

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 90 J.R.]

BETWEEN

AN GARDA SIOCHANA OMBUDSMAN COMMISSION

APPLICANT

AND

MAEVE O'BRIEN

RESPONDENT

AND

FINTAN O'BRIEN

RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Ms. Justice O'Regan delivered on the 20th day of December, 2017**Issues**

1. The applicant is seeking an order by way of application for judicial review quashing part of the determination of District Court Judge Kevin Kilrane made on the 29th July, 2015, clarified on the 22nd October, 2015 and further clarified on the 5th November, 2015 at Sligo District Court insofar as that order provides for an order of costs in favour of the first and second respondents hereto as against the applicant. The applicant is further seeking an order extending time within which it might maintain the within application pursuant to O. 84 r. 21 of the Rules of the Superior Court.

Background

2. The first and second named respondents were involved in a road traffic incident on the 23rd June 2011, which involved an off duty member of An Garda Síochána. On the 29th January, 2013 the said respondents made a complaint to the within applicant against a member An Garda Síochána. The complaint was based upon an attendance note taken by the first and second named respondents' solicitors on the 22nd January, 2013 and forwarded to the within applicant. On the 18th February, 2013 the applicant deemed the complaint admissible. On the 2nd May, 2013, the first named respondent was interviewed by the applicant at the first named respondent's solicitors premises and at that time an amended attendance dated the 28th February 2013 was furnished wherein the facts contained differed in a number of respects over the facts contained in the initial attendance note furnished to the within applicants. On the 2nd May, 2013, the first named respondent was informed of the provisions of s. 110 of the Garda Síochána Act, 2005, and on the 20th May, 2013, the second named respondent was also informed.

3. Section 110 aforesaid provides that it is an offence to give false and misleading information to GSOC

4. An investigation ensued by the applicants as to a possible offence contrary to s. 110 aforesaid and subsequently a file was prepared and referred to the DPP for consideration. A direction issued from the DPP's office that both the first and second named respondents be charged with an offence of providing false and misleading information contrary to s. 110 of the 2005 Act.

5. The trial of these charges took place in Sligo District Court before Judge Kevin Kilrane on the 29th of July, 2015, and during the course thereof a brief period of time having been sought, on the instructions of the office of the DPP, a *nolle prosequi* was entered. Thereafter, counsel on behalf of the first and second named respondents applied for costs and the District Court Judge afforded such costs and measured same.

6. On the application of the DPP the matter was re-entered on the 22nd October, 2015, where it was indicated that an order for costs could not be made as against the DPP. The District Judge affirmed his prior order for costs and directed that same be against the within applicant. The matter was re-entered on the 5th November, 2015 to enable the within applicant to make representations vis-à-vis the order for costs. Notwithstanding the various arguments raised by the applicant, the District Judge affirmed the order for costs made as against the applicant.

7. On the 22nd February, 2016, the applicant secured leave from Humphreys J. to maintain the within judicial review application.

Legal issues arising

8. By reason of the documentation and submissions made the following issues arise: -

- (1) Whether or not to grant an extension of time within which the applicant might maintain the within judicial review proceedings,
- (2) Whether or not it is the case that under s. 98 of the Garda Síochána Act, 2005, it is not possible to make an order for costs as against the within applicant,
- (3) Whether or not O. 36 of the Rules of the District Court permit the District Judge to make an order for costs against a party to proceedings in a criminal matter in circumstances where there is no statutory provision enabling the District Court Judge to make such an order,
- (4) Whether or not GSOC was a party to the proceedings which were heard before the Sligo District Court on the 29th. July, 2015.

Extension of time

9. The first and second named respondents rely on para. 14-45 of Derek Dunne, *Judicial Review of Criminal Proceedings*, 2011 at p. 707 to support the proposition that a satisfactory explanation must be forthcoming to secure an extension of time and courts are increasingly less tolerant of delays in noncompliance with the prescribed time limit under O. 84, r. 21 of the Rules of the Superior Courts, which requires an application for judicial review to be processed within a three-month period.

10. The respondents refer to the decision of Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301 where it was held that in order to secure an order to extend time, the reasons put forward must both explain the delay and afford a justifiable excuse for same.

