[2018] IEHC 90

THE HIGH COURT

2017 No. 107 JR

Between:

NOEL CALLAN

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 5th February, 2018.

I

Introduction

1. When the risk of injury in service becomes an unfortunate reality, a garda officer may be eligible for compensation under the Garda Síochána (Compensation) Acts 1941 and 1945. Under those Acts an officer who suffers an injury not causing death is required, as a pre-requisite to coming to the High Court to make application for compensation, to apply for a certificate of the Minister for Justice, *etc*. allowing that officer to apply to the High Court for compensation. In this regard, s.6(1) of the Garda Síochána (Compensation) Act 1941 provides, *inter alia*, as follows:

> *"Whenever an application is duly made to the Minister for compensation under this Act, the following provisions shall have effect, that is to say…*
>
> *(b) if the application is in respect of injuries not causing death, then –*
> *(i) in case the Minister is of opinion that such injuries are of a minor character and were sustained in the course of the performance of a duty not involving special risk, the Minister shall refuse the application…".*

2. In the case of Garda Callan, his application for permission led to a refusal issuing from the Minister under s.6(1)(b)(i) of the Act of 1941 on the basis that his injury was *"of a minor character"*. That refusal was contained in a letter of 16th November, 2016 which issued to the solicitors for Garda Callan. Consequent upon that refusal, Garda Callan has brought the within application in which he seeks, *inter alia*, the following reliefs: (1) an order of *certiorari* in respect of the said decision, (2) a declaration that Garda Callan is entitled to an authorisation to seek compensation in the High Court pursuant to the Garda Síochána (Compensation) Acts, (3) an order of *mandamus* directing the Minister for Justice, *etc*. to grant the authorisation applied for, and (4) in the alternative, an order directing the Minister to review Garda Callan's application once more.

II

Nature of Within Proceedings

3. It is important to remember at the outset that these are judicial review proceedings; this is not an appeal. The law reports are replete with examples in which judges have spoken to the quite limited role of the court in such applications. In this regard, the court has been referred to the judgment of *Looby v. Minister for Justice, Equality and Law Reform* [2010] IEHC 411, another judgment of the High Court concerned with an application to the Minister under the Act of 1941, in which Hedigan J. made the following comments, at para. 6.1, which are representative of the legal orthodoxy concerning judicial review applications that, for good or bad, has hitherto pertained (and some would perhaps contend that too restrictive an approach has become the accepted norm):

> *"The jurisdiction of the court in judicial review is a very limited one. The Court does not sit as a court of appeal. Even were it to disagree with the decision on the facts, made by the deciding body, it cannot interpose its opinion for that of the body specifically charged with making particular decisions because that would be to usurp the functions of such body. The court may only intervene on the basis of an identifiable error of law or the irrationality of the decision."*

4. At least two related observations might be made in this regard. First, in practice the distinction between the legality and the merits of a decision can be somewhat *'fuzzy'*, especially when, for example, a decision is sought to be quashed on the basis, *inter alia*, that the decision-maker failed to take all relevant factors into account. If a decision is properly to be reviewable on the basis that it is not supportable on the relevant facts, then the court tasked with reviewing that decision will necessarily engage in an examination of the facts as understood (or misunderstood) by the decision-maker. Second, for a court to correct simple errors of fact, *e.g.*, by stating that a historical event happened at 06:15, not 06:00, when all that the court is doing is recognising an unassailable objective truth seems legally unobjectionable. What is legally objectionable is where a court substitutes its *vue du monde* for that of the decision-maker.

III

The Facts in Some Detail

(i) The Injury Suffered.

5. On or about 26th August, 2011, Garda Callan was on duty in Swords, County Dublin. He was in the course of arresting individuals for public order offences when one of those individuals, who was both drunk and violent, lashed out with a kick that resulted in the fifth digit (the 'little finger') on Garda Callan's left hand getting caught in the door of a patrol car. Garda Callan was brought to hospital, the nail on his little finger was removed and some sutures (stitches) had to be made to the nail bed which was lacerated.

