Neutral Citation Number: [2010] IEHC 411

THE HIGH COURT

2009 74 JR

IN THE MATTER OF SECTION 6 OF THE GARDA SIOCHÁNA (COMPENSATION) ACT 1941

BETWEEN:

MARK LOOBY

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice Hedigan delivered on the 17th day of November, 2010

1. The Parties

1.1 The applicant, Mark Looby, is a member of An Garda Síochána. The respondent is the Minister for Justice, Equality and Law Reform whose function, under the particular provisions applying to this case, is to deal with applications for compensation under the Garda Síochána (Compensation) Act 1941.

2. The Application

2.1 These proceedings challenge the decision of the respondent to decline to issue an authorisation to the applicant permitting him to apply to the High Court pursuant to section 6 of the Garda Siochána (Compensation) Act, 1941 for compensation for injuries suffered by him. The applicant was granted leave to apply by way for judicial review by Peart J. on the 26th of January 2009.

3. Factual Background

3.1 On the 14th August, 2001 Garda Looby was off duty at Fleet Street in Dublin. He saw an individual armed with a knife threatening a member of the public. Garda Looby informed the individual that he was a member of An Garda Síochána and directed him to put down the knife. The individual refused to do so and Garda Looby attempted to remove the knife from the said individual. A struggle ensued whereby he sustained a cut to the index finger of his left hand.

3.2 As the knife had penetrated his skin, he received a tetanus injection from his G.P., Dr. Carmel Hutchinson, on the 15th August 2001. Dr. Hutchinson felt that he was at low risk of contracting an infectious disease but that blood tests should be conducted. Blood tests were conducted on the 12th November 2001 and he received pre-test counselling. The tests proved negative for infectious diseases.

3.3 On 3rd January 2002 the applicant submitted to the respondent a form of application for compensation in respect of personal injuries not causing death as prescribed under the Garda Síochána (Compensation) Acts, 1941 and 1945. Garda Looby described his injuries as a cut to his finger and claimed he suffered from anxiety.

3.4 By letter dated the 5th February 2007 Ms. Sylvia Scheplawy of the Compensation Section, Department of Justice, Equality and Law Reform wrote to the solicitors for the applicant. She stated that after having examined all the documentation in Garda Looby's file, including the report of the Garda Chief Medical Officer and all medical reports submitted by Garda Looby, the Department was of the opinion that his injuries were minor and were received in the course of the performance of a duty not involving 'Special Risk'. Ms Scheplawy informed his solicitors that in light of this and the High Court Judgments in *McGee v Minister for Finance* [1996] 3 I.R. 234 and *Merrigan v Minister for Justice* (Unreported, High Court, 28th January, 1998), it was proposed to inform the Minister that the applicant's injuries were of a minor character and were sustained in the course of the performance of duty not involving special risk and that in accordance with the provisions of Section 6 (1) (b) (i) of the 1941 Act the application should be refused.

3.5 By letter dated the 15th August 2008 the Department of Justice, Equality and Law Reform informed the applicant that based on the information provided by him, the Minister was of the opinion that his injuries were of a minor character and were sustained in the course of a performance of a duty not involving special risk and that in accordance with the provisions of section 6(1) (b) (i) of the 1941 Act, his application should be refused. Thus the Minister decided that Garda Looby's application for authorisation to apply to the High Court for compensation would be refused.

4. Legislative Framework

4.1 The Garda Síochána (Compensation) Acts, 1941 and 1945 provide, *inter alia*, for the granting of compensation to members of the Garda Síochána on whom personal injuries not causing death have been inflicted in the course of, or in relation to, their performance of duties as members of the Garda Síochána. Section 6 applies whenever an application is duly made to the Minister for Compensation under this Act.

