



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 26

Record Nos. 2017 194

2017 195

2017 196

2017 197

2017 198

Irvine J.  
Costello J.  
Kennedy J.

BETWEEN

AISLING DUNNE, DAMIAN KELLY, AOIFE QUINNLIVAN, PETER ONYEMEKEHIA AND RONAN MORAN

APPELLANTS/APPLICANTS

- AND -

THE IRISH PRISON SERVICE

RESPONDENT/RESPONDENT

- AND -

COMMISSIONER FOR PUBLIC SERVICE APPOINTMENTS

NOTICE PARTY

**JUDGMENT of Ms. Justice Costello delivered on the 6th day of February 2019**

1. This is an appeal by the appellants from an Order dated the 28th March 2017 of the High Court (Eagar J.) refusing the appellants' applications for leave to apply for relief by way of judicial review. The trial judge's reasons are contained in his judgment delivered on the 27th February 2017, [2017] IEHC 118. I would refuse the appeal of the appellants and allow the cross appeal of the respondent against this judgment for the reasons set out below.

**Selection of candidates to be Work Training Officers**

2. In May 2013 the Irish Prison Service, the respondent, ran an internal promotion competition to enable prison officers to apply for the newly created position of Work Training Officer. There were eight separate skill sets in services, crafts, catering, integrated sentence management, environment, physical education, industrial skills and computers/printing. The competition was to be carried out pursuant to Circular 02/2013 ("the circular"). The circular stated that the process would be conducted in accordance with the Commission for Public Service Appointments Code of Practice for Appointments of Positions to the Civil Service and Public Service ("the code"). The circular set out the criteria that would apply in respect of the applications for the positions. Panels would be established for each of the eight skill sets. Candidates were required to identify the panel or panels for which they wish to apply. The selection process was competitive and merit based. Candidates who met the required standard for each skill set would be placed on a panel in order of merit and considered for appointment in that order. Placement on a panel did not confer any right of appointment to the position of Work Training Officer. The panels were to have a life of eighteen months and any vacancy that arose within the 18 month period would be offered in turn to the candidates on the panel in order of merit.

3. The candidates were required to complete a job application form. This included identifying any qualifications they held that they considered were relevant to the position of Work Training Officer in respect of whichever panel(s) they applied for. Marks were awarded based on the relevance of the candidates' qualifications. The application forms were assessed by five assessors in order to produce a short list of candidates for interview. Candidates had to reach a qualifying mark of 115 out of an available 200 marks in order to be short listed for interview.

4. The respondent received 394 applications of whom 254 candidates were short listed for interview. These lists were sent to the Governors of the various institutions and posted on staff notice boards.

5. There were a number of requests for a review of the short listing process pursuant to s. 7 of the code. Arising from those requests, the respondent decided to carry out a review of all candidates who did not reach the qualifying mark to be called for an interview. As a result of that review, a further 24 candidates were called for interview.

6. The interview scoring sheet listed six headings under which candidates were to be assessed. These were initiative, managing and developing people, commitment to quality results, inter personal communication, relevant experience and relevant qualifications. There was a maximum of 50 marks available under each of these competencies, save for relevant experience where 100 marks were available. The total marks available was 350: 50% was deemed the qualifying mark to be included on the panel, i.e. 175 out of the 350.

7. Marks were to be awarded for the highest relevant qualification submitted by each candidate. A Junior Certificate or equivalent earned 15 marks, Leaving Certificate: 20 marks, Advanced Higher Certificate (Level 6) attracted 25 marks, Ordinary Bachelor Degree (Level 7) attracted 30 marks, Honours Bachelor Degree or Higher Diploma (Level 8): 35 marks, Masters Degree or Post Graduate Diploma (Level 9): 40 marks and Doctorate Degree or Higher Doctorate

(Level 10): 50 marks.

8. Difficulties arose in relation to the awarding of marks in respect of relevant qualifications, in part by reason of the changes introduced to the training afforded to new recruit prison officers. In 2006 the respondent introduced a requirement that all prison officers recruited to the respondent undertake a Higher Certificate in Custodial Care, a Level 6 qualification, as part of their training. The HCCC programme is a bespoke course developed for the respondent. Its aim is to provide a professional development framework for a recruit prison officer and to provide recruit prison officers with a range of skills and competencies so they can carry out their duties in a professional manner. The course is two years in length and comprises eleven subject modules undertaken over the course of four semesters. Prior to that, recruits were not afforded a Level 6 training.

9. In or about 2007 the respondent entered into an agreement with the Prison Officers Association ("the POA") to avoid disadvantaging prison officers recruited prior to the introduction of the HCCC by reason of the fact that they would not have a HCCC.