(ii) Averments as to Longer-Term Effect of Injury.

6. As a consequence of the injury Garda Callan was absent from work for one week and returned to indoor duties for two weeks. In

his affidavit evidence before this Court, Garda Callan avers to certain longer-term consequences of his injury, *inter alia*, in the following terms:

> *"6. In the aftermath of this injury, I suffered numbness, tenderness and hypersensitivity in my finger. Simple tasks such as driving, writing[1] and carrying out domestic chores, such as making a bed, dressing myself and so forth or doing anything that impacted my finger no matter how lightly caused me to experience sharp pain and exquisite tenderness in the finger-tip.*
>
> *7. I believe that it took 8 months before the sensation in my fingertip came anyway back to normal and for the tenderness and hypersensitivity to resolve to a bearable degree. I say and believe that to date I still suffer tenderness and a numb sensation in the fingertip especially if I touch anything and in cold weather. Tasks such as putting my hand in my pocket require care to avoid jabbing my fingertip. I say and believe that I have been left with a permanently compromised fingernail which although it is grown back, is deformed in appearance and has an irregular shape."*
>
> [1] The court understands from counsel that this is a reference to typewriting; Garda Callan is right-handed and it is difficult to see how an injury to his left little-finger could have affected his writing ability.

(iii) Medical Evidence as to Injury.

7. The court has read the medical evidence and does not propose to recite it in any detail. The doctor engaged by Garda Callan states, *inter alia*, as follows:

> *"The nail which had been avulsed in the accident grew back but it had grown back in an irregular shape….This cosmetic deformity is visible at conversational distance but as such should not interfere with his occupational, domestic or recreational lifestyle in the future.*
>
> *It is likely however that the odd appearance of his nail will provoke questions on occasion….I would describe it as a permanent, albeit minor cosmetic blemish which has resulted…*[directly] *from the injury sustained on the 26th August 2011."*

8. The doctor engaged by An Garda Síochána takes a more robust view of matters, offering, *inter alia*, the following view:

> *"In my opinion Garda Callan has essentially made a full recovery from the laceration to the nail bed and fingertip of his fifth finger on his non dominant left had with no residual functional impairment or cosmetic impairment and no long term sequelae of significance following the acute treatment he received with sutures in the Emergency Department after the injury in August 2011."*

9. Counsel for Garda Callan placed some emphasis on the assertion in the last-quoted text that Garda Cullen has "*essentially*", *i.e.* not totally, "*made a full recovery*". The court does not accept the implicit contention, if such is made, that total recovery from a particular injury must ensue before such injury can properly be described as minor. Moreover, it seems to the court to be important to read the last-quoted paragraph as a whole, in particular the reference to Garda Callan having "*no residual functional impairment or cosmetic impairment and no long term sequelae of significance*"; those it seems to the court are precisely the kind of observations which might yield the rational, reasonable and lawful conclusion that the injury to which such commentary relates was and is minor in character.

(iv) The Department's Decision-Making Process.

10. Mr O'Leary, an Assistant Principal Officer within the Department of Justice, *etc*. avers as follows regarding the decision-making process that led to the eventual refusal of permission, pursuant to s.6(1)(b)(i) of the Act of 1941, for Garda Callan to make application to the High Court for compensation:

> *"14. I say that in arriving at the decision to refuse to authorise the Applicant to apply to the High Court, a comprehensive review process was undertaken in relation to the Applicant's application.*
>
> *15. I say that an initial review of the said application was conducted by Mr Martin McDonald (Garda Division, Compensation, Department of Justice [,* etc.*]…) on 10th May 2016, who recommended that the application be refused.*
>
> *16. I say that the above recommendation was reviewed by me on 19th May 2016 and I agreed with the recommendation that the application should be refused….*
>
> *17. I say that on foot of this review of the Applicant's application, the Respondent wrote to the Applicant's solicitors on 24th May 2016 informing them of the Department's view that the injuries sustained by the Applicant were minor and were received in the course of duties not involving special risk. I say that the Applicant's solicitors were also invited to make further submissions in advance of a final decision being made on the Applicant's application….*
>
> *18. I say that a further submission was received from the Applicant's solicitors dated 22nd September, 2016. This submission, together with all of the medical reports and the Garda Commissioner's memorandum was considered by Ms Butler of the Garda Division of the Department of Justice [,* etc.*]….*
>
> *19. I say that the said Ms Butler drafted a recommendation dated 28th September 2016 recommending that the application be allowed on the grounds that the injuries are not of a minor nature….*
>
> [Counsel for Garda Callan indicated that this is the first Garda compensation case in which he has encountered a departure by the eventual decision-maker from such an internal recommendation. However, in truth when Mr O'Leary came to his final review of the file, there were two contrary recommendations on file, viz. that of Mr McDonald and that of Ms Butler. So it was not a case of just departing from a single recommendation (though Mr O'Leary was free in the proper exercise of his discretion so to do). It was a case of taking an informed and reasonable final decision by reference to a file which included contrary recommendations. That is but the ordinary stuff of everyday administrative decision-making.]
>
> *20. I say that the above recommendations of Ms Butler and Mr McDonald together with the Submissions, medical reports*

and correspondence received from the Applicant's solicitors were reviewed [by] *me on 26th October 2016. I agreed with the recommendation of Mr McDonald that the application should be refused*….

21. I say and believe that by letter dated 16th November 2016 the Respondent communicated to the Applicant's Solicitors that the application for authorisation had been refused. That letter set out the reason for such a refusal, namely that based on the information provided the Respondent was of the opinion that the injuries sustained by the Applicant were of a minor character and concludes that in accordance with the provisions of Section 6(1)(b)(i) of the 1941 Act the application was refused….".

IV

Some Case-Law of Relevance

(i) Introduction.

11. The Garda Síochána (Compensation) Acts do not define what constitute "*injuries of a minor character*". The court has been referred by counsel to the following cases in this regard: (1) *McGee v. Minister for Finance* [1996] 3 I.R. 234; (2) *Merrigan v. Minister for Justice* [1998] IEHC 11; (3) *Coyne v. Minister for Justice and Equality* (Unreported, O'Malley J., 28th June, 2012); (4) *McGuill v. Minister for Justice and Equality and ors* [2012] IEHC 519; and (5) *Costigan v. Minister for Justice and Equality* [2015] IEHC 299. The court turns now to a consideration of these cases.

(ii) McGee.

12. In *McGee*, Garda Sergeant McGee was 'head-butted' by a drunken prisoner. Per Carney J., at 236, "*The applicant's injuries consisted of a nosebleed and associated bruising which cleared completely within a period of two to three weeks"*. In a judgment that was notably critical of the Minister of the day for not refusing the application made by Garda Sergeant McGee under s.6 of the Act of 1941, Carney J. observed, *inter alia*, as follows, at 238:

> *"In authorising the applicant to apply to this Court for compensation under the Garda Síochána Compensation Code, the Minister for Justice has, by necessary implication, certified the applicant's injuries to be non-minor in character. In my view, the Minister's certification does violence to the English language and represents a failure on her part to discharge her statutory function to filter out the advancement of trivial and minor claims."*

13. On a couple of occasions at the hearing of the within application, counsel for Garda Callan drew the attention of the court to the fact that in *McGee* what counsel for Garda Callan clearly considered to be a comparatively minor event (when compared by him to the injury occasioned to Garda Callan) had been found to be non-minor by the Minister. But it is quite clear from the above-quoted text that Carney J. considered the determination of the Minister of the day in this regard to be absurd, albeit that it had to stand in that case for reasons that Carney J. went on to state. For this Court what matters, from a legal perspective, is not so much what the Minister did but what Carney J. considered of what the Minister had done…and Carney J. clearly was not impressed by the Minister's "*certification*".

