Neutral Citation No: [2005] IEHC 72

THE HIGH COURT

[2004 No. 974 JR]

BETWEEN

MARTIN POTTS

APPLICANT

AND
THE MINISTER FOR DEFENCE

RESPONDENT

Judgment of Mr. Justice Clarke delivered on the 10th March, 2005.

1. In this matter the applicant seeks leave to apply for relief by way of judicial review. As is pointed out in the written submissions filed on his behalf the essence of the applicant's case involves a challenge to the statutory framework currently in existence for the summary disposition of charges to be laid against members of the Defence Forces such as the applicant. The applicant seeks leave to challenge that framework on the basis that, in certain respects, it constitutes a breach of the rights guaranteed to him under the provisions of the European Convention on Human Rights insofar as same are introduced into domestic law by reason of the enactment of the Convention on Human Rights Act, 2003. The applicant also contends that the same statutory framework constitutes a breach of his constitutional rights.

The Threshold

2. In the ordinary way an application for leave, such as this, would commence by ex parte application to the court seeking such leave. Cases of this type do not come within any of the special categories of case in relation to which it has been determined by statute that applications for leave must be on notice. Equally, it is however, clear that this court has, in general terms, a discretion to require that an applicant put the intended respondent or, indeed, any intended notice party, on notice of the application so as to give them an opportunity to be heard prior to the court coming to a conclusion as to whether leave should be granted.

3. In the ordinary way in an ex parte application seeking leave to commence judicial review proceedings the principles applicable to the granting of leave are those set out in the case of *G v. D.P.P.* [1994] 1 I.R. In such a case an applicant is required to show an arguable case based on stateable grounds in order to obtain such leave from this court.

4. However there have been suggestions that in cases where the applicant has been required, in the discretion of the court, to put the respondent and, if appropriate, others, on notice a higher threshold applies. In D*.C. v. D.P.P.* (unreported judgment Ó Caoimh J. 18th May, 2004) the learned judge stated as follows:-

> "In the first place at the stage when this application was moved ex parte before me I directed the applicant to put the Director of Public Prosecutions on notice to enable the Director to assist this court in relation to the matters at issue on this application. I am satisfied having regard to the views expressed obiter by Kelly J. in *Gorman v. Minister for the Environment* [2001] 1 I.R. 306 and the authority cited by him therein that a higher standard should apply than that of establishing an arguable case such as indicated in the authority of *G. v. D.P.P.* …"

5. Ó Caoimh J. went on at p. 24 of his judgment to comment as follows:-

> "I also approve the approach taken by the Court of Appeal in *Mass Energy Limited v. Birmingham City Council* (1994) Env. L.R. at 298. This was the approach apparently applied by Smith J. in *P. v. Minister for Justice Equality and Law Reform.* On this basis I believe that the approach that I should take is to grant leave only if the applicant's case is not merely arguable but is strong, that is to say, is likely to succeed".

6. As has been pointed out by the respondent in the course of his submissions the rationale for applying the higher test as determined upon by the courts of the United Kingdom in *Mass Energy* is to be found at pp. 307 and 308 of the judgment where Glidewell L.G. stated that:-

> "First we have had the benefit of detailed inter partes argument of such depth and in such detail that, in my view, if leave were granted, it is most unlikely that the points will be canvassed in much greater depth or detail at the substantive hearing. In particular we have had all the relevant documents put in front of us … thirdly, as I said, we have most, if not all, of the documents in front of us; we have gone through the relevant ones in detail – indeed in really quite minute detail in some instances – in a way that a court dealing with an application for leave to move rarely does, and we are thus in as good a position as would be the court at the substantive hearing to construe the various documents. For those reasons taken together, in my view, the proper approach of this court, in this particular case, ought to be – and the approach I intend to adopt will be – that we should grant leave only if we are satisfied that Mass Energy's case is not merely arguable but is strong; that is to say, is likely to succeed."

