Neutral Citation: [2014] IEHC 237

THE HIGH COURT

Record Number: 2014 No. 199 JR

Between:

Garda Representative Association

Applicant

And

Minister for Public Expenditure and Reform

Respondent

Judgment of Mr Justice Michael Peart delivered on the 7th day of May 2014:

1. In these judicial review proceedings, the applicant association has recently been granted leave by this Court to challenge the lawfulness of the Public Service Management (Sick Leave) Regulations, 2014 (S.I. 124 of 2014) which came into operation on the 31st March 2014 on the ground that they are ultra vires the respondent Minister. It is contended that they have been brought into effect in breach of fair procedures and/or the legitimate expectation of the applicant. That leave was granted on foot of an *ex parte* application brought under the provisions of Order 84 RSC.

2. Before the Court now is an application for an interlocutory injunction, brought on notice to the respondent, whereby the applicant seeks to restrain the respondent Minister from operating the 2014 Regulations in respect of members of An Garda Siochána pending the determination of these proceedings. The applicant does not seek to have the Minister restrained from operating the 2014 Regulations in respect of other public servants to whom they apply.

3. There is no doubt that the 2014 Regulations introduce a sick leave regime for all public servants (excluding a member of the judiciary, a member of the Defence Forces, and a member of staff of the Central Bank of Ireland) which is radically different from those previously operating, and all the more so in respect of An Garda Siochána whose sick leave arrangements were particularly favourable historically.

4. It appears that as far back as May 2012 the Minister announced proposals to reform the sick leave in the public service, including An Garda Siochána, as part of the State's obligations under the Memorandum of Understanding between the Government and the Troika. According to the affidavit evidence before me the cost of sick leave in the public service in the year 2011 was more than €500,000,000, and the cost of sick leave within An Garda Siochána alone for the year 2012 was €27,000,000. The Minister's aim was to effect changes to sick leave arrangements by January 2014.

5. The May 2012 proposals were the subject of a consultation process between the GRA and the Minister for Justice and the Minister for Public Expenditure and Reform. That process took place during 2012 and 2013. Part of the process involved a Working Group which presented its recommendations to the respondent Minister in November 2013. An Garda Siochána indicated its view that there should be a derogation for members of An Garda Siochána in any new sick leave regime for public servants. The GRA in its grounding affidavit has stated that it was assured that any changes to pay and conditions for its members would negotiated through the Conciliation and Arbitration Committee. However, no such derogation was provided for by the Oireachtas in the Public Service Management (Recruitment and Appointments) (Amendment) Act, 2013.

6. The applicant says that it was given an assurance by email dated 3rd December 2013 that its members would not be included in the proposed new Regulations in the first instance. However, the respondent says that immediately thereafter he announced that the new Regulations would include An Garda Siochána, but that those new Regulations would be deferred until the end of March 2014. The Minister believes that the GRA and its members were aware of this, and in addition says that he made that position clear in speeches to the Dáil and Seanad on the 12th and 18th December 2013.

7. The Minister considers that sufficient time and opportunity for consultation and discussion was provided to the applicant and its members. He says also that their views were considered, but that the case for a derogation for An Garda Siochána under the Act and the Regulations to be made thereunder was rejected by him.

8. The applicant is not making the case that the Minister does not have the power to make the regulations which have now come into force, including without a derogation for its members. Rather, it is submitting that it was given an assurance amounting to a legitimate expectation, that the Minister would not do so prior to the conclusion of the Conciliation and Arbitration process, and/or that he would not so act prior to the conclusion of the Haddington Road Agreement negotiations which commenced in September 2013 and were due to conclude in June 2014.