11. The applicant relies on the judgment of Denham J. in the Supreme Court in *De Róiste v. Minister for Defence* [2001] 1 IR 190 where Denham J. indicated that there were no absolutes in the exercise of the courts' discretion to extend time and it is clear from precedents that the discretion has ever been to protect justice therefore there is a balancing factor to be undertaken by the court. Such matters as the nature of the order, the conduct of the parties, the effect of the order, any steps taken by the parties and the public policy requirement that proceedings be taken promptly except where good reason is furnished, are all relevant.

12. The applicants also point to the textbook relied upon by the first and second named respondents where it is indicated that the majority of judgments in which extensions of time were refused concern applications to prohibit criminal trials on the basis of missing evidence.

13. It is clear from a reading of the transcript that the evidence furnished by Mr. Sheridan, State solicitor, to the court on the 22nd October, 2016 was to the effect that he appeared on behalf of the DPP only and did not appear for the purposes of representing the within applicant. Accordingly therefore it does appear to me that although the District Court Judge suggested that the order for costs as against the within applicant was made on the 22nd October, 2016, nevertheless a certain order would have been made in the absence of any representation by the applicant.

14. In my view there is no merit to the argument of the first and second named respondents that in fact the order for costs was made on the 29th July, 2016 as against the within named applicant - if this had been clarified on that date there would have been no necessity for the State solicitor to arrange to have the matter re-entered on the 22nd October, 2015 to avoid the order being made as against the DPP.

15. In a judgment of Humphreys J. in *Crowley v. AIB PLC* [2016] IEHC 154, it was indicated that not having a copy of the order was an acceptable sufficient explanation for the delay in commencing judicial review proceedings. No argument has been tendered to this court to suggest that there is any deficiency in the order of Humphreys J. such that the case should not be followed.

16. The order was received by the applicant on the 22nd November, 2015 and the transcript was received on the 3rd February, 2016. The first and second named respondents do not appear to argue as to the necessity of having the order prior to the institution of judicial review proceedings but have argued that there was no necessity to await the transcript.

17. Leave to maintain the judicial review proceedings was granted on 22nd February, 2016.

18. The first and second named respondents through their agents were aware of the fact that as and from the clarification by the District Court of the 5th November, 2015, the applicants intended to maintain judicial review proceedings.

19. In resisting the application for an extension of time the first and second named respondents make the following arguments: -

(1) There is no compelling reason for the delay and it is suggested that the applicants do not come within the ambit of Costello J.'s decision in *O'Donnell* aforesaid,

(2) It is suggested that the respondents have been prejudiced in having the matter concluded having regard to the seriousness of the charges in which they faced and not knowing whether or not they have to pay costs,

(3) It is argued that the applicants were liable for the costs since the 29th July, 2015 and this should be the date of assessment of the extension of time application.

20. I am not satisfied that the seriousness of the charge which the first and second named respondents faced and which clearly ended with the entry of a *nolle prosequi* on the 29th July, 2015, continued to hang over the said respondents because of the within extension of time application - the only issue for which uncertainty remains insofar as these respondents are concerned is not knowing if they have to pay their costs incurred in resisting the charges in the District Court.

21. Balancing the position therefore between the parties and with regard to the various matters identified by Denham J. in assessing whether or not justice is protected by the extension of time sought to bring judicial review proceedings, I am satisfied that given that at best from the respondent's point of view it can be argued that an extension of one month is required (from the date of the Order of the 02/10/15) whereas from the applicants' point of view, if one accepts that the order was made on the 5th November, 2015, the extension of time period is just over two weeks, this is an appropriate case in which the extension of time should be afforded.

In my view, in circumstances where Mr. Sheridan appeared on behalf of the DPP and no evidence was tendered or no submission made to suggest that Mr. Sheridan was misleading the court in this regard, I am satisfied that the applicant has explained the delay up until the 22nd November 2015 when the Order of the District Court was secured and further this constituted a justifiable excuse for same.

Was GSOC a party to the District Court proceedings?

22. Order 36(1) of the District court rules, 1997, as amended provided:-

"Where the Court makes an order in any case of summary jurisdiction (including an order to "strike out" for want of jurisdiction) it shall have power to order any party to the proceedings other than the Director of Public Prosecutions, or an member of An Garda Síochána acting in discharge of his or her duties as a police officer, to pay to the other party such costs and witnesses' expenses as it shall think fit to award".

