Neutral Citation: [2013] IEHC 449

THE HIGH COURT

[2012 No. 123P]

BETWEEN

TREVOR WEBSTER

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 10th day of October, 2013.

Background

1. There is no factual controversy as to the background to these proceedings or the factual basis of the defendants' application, to which this judgment relates, to have the proceedings struck out.

2. In July 2009 the plaintiff applied to Kilkenny County Council (the Council) to participate in a competition for employment as a retained fire fighter attached to Urlingford Fire Station, which was a permanent position. His application was successful to the extent that, at the conclusion of the interview process, he was informed by the Council that he had been ranked first out of the fifteen candidates on a panel for the position at Urlingford and would be selected for the position subject only to satisfactory medical reports, references, training and Garda vetting. The plaintiff provided satisfactory medical reports and references. The problem at the core of these proceedings has arisen out of the Garda Vetting disclosure process which ensued and which is a non-statutory process.

3. On 23rd September, 2009, the plaintiff signed a declaration in a "Garda vetting application form" presented and signed by the Council authorising An Garda Síochána to furnish to the Council "a statement that there are no convictions recorded against me in the Republic of Ireland or elsewhere, or a statement of all convictions and/or prosecutions, successful or not, pending or completed, in the State or elsewhere as the case may be". On 2nd February, 2010, the Garda Central Vetting Unit (the Unit) furnished to the Council a "Garda Vetting Disclosure" containing details "recorded against" the plaintiff of seven offences with which the plaintiff had been charged and in relation to which he had appeared in court on various dates in 2004, 2005 and 2007 and also recording that the "court result" on foot of each charge was non-conviction. On receipt of that information, the Council decided not to proceed with the appointment of the plaintiff to the position at Urlingford Fire Station. That decision was reflected in a letter of 9th February, 2010 from the Council to the plaintiff informing him that the Council would not be in a position to process his application any further. That decision gave rise to judicial review proceedings.

The judicial review proceedings

4. By order of the Court (McMahon J.) dated 1st March, 2010, the plaintiff was given leave to apply for judicial review in proceedings entitled "Trevor Webster, applicant, and Kilkenny County Council, the Commissioner for An Garda Síochána, Ireland and the Attorney General, respondents" under Record No. 2010/226 J.R. (the judicial review proceedings). In the judicial review proceedings the plaintiff sought various reliefs against the Council, for example, an order of *certiorari* quashing the decision refusing to process his application for the post at Urlingford Fire Station. The plaintiff also sought certain declaratory reliefs against the other respondents (the State respondents), including declarations that –

> (a) the State respondents "in maintaining, distributing and relying on certain records of non conviction touching upon the [plaintiff] have failed to vindicate the [plaintiff's] right to his good name and reputation; and
>
> (b) that the "maintenance, distribution and reliance by the [State] respondents on records of non conviction constitutes a failure to vindicate the [plaintiff's] constitutional rights, is unreasonable, irrational and contrary to the provisions of natural and constitutional justice."

5. The plaintiff was given leave to apply for relief by way of judicial review on the various grounds set forth in Paragraph E of the statement grounding the application for leave. One of the grounds set out in Paragraph E was as follows:

> "That the [plaintiff's] rights pursuant to the Constitution of Ireland and the European Convention on Human Rights have been breached and/or not been vindicated."

6. The judicial review proceedings came on for hearing on 22nd February, 2011. Having been at hearing for about two hours, the proceedings were settled and terms of settlement (the terms of settlement) in writing were executed on behalf of the parties on that day. The terms of settlement, in essence, comprised the following three elements:

> (a) There was agreement between the plaintiff and the Council that an independent third party would be appointed to investigate the plaintiff's application for the position of a full-time retained fire fighter with the Council and the process to be followed in that investigation was outlined in detail.
>
> (b) It was agreed that the State respondents would pay the plaintiff's costs of the judicial review proceedings, subject to a limitation which is not material, such costs to be taxed in default of agreement.
>
> (c) It was provided as follows in Clause 15:
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> > "This agreement is in full and final settlement of any claim that the [plaintiff] has or might have against the Respondents and each of them and their respective servants or agents or officers howsoever arising out of or in connection with the decision of the [Council] not to proceed with his application for employment whether the said claim is in respect of salary or other emoluments or otherwise or

howsoever arising out of the Garda Vetting disclosure referred to in these proceedings (which includes for the avoidance of doubt the second letter sent by the Garda Vetting Unit to the [Council] on 18th March, 2010)."