9. I think it is fair to say that the primary ground on which the applicant seeks to challenge the 2014 Regulations is on the basis of this alleged legitimate expectation that its members would not be included in the new Regulations in the first instance. It does so also on the ground of fair procedures based on a lack of full and proper consultation. In addition it is contended that the Minister failed to have regard to a relevant consideration, by failing to consider the need to protect the health of public servants in so far as he failed to consider the case put forward on behalf of members of An Garda Siochána. Finally, the applicant has submitted that the Regulations, and in particular Regulations 9 and 10 are incomprehensible as to their meaning, and in so far as a meaning can be gleaned from the plain and ordinary meaning of the words used, they do not in fact achieve the stated intention of the Minister, namely to effect significant reduction in the cost of public service sick leave. The Minister rejects that the Regulations are in any way opaque or unclear, and is confident that they achieve his purpose.

10. This Court granted leave to seek the reliefs contained in paragraph D of the Statement of Grounds. As I have stated, that was pursuant to an *ex parte* application. On the present application for an interlocutory injunction, the Court must be satisfied that a fair issue arises for the Court's determination. It is not to be concluded from the mere fact that leave has been granted that a fair issue has been raised for the purposes of an interlocutory injunction application. On the present application, both sides are present unlike

on an *ex parte* application. On the *ex parte* application the Court proceeds on the basis of *prima facie* facts and submissions, and on the basis that by virtue of the decision in *G v. DPP* the applicant must show that he has an arguable case. That is accepted to be a low threshold. It is inevitable that on an application to set aside leave, and when the respondent has an opportunity to put before the Court other facts than those disclosed by the applicant on the *ex parte* application, or puts forward legal submissions even on the same or agreed facts, the Court hearing the set aside application can come to the conclusion that having had the opportunity to hear the respondent, the applicant has not in fact established an arguable case for the purpose of leave being granted, and can make an order setting aside that leave order.

11. A *fortiori* on the present application, it is submitted by the respondent that the Court should consider, by reference to a threshold higher than mere arguability and in the light of facts appearing in its replying affidavit as well as in the light of the respondent's legal submissions, whether the applicant has established a serious or fair issue to be tried. In fact the respondent submits that the applicant in reality seeks a mandatory injunction requiring the Minister to continue to apply to members of An Garda Siochána the previous and more favourable sick leave regime pending the determination of these proceedings, and accordingly that the test to be applied is whether the applicant has made out a strong case that is likely to succeed, in accordance with the judgment of Fennelly J. in *Maha Lingham v. Health Service Executive* [2006] 17 ELR 137.

12. The first matter to address is the issue of *locus standi* which has been raised against the applicant by the respondent. The applicant association was established under the Garda Siochána (Associations) Regulations, 1978 (S.I. No. 135/1978) in the following terms:

> *"4. An association to be known as the Garda Representative Association is hereby established for the purpose of representing members of the Garda Siochána holding the rank of Garda in all matters affecting their welfare and efficiency.*

13. The reference to "welfare" therefore must be seen as enabling the association to represent the interests of is members in negotiations and discussions with the relevant Minister in relation to any proposed changes to sick leave arrangements.

14. The respondent accepts that the GRA has the necessary standing to bring a challenge to the new Regulations on the basis of its legitimate expectation and on the basis that it would be consulted as alleged. But he does not accept that such standing extends to an entitlement to seek an injunction on behalf of all its members to suspend their operation pending the determination of that challenge, and in so far it seeks an injunction it does so only on the basis of a *ius tertii*. It is submitted that only an individual member who stands to be personally affected by the new Regulations could have an entitlement to seek such an injunction as part of a challenge to their lawfulness, since only in such a case could the Court realistically consider matters such as the adequacy of damages, the balance of convenience and the worth of any undertaking as to damages which may be available on the application.