14. In passing, the court notes that the word "*trivial*" is an innovation of Carney J. and that what s.6(1) requires is but the exclusion of claims which (a) concern personal injuries that vault the hurdle that separates the "*minor*" from the greater than minor and also (b) "*were sustained in the course of the performance of a duty not involving special risk*". (There is no dispute in the within application that Garda Callan, at the time he sustained the injury in issue, was engaged in the performance of a duty that did not involve "*special risk*").

(iii) Merrigan.

15. In *Merrigan*, Garda Merrigan sought a judicial review of the Minister's decision that certain injuries were of a minor nature, eventually succeeding on grounds that are not of relevance to the within application. The judgment of Geoghegan J. is notable for offering an interpretation of s.6 which involves very specific time limits that have no basis in the express text of s.6 and which involve no little innovation as to what the word "*minor*" means in terms of timing. Thus, Geoghegan J. observes:

> *"I think that the expression 'of a minor character' implies a consideration of the nature of the injury rather than the amount of the compensation which would be paid for it. What the legislature intended, in my view, was that if, for example, a member of the force sustained an injury of a kind which would otherwise be compensatable but which cleared up after say two months with no ill effects such an injury would be considered to be of a minor character. I give that as an example of such an injury rather than a definition which would be quite impossible. It is my view, therefore, that the Minister ought to refuse to authorise proceedings in a case where there has been a complete recovery within a matter of weeks with no medically explicable adverse sequelae".*
>
> [The word "*sequelae*" is defined in the *Oxford Online Dictionary as "a condition which is the consequence of a previous disease or injury*"].

16. Notably, Geoghegan J. declines to attempt a definition of the meaning of the term "*injuries of a minor character*". Thus he does not suggest that the courts should depart from the express and clear wording of statute and do anything other than ask themselves: 'are the injuries presenting 'injuries…of a minor character'?', with the words "*injuries*" and "*minor*" bearing their ordinary English meaning. Such observations as Geoghegan J. does make are not perhaps without difficulty:

> – first, his observations factor in suggested timespans that do not appear in s.6 ("*two months*", "*a matter of weeks*");
>
> – second, his observations introduce the notion of "*complete recovery*" (albeit within defined parameters (though parameters that are not defined in statute)), being a notion that has no basis in the express wording of s.6 and which could conceivably yield difficulties in practice. Suppose, for example, that a garda is hit on the head by an arrestee and knocked unconscious, but makes a complete recovery within a few days. Does it ring true as a matter of plain English that such an injury – being knocked unconscious – "*ought*" to fall to be categorised as an 'injury of a minor character' because recovery was swift?
>
> – third, the reference to the absence of "*medically explicable adverse sequelae*" again has no basis in the express

wording of s.6 and, as with the suggested timespans and the concept of complete recovery, introduces a level of conditionality to the application of s.6 that was not there when the Oireachtas enacted it.

17. Notwithstanding the foregoing, the difficulty that arises for Garda Callan, even if the court applies the judgment of Geoghegan J. without demur (as it now proceeds to do), is that that judgment offers Garda Callan scant support as regards the within application. Thus, even if the court assumes for the sake of argument that there has been no complete recovery by Garda Callan from the injury sustained by him on or about 26th August, 2011, it is clear from the above-quoted text that whereas (i) Geoghegan J. is of the view that "[T]*he Minister ought to refuse to authorise proceedings in a case where there has been a complete recovery within a matter of weeks with no medically explicable adverse sequelae*", (ii) Geoghegan J. never expresses the view that a case in which there is less than complete recovery ought unfailingly to be the subject of favourable decision by the Minister.

(iv) Coyne.