10. At the commencement of the selection process for the position of Work Training Officer the respondent confirmed to the POA that the HCCC did not form part of the scoring system as it was not envisaged that it would be a relevant qualification for the skills of the new Work Training Officer positions. The short listing and interview boards were advised that the HCCC should not be considered as relevant to the role. The interview boards were informed that marks should only be awarded for relevant qualifications.

11. On the 12th August 2013, following the conclusion of the interview process, the respondent issued the details of the panels of those persons who had been successful in the competition. Thereafter the POA raised an issue regarding the manner in which the HCCC was considered in both the short listing and interview stages. In effect, in the course of both the short listing stage and the interview process, assessors and interview boards accepted the HCCC as a relevant qualification in respect of some of the Work Training Officer positions. 25 marks had been awarded to those candidates who successfully established that HCCC was relevant to the position for which they had applied and certain applicants received 25 marks simply because they held the HCCC without having to establish its relevance.

12. The respondent immediately sought guidance from the Commissioner for Public Service Appointments, ("the Commission") on how best to deal with the issues arising. The details of the advice were not established in evidence. The respondent consulted with the POA. On the 15th August 2013 the respondent withdrew the panels pending an investigation into the issue of the HCCC, in particular relating to the appropriateness of awarding marks to those candidates who held the HCCC.

13. In order not to disadvantage prison officers who had been recruited prior to 2006 and in accordance with the agreement which had been reached with the POA in 2007, the respondent decided to award a minimum of 25 marks to all candidates in respect of the qualifications criteria whether or not they held a HCCC.

14. This decision had the effect of increasing the marks of candidates who only held qualifications of FETAC Level 5 or lower. Candidates with relevant qualifications of Level 6 or above had already been awarded at least 25 marks in respect of those qualifications. Where candidates had scored lower than 25 marks with their qualifications, their mark was raised to 25. As a consequence of this decision an additional 15 candidates were called to interview who had not previously been short listed.

15. On the 23rd August 2013 the respondent issued a notice to all prison officers including all candidates explaining the situation. The notice provided *inter alia*:-

*"To ensure that all candidates are treated in the same manner, the Irish Prison Service is revising the marks awarded at both short listing and interview stages as follows:...*

*- All candidates will receive a minimum of 25 marks at shortlisting stage to ensure all candidates are treated the same with regard to whether or not they hold the Higher Certificate in Custodial Care (HCCC)...*

*- With regard to the interview stage, all candidates will also be credited with a minimum of 25 marks, to bring all candidates up to the equivalent of the qualifying mark awarded for the HCCC...*

*- When the reconciliation of the marks as outlined have been completed, the Irish Prison Service will issue the revised panel. Following the conclusion of the entire process, candidates will be afforded the opportunity to appeal, if they so wish. All appeals should be sent directly to the Director of Staff and Corporate Services setting out a **specific** ground for the appeal. In addition, candidates may also appeal to the Commission for Public Service Appointments.*

*- **Candidates should await receipt of marks and feedback forms before submitting an appeal.**" (emphasis in the original)*

16. The 15 additional candidates were interviewed and the panels were reissued on the 9th September 2013. No candidate was removed from any panel, though there were slight adjustments to the placement of candidates on the panels.

### **The Appellants**

17. Each of the appellants were prison officers who applied for the position of Work Training Officer in respect of one or more panels.

18. Mr. Damien Kelly was awarded 25 marks in respect of his HCCC as he established to the interview panel that it was a relevant qualification. He was not successful at interview and was not placed on any panel for the position of Work Training Officer.

19. Ms. Aisling Dunne was successful at interview and on the 15th August 2013 she was placed number 24 on the Integrated Sentence Management panel. This panel was cancelled and she was placed number 26 on the new panel. She was directly affected by the manner in which the HCCC was treated and the consequential admission of 15 further candidates for interview as she dropped two places in the order of merit on the panel. Ultimately on the 10th February 2015 she was offered a WTO position in Limerick which she accepted on a without prejudice basis on the 13th February 2015.

20. Ms. Aoife Quinlivan likewise was impacted by the manner in which the HCCC issue was treated. On the 15th August 2013 she was placed number 21 on the Integrated Sentence Management panel and number 23 on the Services panel. These panels were cancelled and replaced by new panels issued on the 9th September 2013. She dropped to number 25 on the Integrated Sentence Management panel and to number 28 on the Services panel. On the 4th February 2015 she was offered two WTO positions, one in Limerick and one in Dóchas. On the 13th February 2015 she accepted the position in Dóchas on a without prejudice basis.

21. Peter Onyemekeihia was short listed for interview and initially was not successful in being placed on any panel. Following the exhaustion of all review mechanisms, representations were made on his behalf by the POA in respect of marks awarded to him for his qualifications Bachelor of Engineering degree in Manufacturing Engineering and a Bachelor of Science degree in Applied Physics. Those representations were accepted and he was awarded 35 marks for his qualifications in lieu of the HCCC. As a result, he was then placed on the Environmental panel but the panel expired before he was reached, so he

was never offered an appointment to the role. Subsequently, in 2015 he applied for the post of Assistant Chief Officer and was placed on the panel. On the 29th July 2017 he was promoted to Assistant Chief Officer.