15. In this regard, Eileen Barrington SC for the respondent has referred to the judgment of McCracken J. in *Construction Industry Federation v. Dublin City Council* [2005] 2 IR. 496. That was a case where the applicant association brought a challenge on behalf of its members (being construction firms and property developers in the State) to a certain scheme whereby such members could be required as a condition of a planning permission to make a financial contribution towards the costs of public infrastructure and facilities to be provided by a local authority in its area whether or not same would benefit a particular development. In the High Court Gilligan J. decided that the applicant federation has standing to bring the challenge, but found against the applicant on the merits. The applicant appealed, but before deciding the substantive appeal, the Supreme Court directed a preliminary issue in relation to *locus standi*, and concluded that although there could be circumstances in which the general *ius tertii* rule might not apply, nevertheless, as in that case, where the applicant federation could not point to any damage to itself which might be caused by the impugned decision, then the Court was being asked to deal with a hypothetical question and furthermore there was no evidence that the members of the federation were financially incapable of mounting a challenge in their own right. In reaching this conclusion, McCracken J. (Murray CJ. and Fennelly J. concurring) stated at pp. 526-527:

> *"In the present case the applicant claims to have a sufficient interest on the basis that the proposed scheme affects all or almost all of its members in the functional area of the respondent and, therefore, the applicant has a common interest with its members. However, it appears to me that to allow the applicant to argue this point without relating it to any particular application and without showing any damage to the applicant itself, means that the court is being asked to deal with a hypothetical situation, which is always undesirable. This is a challenge which could be brought by any members of the applicant who are affected and would then be related to the particular circumstances of that member ……".*

16. The applicant on the other hand seeks to distinguish the present case, and for that purpose points to the remainder of that quoted paragraph where McCracken J. went on to state:

> *"The members themselves are, in many cases, very large and financially substantial companies, which are unlikely to be deterred by the financial consequences of mounting a challenge such as this. Unlike many of the cases in which the parties with no personal or direct interest have been granted locus standi, there is no evidence before the court that, in the absence of the purported challenge by the applicant, there would have been no other challenger. Indeed the evidence appears to be to the contrary."*

17. Feichin McDonagh SC for the applicant submits that unlike the builders and developers who made up the membership of the CIF, ordinary rank and file members of An Garda Siochána are not wealthy individuals to be expected to be in a position to bring individual challenges to these Regulations. While I have no evidence of that, it is a fair submission to make, and perhaps it is something of which I can have judicial notice. Nevertheless, and in line with the concession made by the respondent in this regard, that factor is sufficient to enable the Court to conclude that the GRA should be considered to have the necessary standing for the purpose of the challenge to the Regulations, certainly on the basis of the asserted legitimate expectation and the alleged entitlement to be further consulted before the Regulations were brought in respect of its members. But it does not in my view get over the question of standing to seek an injunction to prohibit the application of the new regime, or in effect to provide for a derogation from the new regime for members of An Garda Siochána, pending the determination of the proceedings.

18. To grant an injunction as sought would be to do so on a hypothetical basis, and on an assumption that in all the cases which might arise damages would not be an adequate remedy for any individual member on sick leave. A line of jurisprudence has developed in employment law cases where a dismissed teacher, for example, may be granted a mandatory injunction requiring his/her salary to be paid pending the determination of a claim that his/her dismissal is unlawful, but that is a discrete area where the Courts have taken into account that the employee's salary is his/her only means of support, and the likelihood of resultant destitution, and has taken the view that despite the distinct possibility that it may not be possible for the defendant to recoup from the employee the

amount of salary paid as a result of the injunction, in the event that the plaintiff ultimately fails in the claim, the balance of convenience rests in favour of granting the injunction (see Fennelly v. Assicurazioni Generali Spa [1985] 3 I.L.T 73). That is a far cry from the present case.

