Neutral Citation: [2016] IEHC 224

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 796 JR]

BETWEEN

SHARON MAYBURY

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 3rd day of May, 2016.

1. The applicant is a member of An Garda Síochána and brings this application for judicial review arising from the decision of the respondent to transfer her from Killarney Garda Station to Tralee Garda Station on or about the 5th June, 2012. She seeks an order of *certiorari* quashing the decision and/or a declaration that in seeking to transfer her, the respondent acted without jurisdiction, in breach of fair procedures and in breach of the Garda Síochána Code ("the Code"). The applicant asserts that it was not her wish to move to work in Tralee, and that she did not apply for a transfer. The facts may briefly be stated.

Facts

2. On the 5th June, 2012 the applicant was directed by the Chief Superintendent in Killarney to take up duties in Tralee Garda Station on the following day, the 6th June, 2012. The applicant did attend at Tralee Garda Station on the 6th June, 2012 but asserts that she did so as a matter of courtesy, not with a view to accepting the transfer, and as she so communicated to the Assistant Commissioner.

3. There is a process of appeal within the Code and this admits of appeal or review at a number of levels. The complex stages of the processes for appeals and reviews are set out in Chapter 8. In Noonan v. Commissioner of an Garda Síochána [2007] IEHC 354 McKechnie J. accepted as a matter of principle that members of An Garda Síochána:

> *"have a legitimate expectation that the provisions of the Gardaí code would be applied unless there was a legal justification for not so doing."*

4. Having considered the judgment of the Supreme Court in *Glencar Exploration Plc v. Mayo County Council* [2002] 1 I.R. 84, he went on to say that the legitimate expectation of a Garda in regards to the operation of the Code:

> *"stems from the existence and publication of the Code and that the applicant's standing to rely upon it arises from his membership of An Garda Síochána to whom the Code is addressed." (para. 26)*

5. The applicant's first appeal against her transfer was rejected on the 12th July, 2012 on the grounds that an appeal could not retrospectively alter a transfer which had already occurred. This was based on a view that the applicant had accepted the transfer by attending at Tralee on the 6th June, 2012.

6. She then asked for the matter to be submitted to the Garda Commissioner in accordance with the provisions of Article 8.13(5) of the Code. This second stage of appeal was commenced on the 7th August, 2012. Her file was referred back by the Commissioner to the same Assistant Commissioner who had earlier reviewed the decision. On the 24th September, 2012 her Chief Superintendent was informed that her appeal was rejected, and on the 7th November, 2012 her solicitor was informed by the Commissioner that this appeal was rejected.

7. On the 6th November, 2012 the applicant availed of the third procedural stage and applied for a review by the Transfers Review Body pursuant to the provisions of Article 8.14 of the Code. The Transfers Review Body met to hear the appeal on the 22nd April, 2012 and adjourned to the 29th August, 2012. On the 17th October, 2013 the Transfers Review Body informed the applicant that her appeal on review had been rejected.

8. The applicant asserts that the procedures adopted by the respondent are fundamentally unfair, and that at each stage of review and appeal the decision of the relevant body came to its decision on an erroneous view that she was seeking to retrospectively appeal what had been a valid transfer.

9. The respondent argues that the applicant had agreed to transfer from Killarney to Tralee as part of a compromise reached with the assistance of her representative association, arising from so-called "performance issues", and because she would be subject to a greater degree of supervision in Tralee Garda Station. It is asserted that the applicant agreed to transfer at a meeting on the 4th May, 2012 and that she confirmed her agreement on the 5th June, 2012, the day before she attended at Tralee Garda Station.

Time limits

10. By way of preliminary objection the respondent objects to the application for judicial review on the grounds that the applicant is out of time. It is asserted that time began to run when the applicant was directed to transfer to Tralee Garda Station on the 5th June, 2012, and that as the leave application was not brought until the 4th November, 2013, the applicant is out of time and has offered no justifying reason which would entitle her to an extension of time.

11. This issue can best be dealt with by first determining what decision is impugned in the present application for judicial review.

Which decisions are subject to this application?
12. The applicant has sought to challenge four decisions: the decision of the 5th of June, 2012 transferring her, the decision of the 12th of July, 2012 by which her first appeal was rejected; and the decision of the 7th of November 2012 when her appeal to the Commissioner was rejected and the final rejection on 17th October 2013 by the Transfers Review Body.