22. Mr. Ronan Moran was not short listed for interview. In light of the decision taken in respect of the HCCC, Mr. Moran was awarded an additional 5 marks bringing him to a total of 25 marks for qualifications. He was a beneficiary of the decision to award 25 marks to all applicants as he had previously only been awarded 20 marks in this section. Notwithstanding this increase, Mr. Moran did not reach the qualifying mark to be interviewed. He subsequently applied for promotion to Assistant Chief Officer and he also was successful in been placed on that panel and has been promoted to Assistant Chief Officer.

#### **Public Service Management (Recruitment and Appointments) Act 2004**

23. The Public Service Management (Recruitment and Appointments) Act 2004 (the Act) established the Commission for Public Service Appointments. The Commission is required to establish standards of probity, merit, equity and fairness and other principles as they are appropriate to be followed in the public interest in the recruitment and selection of persons for positions in the Civil Service and other public bodies and to publish codes of practice. Section 23 required the Commission to prepare codes of practice setting out the principles to be put in place in respect of recruitment and selection procedures and promotion procedures in relation to the probity, equality and fairness of the process, the need to ensure that candidates are selected on the basis of merit, the protection of the public interest, the implementation of best practice and good governance and general procedures (including review procedures) to be adopted in respect of grievances and complaints brought forward by candidates. Section 24(8) of the Act limits the role of the code of practice in any recruitment or promotion process. Sub-section 8 provides:-

*"24.(8) If in respect of a code of practice a question arises as to whether a candidate is or is not qualified for appointment to a post to which that code relates, it shall be decided upon by the licence holder responsible for the competition concerned."*

24. Certain bodies who wish to recruit and promote personnel, referred to as office holders in the Act, must apply to the Commission to hold a recruitment licence for the purposes of the Act pursuant to s. 44. Under s. 43 of the Act the Commission may grant a licence only if it is satisfied that the applicant for the licence comes within the scope of the Act and that the applicant can and will observe the appropriate standards and codes of practice. Recruitment in respect of posts to which the Act applies may only be undertaken by either the Public Appointments Service or a holder of a recruitment licence and the licence holder must operate within the terms and conditions of the recruitment licence concerned. The Commission has power to issue instructions to licenced holders (s. 48), issue advice (s. 49), amend the recruitment licence (s. 51), and ultimately it may revoke the recruitment licence under s. 52. Section 48 provides as follows:-

*"48(1) Where the Commission is of the opinion that an aspect of the recruitment process has been or is likely to be compromised, then the Commission may-*

*(a) issue instructions to the licence holder concerned, and*

*(b) issue a copy of those instructions to any other person it considers appropriate to issue a copy to.*

*(2) Nothing in subsection (1) shall be read as permitting an instruction to be issued which has the result of affecting any particular appointment or purported appointment or the recruitment process relating to that appointment or purported appointment."*

25. This is in keeping with the role of the Commission established under the Act. It has no role in the question as to whether any individual is suitable for appointment or promotion and it may not interfere with the powers of a licence holder (employer) in that regard.

#### **The code of practice**

26. The circular provided that the recruitment and selection process for appointment to the positions of Work Training Officer would be conducted in accordance with the code. Section 1 of the code outlines that the purpose of the Act is to provide a modern and efficient framework for public service recruitment that allows for increased flexibility while maintaining high standards of probity and fairness. The Commission is responsible for establishing and safeguarding standards in the recruitment and selection of appointees and it has the powers necessary to enforce those standards, which include the power to amend the terms of a recruitment licence issued to a public body or to revoke the licence in extreme cases. The code expressly states that the Commission does not have the power to alter a recruitment decision once made.

27. Appointments are to be made on merit through an open, accountable, transparent, competitive recruitment process. The code provides:

*"It is essential to ensure that the selection process does not provide unjustifiable advantage or disadvantage to any particular candidate or a group of candidates. The selection process should embrace general equality of opportunity, and should be integral to the processes by which appointments are made."*

28. The code provides for review or appeal procedures which were to be followed by the respondent in the process of selecting work training officers. A s. 7 review is a procedure where the candidate seeks a review of a decision taken in relation to his or her application. There is also a s. 8 review procedure in relation to allegations of a breach of the code of practice. Under s. 7 of the code, there is an informal process to be followed by a formal process and then, if required, by a review. Under s. 8 there is an informal process, to be followed by a formal review and then, by way of an appeal to the Commission. Clause 8.9 of the code provides:-

*"The Commission may take whatever action it considers necessary when it deems there to have been a failure, on the balance of probabilities, to comply with the code of practice in accordance with the provisions of the Public Service Management (Recruitment and Appointments) Act 2004, including the revocation of a recruitment licence, where appropriate."*

29. The Commission on a s. 8 appeal does not determine the outcome of any individual recruitment decision by the employer, the licence holder, in this case, the respondent.