18. In *Coyne*, Ms Coyne was a former garda who, in the course of arresting a number of youths in Balbriggan, County Dublin, got a blow to the head and a bite to her arm from one of the arrestees. Per O'Malley J., at paras 1, 3-6 and 30:

> "*1. In the course of struggling with him* [the youth] *the Applicant received a blow from his knee to the right side of her head which caused her ear to ring and left her temporarily unable to hear. The young man then bit her on the arm, breaking the skin and causing some bleeding.*
>
> …
>
> *3. It transpired the youth who had bitten the Applicant tested negative for blood borne viruses a couple of months later but apparently this fact was not conveyed to her for some seven months. The reason for this is not clear….She avers that during this time she felt 'a lot of stress' and had 'a huge sense of relief' when informed of the results. It is not suggested, however, that she had to undergo any further testing herself after the incident or that she was given advice causing her any particular concern in relation to her personal life.*
>
> *4. The Applicant was off work for about two weeks. She says that when she returned to work she was lacking in motivation and concentration and had a fear of working at night. She avers that she had 'psychological symptoms' for about eighteen months. There is no psychiatric evidence in the case although the Accident and Emergency Consultant did give brief consideration to these aspects.*
>
> *5. The bite left a small residual scar on her arm which is not of cosmetic significance.*
>
> *6. The only ongoing complaint is of tinnitus as a result of the blow to her head. This, she says, manifests itself when she is in quiet areas or in areas of loud noise.*
>
> …
>
> *30….It is agreed that the Applicant suffered a kick to the head which caused a perforated ear drum. She suffered a temporary loss of hearing and difficulty with balance for about two days. The significant aspect is that she has been left with permanent tinnitus which is unlikely to improve or dis-improve. There is no doubt that it is to be classified as mild. It involves no loss of hearing or other function. According to some of the medical practitioners there are times when she does not notice it. However, a twenty-six year-old has been afflicted for life with a condition which is undoubtedly irritating, affects her social enjoyment and, depending on what evidence is accepted, sometimes her sleep. In my view, an injury which has life-long adverse sequelae, even if mild, cannot be regarded as minor. It is so far from the nature of the examples discussed in McGee and Merrigan as to be irrational…".*

19. Counsel for Garda Callan has sought to place especial emphasis on the observation of O'Malley J. that "*In my view, an injury which has life-long adverse sequelae, even if mild, cannot be regarded as minor*." Garda Callan, his counsel maintains (a) suffered injury, and (b) is suffering "*life-long adverse sequelae*" by way of what his own doctor describes as "*a permanent, albeit minor cosmetic blemish*", and (c) the court is bound by reference to O'Malley J.'s observation (as indeed was the Minister) to conclude that the injury at issue here is greater than minor. However, the court does not understand from the above-quoted segment of the judgment of O'Malley J. in *Coyne* that she meant thereby to establish a test that would sit separate and apart from the express and clear wording of the Act of 1941. Moreover, the arguments of counsel for Mr Callan in this regard appear to the court to ignore the following factors that the Minister could properly bear in mind, viz. (a) that the doctor engaged by An Garda Síochána observes that in his professional opinion there are "*no long term sequelae of significance*", and (b) when it comes to the unfortunate injury that Garda Callan has suffered, he is, for all that he has been unfortunate, in a qualitatively different situation from that which presented in *Coyne*.

(v) McGuill *and* Costigan.

20. The decisions in *McGuill* and *Costigan* were not extensively opened before the court but are briefly considered hereafter.

a. McGuill.

21. *McGuill* involves a faithful application of the decisions in *McGee* and *Merrigan* in a case where Garda McGuill was injured when the patrol car in which he was an observer was rammed by a Jeep, Hogan J. observing, at para.12 that "[A]*s Geoghegan J. noted in Merrigan, s.6 of the 1941 Act posits a test which focusses on the nature of the injury actually suffered*."(Garda McGuill's application was ultimately successful on the ground that there had been an inadvertent breach of fair procedures). It does not appear to the court that the Minister has posited a test other than that which *Merrigan* and *McGuill* posit as correct.

b. Costigan.