7. In commenting on the test to be applied in *R. v. Cotswold District Council* (1998) 75 P&CR 515 at pp. 530 and 531 Keane J., having commented upon the test applied by the court in Mass Energy stated the following:-

> "As I indicated in Ex p. Frost, that approach seems in principle to be as applicable at a first instance hearing of a leave application as in renewed leave proceedings before the Court of Appeal … for my part, I would prefer to put it on the basis that where the court seems to have all the relevant material and have heard full argument at the leave stage on an inter partes hearing, the court is in a better position to judge the merits than is usual on a leave application. It may then require an applicant to show a reasonably good chance of success if he is to be given leave".

8. While it is true to state that Kelly J. in *Gorman v. Minister for the Environment* [2001] 1 I.R., as cited by Ó Caoimh J. indicated broad agreement with the principles adopted in the relevant UK case law he did reserve final decision on the matter to "another day and in another case where the issue can be fully debated".

9. I am not persuaded that the fact that an application is on leave, does, by itself, raise the threshold. In Mass Energy the court seems to have been influenced by the fact, that on the facts of that case, it seemed unlikely that issues of fact, interpretation, or legal argument, could be canvassed in much greater depth or detail at a substantive hearing. Similarly in *R. Cotswold District Council*, the court was influenced by the fact that it seemed "to have all the relevant material and have heard full argument at the leave stage on an inter partes hearing".

10. Of equal importance it seems to me is a consideration of the statutory regime which has been introduced by both s. 50 of the Planning and Development Act, 2000 and s. 5 of the Illegal Immigrants (Trafficking) Act, 2000. Both those provisions require that applications for judicial review in respect of certain planning matters and certain asylum type issues ("the statutory cases") must be made by motion on notice to the appropriate respondents and impose a higher threshold than exists in respect of ordinary judicial review applications. Both the statutory cases require that the court, prior to granting leave, must be satisfied that there are substantial grounds for contending that the matter intended to be challenged is invalid or ought to be quashed.

11. In the jurisprudence of the courts in relation to both the above sections it has been accepted that a higher threshold for the grant of leave is required in such cases. That threshold has been variously been described as being equivalent to "reasonable" "arguable" and "weighty" but not "frivolous" or "tenuous". See for example *V.Z. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 135. It seems to me that the existence of such an established statutory regime in respect of matters where the Oireachtas has determined that leave should only be granted where a more onerous threshold is passed is a matter that needs to be considered in a case such as this. It would be a strange result if a yet higher standard still was required to be met by an applicant who, though not the subject of a statutory requirement to give notice and to meet a higher threshold but who was nonetheless, on a discretionary basis, required to give notice by the court hearing an ex parte application. It should be noted that in the statutory cases the court has all the benefits of having facts put forward by the respondents (should they so wish) and hearing legal argument addressed by the respondents. It was those factors that led to the decisions in the courts of the United Kingdom referred to above. It is also clear that the statutory cases arise where the policy of the Oireachtas is that leave should only be granted in such cases where there are substantial grounds made out. Yet nonetheless it has not been suggested that in such cases it is necessary to pass a threshold which goes as far as that identified in *Mass Energy*. In the circumstances I cannot agree with the proposition put forward on behalf of the respondent that a test higher than that applicable in the statutory cases should be applied in a discretionary leave on notice application such as this. However equally, I cannot agree with the proposition put forward on behalf of the applicant to the effect that it would be impossible to define a standard higher than the standard set out in *G.* that fell short of the standard which would require to be reached by a successful applicant at a full hearing. Such a standard has been established in the statutory cases and it seems to me that it is the appropriate standard to apply in any case where the court has had the benefit of having evidence placed before it by both sides and heard argument from both sides on a leave application.

12. Before passing from this issue I should state my agreement with the proposition put forward by counsel for the applicant when he indicated that there may be some cases (of which he contended this was *not* one) where the case was sufficiently straightforward that all of the issues could readily be determined on a leave application on notice. There undoubtedly are such cases. However if, on the facts and the law of a specific case, the issues are such that they can be easily and fully argued at the leave stage then it seems to me that the preferable course of action would be to treat the leave application as the trial of the substantive matter so as to avoid the wasting of court time and the incurring of additional expense to parties that would be necessitated by having two substantive hearings. However if that is to occur then it would either need to be with the agreement of both parties or would need to be the subject of a direction from the court at or prior to the commencement of the hearing of the leave application. Otherwise the applicant would, be placed in the very difficult situation of not knowing what the possible outcome of the hearing might be.