19. However, I accept that under the new Regulations it is possible that an individual Garda officer might, given his or her particular sick leave history, be entitled to no sick leave pay under the new Regulations should he/or she have become ill again after the 31st March 2014. But that possibility is insufficient itself to give standing to the GRA to seek an injunction generally in respect of the 2014 Regulations pending the determination of these proceedings. It is perfectly possible for such a Garda if sufficiently adversely affected by the new Regulations, to seek to be joined in the present proceedings for the purpose of seeking an interlocutory injunction to enable him to receive sick pay under the old regime, but it would be dependent upon the actual facts and circumstances of his particular case. It is safe to assume, I think, that the GRA would continue to fund and pursue its proceedings even though it had another passenger on boards. Alternatively if preferred he or she could bring an individual challenge, and therein seek an injunction. But the Court would have to be satisfied on Campus Oil grounds that an injunction was warranted. Indeed, the higher Maha Lingham test might have to be surmounted, albeit ameliorated perhaps by reference to considerations of possible Fennelly-type destitution arguments referred to above. But it is inescapable that the Court must reach conclusions in relation to any such injunction restraining the operation of the 2014 Regulations by reference to a particular case and particular facts and circumstances affecting a particular Garda. Only then can the Court consider the matters I have adverted to already, namely the adequacy of damages, the balance of convenience, and the sufficiency of any undertaking as to damages required. I add now that in the present case no undertaking as to damages is on offer from the GRA.

20. I am not satisfied that the applicant has standing to seek injunctive relief, and for that reason alone I refuse the application.

21. However, I would like to go further and say that even if *locus standi* was not a problem for this applicant, and even if I assume for present purposes that the applicant has raised a serious or fair issue or issues for determination, and that damages are not an adequate remedy, I am disinclined to conclude that the balance of convenience lies in favour of granting the injunction sought. In that regard I refer to the judgment of Finlay CJ in *Pesca Valentia Limited v. The Minister for Fisheries and Forestry and others* [1985] IR. 193. That was a case in which the plaintiff succeeded in obtaining an injunction restraining the enforcement of an impugned condition attaching to its fishing licence (which included the prosecution of an offence) pending the determination of proceedings in which the plaintiff sought a declaration that, inter alia, the section under which the licence was issued was unconstitutional. In his judgment, Finlay CJ. was satisfied that there was no impediment to the Court granting an injunction pending the determination of a claim with regard to the constitutionality of a statute, even where a consequence was to postpone or suspend the trial of an offence under the impugned legislation. In that regard he stated that "*in particular, it seems to me that this power must exist in an appropriate case where the form of action is under a penal section and involves conviction of and the imposition of a penalty for the commission of a criminal offence*". In the present case, one is not of course dealing with penal legislation or Regulations made under any penal legislation. There is that distinction to be drawn with *Pesca Valentia*. But in addition it is noteworthy that at page 201 Finlay CJ expressed his view that the consequences that might flow from the granting of an injunction which prevents the Executive from carrying out its powers under a statute which enjoys the presumption of constitutionality is a factor to be taken account of in the consideration of the balance of convenience. In that regard he stated:

> *"I am, therefore, satisfied that the presumption of constitutional validity which applies to the Fisheries (Amendment) Act, 1983, expressly authorising the insertion of this condition in these licences is material in relation to the determination by the Court as to whether the plaintiff has established a fair question to be tried at the hearing of his action. I am also satisfied that the consequence arising from the making of an interlocutory injunction of preventing the Executive from carrying out powers vested in them by a statute enjoying that presumption and, in particular, the consequence of postponing the bringing to trial of a criminal offence created by such a statute, is a matter for consideration on the balance of convenience. I am not, however, satisfied that there is any special principle applicable to an application for an interlocutory injunction of this kind."*

22. In his judgment in *D v. Ireland and others*, [2009] IEHC 206, Clarke J. emphasised that while such a jurisdiction clearly existed it was nevertheless one which ought to be exercised "most sparingly". He explained the reasons why this should be so at pp. 5-6 as follows:

> *"The reasons for this are obvious. Legislation which has been passed into law by the Oireachtas enjoys a presumption of constitutionality. If it were to be the case that persons who were able to establish a fair case to be tried concerning the validity of the relevant legislation having regard to the provisions of the Constitution (which is not a particularly high threshold) were able to obtain an injunction preventing, in practice, the application of the legislation to them until the proceedings had been determined, then it would follow that legislation could, in practice, be sterilised pending a final determination of the constitutional issues raised. Those considerations apply with equal force where the statute concerned is one which creates a criminal offence.*
>
> *While, in general terms, the principles applicable to the grant or refusal of an interlocutory injunction in a case such as this are no different from those which apply in the case of any other interlocutory injunction, it has to be emphasised that a very significant weight indeed needs to [be] attached, in considering the balance of convenience, to the desirability that legislation once coming into force should be applied unless and until such legislation is found to be invalid having regard to the Constitution. It should only be where significant countervailing factors can be identified or where it is possible to put in place measures which would minimise the extent to which there would be any interference with the proper and orderly implementation of the legislation concerned, that a court should be prepared to grant an injunction which would have the effect of preventing legislation which is prima facie valid from being enforced in the ordinary way."*

