Neutral Citation: [2016] IEHC 213

THE HIGH COURT

[2016 No. 141 JR]

BETWEEN

DARREN DEEHAN

APPLICANT

AND

STATE EXAMINATIONS COMMISSION

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 27th day of April, 2016

1. The applicant is eighteen years of age and a student at Ard Scoil Ris, Griffith Avenue, Dublin 9. He is due to sit his Leaving Certificate examination in June 2016, now a matter of weeks away. When the applicant was nine years old, he was diagnosed as suffering from dyslexia and attended a special needs junior school. When he sat his Junior Certificate examination, the applicant, through his school, applied to the State Examinations Commission ("SEC") for the assistance of a reader at his Junior Certificate examination. This application was successful.

2. A reader is a person designated to attend at the examination with the candidate for the purpose of reading the exam paper to him or her. The purpose of this accommodation is to overcome the difficulty that might otherwise be inherent in the candidate being left to read the exam paper for him or herself having regard to his or her disability and thus, as it were, provide a level playing field with candidates not suffering from such a disadvantage.

3. The applicant again applied through his school for the assistance of a reader for the Leaving Certificate. The fact that a reader was granted for the Junior Certificate does not guarantee that a similar facility will be afforded for the Leaving Certificate. The SEC publishes guidelines entitled "Reasonable Accommodation for Junior and Leaving Certificate Examinations 2016" commonly known as the RACE Scheme. These set the criteria for qualification for accommodation. The scheme provides that access to a reader is appropriate where it can be established that the candidate's inability to read a question paper is attributable to a specific learning difficulty as distinct from his/her general intellectual ability. A reader should only be granted where a candidate is unable to read the paper. In order to be eligible for a reader, the candidate must meet the following criteria:

> "A. Evidence of a Specific Learning Disability.
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> B. A standard score of 85 or less on a recommended test of word reading
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> (i.e. reading accuracy not comprehension).
>
> C. A reading (accuracy) error rate of 7% or more on sample papers."

In addition to a reader, the applicant also applied for a waiver from the assessment of spelling, grammar and punctuation in the language subjects comprised in the examination. Again three criteria had to be satisfied:

> "A. Evidence of a Specific Learning Disability.
>
> B. A standard score of 85 or less on a recommended spelling test.
>
> C. Spelling/grammar/punctuation error rate of 8% or more in written samples."

4. The closing date for applications for the 2016 Leaving Certificate was the 25th of May, 2015. The reason for the apparently long lead time is that on average, of some 116,000 students who annually sit the State Certificate Examinations, some 18,000 apply for reasonable accommodation. There is thus a huge volume of applications to process.

5. On the 18th of May, 2015, a reading and spelling test was given to the applicant by a special needs teacher in the school, Ms. Yvonne Markey (Test 1). The test given is known as a WRAT 4 being one of the kinds recommended for the purposes of the RACE Scheme. The applicant achieved a standard score of 90 for reading and 90 for spelling, both being in excess of the minimum criteria specified by the scheme. The application was submitted to the SEC on the 22nd of May, 2015. On the 26th of June, 2015, the applicant was assessed by Dr. Patricia Jansen, a clinical psychologist who administered another reading test known as the WMRT – 3rd edition, also approved for the purposes of the RACE Scheme. The applicant achieved a standard score of 101 on this occasion (Test 2). He also underwent an approved spelling test known as the Vernon (3rd edition) in which he achieved a standard score of 75. Dr. Jansen's report was also submitted to the SEC. The decision of the SEC was communicated to the applicant's school on the 15th of December, 2015. His application for a reader was refused but he was granted a waiver from the assessment of spelling/grammar/punctuation. The letter from the SEC stated:

> "1. Access to a reader
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> Your application for access to a reader has not been granted for the following reason(s):
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> The candidate obtained a score which was greater than 85 on a standardised test of word reading."

6. It was also the case that the applicant had obtained a score greater than 85 on a spelling test (Test 1) but he achieved a score of less than 85 on the other spelling test (Test 2). The SEC's position at the trial was that in respect of the spelling test, the applicant had been given the benefit of the doubt.

7. The applicant, as he was entitled to do, appealed this decision to the Independent Appeals Committee ("IAC"). The respondents are the members of that committee.