13. While it may well be that there is very little by way of fact which can be added to the evidence that might be material to a consideration of the merits of this case it seems to me that it is far from the sort of relatively net issue in which it could, in any event, have been appropriate to treat the trial of the leave application as, in substance, the trial of the substantive issues. In any event no such direction or determination was made in this case.

14. For all of the above reasons it seems that the test that should be applied is that applicable in the statutory cases.

Statutory Framework
15. Sections 178 and 179 of the Defence Act, 1954 provide for investigation of a charge against a person subject to military law and its being dealt with, in certain circumstances, in a summary fashion. Section 179 permits a subordinate officer (that is an officer to whom powers under this section are delegated by a commanding officer) to conduct such an investigation and in the event that he does not dismiss the charge he can either deal with it summarily or refer same to his commanding officer. Under s. 178 the commanding officer equally can deal with the matter in a summary fashion or remand the accused for trial by Court Marshall.

16. The penalties applicable where a subordinate officer deals with the case summarily are:-

(a) a fine not exceeding an amount equal to a day's pay of the offender,

(b) confinement to barracks for any period not exceeding 7 days, or if the offender is employed on a state ship, stoppage of shore leave for a period for not exceeding 7 days,

(c) a warning.

17. See s. 179(3)

18. Where the matter is dealt with summarily by the commanding officer under s. 178 he may award:-

(a) a period of detention not exceeding 28 days (or certain lesser periods in appropriate cases),

(b) a fine not exceeding an amount equal to 3 days pay of the offender,

(c) confinement to barracks for a term not exceeding 14 days with equivalent provisions in respect of those employed on a state ship, or

(d) a warning.

19. See s. 178(3)

20. Under s. 179(6) if the subordinate officer does not dismiss the charge (under s. 179(2)) or propose a warning alone he is required to offer the accused the possibility to have his case referred to his commanding officer. If the matter is referred to the commanding officer then the more significant penalties available under s. 178(3) come into play together with the possibility of the matter being sent forward for a full court martial.

21. The procedural rules for the investigation of matters such as are of concern here are to be found in the Rules of Procedure

(Defence Forces) 1954 contained in S.I. 243 of 1954. Rule 6(1) prohibits representation. However it should be noted that the charge sheet informs the applicant that he has a right to:-

1. Cross-examine witnesses whose statements are unfavourable to him;

2. Present anything he wishes on his own behalf by way of defence and/or in mitigation;

3. Have called and examine any reasonably available witness he may wish;

4. Have all the witnesses against him sworn, if he so demands.

The facts of this case

22. The applicant is currently before a subordinate officer. A charge has been laid against him of being absent without leave but no investigation of that charge has yet taken place. By virtue of the provisions of s. 179(3) referred to above, that charge carries with it the possibility of confinement to barracks for a period of 7 days, a fine of an amount equal to a day's pay or a warning.

23. Certain other facts may be material to a consideration of the issues in this case.

24. The first is that the applicant is a married man and resides with his family off barracks. It is therefore the case that as a matter of practicality a determination by either the subordinate officer or his commanding officer that he be confined to barracks amounts to a requirement that he would not be able to live at home during the period when he is so confined. In those circumstances it is suggested that the penalty of being confined to barracks is a significantly onerous one in his case.

25. Secondly it is common case that in the event of a finding that the applicant was absent without leave he would, as a automatic consequence, forfeit pay in respect of the days when he was absent. Finally it is contended that the provisions of s. 180 of the Act (which provides for the revision of summary awards) is unable to work in practice by virtue of the fact that the "prescribed military authority" referred to in each of the subs. of s.180 has not been prescribed. Each of those subs. permits the person identified as the "prescribed military authority" to carry out a review of a summary award and to make such adjustments including the complete cancellation of the award as maybe appropriate. However, by reference to the defence force regulations, it is contended that no military authority has been prescribed for the purposes of s. 180 and, it is said, therefore the right to a review is denied by virtue of the absence of there being any person in whom the power of review is vested.