23. Clarke J. revisited this point in his judgment in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 IR 153, albeit in the context of a challenge to a deportation order. At paragraph 92 he stated:

> *"However, there is a further feature of judicial review proceedings which is rarely present in ordinary injunctive proceedings. The entitlement of those who are given statutory or other power and authority so as to conduct specified types of legally binding decision making or action taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas. The list can go on. All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me*

that significant weight needs to be attached to that factor in all cases …….. An order or measure which is at least prima facie valid (even if arguable grounds are put forward for suggesting invalidity) should command respect such that appropriate weight needs to be given to its immediate and regular implementation in assessing the balance of convenience."

24. In the present case, the new Regulations have been introduced by the respondent Minister in order to reduce the very significant cost to the taxpayer of the sick leave arrangements for public servants including An Garda Siochána, and at the same time meet obligations arising from the Memorandum of Understanding entered into by the Government with the Troika. This must be regarded as a pressing need in the national interest. That consideration need not in all circumstances trump the interest of any particular litigant who may seek to challenge a measure and seek an injunction to restrain its effect upon him or her pending the determination of proceedings commenced, but it must weigh heavily in the balance when the Court comes to consider the balance of convenience. In the present case, the GRA will not suffer any direct loss as a result of the new Regulations coming into operation. I have addressed that question as part of the *locus standi* issue already. But even if one was to overlook that question and consider the question of an injunction from the standpoint of an individual member of An Garda Siochána who is represented by the GRA, the question of the adequacy of damages would loom large. It seems to me that if any individual member seeks to challenge the new Regulations on the same or similar basis as the GRA has, the Court would have to consider whether that individual is likely to suffer loss pending the determination of the proceedings which could not be compensated in damages. Such an individual may, under the new Regulations, have a more limited entitlement to paid sick leave or indeed no entitlement, after 31st March 2014, and he/she will suffer financial loss and even hardship while the litigation is pending if no injunction is granted. But the losses are easily quantifiable, and there could be no question of any risk that damages would not be recoverable. That adequacy of damages would be sufficient in my view to disentitle such an individual member to an interlocutory injunction, barring some exceptional circumstance which any particular individual member may be able to demonstrate. But it would be an exceptional case, and indeed might well be one capable of being dealt with in a way which did not interfere with the general application of the Regulations.

25. If the Court got as far as having to consider the balance of convenience, I have no doubt that, again barring some truly exceptional circumstances in an individual and exceptional case, the balance of convenience must lie against prohibiting the operation of measures which are prima facie lawful pending a determination of the issues arising. In this regard I refer to what Clarke J. has stated at paragraphs 93 and 94 of his judgment in *Okunade*.

26. I want to refer also to what he stated at paragraphs 95-98 of his judgment in relation to the role which can be played by an assessment of the strength of the plaintiff's case in judicial review proceedings "*where the risk of injustice may be evenly balanced*". In that regard, he stated as follows:

"Finally, so far as the cases where the risk of injustice may be evenly balanced are concerned, it does seem to me that there may be greater scope, in the context of judicial review proceedings, for the court to take into account the strength of the case, as it appears on the occasion of the application for a stay or injunction, then may apply in an ordinary injunction case. I have already set out the reasons why it is neither desirable nor practicable in ordinary cases for the court to have to routinely form an assessment of the strength of the case. However it is of some interest to note the way in which this question was put as far back as the decision of the House of Lords in American Cyanamid v. Ethicon Ltd [1975] A.C. 396. At p. 407, Lord Diplock said the following: –

