred to letters

"allegedly" signed by a number of other complainants after the hearing on 16th October, 2006, requesting that their cases be heard by a different Equality Officer. She warned Ms. Rosen that she considered her behaviour as obstructing the Tribunal in its investigation and decision making process and that if such behaviour continued she would be asked to leave the hearings. She referred Ms. Rosen to s. 37 of the ESA 2000, which renders it a punishable offence for a person to obstruct or impede the Director or Equality Officer in the exercise of powers under the Act. Ms. Duffy warned that, while she had previously been 'lenient' with Ms. Rosen and her clients regarding non-attendance and lateness, henceforth, if her clients did not turn up for a hearing, the case might be dismissed unless there was a valid and properly documented reason for the adjournment. If there was a medical reason for non-attendance she would require a valid medical certificate confirming that the complainant was not fit to attend on the date in question. She also required Ms. Rosen to provide her with the address and telephone numbers of all the complainants so that she could notify each of them directly of the dates of hearings, stating that this was necessary because Ms. Rosen had indicated to her that she had difficulty in notifying the complainants.

13. She stated in the letter:-

> "In the case of lateness, I will no longer tolerate complainants arriving late, the complainants must attend on time otherwise their cases may be dismissed."

Thus non attendance was seen as good grounds for dismissal.

14. The letter also refers to the apparent explanation for Ms. Rosen's objection to the Equality Officer. In the course of earlier hearings, Ms. Rosen had objected to her decision to hear together a number of connected complaints from the same named complainants concerning accommodation issues at the hearing. This was upon a determination that the incidents were properly to be regarded as further occurrences in an ongoing situation and should therefore form part of one investigation in the case of each group of complainants. There is no evidence that this ruling was unjustified. It is not said it was unlawful.

15. However none of this material determines or indicates what precisely, was the true and full nature of the decision which Ms. Duffy had made in striking out the claims on 19th October , 2006, or its precise statutory basis. Such reasoning, while not determinative, might have assisted this Court in a consideration of the lawfulness of the Respondents decision now in suit.

16. On 11th December, 2006, Ms. Duffy, wrote to Mr. John Shaw, partner in Michael Houlihan and Partners, with whom she had previously corresponded in relation to these claims. The nature of that earlier correspondence is not material to this application. She wrote:-

> "My investigation in regard to the above complaint under the Equal Status Act 2000, has been completed and my decision is enclosed.
>
> *In accordance with s. 28 of the Equal Status Act 2000, a party may appeal against the decision by notice in writing to the Circuit Court …*"

Either the latter sentence was intended or in error. The question considered later is whether the decision made could actually be applied at all. She advised further as to the time limits within which such appeal should be lodged.

17. A further part of Ms. Duffy's decision should be quoted, as it refers again to her decision. She wrote:-

> " … on the basis of the foregoing I find that the complainants have not established a prima facie case of discrimination and accordingly their cases cannot succeed. I therefore dismiss this case and all the connected issues referred to the Equality Tribunal."

18. The "foregoing" in the Equality Officer's decision comprised in total some ten pages. Effectively it was a finding confined to two issues. They were:

> (a) whether the names of the Clare County Council officials (who had been named and identified personally in the proceedings as parties) should be substituted by that of their employers, the County Council in the title; and
>
> (b) a consideration of the objection which had been raised by Ms. Rosen to Ms. Duffy herself hearing the case and what she had termed in a letter as "grave dismay" in relation to previous rulings.

19. These were purely procedural issues. No other matter was dealt with in the course of the ruling. The decision contained an appendix which identified a series of complaint references between 14th January, 2004, and 14th of November, 2005, all of which had apparently not progressed within the previous twelve months. The final case (ES/2006/006) dated 9th January, 2006, remained outstanding on the hearing date. The expiry of twelve months without any further progress provides a basis for a dismissal of complaints. (Section 38 E.S.A. 2000).

Findings
I find:

> (1) that neither the decision nor any of the surrounding correspondence referred to thus far made any reference to the precise section of the Equal Status Acts of 2000 to 2004, on which Ms. Duffy made the decision; (2) the evidence does not in any way establish that Ms. Rosen's conduct (and her allegations) were justified (3) Ms. Rosen's apparent conduct in the repeated filing of large numbers of related complaints raises questions as to her *bona fides* and conduct vis-à-vis the Tribunal. Ms. Rosen did not swear an affidavit in the proceedings, although she was present in Court for the hearing.