Section 6, sub-s. 1 (b) of the Act of 1941 provides as follows:—

> "If the application is in respect of injuries not causing death, then -
>
> > 1. (i) in case the Minister [for Justice] 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. (ii) in case the Minister is of opinion that, although such injuries are of a minor character, they were sustained in the course of the performance of a duty involving special risk and that a sum not exceeding one hundred pounds would be adequate compensation therefor, the Minister may, with the consent of the Minister for Finance, pay the applicant such sum not exceeding one hundred pounds as he thinks proper,

3. (iii) in any other case, the Minister shall authorise the applicant to apply to the High Court in accordance with this Act for such compensation."

Section 6, sub-s. 2 provides:-

> "The Minister shall not award under this section compensation in respect of personal injuries not causing death unless he is satisfied that this Act applies to the said injuries and that the applicant for the said compensation is the person on whom the said injuries were inflicted."

Section 6, sub-s. 3 provides:—

> "The decision of the Minister [for Justice] under this section on application to him for compensation under this Act shall be final and conclusive."

4.2 In sum, in the circumstances prevailing herein, in order to refuse authorisation, it is necessary that the Minister is of the opinion that the injuries (i) are of a minor character and (ii) that they were sustained in the course of a duty not involving special risk.

4.3 On the website of the Department of Justice, in the FAQ section relating to the Garda Compensation Scheme, the Commissioner of An Garda Síochána advises the following in relation to the meaning of what constitutes 'special risk.' " The Minister is advised by the Garda Commissioner whether the applicant sustained injuries while performing duties which involved special risk. Generally, members are detailed for similar duties on a regular basis and in the majority these duties pass without any incident occurring. Similar incidents could arise on any day or night, when members are on routine patrol and public order disturbances occur, resulting in riots or affrays. No special risk is considered to be attached to such incidents."

5. The Submissions of the Parties

5.1 The applicant argues that the Minister's categorisation of the injuries as minor in character is flawed and his categoration of the injuries as arising in circumstances not involving special risk is flawed. He argues that such categorisation is unreasonable.

5.2 The applicant submits that the injuries he sustained were in the course of duties which involved special risk. In relation to what constitutes a duty involving special risk, he submits that there is no definitive authority on this matter. He notes that even in the case of *McGee v Minister for Finance* where it was agreed that there was no duty which involved a special risk, an authorisation was still granted.

5.3. The applicant submits that the Minister cannot refuse an authorisation unless both criteria in s.6 subs. 1(b)(i) are satisfied. He argues that even if his injuries are minor, if the injuries sustained are due to malice and sustained in the course of the performance of duties, then the matter is one in which the High Court would be entitled to award compensation, and one therefore which ought to be authorised by the Minister. In this regard he relies specifically *on Carey, O Connor and O'Sullivan v. Minister for Finance*, (Unreported, 15th June, 2010). He submits that the Minister's decision to come to the opposite conclusion is not adequately reasoned.

5.4. The applicant further in oral submissions of counsel, that 'special risk' refers to the nature of the event and not the type of duty. It was argued that Garda duty inherently involves special risk, not ordinarily assumed by a citizen in the ordinary walk of life. In this regard, the applicant relies on *Fedorski v The Board of Trustees of the Aurora Police Pension Fund,* 375 111. App. 3d 371 (2nd Dist. 2007).

5.5 The respondent submits that for the applicant to succeed it must be shown that there is no evidence to support the decision of the respondent that the applicant's injuries were of a minor character. The respondent relies on the tests set out in *The State (Keegan) v Stardust Victims Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39. Because the procedure herein leading to the decision is not challenged, the decision can only be set aside if the applicant can show it was irrational.

5.6 The respondent submits that the Minister's decision that Garda Looby's injuries were of a minor nature was based on the completed application form of the applicant, the medical reports from Dr. Hutchinson and the report from the Garda Chief Medical Officer. The applicant was left with no residual medical effect, received a superficial laceration and his blood tests came back negative. The respondent seeks to rely on *McGee v Minister for Finance* [1996] 3 I.R. 234 and *Merrigan v Minister for Justice* (Unreported, High Court, 28th January, 1998).