23. The arguments presented by the first and second named respondents to support the contention that GSOC was a party to the

District Court proceedings from the outset can be summarised as follows: -

- (1) The name of the applicants can be found on all witness statements,
- (2) The applicants participated in the prosecution and secured the relevant engineering evidence,
- (3) The title of the proceedings is headed "DPP at the suit of GSOC" therefore the applicants are the main prosecuting party,
- (4) All of the applicants' evidence was one-sided and was so held by the District Court Judge,
- (5) It is submitted that the State solicitor in fact acted for the applicants although there is no affidavit evidence to support this contention,
- (6) The District Court Judge held that the DPP had no role in the prosecution.

24. The applicants arguments that the applicant was not a party to the proceedings and therefore not amenable to an order for costs can be summarised as follows: -

- (1) The instructing solicitor was that of the DPP and there was no other solicitor appearing on behalf of the prosecution,
- (2) The relevant counsel, the decision to prosecute, the decision to enter a *nolle prosequi* and the party who was contacted when a brief adjournment was sought was the DPP,
- (3) The name of the applicants naturally appeared in all witness statements and in securing the engineer as it was the applicant, who conducted the relevant investigation,
- (4) The transcript confirms that the State solicitor acted on behalf of the DPP only,
- (5) The State solicitor re-entered the matter on the 22nd October, 2015 for the purposes of advising the court that the order for costs on the 29th July 2015 could not, from a statutory basis, be made as against the DPP and if in fact the applicants were the prosecuting party, then such argument would not arise,
- (6) Irrespective of all of the foregoing the applicants argue that in criminal proceedings, the District Court does not have authority to grant an order for costs against the prosecuting party without an independent statutory provision which does not exist.

25. In countering the last mentioned argument on behalf of the applicants, the respondent argues that a statutory provision is not in fact required although, unlike the applicant, the respondents did not refer to any jurisprudence to support their position. In addition the respondents did not in fact argue that a statutory provision did exist.

26. The applicants rely on two judgments, namely:-

(a) The judgment of Hedigan J. in *Southern Hotel Sligo Limited v. Iarnrod Eireann* [2007] IEHC 254, in a case stated from the District Court, where it was held that the relevant complaint in the District Court was not a claim in private law but more in the nature of a public law complaint, and as the relevant section of the legislation then under review did not provide for costs, no such order could be made.

(b) The judgment of Baker J. in *DPP v. Sean Douglas* [2015] IEHC 461. During the course of her judgment, Baker J. dealt with O. 51 r. 1 of the District Court Rules and O. 36, r. 1 of the District Court Rules. In O. 51 r. 1, it is provided that save as otherwise provided by statute or by Rules of Court, the granting or withholding of the costs of any party in civil proceedings in the District Court shall be in the discretion of the court. The court also distinguished between Part 2 and Part 3 of the 1987 Rules. At para. 49 of the judgment the court held that "the Rules committee, having made a distinction between criminal proceedings and civil proceedings thereby excluded from the jurisdiction to award costs proceedings which are characterised by the Rules as being "criminal proceedings".

28. The respondents do not raise any counter jurisprudence nor do they suggest that for any particular reason the court should not follow the decisions of Hedigan J. and/or Baker J.

29. Insofar as it is suggested that the applicants were a party to the proceedings, it is clear that the decision making process vis-à-vis the institution and effective ultimate abandonment of the criminal proceedings was made by the DPP and that for the purposes of processing the prosecution it was the DPP's personnel who were present albeit they did avail of evidence from the applicants together with the witness statements secured by the applicant in or about the prior investigation, I am satisfied that it was the DPP and not the within applicant that was the relevant prosecutor and relevant party to the proceedings. For the avoidance of doubt I am satisfied that the within applicants were not a party to the District Court proceedings.

Conclusion

30. In conclusion therefore, an order will be made extending time within which the judicial review proceedings might be maintained by the applicant, and thereafter an order will be made quashing the decision of the District Court of the 22nd October, 2015 and/or the 5th November, 2015 insofar as it purported to award costs to the first and second named respondents herein to be paid by the within applicant.