20. I am unable on the evidence to make any finding as to whether or not complaints were pursued despite the contrary wishes of certain other complainants. Such evidence as there is on this question is entirely hearsay.

Subsequent
21. It is necessary to briefly describe subsequent events in the Tribunal. The Equality Officer arranged for a further call-over of a number of cases. This occurred on 15th January, 2007. A list of 29 family cases representing approximately 129 individual adults and children, had been circulated in advance. At that call-over, out of that list of 29 families, 21 failed to attend and their cases were struck out. Thereafter, a series of written decisions recording the dismissal of such complaints were issued from the Equality Tribunal in the months of February and March, 2007. These are not exhibited. In respect of the remaining eight cases listed in the January

call-over, three were withdrawn, leaving a total of five cases. It is suggested that Ms. Rosen may have lodged a significant number of appeals to the Circuit Court office in Ennis in respect of dismissals arsing from the January call-over.

22. A further call-over was organised by the Tribunal for 28th May, 2007, in respect of the remaining cases. The names of some 56 family groupings appeared on the call-over list, representing approximately 242 individual adults and children. On that date there was no appearance by a substantial number of complainants and only twelve family groupings were represented.

23. There is no evidence as to what transpired subsequently in relation to these complaints. No explanation has been tendered as to the vast number of non attendances of these call over lists. Nothing has been adduced to show precisely under which section of the ESA the Equality Officer has made her decision.

24. In the instant case, Ms. Rosen filed a notice of appeal on 22nd January, 2007. The respondent named in the notice was "the Equality Tribunal (Clare County Council)". The reliefs sought in the notice of appeal were:-

(a) that the decision to dismiss all of the complaints of the above complainants be overturned,

(b) that the decision to count all of the complaints of the above complainants as one complaint be overturned.

25. Item (b) related to the preliminary hearing conducted by the Equality Officer on 24th May, 2006, which had the effect of grouping the complaints. Ms. Rosen objected to this procedure decided on 26th June, 2006, by letter of 11th October, 2006.

Issues
26. Thus far a number of issues may be identified as being relevant to the Circuit Court decision on jurisdiction in relation to the notice of appeal and the procedure adopted. These were:- (i) When do the Equal Status Acts 2000-2004, provide for a right of appeal? (ii) Did such a right arise from *this* determination of the Equality Officer?; (iii) Even if such right existed, had the time limit for appealing expired by the date the notice parties' purported appeal was made on 22nd January, 2007? *Prima facie* the appeals may have been out of time; the time limitation for such appeal is forty two days (s. 28 E.S.A. 2006). (iv) If what was being challenged was the procedural fairness or lawfulness of the decisions and rulings by the Equality Officer, should the notice parties have sought leave to apply for judicial review rather than appealing? But this list is not conclusive. Yet further issues which were before the Circuit Court are identified later.

27. By letter dated 4th April, 2007, Ms Walsh raised this latter issue and in that regard correspondence took place, the thrust of which suggests that Ms. Rosen was indeed at that time actively considering the possibility of judicial review proceedings. This was not pursued.

Events in the Circuit Court
28. The notice of appeal was made returnable to 14th April, 2007. On that date Ms. Rosen advised the Circuit Court that a Dublin solicitor and counsel had been engaged to advise. The matter was adjourned by His Honour Judge Gerard Keys for mention, to allow for the preparation of legal submissions on the issue of jurisdiction for an appeal. The matter was further adjourned on 14th May, 2007, to 2nd July, 2007, for hearing on the same issue. On 2nd July, 2007, the matter was listed for hearing before Judge Carroll Moran but was not reached. Ultimately it was listed for hearing before the respondent on 9th October, 2007. On that hearing date four Circuit Court appeals were listed for hearing involving four separate families by the name of Mongan. Mr. Patrick Mongan, was in attendance.