13. The role of the High Court in a judicial review where an applicant has exhausted internal remedies has been considered by Finlay Geoghegan J. in *N.A.A. v. Refugee Applications Commissioner* [2007] 2 I.R. 787in which she said the following:

> *"…the normal position must be that where an appeal is determined an applicant has gone too far and the High Court will not subsequently interfere with the first instance decision by way of judicial review. Whilst the court retains a discretion to do so it should only exercise its discretion to grant certiorari of a decision which has been the subject of a decided appeal where there exist special circumstances which make such late interference necessary to do justice for the parties. (para. 67)*

14. Finlay Geoghegan J. noted that there could not be an exhaustive list of what might constitute special circumstances, but held that no such circumstances existed in the case before her:

> *"On these facts the applicant must also be considered to have acquiesced in or permitted the second respondent determining the appeal. No steps were taken on the applicant's behalf to prevent the [Tribunal] from deciding the appeal even after the [Commissioner] refused to quash her recommendation and reopen the investigation. All relevant facts and grounds were known to the applicant and by reason of her legal representation she was not precluded from applying for leave at an earlier date." (para. 77)*

15. A person who has engaged in an internal grievance procedure cannot thereafter seek to impugn the decision in respect of which the grievance procedure is engaged. If an alleged error or legal frailty identified in a decision of first instance is appealed or reviewed by virtue of an internal appeals or review procedure, the same or substantially the same point or points will have been raised at various stages in the process. It is the final decision in the chain of decisions that may be the subject of judicial review, as it is that decision which is operative.

16. I adopt the statement of Charleton J. in the Supreme Court decision of *M.A.R.A. (Nigeria) (infant) v. Minister for Justice and Equality and Ors.* [2014] IESC 71 where, he pointed to the fact that the decision of the earlier body was by virtue of an appeal *"rendered merely historical"* (para. 15).

17. In the present case, the appellate process has the effect that the original decision has become merged in and extinguished by the later decisions, and in particular in the final decision by the Transfers Review Body. The various bodies or persons charged with hearing the appeals or reviews cannot be regarded as doing so in the knowledge that their decision did not bind an applicant.

18. This is apparent too from the grounds submitted by the applicant in her correspondence with that body. In particular, in her letter of the 16th September, 2013 she outlines her argument with regard to the decision made on the 5th June, 2012, namely that she was not given a reason for her transfer, that the decision of the first instance appellate body was in error in concluding that there was no provision in the legislation for a retrospective appeal against transfer and that there had been a breach of the provisions of Chapter 8 of the Code.

19. For these reasons I consider that the only decision open for consideration in the present application for judicial review is the decision of the final body namely the decision of the Transfers Review Body. I do not consider that any legal or rational basis has been shown which would permit me to now review the lawfulness and procedural correctness of the earlier decisions, when these have already been fully considered and appraised by internal review. Thus I reject the assertion that the applicant is out of time but consider that she may challenge only the final decision in the chain. i.e. the decision made or communicated on the 17th October, 2013 of the Transfers Review Body.

The complaint made against the Transfers Review Body
20. The respondent argues that the applicant has not sought review of any decision made by the final body in the process, the Transfers Review Body. This is not apparent to me on the pleadings, although I accept that the pleadings are very general and relief is sought with regard to the "various decisions made" and each is challenged. Thus I consider that I may determine the question of the lawfulness of the decision of that body.

21. The applicant makes three complaints against the Transfers Review Body: that its decision was premised on a wrong view of the law; that its process was tainted by bias; and that it failed to give reasons. I will deal with each in turn

Retrospective appeal: was the Transfers Review Body wrong in law?
22. The applicant argued in the course of her submissions to the Transfers Review Body, and before me, that the decision at first instance and that of the first review or appeals stage both relied on a wrong interpretation of the law, namely that the Code make no provision for a retrospective review. That argument is of course premised on the fact that the applicant did not agree to a transfer, and I deal below with whether I may determine that factual question, but it is also based on an erroneous view of the law and I accept in that regard the judgment of O'Malley J. in *Herlihy v. Superintendent of Gurranabraher Garda Station* [2012] IEHC 531. I adopt her statement that the window open to the applicant in that case to appeal was so short as to make it "impossible for an appeal to be processed", and :

> *"To refuse to entertain his appeal, as the Assistant Commissioner and the Commissioner did, on the basis that it was 'retrospective' was both unfair and unreasonable." (para. 53)*

23. The respondent argues that the Transfers Review Body is an independent body and that if any frailty had arisen in the earlier decisions within the process, that those frailties did not make their way into the decision of the Transfers Review Body.

24. I consider that I must accept the uncontroverted evidence of the affidavit sworn on the 26th May, 2014 by Richard Ryan, who acted as Chairperson of the Transfers Review Body, that its decision was not made on the basis that the appeal was late and/or that there was no basis in the Code for retrospective appeal, i.e. it did not make its decision based on an assertion that the applicant had already transferred and agreed to transfer to Tralee when she appealed against the transfer, and that it did not come to its determination in reliance on a finding that the application could not retrospectively appeal a decision. I consider that the decision of the Transfers Review Body is not tainted by any wrong view of the relevant legal principles.