5.7 In relation to the meaning of "in the course of a duty not involving special risk", the respondent submits that section 6 of the 1941 Act refers to the performance of a 'duty', and not to the circumstances of the event involved.

5.8 The respondent submits that the mere occurrence of injury cannot be a relevant factor in the assessment of whether the duty in question involves risk and that the use of the word special establishes the requirement that the risk in contemplation must be of a different character to that to which a Garda on normal duties would be exposed, and furthermore it must be a level of risk that is greater than is faced by a Garda who is performing his normal duties.

5.9 In relation to the incident in question, the respondent submits that the applicant, who was in fact off duty, may be considered as a Garda on patrol duty and that this duty is not special. In relation to the applicant's reliance on the US case of *Fedorski v The Board of Trustees of the Aurora Police Pension Fund*, the respondent submits that there is a clear distinction between the legislation in the US relevant to that case, and the legislation in this jurisdiction. Under *Fedorski* an act of duty is defined by the difference between a police officer and an ordinary member of the public. The respondent submits that in Ireland it is a special risk attendant upon a certain type of duty undertaken by one garda as opposed to another garda.

5.10 The respondent submits that the Minister gave adequate reasons that demonstrate a proper application of the tests and criteria set out in section 6 of the Act.

6. Decision

6.1 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 it's 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 irrationality of the decision.

6.2 In *The State (Keegan) v Stardust Victims Compensation Tribunal* [1986] I.R. 642, Henchy J held at p 658: 'I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and commonsense. If it does then the decision maker shall be held to have acted ultra vires for the necessarily implied constitutional limitation of jurisdiction in all decision making which affects rights or duties requires, *inter alia*, that the decision maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.'

6.3 In *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39, Finlay C.J. of the Supreme Court held, at p 71, that 'the Court cannot interfere with the decision of an administrative decision making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.' The Judge goes on to state at p 72 that 'in order for an applicant for judicial review to satisfy that the decision making authority has acted irrationality…so that the court can intervene and quash its decision, it is necessary the applicant should establish to the satisfaction of the court that the decision making authority had before it no relevant material which would support its decision.'

6.4 In this case the applicant has argued his case primarily on the basis of the unreasonable nature of decisions made on whether the applicant could be regarded as being involved in a duty which involves a special risk. In the light of the decision in *Carey, O Connor and O'Sullivan v. Minister for Finance,* where a very similar injury was held to be a minor injury, it is not possible to successfully argue that the decision herein was irrational. In any event, it is quite clear there was relevant evidence before the Minister upon which he could ground his decision.

6.5 The real challenge herein is based upon the alleged irrationality of the decision as to what constitutes a duty involving a special risk. The applicant relies in this regard on the decision of the appellate court of *Fedorski*. I agree with the respondent's argument that this case is of little assistance in this application. It is a case which focuses on the difference between a police officer and a member of the public in the context of identifying a special risk situation. In this application, however, we are dealing with the difference between the risk faced by a garda on normal duty and a garda on a duty involving special risk.

6.6 The applicant's argument that the nature of the event occurring while a garda is on duty should determine whether he is on a duty involving special risk does not seem logical to me. The wording of the Act provides the Minister should refuse an application in respect of an injury of a minor nature "sustained in the course of a duty not involving special risk." Thus the event i.e. the injury and the duty are two quite separate things and the one cannot create the other. In this case the garda was off duty but it is common case that he may be considered, for the purposes of the garda compensation scheme, to have been a garda on ordinary duty. Moreover, I note the garda commissioner has, on the Department of Justice website, set out a working definition of the "duty involving special risk." This confirms that ordinary garda duties do not constitute such a special risk duty situation.

6.7 It is therefore the case herein that the decision that the injury suffered was minor and was sustained in the course of the performance of a duty not involving special risk required the Minister to refuse the application. This decision, far from being irrational, was in my view the only one open to the Minister on the evidence before him. This application must therefore be refused.