> *'It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.'*

It is well worth recalling that Lord Diplock spoke of the court refraining from deciding questions of disputed fact or "difficult" questions of law. In the context of an application for an interlocutory injunction in the commercial, contractual, property or allied fields the wisdom of those remarks is obvious. If it were to be otherwise then the problems referred to earlier, as noted in Allied Irish Banks Plc v. Diamond [2011] IEHC 505, [2012] 3 I. R. 549, would loom large. However, those considerations may be of significantly less weight in judicial review applications. First, it is rarely the case that questions of fact as such are an issue in judicial review proceedings. Even if the decision maker had to decide facts, then the only question which can arise before the court in a judicial review challenge to the decision in question is as to whether the decision maker could rationally (in the sense in which that term is used in this jurisprudence) have come to the conclusion of fact concerned. On that question the only matters that the court ordinarily needs to consider are the materials which were before the relevant decision maker.

In addition, while there may well be some judicial review proceedings which could come within the parameters of what Lord Diplock spoke of as "difficult" questions of law, many such cases involve either very in net questions of law or involve the application of well-established principles to the circumstances of the case. It seems to me, therefore, that in considering whether to grant a stay or injunction pending the progress of judicial review proceedings, the court can have regard to the strength of the case at least where, as will frequently be the case, the challenge does not involve issues of fact as such or the sort of complex questions of law which, in the words of Lord Diplock at p. 407 "call for detailed argument and mature considerations".

27. While in the present case I do not consider the question of the greater injustice to be evenly or even finely balanced, I want to say that if on the other hand I had done so, then in order to tip the scales towards refusing an injunction I would have considered that the applicant's case, as argued at this stage at least, has weaknesses even though its arguability to the low threshold of arguability required at ex parte leave stage was considered to be surpassed. I mentioned much earlier that it appears to me that the main plank of the applicant's case is based on the alleged breach of the applicant's legitimate expectation, arising out of certain assurances, that members of An Garda Siochána would not be included in the new proposed Regulations in the first instance, and that any changes to pay and conditions would be proceeded with by way of Conciliation and Arbitration. I cannot actually recall if on the ex parte application seeking leave the provisions of section 7 of the Act of 2013 which provides for the insertion into the Principal Act of Part 7A after Part 7 thereof was opened or referred to. But Part 7A contains sections 58A, 58B, and 58C, the last of which provides:

"58C. – This Part has effect notwithstanding –

(a) any provision made by or under --

> *(i) any other Act,*

(ii) any statute or other document to like effect of a university or other third level institution,

(iii) any circular or instrument or other document,

(iv) any written agreement or contractual arrangement, or

(b) any verbal agreement, arrangement or understanding or any expectation" [emphasis added]

28. It seems to me that even if the applicant can establish the necessary ingredients of a legitimate expectation arising from such assurances and other communications made to it during the consultation process which took place since May 2012, paragraph (b) above excludes the possibility that it could prevent Part 7A from having effect. It is hard at this stage to see what *deus ex machina* might be contrived in order to rescue the applicant's case on legitimate expectation from the apparently fatal embrace of paragraph (b). Absent such an escape on that issue, the applicant is left with a case on lack of consultation which, on the facts, cannot be the strongest limb of the case, as well as an argument that the provisions of Regulations 9 and 10 are worded in such a way as to be incomprehensible and unworkable and such as not to achieve the stated purpose of the Minister, and the argument that the Minister failed to have regard to a material consideration, namely the Minister's obligation to have regard to the need to protect the health of public servants. I do not of course express any concluded view on the ultimate merits of all these arguments. I am merely stating that if I was to have to resort to assessing the strength of the applicant's case as part of the balancing of justice or balance of convenience between the parties, I would, based on what has been urged to date, consider that the case is not a strong case.

29. For these reasons I refuse the application for an interlocutory injunction.