29. The evidence as to what transpired again comes largely but not entirely from Ms. Walsh. She says: Counsel for the applicant opened the legal submissions. He drew attention to a number of individual tagged documents and exhibits. Thereafter counsel for the notice parties made legal submissions. In all, the hearing took approximately 1½ to 2 hours. During this time the learned respondent asked a number of questions of counsel. In particular, he made and invited observations on specific issues. He noted that there had never been a substantive hearing of the complaint on the merits before the Equality Tribunal. He remarked on a difficulty in reconciling the fact that the decision by the Equality Officer without a full hearing with the provisions of s. 25 of the Equal Status Act 2000. No evidence on the substantive matters of the complaint had been heard by her. He stated that he wished to review the submissions.

30. The learned respondent had before him comprehensive legal submissions from both sides. He had to determine whether or not the Circuit Court had jurisdiction, on the facts, to entertain an appeal. Some considerations before him were outlined at paragraph 26. There were a number of interlinked issues arising from the Equality Officer's determination, that is the matters upon which she had (or had not) made a decision arising from an 'investigations.' But a further core issue was precisely which section of the Equal Status Acts 2000 to 2004, (as amended in 2004 by the Equality Act 2004) was the basis of Equality Officer's determination? This was in point because some, but not all, of the sections allow for appeal. The provisions are considered later in more detail. If the determination of the Equality Officer did not come with a section allowing for an appeal then, clearly there was no jurisdiction to entertain an appeal at all.

31. But further factors were put to the respondent. By accepting an appeal, it was submitted by the Council the Circuit Court could effect a grave and unfair prejudice to a party as, through no fault of its own, such party might have been deprived of a substantive hearing on the merits before an Equality Officer (as here) in respect of which it would otherwise have had a right of appeal to the Circuit Court by way of a *de novo* hearing. By virtue of acceptance of jurisdiction, the Council would find itself in a position where the only recourse from an adverse finding following a substantive hearing on the merits in the Circuit Court, would be to the High Court on the narrow ground of a point of law. Thus, by permitting a complainant to "sidestep" the hearing before the Equality Officer, an injustice could be rendered to a respondent in an appeal as well as short circuiting the investigation process, part of which was, as the Equality Officer determined here, an oral hearing. A question therefore arose as to whether by accepting jurisdiction the Circuit Court might countenance a procedure which might set at nought the rationale of a self-contained statutory scheme under which a notice party might so act himself so as to render provisions of the ESA useless by virtue of what, by analogy, might be seen as an "abuse of process." This summary of the point is not to make a finding: it is to identify the issue before the Circuit Court.

32. Alternatively a potential rationale for a decision to accept jurisdiction might have been that the learned Respondent, by analogy saw the situation as analogous to that applicable to a District Court appeal.

The decision without reasons
33. However, what actually transpired is not controverted by affidavit. In these very complex circumstances at the conclusion of the hearing the learned respondent confined himself to deciding that he "would allow the notice parties to proceed with their appeals before the Circuit Court".

34. No reason was given for this decision. The respondent unfortunately did not refer in judgment to the submissions and arguments which had been made on either side, or furnish any rationale for the decision, which by any standards had significant consequences for all parties.

Extraneous Considerations
35. Furthermore, it is also stated (and not controverted) that the respondent made his decision having inquired into what would happen if he held against the notice parties. Counsel for the notice parties had replied that the six-month time limit for the institution of judicial review proceedings had expired. The respondent then inquired as to whether that could be extended and counsel for the notice parties advised the respondent that the period had long since passed and there were very strict time limits. This is to be seen in the context of a letter from the applicant's solicitors to Ms. Rosen as far back as 4th April, 2007, that the matters complained of by the notice parties should more properly have been the subject matter of a judicial review, the possibility of which was clearly envisaged by Ms. Rosen's letter of 15th April, 2007, to the Clare County Registrar asking for time for the preparation of the paperwork for the judicial review. These were not a "relevant consideration" to the respondent's decision. They were extraneous.