In the interests of clarity, it is appropriate to record that the letter of 18th March, 2010 gave further details of the "Court result" and disclosed that in the case of six of the charges the proceedings were struck out because the injured party was not willing to give evidence and in the case of the seventh charge the reason for the strikeout was not recorded.

7. The terms of settlement also provided in Clause 16 that the judicial review proceedings were "to be struck out without order save an order for the taxation of the [plaintiff's] costs" as outlined earlier in the terms of settlement. As a consequence of the terms of settlement, by order of the Court (Hanna J.) made on 23rd February, 2011, the terms of which will be outlined in more detail later, it was ordered that the State respondents pay the plaintiff's costs when taxed and ascertained.

8. The result of the independent investigation which was conducted in accordance with the terms of settlement was that the decision of the Council not to employ the plaintiff was upheld and the plaintiff has unequivocally acknowledged that the decision is binding on him.

9. As regards the plaintiff's costs of the judicial review proceedings, the State respondents, being the defendants in these proceedings, discharged costs in the sum of €101,979.88.

Preliminaries to the initiation of these proceedings

10. By letter dated 14th July, 2011, the plaintiff's solicitors requested confirmation from the Unit that "details of any non convictions or pending charges against" the plaintiff would not be disclosed in any future applications for Garda vetting in relation to the plaintiff. It was stated that the confirmation was required because the plaintiff intended to apply for a position in the near future which required Garda vetting.

11. Following a reminder dated 11th August, 2011 from the plaintiff's solicitors, the Unit responded by letter which appears to be undated but was received by the plaintiff's solicitors on 30th August, 2011. The substance of the response was that the Unit conducts vetting for organisations registered with it in accordance with standard procedures. Those procedures require the vetting subjects to give their written authorisation, on the lines of the authorisation given by the plaintiff which has been quoted earlier, which encompasses disclosure of prosecutions, successful or not, pending or completed against the vetting subject. That being the case, predicated on the vetting subject's written authorisation, all prosecutions, successful or not, pending or completed may be disclosed. The disclosures are issued directly to the registered organisations. Policy, of which Garda vetting is just one component, in respect of assessing the suitability of the vetting subject for a position is a matter for the registered organisation. While it was not expressly stated, implicit in that response was that the confirmation sought by the plaintiff's solicitors would not be given.

12. The plaintiff's solicitors in a further letter of 26th October, 2011 called on the Unit to undertake "not to disclose to any party seeking a Garda vetting application in relation to [the plaintiff] any details other than to record that no convictions are recorded against him in the State or elsewhere". In the absence of such an undertaking, legal proceedings were threatened. The undertaking was not forthcoming and these plenary proceedings were initiated.

The proceedings

13. The proceedings were initiated by a plenary summons which issued on 19th January, 2012, in which the plaintiff claims, *inter alia*, the following reliefs:

(a) a declaration that "the current Garda Vetting Procedure" is a procedure which fails to vindicate the constitutional rights of the plaintiff and further breaches the constitutional rights of the plaintiff and, in particular, the plaintiff's right to his good name, reputation and his right to livelihood;

(b) a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003 (the Act of 2003) that "the Garda Vetting Procedure" as operated in the State is incompatible with the State's obligations under the European Convention on Human Rights and Fundamental Freedoms (the Convention); and

(c) injunctive relief restraining the first named defendant from disseminating or otherwise publishing or causing to be published any details to any third party relating to anything other than the details of convictions recorded against the plaintiff in the State or elsewhere.