25. I turn now to consider the argument of bias.

Bias
26. The applicant argues that the Transfers Review Body is tainted by bias in that Fintan Fanning, the Assistant Commissioner Human Resource Management, was involved in a number of stages in the review and appeal process. He transferred her internal personnel file to the Transfers Review Body, and made submissions on behalf of the Commissioner on the appeal. Assistant Commissioner Fanning sent the letter of the 17th October, 2013 from the Transfers Review Body confirming that the appeal had been refused. He had also been involved at an earlier stage of the process in that it was he who filed the transfer letter of the 6th June, 2012, and it was he who made the determination on the 12th of July, 2012 on the first appeal, by which he had refused the appeal on the grounds that there was no avenue for a retrospective appeal of transfer. Assistant Commissioner Fanning also issued the results of the second stage of the transfer appeals process on the 27th August, 2012.

27. It was asserted in those circumstances that the respondent has breached one of the fundamental keystones of fair procedure namely the rule of nemo iudex in causa sua. I consider that the applicant's argument is misplaced. Garda Fanning is the Assistant Commissioner with responsibility for human resources, and his role requires him to engage with issues relating to the contract of employment of a member of the Force. No evidence was adduced that he made the impugned decisions and the evidence points me to the conclusion that he merely acted as conduit to communicate the decisions and/or coordinated the transmission of the paperwork to the relevant bodies that made the decisions. In the light of the conclusion that I came to above, namely that the only decision capable of being challenged in this judicial review is the decision of the final appeals body, I consider that Assistant Commissioner Fanning had no substantive role in any decision capable of being subject to the present application, and insofar as he had a role it was purely the administrative role of transmitting the file of the applicant to that body for its consideration and as part of the evidence before it.

28. Even if, as the applicant puts it, Assistant Commissioner Fanning was "in the wings" throughout the first and second stages of the appeal, it is the decision of the final stage of the process that is capable of being challenged and the evidence that I have is that the body engaged at that stage is an independently constituted body charged with making its decision independently of any involvement of Assistant Commissioner Fanning. I consider that the respondent is correct in that Assistant Commissioner Fanning acted either in an administrative role, or, in the case of the third stage of the process, in a capacity wholly different from that with which he had engaged in the earlier stages of the process.

29. There is no objective bias. He did not make the decisions communicated by him, but was a conduit of information and/or paperwork, and he engaged in the precise role prescribed by his job description. In the absence of evidence that Assistant Commissioner Fanning was involved in the decision making, I do not consider that the applicant has made out the argument that his involvement renders the process invalid by reason of bias.

30. The final ground of review is that no reasons or explanations were given for the "various decisions in the case".

Reasons
31. As is now well established in our jurisprudence, a person whose interest is affected by a decision is entitled to reasons for that decision. The recent and authoritative decision of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 has been followed in a number of cases. Giving reasons is at its basic level necessary so that a party impacted by a decision has sufficient information to know whether an appeal or judicial review is justified. That is not however the only rationale for the rule as explained by the Supreme Court in *Mallak v. Minister for Justice* [2012] IESC 59. Fennelly J. gave the judgment of the Court and I consider that he squarely positions the requirement for reasons as one that emerges from the requirement of fairness, openness and transparency. He said in para. 67 of his judgment:

> *"Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them"*

32. In that case the Supreme Court did quash by certiorari the relevant decision of the Minister and at para. 76 of the judgment Fennelly J. explained:

> *"In my view, the Minister was under a duty to provide the appellant with the reasons for his decision to refuse his application for naturalisation. His failure to do so deprived the appellant any meaningful opportunity either to make a new application for naturalisation or to challenge the decision on substantive grounds. If reasons had been provided, it might well have been possible for the appellant to make relevant representations when making a new application. That might have rendered the decision fair and made it inappropriate to quash it. In the absence of any reasons, it seems to me that the appropriate order is one of certiorari quashing the decision."*

33. The Supreme Court in the later decision of Kelly v. An Garda Commissioner [2013] IESC 47 quashed the decision of the Garda disciplinary appeals board for want of reasons, and in his judgment, O'Donnell J. accepted a general position that *"reasons are required as a matter of the general law"* (para. 30).