The legal issues

26. As indicated above the principal attack which the applicant makes against the summary regime stems from the provisions of the European Convention on Human Rights ("the Convention"). In a series of cases before the European Court of Human Rights ("ECHR") consideration has been given as to the extent to which a military matter constitutes a "criminal charge" within the meaning of Article 6 of the Convention so as to give rise to the procedural safeguards set out in that article. In particular in *Engle v. Netherlands* [1979-80] 1 EHRR 647 the court established three criteria for deciding whether a matter constituted such a criminal charge. In the relevant passage the court addressed the question thus:-

> "It is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent state, to criminal law, disciplinary law or both concurrently. This however is no more than a starting point. . .
>
> The very nature of the offence is a factor of great import. When a service man finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the state may in principle employ against him disciplinary law rather than criminal law.
>
> However supervision by the court does not stop there. Such supervision would generally prove to be illusory if it did not take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by there nature, duration or manner of execution cannot be appreciable detrimental".

27. If the charge amounts to a "criminal charge" for the purposes of the Convention then, it is said, the procedural safeguards required by Article 6 are not met by virtue of the lack of a public hearing and the absolute prohibition on representation.

28. The ECHR also had regard to the application of the provision of the convention to a military code not dissimilar to the one in this jurisdiction (being that of the United Kingdom) in *Thomson v. United Kingdom* [September 2004].

29. It would appear that, perhaps in answer to concerns as to the compatibility of the United Kingdom Summary Military code with the Convention, a new summary appeals body has been introduced to military law in that jurisdiction.

30. In all the circumstances of this case it does not seem to me to be possible to say that the contentions of the applicant are either frivolous or trivial and I am therefore satisfied that he has passed the threshold required insofar as establishing a sufficient case to be granted leave in respect of his contention that the summary process in Irish military law contravenes the convention.

31. The factors identified in *Engle*, potentially point in different directions. While it was contended at the hearing that the offence of being absent without leave was a purely disciplinary offence rather than a criminal offence as a matter of domestic law that is by no means clear. Indeed it is not clear that there is any such distinction made in Irish military law. Chapter 2 of the Defence Act, 1954 is headed "Offences against Military Law". It is not subdivided. It includes at one extreme matters of the severity of mutiny, treacherous desertion and the like while at the other extreme includes the negligent driving of a service vehicle and the general offence of conduct to the prejudice of good order and discipline. While the matter will require further analysis at a full hearing it is at least open to the view that Irish law makes no distinction of the type identified in *Engle* between criminal and disciplinary matters in the military context.

32. While again the matter is far from free from doubt it may be that the second criteria (that is to say whether the matter is one which solely governs the operation of the armed forces) favours the respondent's case in that desertion might be regarded as a matter of a purely disciplinary nature in a military context.

33. Finally as to the severity of the penalty it is clear that a variety of different forms of punishment were differently considered by the ECHR in *Engle*. Attempting to calibrate the punishment to which the applicant might be exposed in this case into the spectrum identified in *Engle* is a complex task.

34. Given that the overall conclusion requires taking into account all of the above factors it seem to me that this is a case which requires a full and detailed hearing to assist the court in being able to identify with precision how the precise matter of which the applicant stands accused fits into the test set out in *Engle*.

35. Similar considerations apply in relation to the contention that the summary military procedure breaches Irish constitutional law. It is clear that there are certain matters which do not warrant the intervention of the court at all. For example, a three day suspension from school was so considered in *Murtagh v. Board of Management of St. Emer's National School* [1991] 1 I.R. 482 where the Supreme Court held that such a suspension was an "ordinary application of disciplinary procedures inherent in school authorities" which was not determinative of right and liabilities and that, therefore, certiorari did not lie. It is equally clear that persons are, in appropriate cases, entitled as part of their right to fair procedures, to seek the intervention of the court if adequate protections are not built into the system by which a hearing which may affect their rights is conducted. In that context it should be noted, as set out above, that all of the rights specifically identified in In *Re Haughey* [1971] I.R. 217 are afforded to a person who is before a subordinate or commanding officer under the terms of the rules applicable. The only real complaint that can be made on behalf of the applicant is that he is denied any form of representation. However it is equally clear that in not all cases to which the *Haughey* rights apply is a person necessarily entitled to legal representation. The extent to which there may be matters within military discipline which are not sufficiently serious so as to carry with it an entitlement to representation (whether legal or otherwise) at a summary hearing is again a matter which would require to be explored in considerable detail. At this stage I do not feel that I could hold that the contention that a matter of the type with which the applicant is faced requires legal or other representation is frivolous or trivial or otherwise fails to meet the threshold in the statutory cases. I come to that view while fully recognising the argument of the respondent that different considerations may well apply in military matters as has been noted in, for example, *Scariff v. Taylor* [1996] 1 I.R. 242.