14. In the statement of claim delivered on behalf of the plaintiff it was pleaded that the plaintiff wishes to apply for a vacancy "either with the Civil Defence Forces or other such body or organisation". It was further pleaded that there is no justification for details of charges in respect of which the plaintiff has not been convicted being furnished by the Unit in connection with such an application or any other application the plaintiff may make in the future and that such dissemination or publication would constitute a violation of the plaintiff's constitutional rights and be repugnant to the Constitution and incompatible with the State's obligations under the Convention. As regards the alleged breach of constitutional rights, various provisions of Article 40 and Article 43 were specifically invoked. As regards the alleged breach of Convention rights, no particular article of the Convention was invoked.

The application

15. On this application the defendants seek to have these proceedings struck out on various grounds, which on the basis of the submissions made by counsel for the defendants may be subsumed under the following headings;

(a) that these proceedings are in breach of the terms of settlement entered into on 22nd February, 2011 in relation to the judicial review proceedings;

(b) that the claims being pursued in these proceedings are *res judicata*;

(c) that these proceedings are an abuse of process and, in particular, that they are in breach of the rule in *Henderson v. Henderson*; and

(d) that the plaintiff has failed to establish *locus standi* to pursue the claims and reliefs sought in these proceedings.

The defendants have also sought to have whole of part of the proceedings struck out on the ground that they disclose no statutory provision or rule of law which could be the subject of a declaration of incompatibility with the Convention pursuant to s. 5 of the Act

of 2003.

16. It is necessary to consider each of the foregoing grounds separately.

Alleged breach of terms of settlement
17. There is no doubt that the plaintiff is bound by the terms of settlement. Indeed, the plaintiff's counsel did not seek to argue otherwise. Whether there has been a breach of the terms of settlement in initiating and prosecuting these proceedings turns on the proper construction of Clause 15 thereof, which has been quoted earlier. Counsel for the defendants submitted that, in interpreting the terms of settlement, the Court should adopt the orthodox rules of contractual analysis and relied, in particular, on the following statement of Keane J. *Kramer v. Arnold* [1997] 3 I.R. 43 (at p. 55):

> "In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances."

18. The defendants' position as articulated by their counsel was that in these proceedings the plaintiff is trying to re-litigate the issue litigated in the judicial review proceedings and is precluded from so doing on the proper construction of Clause 15 of the terms of settlement for two reasons. First, notwithstanding that in Clause 15 the agreement embodied in the terms of settlement is expressed to be "in full and final settlement of any claim" arising out of or in connection with the decision of the Council not to employ the plaintiff, the factual background of the plaintiff's claim as pleaded in the statement of claim concerns that position and the plaintiff's current position as pleaded contains no elaboration as to which specific other positions the plaintiff has applied for. Secondly, it was submitted that the words "or howsoever arising out of the Garda Vetting disclosure referred to in these proceedings" in Clause 15 preclude the plaintiff from seeking to challenge the Garda Vetting scheme in any future action, the Garda Vetting disclosure referred to in the judicial review proceedings being the same as the Garda Vetting disclosure referred to in these proceedings.

19. Counsel for the plaintiff submitted that the ordinary meaning of Clause 15 is that the terms of settlement represented a full and final settlement of the dispute between the parties arising from the decision of the Council in February 2010 not to process the plaintiff's employment application further on foot of the receipt of the Garda Vetting disclosure, not that the plaintiff might never again take any action against the defendants in relation to the Garda Vetting process. The alternative submission made on behalf of the plaintiff was that Clause 15 should be interpreted in the light of the *contra proferentem* rule and that any ambiguity must be interpreted in favour of the plaintiff.

20. There is no ambiguity in Clause 15 of the terms of settlement and, in my view, there is no necessity to resort to the *contra proferentem* rule. Having regard to the language used in Clause 15, in the context of the surrounding circumstances, that is to say, the settlement of the judicial review proceedings which related to the decision of the Council, which was primarily a consequence of the Unit's disclosure letter of 2nd February, 2010, as regards the State parties in the judicial review proceedings, being the defendants in these proceedings, Clause 15 rendered the terms of settlement "full and final" as regards disclosures made to the Council in 2010. As a matter of construction of Clause 15, on a plain reading of it in that context, I am not satisfied that it precludes the plaintiff from initiating and pursuing a claim against the defendants arising out of any Garda Vetting disclosure which might be made in relation to the plaintiff, apart from the disclosure made in 2010, including the amplified disclosure in the letter of 18th March, 2010.