Application for a Case Stated
36. In the course of responding to the notice parties' submissions, counsel for the applicant had requested the respondent, if he was in any doubt about the applicant's application, to state a case for the opinion of the Supreme Court on the question or questions of law raised by the applicants and to adjourn any pronouncement of their application pending determination by the Supreme Court. The respondent inquired as to what question the appeal to the Supreme Court might be asked to decide and counsel for the applicant had submitted that, in essence, what ought to be considered was whether there was a right of appeal to the Circuit Court under s. 28 of the ESA 2000; (a) in circumstances where a complainant did not attend at a hearing before the Equality Officer and failed to give evidence and; also (b) in circumstances where it was indicated by a complainant to the relevant Equality Officer that he did not desire to be heard in the matter of his complaint by the Equality Officer duly assigned. In response, counsel for the notice party said that, in his view, the legislation was "clear." The respondent held that he would refuse the applicant's request to appeal to the Supreme Court. This point surely raised the necessity again for a reasoned decision so the parties should know their positions.

37. I must conclude that the decision to accept jurisdiction on this vexed issue was made without giving reasons, and having had regard to extraneous considerations. This finding is not in itself determinative. The further question arises as to whether, in the circumstances there was necessarily a duty to give reasons, and whether the extraneous considerations bore on the decision made.

The Equal Status Act 2000 - 2004
38. It is now necessary to deal with the statutory context of the issue. Part III of the Equal Status Act of 2000, deals with the procedure in relation to Tribunal hearings. By virtue of s. 21, as amended by s. 54 of the Act of 2004, a person who claims that prohibited conduct has been directed against him or her may, seek redress by referring the case to the Director of Equality Investigations. The Director must within two months after the prohibited conduct is alleged to have occurred, notify the respondent in writing of the nature of the allegation, the complainant's intention if not satisfied with the respondent's response to seek redress by referring the case to the Director and may question the respondent in writing so as to obtain material information. The Director shall not investigate a case unless he or she is satisfied either that the respondent has replied to the notification or that at least one month has elapsed after it was sent to the respondent. A claim for redress in respect of prohibited conduct may not be referred under this section after the end of the period of six months from the date of the occurrence of the prohibited conduct to which the case relates, although this period is capable of extension in exceptional circumstances.

Appealable decisions
39. By virtue of s. 22 of the Act of 2000, (as inserted by s. 56 of the Act of 2004) the Director may dismiss a claim at any stage if of the opinion that it has been made in bad faith or is frivolous, vexatious or misconceived or relates to a trivial matter. Such a decision may be appealed not later than 42 days after the Director dismisses a claim under this section. On appeal, the Circuit Court may affirm or quash such a decision.

40. Thus a finding under s. 22 (frivolous, vexatious etc.) may be the subject of an appeal.

41. Section 25 (also amended but not in any material sense by the Act of 2004) provides that unless the matter may be dealt with otherwise the Director "shall investigate the case and hear all persons appearing to the Director to be interested and desiring to be heard." (Section 25(1)). By virtue of subs. (4) it is provided:-

> "At the conclusion of an investigation under this section the Director shall make a decision on the case, and the decision, if it is in favour of the complainant, shall provide for redress in accordance with *section 27*."

42. By virtue of s. 28 of the Act, where there has been a decision in favour of a complainant and to direct redress, such decision may be appealed not later than 42 days from the date of such decision by notice in writing specifying the grounds of the appeal. It is provided in s. 28(2):-

> "In its determination of the appeal, the Circuit Court may provide for any redress for which provision could have been made by the decision appealed against (substituting the discretion of the Circuit Court for the discretion of the Director)."

Thus a determination under s. 25 entitling a complainant to redress or in favour of a respondent may also be appealed. By virtue of subs. (3) of that section no further appeal lies, other than to the High Court on a point of law.

43. Section 29 provides that every decision of the Director shall be in writing and shall include a statement of the reasons of why the Director reached the decision.

A non Appealable decision
Finally s. 38 provides:-

> (1) "Where a case is referred to the Director and, at any time after the expiry of one year from the date of the reference, it appears to the Director that the complainant has not pursued, or has ceased to pursue the reference, the Director may dismiss the reference.
>
> (2) As soon as practicable after dismissing a reference, the Director shall give notice in writing of that fact to the complainant and the respondent.
>
> (3) Where a reference is dismissed under this section, no further proceedings may be taken in relation to that reference,

but nothing in this section prevents a person from making a further reference in relation to the same matter (subject to any applicable time limit)."

Thus the section which most closely approximates to the determination of the Equality Officer allows for "no further proceedings" in relation to that reference. While a new section 38A is inserted by virtue of s. 64 of the Act of 2004, this deals with the burden of proof and is immaterial to these proceedings. The only interpretation of the term of "no further proceeding" must undoubtedly be to preclude an appeal.