22. In *Costigan*, a case in which the applicant suffered a fracture to the nose after being head-butted by a prisoner in a garda patrol-car (which fracture required two surgeries, one to manipulate the fracture and the other to cure a deviated nasal septum) and resulted in continuing intermittent congestion of the nose, Hedigan J., in quashing the decision of the Minister that such injury was minor, offered the following view at para.5:

> *"The court should look primarily to the nature of the injury but it may also take account of comparator cases to determine the unreasonableness or otherwise of the characterisation as minor of a particular injury. Clear inconsistency in the characterisation of such injuries is obviously undesirable and indicative of unreasonableness. Such inconsistency can only be identified by comparison with similar cases."*

23. To the extent that this observation departs from the observations of Geoghegan and Hogan JJ. in *Merrigan* and *McGuill* respectively that s.6 of the Act of 1941 posits a test which focuses on the nature of the injury actually suffered, the court respectfully prefers the views of Geoghegan and Hogan JJ. in this regard. Moreover, although consistency in result may be a desirable objective, that consistency, it seems to the court, ought to arise from the consistently correct application of the clear and express wording of statute, not by trying to equate one injury with another by reference to, if the court might respectfully observe, the not unassailable contention that the fact that an injury falls to be treated in one way in one case ought to lead to it being treated in a similar way in a different case. Be all that as it may, however, the court has been referred to a number of comparators by counsel for Mr Callan, though it would be fair to say that counsel did not seek to place especial reliance on these comparators, and the extent to which comparison could be made was vigorously and successfully resisted by counsel for the Minister on the basis that when it came to those comparators counsel for Garda Callan was not comparing (and he was not comparing) like with like.

V

The Express and Clear Wording of Statute

24. Notwithstanding the helpfulness of the above-mentioned judgments, it is important to remember that there is not a single case on record in which it has been suggested that the courts in considering whether s.6 has been correctly applied by the Minister should or may depart from the express and clear wording of s.6 of the Act of 1941 and the critical question which falls to be answered by reference thereto, viz. 'are the injuries presenting 'injuries…of a minor character'?', with the words "*injuries*" and "*minor*" bearing their ordinary English meaning as defined, for example, in the *Oxford Online Dictionary*:

"injuries"	*"minor"*
"1. An instance of being injured…. synonyms: wound, bruise, cut, gash, tear, rent, slash, gouge, scratch, graze, laceration, abrasion, contusion, lesion, sore; technical trauma"	*"1. lesser in importance, seriousness, or significance…. synonyms: slight, small"*

25. Again, an application of the plain wording of s.6 presents no issue as regards the conclusion reached by the Minister. If the court might borrow the above-quoted terminology deployed by Carney J. in *McGee*, the Minister's certification does no violence to the English language and represents but the discharge by the Minister of the statutory function to filter out the advancement of claims that are in respect of "*injuries…of a minor character".*

VI

Conclusion

26. Garda Callan suffered an injury that ought never to have been visited upon him, at a time when, in the discharge of his duty to protect the public, he was arresting individuals for public order offences. What he suffered in and after his injury ought not to be under-estimated: getting one's hand caught in a door, losing the relevant finger-nail, getting stitches to the nail-bed, *etc*., these are experiences from which any rational being would shrink. However, the court's task in the within proceedings is relatively limited. It is confined to deciding whether the Minister in reaching the decision contained in the letter of 16th November, 2016, acted in (to borrow from the wording of Hogan J. in *McGuill*, para.3) a manner that was "bona fide, *factually sustainable and not unreasonable*", as well as otherwise in accordance with law. The good faith of the Minister has not been challenged by Garda Callan. For all of the various reasons aforesaid, the court considers that the Minister acted in a manner that was "bona fide, *factually sustainable…not unreasonable"* and not otherwise legally flawed. That does not mean that were the court placed historically in the position of Mr O'Leary it would necessarily have reached the same conclusion that he reached (and at least one other person in the Department of Justice (Ms Butler) viewed matters differently from Mr O'Leary). But what it does mean is that there is no basis in law on which the court could now grant any of the reliefs sought by Garda Callan. It follows, therefore, that all of those reliefs must respectfully be refused.