21. Accordingly, in my view, the defendants are not entitled to have these proceedings struck out on the ground that they are in contravention of the terms of settlement.

Res judicata
22. In support of their contention that these proceedings should be struck out on the ground of *res judicata*, the defendants relied on a decision of the Court of Appeal in England and Wales: *Specialist Group International Limited v. Deakin & Anor*. [2000] EWCA Civ 777. In particular, they relied on paragraphs 22 and 23 of the judgment, quoting paragraph 23, which is in the following terms, in their written submissions:

> "If a claim has been explicitly determined in previous concluded proceedings between the same parties, that claim cannot be raised again, other than on an appeal, unless there is fraud or collusion. If a necessary element of a claim has been explicitly determined in previous concluded proceedings between the same parties, that issue cannot be raised again, if, as is likely but not inevitable, it would be an abuse to raise that issue again. This may also extend to an implicitly necessary element of the previous determination. The previous determination may include a settlement. If a claim or issue has not been determined in previous concluded proceedings between the same parties, there may nevertheless be circumstances in which, as a matter of public and private interest on a broad merits-based procedural judgment, it would be an abuse for a party to raise that claim or issue. Such circumstances may, depending on the facts, exist where the litigant could and should have raised the matter in question in earlier concluded proceedings. There may in particular cases be other elements of abuse, including oppression of another party; but abuse of process is a concept which defies precise definition in the abstract. The Court will only stop a claim as an abuse after most careful consideration."

23. In particular, counsel for the defendants underlined three sentences in the above quotation: the sentence which stated that that previous determination may include a settlement; and the two sentences which preceded that sentence. As he explained in paragraph 22, what May L.J. was doing in that paragraph was explaining the concepts of cause of action estoppel and issue estoppel in simple and easily understandable language, which, in my view, he achieved, as well as explaining the basis of the rule in *Henderson v. Henderson*, but without referring to that decision. However, the issue which requires to be addressed on this application is whether the Court's consent order of 23rd February, 2011 is "a final and conclusive judgment on the merits", so as to ground a plea of *res judicata*.

24. Counsel for the plaintiff relied on the commentary in Delany and McGrath on *Civil Procedure in the Superior Courts* (3rd Ed.) on the circumstances in which an estoppel *per rem judicatam* may be raised on foot of a default or consent judgment. Having stated that it may be so raised, the authors also state at para. 32 – 22:

> "However it is important to note that, as emphasised by Davitt J. in *Kinsella v. Byrne* [(1940 74 ILRT 157], a consent can only give rise to an estoppel where it has resulted in a judgment by the court. This is because it is not an agreement of the parties which creates an estoppel but the judgment given on the basis of that agreement. Thus, in *Kinsella*, where the order of the court merely made the consent a rule of court and stayed all further proceedings the consent did not operate as an estoppel because there was no adjudication on any of the issues raised by the parties."

The authors go on to state that, similarly, a plea of *res judicata* cannot be grounded on an order striking out proceedings as this does not involve any adjudication on the merits. They then go on to analyse the decision of the High Court (O'Neill J.), which was affirmed by the Supreme Court, in *Sweeney v. Bus Átha Cliath* [2004] 1 I.R. 576.

25. The decisions in *Sweeney v. Bus Átha Cliath*, on which counsel for the plaintiff relied in submitting that these proceedings are not *res judicata*, arose out of a road traffic accident. Leaving aside some of the factual complexities of the case, the core facts were that the plaintiff, Mr. Sweeney, was the driver of the car which collided with a bus of the first defendant, Bus Átha Cliath. He instituted proceedings for personal injuries against the defendants, including Bus Átha Cliath in the High Court. Bus Átha Cliath had issued proceedings against the plaintiff in the Circuit Court for loss incurred in relation to damage to the bus. Mr. Sweeney's insurers settled the Circuit Court proceedings and a consent order was made in which it was ordered that the plaintiff's action (*i.e.* the action of Bus Átha Cliath) be struck out and that the plaintiff (*i.e.* Bus Átha Cliath) recover from the defendant (*i.e.* Mr. Sweeney) the costs of the proceedings to be taxed in default of agreement. In his judgment in the High Court proceedings on a preliminary issue as to whether the issue between Mr. Sweeney and Bus Átha Cliath was *res judicata*, O'Neill J. distinguished the decision in *Kinsella v. Byrne*, stating that, in his view, it could not be considered as authority for the proposition that the order made, which terminated the Circuit Court proceedings, although final, could give rise to issue estoppel. The following passage from his judgment (at pp. 583 and 584) was relied on by counsel for the plaintiff:

> "Where, as in this case, the proceedings are brought to a conclusion by an order simply striking out the proceedings, it cannot, in my view, be said that any judgment is given or that any judicial decision is made. The essence of a strike out of the proceedings is to terminate the proceedings without any recourse to a judicial decision on the claims made in the proceedings. A judgment by consent is wholly different because what happens there is that the court, with the agreement of the parties, moves to an agreed determination on the claims made in the proceedings. Hence, although there is not a judgment which expressly deals with the issues raised in the proceedings, it can, nevertheless, be said that in order for there to be a judgment, certain issues were necessarily determined for that purpose. Nothing of the kind can be said where the proceedings are terminated by a simple strikeout. It cannot be said, without further evidence, what the outcome of the case has been between the parties, and it cannot be inferred from a strikeout what issues are necessarily determined. Hence, in my view, as a matter of principle, an order of the kind made in the Circuit Court proceedings here, although final, cannot satisfy an essential requirement in order to invoke the doctrine of *res judicata*, namely, to indicate the issues either expressly determined or necessarily determined, so that it can be said that these same issues cannot be litigated again in further proceedings by a party against whom they have been determined."

26. In delivering judgment in the Supreme Court, Keane C.J., with whom the other Judges concurred, stated that the High Court was entirely correct in deciding that the first requirement of issue estoppel (that the same question has been decided) was not met. He stated (at p. 589):

> "There was no judicial determination or decision of the issue of liability. What happened was that the insurers, as they were no doubt entitled to do, decided not to contest the issue of liability and to treat the matter as an assessment of damage only. It is not necessary to consider what the position would be if judgment had been entered by consent for the agreed amount of the damages because that did not happen. What happened, as happens so often today, was that the proceedings were simply struck out. They were struck out in circumstances where no plea as to liability had been raised and on no view could that be said to constitute a determination or a decision of the issue of liability. Nor can it be said, on any view, that the plaintiff, in maintaining proceedings in respect of the injuries which he sustained in the accident, is, in any sense, attempting to re-litigate an issue which was previously decided against him in proceedings because it was not decided against him in any proceedings."

27. It is appropriate at this juncture to look more closely at the terms of settlement and the terms of the order of the Court perfected on foot of the terms of settlement. As has been recorded earlier, in Clause 16 of the terms of settlement it was agreed that the judicial review proceedings were "to be struck out without order save for an order for the taxation of the [plaintiff's] costs" as agreed to earlier in the terms of settlement. The order of the Court, which was made on 23rd February, 2011, as perfected, recited that the defendants' motion had come on for hearing on 22nd March, 2011 and that counsel on both sides had been heard and that on 23rd February, 2011 the settlement had been reached. The curial part of the order merely ordered that the State respondents (*i.e.* the defendants in these proceedings) pay the plaintiff's costs as agreed when taxed and ascertained. The proceedings were not struck out in the curial part of the order, as had been agreed. That omission could clearly be rectified under the so-called Slip Rule and, accordingly, for present purposes I consider that it is appropriate to regard the judicial review proceedings as having been struck out by order of the Court by consent of the parties.

28. Following the decisions of the High Court and the Supreme Court in *Sweeney v. Bus Átha Cliath*, I am satisfied that the issues which had been raised in the judicial review proceedings against the State respondents, who are the defendants in these proceedings, were not the subject of any judicial determination or decision in the judicial review proceedings. Accordingly, I am satisfied that the plaintiff is not precluded by operation of the doctrine of *res judicata* from prosecuting these proceedings.