The range of decisions available to an Equality officer

44. To summarise therefore, the decision lawfully made by the Equality Officer might lawfully be:-

> (a) a decision pursuant to s. 22 of the Act of 2000 to dismiss the grounds that the claim was made in bad faith or was frivolous or vexatious or misconceived or relates to a trivial matter;
>
> (b) a decision made pursuant to s. 25 of the Act of 2000 which might have been in favour of the complainant or respondent and which thereby could be appealed under s. 28 or; finally,
>
> (c) a decision pursuant to s.38 on the grounds of non-pursual or cessation to pursue the reference. But in such circumstance, no further proceeding may be taken in relation to that reference although a person may make a further reference in relation to the same matter is subject to applicable time limits. The only reasonable interpretation of s. 38 is that 'no further proceeding' as a term precludes an appeal.

45. The Equality Officer made no finding that the complaint was frivolous or vexatious. Accordingly, I find that the only possible statutory basis here by which the notice parties might lawfully have appealed to the Circuit Court would have been under s. 28 of the Equal Status Act 2000, if applicable. But such appeal could only be following an *investigation* conducted pursuant to s. 25 of the Act of 2000. For a decision to have been made by an Equality Officer under s. 25(4), it would have to have followed the *conclusion of an investigation* under s. 25(1) by the Equality Officer. None of these conditions had been fulfilled here, a point raised by the learned respondent in argument before him.

46. Although the procedures to be followed by such officer in carrying out investigations are left to the Equality Officer to determine, the Act nevertheless envisages that an investigation under s. 25 may involve a hearing by the Equality Officer of evidence from all persons appearing to that officer to be interested and desiring to be heard. This was what the Equality Officer decided was necessary. She did not reverse this decision. However there was not an 'investigation' or 'hearing' of evidence by the Equality Officer. This was in the circumstance where she had determined that such would be necessary, as part of such investigation.

47. Instead she determined simply that the complaints had not established a *prima facie* case. The Act does not allow for dismissal on such grounds, but the officer may have an inherent power to do so. But if so the Act does not allow for an appeal.

48. Section 27(1) of the Act of 2000 deals with redress which may be ordered in a decision under s. 25. While amended, it provides (insofar as material:-

> (1) "Subject to this section, the types of redress for which a decision of the Director under section 25 may provide are either or both of the following as may be appropriate in the circumstances:
>
> (a) an order for compensation for the effects of the prohibited conduct concerned; or
>
> (b) an order that a person or persons specified in the order take a course of action which is so specified."

49. If the question arose as to whether the appeal was, or could have been pursuant to s. 25, the learned Respondent might well by reference to s. 27 have asked himself the following question: -

> "Was the decision one which might have provided for an order for compensation for the effects of the prohibited conduct concerned, or an order that a person or persons so specified in the order take a course of action which is so specified?"

50. The actual decision made by the Equality Officer could not come within any of those categories. The only issues which had been dealt with were the two procedural questions outlined earlier. No finding of discrimination had been made. The question of redress simply could not arise, nor could the question of compensation.

Procedural Issues before this Court

51. The solicitors acting for the Council served a notice of appeal to the High Court in this case because of the restricted time frame to lodge an appeal. However the only effective remedy is an order by way of judicial review. It is intended to withdraw such a notice of appeal. I do not consider this issue relevant on the question of discretion or alternative remedies therefore.

52. The Equality Officer was not joined as a notice party to these judicial review proceedings. Consequently, although it would not have been determinative, the Court has no assistance as to the state of mind or intention of the Equality Officer and whether her references in correspondence to right to an appeal were simply an error.