36. For all of the above reasons I am satisfied that the applicant has made out a sufficient case in respect of his contention that under either the provisions of the convention or the constitution he is entitled in all the circumstances to representation, and in respect of the contention potentially to a public library.

37. I am also satisfied that the applicant has made out a sufficient case in respect of his contention that he has been denied his right to review and revision under s. 180 by virtue of the absence of a prescription of an appropriate authority.

38. Before passing on to the question of prematurity I should add that I am not persuaded that the applicant has made out a sufficient case to pass the relevant threshold in relation to a separate contention which he made at the hearing to the effect that the process with which he is faced is potentially affected by a perception of bias if the matter should go before his commanding officer who may not be in a position, by virtue of his command position and his involvement in the events, to be seen to be an independent arbitrator. However it is clear from the affidavit of the director of the legal service of the defence forces that it is normal practice, where a commanding officer has a prior involvement in a case, for the accused person to be attached to a different unit of the defence forces so that the charge against the person can be dealt with by a commanding officer in that unit. Paragraph 34 of the defence force regulations (A7) issued by the Minister for Defence pursuant to the Defence Act, 1954 is, it is suggested, authority for such an attachment. Even if there were no direct authority for such an attachment it seems to me that, having regard to the obligation of the courts to construe legislation in a manner consistent with the protection of rights guaranteed both by the constitution and, now, under the Convention on Human Rights it would be necessary to imply such an entitlement to deal with circumstances where the original commanding officer was unable, by reason of conflict, to deal with the case. I am not, therefore, satisfied that any arguable case has been made out under this heading and would not propose to grant leave in that regard.

Prematurity

39. Finally it is necessary to deal with the contention on the part of the respondent that the application in this case is premature. In that regard reliance is placed upon the well established principles that an application for judicial review will not be entertained by the courts where the matters complained of are hypothetical or where the impugned conduct is merely a hypothetical possibility. The above principle was approved by Carroll J. in *Philips v. Medical Council* [1992] 1 ILRM 469 and 475 where that it was held that:-

> "Judicial review does not exist to correct procedure in advance or to make sure bodies which have made decisions susceptible or review have carried out their duties in accordance with the law and in conformity with natural and constitutional justice".

40. The above passage was cited with approval by McGuinness J. in *Carroll v. Law Society of Ireland* [2003] 1 I.R. 284. This principle stems form the presumption that anybody in whom legal power is vested will exercise that power in a constitutional fashion. Thus it should not be presumed that a body will exercise any discretion which it may have in a fashion which is inconsistent with the constitution. Similar principles would also seem to be applicable in cases where the rights asserted derive from the convention. However the difficulty with the prematurity argument on the facts of this case is that the provisions of Statutory Instrument 243/1954 which set out the rules of procedure for the conduct of the enquiry and summary hearing contemplated in this case expressly prohibit representation in respect of summary proceedings. It is at least arguable, to say the least, that the rules do not permit of any other interpretation. On that basis it is equally arguable that the relevant officers do not have a discretion in that matter. In those circumstances, and given that the applicant is clearly about to be subjected to the process, it does not seem to me to be premature to consider whether the conduct of the process in accordance with the clear statutory rules laid out may breach his right either under the convention or under the constitution.

41. For all of the above reasons I am prepared to grant leave in this case. However having regard to certain of the comments made in the course of this judgment I believe that the reliefs sought and grounds to be relied upon in the statement to ground such an application need to be refined, and in some cases narrowed or abandoned. When the parties have had an opportunity to consider this judgment I will list the matter further for the purposes of hearing them as to the precise leave which should be granted.