8. The IAC issued its determination on the 14th of January, 2016, in the following terms:

> "1. Access to a reader.
>
> Your appeal for access to a reader has not been granted."

9. Thus no reasons were given by the IAC for its conclusion. This led to the commencement of earlier judicial review proceedings by the applicant on this ground which were compromised by the IAC consenting to an order quashing its decision and remitting the matter for fresh consideration. One of the terms of the compromise was that the applicant was permitted to furnish additional material for the IAC to consider when deciding the application afresh. Thus on the 10th of February, 2016, the applicant underwent a further WRAT4 reading test (Test 3) again administered by Ms. Markey. On this occasion, the applicant achieved a standard score of 85 on the reading test. This test result was submitted to the IAC on the 11th of February, 2016. It issued its decision on the 24th of February, 2016, the operative portion of which is:

> "Guided by the terms of the scheme, the Appeals Committee considered all the material on file including recent documentation submitted on behalf of the candidate. The material shows that the candidate met two of the criteria stipulated above i.e. A & C.
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> With regard to criteria B, the Appeals Committee considered in particular three reading scores. The first score was submitted by May 25, 2015 the official closing date for receipt of Reasonable Accommodation application data. The second score formed part of a psychological report compiled by Ms. P. Jansen, 26th June, 2015, and the third score came from the candidate's school on February 12, 2016, following a test which was carried out on February 10, 2016. The evidence from these scores demonstrates that two of the scores submitted are in excess of 85.
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> The third score, i.e. a score of 85 comes from a test carried out on Feb 10, 2016. This score contrasts with the score of 90 in the same test of word reading, carried out by the same examiner on May 18, 2015.
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> Having given detailed consideration to all the evidence available to it, the Appeals Committee rejects the application for a reader."

10. In these proceedings, the applicant seeks an order of certiorari quashing the foregoing decision of the IAC.

The Arguments.

11. Mr. O'Higgins S.C. on behalf of the applicant contends that the decision under challenge leaves the applicant, and the court, completely in the dark as to why it was reached. In effect, for a second time, no, or no adequate, reasons are given. The RACE Scheme itself appears to contemplate that a single reading test result will be submitted with the application and is silent as to how an application with multiple test results is to be considered. In the respondent's opposition papers, the suggestion appears to be made that the application was refused because no explanation was forthcoming from the applicant to explain the discrepancy in test results and the onus was on him to do so. The applicant contends that he was entirely unaware of such a requirement and this was manifestly in breach of fair procedures.

12. The applicant argues further that he could not have been aware of any requirement to explain or contextualise conflicting test results in circumstances where the SEC application form on its face states that where the results of school based assessments are submitted, these results will be used for the purposes of deciding on the accommodation for which the candidate is eligible. The form then says **"No later submissions will be considered."**

13. However, the respondents in their affidavit state that they do have regard to further evidence provided in support of the application "to be fair to all candidates". The applicant complains that having submitted the results of a further school based assessment as agreed between the parties, he was led to believe that he could make no further submission and yet his failure to do so is now relied upon by the respondents as the reason for refusing his application.

14. Mr. Shipsey S.C. for the respondents submitted that by way of preliminary objection, the applicant had failed to exhaust the remedy of an appeal to the Ombudsman provided for in the RACE Scheme for persons dissatisfied with a decision of the IAC. It was contended that the court should extend curial deference to the IAC as an expert body comprising very highly qualified individuals acting within their own area of expertise. It was submitted that there was no basis to suggest that the IAC's decision was unreasonable or irrational within the context of authorities such as *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39. Based on these decisions, the applicant was required to demonstrate that there was no evidence before the IAC upon which it could have come to the conclusion it arrived at and that feature was manifestly absent. The respondents submitted that the IAC were perfectly entitled to come to this conclusion in the absence of evidence being furnished by the applicant as to why his reading competence deteriorated between the first two tests and Test 3. It was said that the applicant could discern from the decision the reason why his application failed and this was sufficient to satisfy the legal test.

Discussion.