Evidence inconclusive

53. A number of submissions have been made to this Court as to the *possible* rationale for the decision of the learned respondent. Regrettably, however, there is no evidence which is determinative. The learned respondent undoubtedly was acting within jurisdiction in *entertaining* a motion to deal with the question of whether the Circuit Court had, in the circumstances, jurisdiction to deal with an appeal. But a court in judicial review proceedings cannot act on what must be, at best, a hypothesis as to the possible rationale for the decision, particularly so in the context of the array of possible reasons some of which would go beyond jurisdiction: This was not a decision where reasoning was desirable. The situation required a decision so that all the parties would be aware precisely of their positions. The reason or rationale for the decision as to jurisdiction unfortunately cannot be inferred by what was said by the judge. The discussion on the extraneous matters should not have had a bearing on the decision. I conclude that in failing to give reasons and in having regard to extraneous considerations the respondent moved beyond jurisdiction into "unconstitutionality" as defined by Henchy J. below.

Duty to give reasons for particular decisions

It is sufficient to refer to a number of decisions on the necessity of giving reasons, in the contexts identified. It is not a general duty.

54. In *The State (Cork County Council) v. Fawsitt* (Unreported, High Court, McMahon J., 13th March, 1981), that judge concluded that a court or tribunal exceeds its jurisdiction if it addresses itself to the wrong question, takes irrelevant considerations into account or if it makes an order without deciding the issues which it is required to decide before an order can validly be made (see p. 6 of the judgment). All of these bases apply in the instant case. Alternatively, such a decision will be in excess of jurisdiction if made in such a manner as to be devoid of legal validity (see *The State (Holland) v. Kennedy* [1977] I.R. 193). Pre eminently this decision required a rationale by the decision maker. As found earlier the respondent also took into account extraneous considerations.

55. *The State (Hennessy) v. Commons* [1976] 1 I.R. 238, is also of assistance. Finlay stated at P. 245 and 246 that in considering the entire code of licensing laws the legislature intended that there be specific grounds upon which a District Judge should exercise his discretion to grant or revoke any form of licence. In such circumstance the duty of the Court is to detail the grounds for refusal in the event that there is to be a repeal of such application.

This is consonant with the decision in *The State (Creedon) v. Criminal Injuries Compensation Tribunal* (1988) II.R 51 where Finlay C.J. observed that, for a tribunal such as the Criminal Injuries Tribunal to reach a conclusion rejecting in full the claim of an applicant and not to give any reasons for the rejection was an unacceptable and improper form of procedure. He observed (at p. 55):-

> "Once the Courts have a jurisdiction and if that jurisdiction is invoked, and obligation to enquire into and, if necessary, correct the decisions and activities of a tribunal of this description, it would appear necessary for the proper carrying out of that jurisdiction that the Courts should be able to ascertain the reasons by which the tribunal came to its determination. Apart from that, I am satisfied that the requirement…necessitates that the unsuccessful applicant…should be made aware in general and broad terms of the grounds on which he or she has failed. Merely, as was done in this case, to reject the application and when that application was challenged subsequently to maintain a silence as to the reason for it, does not appear to me to be consistent with the proper administration of functions which are of a quasi judicial nature."

56. These observations, of course, apply a *fortiori* the context of a judicial decision of this type and in this situation. Of course the apposite observation of Murphy J. in the decision of *O'Mahony v. Ballagh* [2002] 2 I.R. 410 cannot be ignored; he stated (at p. 416):-

> "I would be very far from suggesting that judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice it would be undesirable – and perhaps impossible – to reserve decisions even for a brief period. On the other hand it does seem, and in my view this case illustrates, that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing. … It does seem to me, however, that in failing to rule on the arguments made in support of the application for a non-suit [the judge] fell *'into an unconstitutionality'* to use the words of Henchy J. in *The State (Holland) v. Kennedy* [1977] I.R. 193 at p. 201. In those circumstances it seems to me that the appeal must be allowed and the matter remitted to the District Court for rehearing."

57. More recent decisions of McCarthy J. in *Smith v. Judge Ní Chondun* [2007] I.E.H.C. 270 and *Foley v. Judge Murphy & Anor.* [2007] I.E.H.C. 232, a judgment by the same judge on the same date are to similar effect.

58. A judge dealing with a busy list must necessarily make many decisions. Not every decision requires reasons. But I think this decision requires that reasons be given.

59. In the circumstances, it seems to me that, the learned respondent, on this occasion "*fell into unconstitutionality*". I do not think that this Court can proceed further to deal with a hypothetical issue. I will simply grant judicial review and order the matter as to jurisdiction be remitted back to the Circuit Court judge of the South Western Circuit to be reconsidered in accordance with law.