29. The basis of the foregoing conclusion is that the order of the High Court in the judicial review proceedings did not involve any adjudication on the merits of the issues raised in these plenary proceedings between the plaintiff and the defendants. For completeness, I would observe that the submissions made on behalf of the plaintiff based on the commentary in Delany and McGrath (at para. 32 – 98 *et seq*.) as to whether the principles of issue estoppel are applicable at all in judicial review proceedings are misconceived. The issue on the defendants' application is whether the principle of *res judicata* applies to these plenary proceedings.

Abuse of process/rule in *Henderson v. Henderson*

30. As is pointed out in Delany and McGrath (at para. 32 – 148), there is a useful summary of the distinction between the doctrine of *res judicata* and the rule in *Henderson v. Henderson* and the consequences of their application in the judgment of Clarke J. in *Moffitt v. Agricultural Credit Corporation plc* [2008] 1 ILRM 416, where it is stated (at p. 424):

> "*Res judicata per se* applies where the matter sought to be litigated has already been decided by a court of competent jurisdiction. . . . The rule in *Henderson v. Henderson*, on the other hand, applies where a new issue is raised which was not, therefore, decided in the previous proceedings but is one which the court determines could and should have been brought forward in the previous proceedings.
>
> The importance of the distinction lies in the consequences. If a matter is *res judicata* then, in the absence of a defence to the application of the doctrine such as fraud, the availability of fresh evidence in respect of issue estoppel only, estoppel, or other special cases, the plea will necessarily succeed.

> On the other hand, where reliance is placed on the rule in *Henderson v. Henderson* to the effect that it would be an abuse of process to now allow the party concerned to raise a different issue which could have been raised in the original proceedings, it is well settled that the court adopts a more broad based approach."

31. On this application it was submitted on behalf of the defendants that the Court should exercise its discretion in favour of striking out these proceedings given the following factors:

> (a) that the judicial review proceedings provided an apt opportunity to seek the reliefs sought in these proceedings;
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> (b) the significant costs of the earlier proceedings which were borne by the defendants;
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> (c) the fact that at all material times (including in the course of the settlement talks and agreement) the plaintiff had legal representation; and
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> (d) that it is in the public interest that there should be an "efficient use of court time" citing the judgment of Finnegan J., with whom the other Judges of the Supreme Court concurred, in *Arklow Holidays Limited v. An Bord Pleanála* [2012] 2 I.R. 99 (at p. 129).

Counsel for the defendants also submitted that the Court should have regard to the fact that no explanation has been given by the plaintiff as to why the earlier proceedings did not include the reliefs sought in these proceedings, referring to the decision of the Supreme Court in *A.A. v. Medical Council* [2003] 2 I.R. 302 and, in particular, to the observations of Hardiman J. at p. 318. Counsel for the defendants also identified what it was submitted were other pertinent factors, namely:

> (i) the short space of time between the initiation of these plenary proceedings and the determination of the judicial review proceedings;
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> (ii) the fact that nothing new had happened in the intervening period;
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> (iii) the fact that the plaintiff had not applied for any position which would have involved the Garda Vetting process and merely expressed general aspirations; and
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> (iv) the fact that the evidence showed that there had been no change in the Garda Vetting process.

32. The basis on which counsel for the plaintiff in response submitted that these proceedings are not within the ambit of the rule in *Henderson v. Henderson* was that, while the judicial review proceedings were the appropriate basis for challenging the decision of the Council not to appoint the plaintiff to the position of retained fire fighter, the judicial review proceedings were not the appropriate forum in which to challenge the constitutionality of the Garda Vetting procedure and, in particular, its lack of statutory basis or to test its incompatibility with the Convention. Rather, the appropriate manner to pursue those challenges was by way of plenary proceedings. In this connection, the plaintiff relied on the decision of the Supreme Court in *S.M. v. Ireland* [2007] 3 I.R. 283.