15. In the wake of *Meadows v Minister for Justice and Law Reform* [2010] IESC 3 and Mallak v Minister for Justice and Law Reform [2012] IESC 59, it can no longer be seriously doubted that administrative bodies have a duty to give reasons for decisions that affect rights. The reasons do not necessarily have to be elaborate or discursive. The extent to which elaboration is required will depend upon the facts of the individual case. The essential point however, is that the person whose rights are affected by the decision in issue must be enabled thereby to comprehend the reason or reasons for it and how and why it was arrived at. The reasons must be sufficiently meaningful to enable the person affected, and ultimately the court, to determine if the decision was lawfully made. Thus in *Meadows*, Murray C.J. stated (at p. 21):

> "[93.] An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.
>
> [94.] Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.

> [95.] In my view the decision of the first respondent in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced."

16. Similar views were expressed by Fennelly J. in *Mallak*, although that was a case concerned with the failure to give any reasons. He said (at p. 20):

> "[66.] In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.
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> [67.] 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."

17. In a similar vein, Fennelly J. continued (at p. 32):

> "The developing jurisprudence of our own courts provides compelling evidence that, at this point, it must be unusual for a decision maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reasons, it is simply not possible for the applicant to make a judgment as to whether he has a ground for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. At the very least, the decision maker must be able to justify the refusal."

18. In the present case, it seems to me that a reading of the IAC's decision of the 24th of February, 2016, leaves the reader none the wiser as to why the application failed. The reading score achieved by the applicant in Test 3 clearly brought him within the Scheme. The applicant may well have thought, not unreasonably in my view, that the most recent test result was likely to be the operative one. One would assume that a contemporary test result would be of more value to the assessment process than one many months or perhaps even years old. There is no dispute about the fact that the applicant was entitled to submit all three test results and in particular Test 3. It was expressly agreed as part of the compromise of the earlier judicial review proceedings that he could do so.

19. The Scheme however, appears to expressly contemplate that only one test result would be submitted. It is silent as to the procedure that is to be followed where more than one was put before the committee. Insofar as past form was a guide, as already noted in the case of the two spelling tests previously submitted, one of which qualified for the exemption and one of which did not, the applicant was given "the benefit of the doubt" and the qualifying score was preferred. Insofar as the applicant had any guidance as to how conflicting results might be interpreted, this was all he had to go on.

20. If the respondents were proposing to adopt some different procedure when it came to the reading tests, it seems to me that the least the applicant was entitled to was notice of the basis upon which such conflict would be resolved. The scheme provides none.

21. A reading of the decision in issue does not in my view facilitate any understanding of how it was arrived at. If Test 3, the latest in time, was to be disregarded in favour of Tests 1 and 2, the applicant was entitled to know why. The fact that the decision draws attention to the three different scores is in itself entirely opaque.

22. In the opposition papers and affidavits, the respondents seem to assert that the disparity in the test results called for explanation and none was forthcoming. There is a clear implication that the respondents had some misgivings about Test 3. If that is so, it seems to me that at minimum, the applicant was entitled to know that and be given at least an opportunity to address it. I cannot accept the proposition advanced by the respondents that they do not conduct an inquisitorial or investigative process and had no duty to communicate their concerns to the applicant. How could the applicant be expected to address concerns of which he had no knowledge?

23. The respondent's assertion on affidavit that the applicant was expected to furnish an explanation is all the more startling for the fact that the application form explicitly prohibits it. The further averment that the IAC routinely has regard to further evidence notwithstanding what the application form states in order "to be fair to all candidates" can hardly be fair to candidates who know nothing of it.

24. It has to be said that the IAC's failure to give any understandable rationale for refusing the application is all the more difficult to comprehend when its previous decision was quashed for precisely the same reason. Furthermore, the unfairness of the respondent's approach is thrown into sharp relief by virtue of the fact that had the applicant been aware of the requirement for an explanation for context for the differing results, he could have given it.

Conclusion.

25. For these reasons therefore, I am satisfied that the respondent's decision cannot stand. For the same reasons, I am of the view that the decision arrived at was made *ultra vires* and without jurisdiction. The availability of an appeal to the Ombudsman cannot cure such a want of jurisdiction at first instance. The authorities establish clearly that the availability of an appeal in circumstances such as arise here does not preclude a remedy by way of judicial review. Accordingly I will grant an order of *certiorari* quashing the decision.