34. I consider that it would fail to recognise the importance of these decisions of the Supreme Court and the importance of fairness, openness and transparency in an administrative process, the result of which could impact on the rights of a person, were I to accept an argument that the mere fact that the applicant has de facto commenced judicial review mean that reasons are not necessary to assist him in deciding to so appeal. The giving of reasons is necessary in a broad sense to enable a party affected by a decision to understand how the decision was made, and if necessary to allow him to make further representations or take whatever further relevant action is available. The giving of reasons is one way in which an administrative body shows the person affected, and perhaps in certain circumstances shows the general public, that the process is open, fair and transparent. Reasons are not required merely to support an appeal, but to highlight and show the fairness of the process itself.

35. Ms. Maybury is clearly affected by the decision of the Transfers Review Body, and the decision to transfer her is one that impacts on her daily life. She is entitled as a matter of natural and constitutional justice to know the reason why her final appeal has failed and I consider that she succeeds on that ground alone namely that the decision communicated to her by the letter of 17th of October, 2013 is so devoid of reasons as to give her no idea of the basis of that decision. The affidavit evidence of Mr Ryan offers comfort with regard to what was not considered by the Transfers Review Body in its deliberations, but does not offer evidence of the reason the applicant failed at that stage of the process.

36. One further matter arises in the application and I turn now to consider whether I may make a determination that the applicant is estopped from denying in this application that she agreed to the transfer.

An agreement to transfer?
37. An unusual feature of this case is that Chief Superintendent Patrick Sullivan, Tralee Garda Station, who swore an affidavit in opposition, was cross-examined on that affidavit at the hearing before me. His evidence related primarily to the issue whether the applicant had in fact agreed to the transfer at an earlier meeting between Chief Superintendent Sullivan and the applicant on the 4th May, 2012, at which Gerard Maybury, the applicant's father, attended. The minutes of that meeting were exhibited in Chief Superintendent Patrick Sullivan's affidavit. The applicant has persisted in her denial that no agreement was ever reached with her for a transfer, and her position is supported by the affidavit of her father in which Mr. Maybury says that his daughter definitely did not wish to transfer to Tralee and no agreement was reached at the meeting.

38. What is apparent however, from the affidavit evidence both of Chief Superintendent Sullivan and of Gerard Maybury is that the applicant entered Garda College in Templemore in February, 2007, and that her probationary period was extended for an overall period of 5 years. This is described as being unusual, and Chief Superintendent Sullivan said that in his 37 years of experience in the Force he had never known a person to remain on probation for such a long period. His evidence is that in a bid to accommodate the applicant and move her out of her probationary status, she had been offered confirmation as a member of the Force on the strict condition that she would agree to a transfer to Tralee Garda Station where an additional element of support and supervision would be available to her. That, it is argued, was the context of the meeting on the 4th May, 2012 and Chief Superintendent Sullivan's evidence is that, absent an agreement to transfer to Tralee, the alternative course of action was that the applicant's employment with An Garda Síochána would be terminated as no further probationary period was envisaged. The exhibited minutes of the meeting of the 4th May, 2012 show that a clear proposition was outlined to the applicant at that meeting that she would not be confirmed in her position were she to remain in Killarney.

39. The applicant swore a long replying affidavit on the 2nd December, 2014 in reply to Chief Superintendent Sullivan's affidavit. She puts much of his evidence in issue. I find it impossible to resolve the conflict of evidence, save to note that on the 13th June, 2012 the applicant was confirmed as a full member of the Force.

40. On the 6th December, 2012 the applicant submitted a complaint to the Labour Relations Commission (formerly the Rights Commissioner), pursuant to the Terms of Employment (Information) Act 1994, and in which she argued that her employer had unlawfully altered the terms of her contract. She argued in that application that the Rights Commissioner had "jurisdiction to decide on the legality of the procedures followed".

41. It is not my function in this judicial review to determine whether the applicant willingly transferred to Tralee Garda Station, whether an agreement was reached with her by way of a compromise of ongoing discussions and considerations arising from her lengthy probationary period, and the question before me is not whether the applicant agreed to be transferred, but whether the process of transfer was one made in accordance with fair procedures. I appreciate that there is a considerable overlap in the arguments and evidence that might lead one to a conclusion, but the appropriate forum for a determination on the facts is the Labour Relations Commission and in respect of which the applicant has not chosen to exhibit any documentation.

42. I do not in those circumstances propose making a determination on that issue, and accordingly I do not propose considering the plea in the statement of opposition that the applicant is estopped, by virtue of the existence of such alleged agreement, from maintaining this review.

Conclusion
43. Therefore I propose making a declaration that the decision of the respondent, communicated to the applicant on 17th of October, 2013 was contrary to fair procedures and in breach of natural and constitutional justice for failure to give reasons, and accordingly, I make an order of certiorari quashing that decision. I refuse to quash the primary decision to transfer the applicant from Killarney to Tralee Garda Station.