33. The factual background to the proceedings to *S.M. v. Ireland* is succinctly outlined in the headnote. The plaintiff brought judicial review proceedings in February 1998 seeking to restrain his criminal prosecution of twenty three offences of indecent assault on a number of complainants contrary to s. 62 of the Offences against the Person Act 1861 on the grounds of delay. The application, which was against the Director of Public Prosecution (DPP), was refused by the High Court (McGuinness J.) in December 1999. In February 1999 the plaintiff had been served with a second book of evidence charging him with a further eight offences of indecent assault contrary to s. 62 on two separate and distinct complainants. No judicial review proceedings were ever initiated in relation to the later eight charges. The plaintiff then instituted plenary proceedings in 2003 claiming, *inter alia*, a declaration that s. 62 of the Act of 1961 was unconstitutional and consequential relief by way of injunction restraining the further prosecution of all of the offences contrary to s. 62 against him. The defendants in those proceedings were Ireland, the Attorney General and the DPP. After the proceedings were listed for hearing in 2005, the defendants brought a motion seeking to dismiss the plenary proceedings on the basis that they were an abuse of process. The Supreme Court reversed the decision of the High Court dismissing the plaintiff's claim on the grounds that the plenary proceedings were an abuse of process.

34. In his judgment, with which the other Judges of the Supreme Court concurred, Kearns J. found that the defendants had failed to put forward any evidence or reasoning to support a case of abuse or misuse of process based on any collateral attack of a decision made in the prior judicial review proceedings (para. 45). He further found that the plenary proceedings raised a discrete constitutional point which could not "sensibly" have been raised as part of the judicial review proceedings and pointed to the fact that the defendants had merely contended that the plaintiff could have raised his constitutional point either in the judicial review or in parallel plenary proceedings brought at the same time (para. 46). Kearns J. pointed to certain "changed circumstances" between the judicial review proceedings and the plenary proceedings, for example, the fact that eight additional charges involving different complainants were added to those which were the subject matter of the judicial review and there had been no litigation of any sort in relation to the second tranche of charges. Of particular significance for present purposes is the following passage from the judgment of Kearns J. (at para. 48):

> "Furthermore, the plaintiff is not here seeking to reopen the same subject of litigation. He is not seeking to challenge a related procedural defect which might, and which should have been argued in the context of his delay type judicial review in 1998. What the plaintiff seeks to achieve in the present proceedings is a discrete and distinct subject of litigation, namely, that of seeking to have the statutory sentencing regime as set out in s. 62 . . . declared unconstitutional. The *dictum* of Barrington J. in *Riordan v. An Taoiseach (No. 2)* [1999] 4 I.R. 343 makes it clear that this was not a relief to be claimed appropriately in the judicial review proceedings."

On the "parallel proceedings" argument, Kearns J. stated as follows (at para. 49):

> "Finally, any case on the 'parallel proceedings' argument seems to me to have the fatal flaw that such proceedings could not address charges not yet in being at the time of the judicial review proceedings and in respect of which no legal proceedings were ever brought. In another case, however, that argument might well prove conclusive in favour of a defendant."

A factor which informed the decision to allow the appeal in that case was the defendants' delay in bringing the motion to dismiss.

35. There are many features of these proceedings which distinguish them from *S.M. v. Ireland*. No question of delay on the part of

the defendants in bringing the application to strike out these proceedings arises. There have been no changed circumstances since the terms of settlement were agreed and since the striking out of the judicial review proceedings. On that point, I think what is material is that there have been no changed circumstances which were brought about in a manner effected by the defendants or any of them or any other public body, or any emanation of the State. The crucial question, however, in my view, is whether, insofar as any new allegations are made or any new reliefs are claimed in these proceedings, they could have "sensibly" been raised as part of the judicial review proceedings or, alternatively, in parallel plenary proceedings brought at the same time. The answer to that question, as regards any new or different elements in these proceedings, in my view, is that they could.

36. In the judicial review proceedings one of the grounds on which the plaintiff sought relief against the State respondents, as has been recorded, was that his rights pursuant to the Constitution and the Convention had been breached or had not been vindicated. As regards the invocation of the Constitution, while the declaratory relief sought in the judicial review proceedings was formulated in different terminology to the declaratory relief sought in the plenary proceedings, in substance, in both proceedings what the plaintiff was and is seeking relates to his rights under the Constitution. Therefore, in substance, there is no difference between the invocation of constitutional rights in both proceedings. In particular, in reality there is nothing new in these proceedings. Unlike the *S.M. v. Ireland* case, the plaintiff in these proceedings is not seeking to challenge the validity of a statutory provision in accordance with the Constitution. As regards the invocation of the Convention, there is a new element in these proceedings in the form of a claim for declaratory relief. However, although the declaratory relief sought by the plaintiff in the judicial review proceedings did not specifically relate to any breach of the State's obligations under the Convention, it clearly could have done so. Having regard to the plaintiff's response to the defendants' contention that the plaintiff cannot establish an entitlement to declaratory relief under s. 5 of the Act of 2003, which will be more fully addressed later, in essence, the plaintiff's position is that the State has failed to perform its functions in a manner compatible with its obligations under the Convention, giving rise to a cause of action on his part under s. 3 of the Act of 2003. It is difficult to see how appropriate relief under the Act of 2003 could not have been claimed in the judicial review proceedings, particularly as one of the grounds on which the plaintiff's claim for relief was based was that there had been a breach of and a failure to vindicate his rights under the Convention.

37. Adopting the language of Hardiman J. in *A.A. v. Medical Council* (at p. 319), this present litigation –

> ". . . runs foul of the rule of public policy 'based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits where one would do'",

citing the words of Brooke L.J. in *Woodhouse v. Consignia p.l.c*. [2002] 1 WLR 2558 at p. 2575. Put another way, even adopting the more broad based approach identified in the passage from the judgment of Clark J. in *Moffitt v. Agricultural Credit Corporation* plc quoted earlier, I am satisfied that the defendants' reliance on the rule in *Henderson v. Henderson* is well-founded and that these plenary proceedings should be struck out as an abuse of process.

Relief under s. 5 of the Act of 2003

38. The response of counsel for the plaintiff to the defendants' submission that the plaintiff has failed to identify any statutory provision or rule of law in respect of which a declaration of incompatibility could be made under s. 5 of the Act of 2003 was that the reference to s. 5 in the plenary summons and in the statement of claim was a mistake and that what the plaintiff was really seeking was relief under s. 3 of the Act of 2003. That section mandates every organ of the State to perform its functions in a manner compatible with the State's obligation under the Convention provisions. If a requirement to amend the plenary summons and the statement of claim, which is implicit in that response, was the only issue on this application, it would be appropriate for the Court to adopt the approach advocated by McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425, where he stated (at p. 428):

> ". . . if the statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed."

Such approach would also be consistent with the flexible approach which is adopted in applying the rule in *Henderson v. Henderson*. However, in the light of what I stated earlier, such amendment would not take these proceedings outside the ambit of the rule in *Henderson v. Henderson*, because a claim based on s. 3 could have been brought in the judicial review proceedings.

Locus standi

39. While, having regard to the conclusion reached that these plenary proceedings do run foul of the rule in *Henderson v. Henderson*, the question of the plaintiff's standing to maintain the proceedings is hypothetical, I think it is appropriate to make it clear that my decision to strike out the proceedings is in no way informed by the defendants' submission that the plaintiff does not have *locus standi*. On the contrary, it seems to me that, notwithstanding that the plaintiff has not applied for any employment or appointment which would be subject to the Garda Vetting process, other than the appointment with the Council, nonetheless, he is in real danger of being adversely affected by the operation of that process. I note from the documentation exhibited that he is a young man, aged 32 years of age. He has averred that he wishes to apply for an appointment which would be affected by the process. In the circumstances, in my view, his case in challenging the process does not have, in the words of Henchy J. in *Cahill v. Sutton* [1980] I.R. 269 (at p. 286), "the insubstantiality of a pure hypothesis". In any event, counsel for the defendants made it clear that the defendants were not pursuing the application to strike out the proceedings on the ground of lack of *locus standi* alone; rather their position was that the question of *locus standi* feeds in to the overall picture.

Order

40. The only ground for striking out these proceedings advanced by the defendants which has been established is the ground based on abuse of process in accordance with the rule in *Henderson v. Henderson*. Having found that, insofar as there is a new issue arising from the application of the Convention in these proceedings which was not raised in the judicial review proceedings, it is an issue which could and should have been brought in the judicial review proceedings, there will be an order striking out these proceedings.