#### **The further steps of the appellants**

30. Each of the appellants exercised their right to appeal or review pursuant to s. 8 of the code. Initially there was an informal review in which they were unsuccessful. They then asked for a formal review under s. 8. In the case of Mr. Kelly, Ms. Dunne and Mr. Onyemekeihia they were each informed that their appeals had not been upheld by the formal reviewer, Ms. Angela Kenny, on the 11th November 2013. Ms. Aoife Quinlivan was so informed on the 14th March 2014. All five appellants sought a review by the Commission in accordance with s. 8. Mr. Kelly applied on the 20th November 2013, Ms. Dunne on the 13rd November 2013, Ms. Quinlivan on the 2nd May 2014, Mr. Moran on the 3rd September 2013 and Mr. Onyemekeihia on the 26th November 2013. The Commission decided to issue a single report dealing with all s. 8 appeals arising out of the competition and it issued its report on 9 June 2014. The appellants each received copies of the report on the 9th July 2014.

#### **The report of the Commission of June 2014**

31. The report describes the competition and the complaints regarding the respondent's conduct of the competition in detail. The Commission received

eleven formal s. 8 requests for review. It summarised the allegations of the breaches of the code including an allegation that there was an inappropriate and unfair awarding of marks for the HCCC in a manner that was not consistent with the respondent's communications at the outset of the competition. The Commission noted that after additional interviews had taken place and the extra 25 marks for the HCCC were awarded, the revised panels issued "which reflected some minor changes to the order of merit on the original panels". The Commission found that there were some inconsistencies in the awarding of marks for relevant qualifications across the selection boards and that it was not always clear what was the relevance of the qualification to a particular position. At p. 11 of the report it stated:-

*"The Code of Practice confers an obligation on the [respondent] to treat all candidates fairly and to ensure that selection criteria are applied consistently across all candidates at all stages of the process. It also sets out that the criteria employed must be relevant to the role. The Commission found a lack of consistency in how marks for qualifications were awarded and little clarity in many cases in the relevance of the qualifications to the duties and responsibilities of the roles."*

32. The issue of the HCCC qualification was dealt with on page 12:

*"The Commission notes the decision by the [respondent] to withdraw the panels once [the HCCC issue] was brought to their attention and to review all applications. This resulted in all candidate being given the benefit of marks equivalent to Level 6 HCCC, i.e. up to a maximum of 25 marks were awarded to all candidates who had a Level 6 qualification or lower. The Commission acknowledges the efforts by the [respondent] to rectify the situation so that no candidate was disadvantaged by the decision of the selection boards to award marks for the HCCC. However, it is of the view that the [respondent] should have taken greater care to ensure that the scoring system (i) was clearly defined in advance of the process (ii) was sufficiently robust (iii) reflected the requirement of the role and (iv) was followed consistently by all of the selection boards. The Commission considers certain candidates were disadvantaged in this instance which in breach of the merit principle.*

*The Commission considers that the appointment process used in this instance fell short of the standards provided in the Code of Practice."*

33. In its conclusions the Commission recorded that it had concerns about the management of the process particularly in relation to how candidates' experience and qualifications were assessed for the different roles. It concluded:

*"The Commission acknowledges the immediate actions taking by [the respondent] to address the inconsistent awarding of marks for the HCCC by the selection boards. However, it is the view of the Commission that the decision to give all candidates the benefit of the additional marks did have an impact on the outcome of the selection process in a manner which would not have been anticipated at the outset of the process.*

*The Commission considers that the [respondent's] management of the selection process in relation to the use of selection criteria...fell short of the standards set out in the Code of Practice."*

34. The appellants argued that the report of the Commission was an independent assessment of the conduct by the respondent of the competition and it found that there were flaws in the process and that individuals were disadvantaged. This was the conclusion of the body with specialist expertise in the area, who had established the code of practice in question. The Commission is the principal regulator of recruitment and selection processes within the public service with a statutory role to ensure that appointments in the organisations subject to its remit are made on merit and as a result of fair and transparent appointment processes. The appellants placed considerable reliance upon the findings of the report adverse to the respondent and they decided to institute these proceedings.

### **The proceedings**

35. On the 29th July 2014 Mr. Kelly applied *ex tempore* for leave to apply by way of an application for judicial review before Baker J. seeking the following reliefs:-

*"(1) an order of certiorari by way of judicial review quashing the results of a selection process for posts of Work Training Officer in the Irish Prison Service carried out on foot of circular 02/2013;*

*(2) an order of prohibition preventing the respondent, his servants or agents from making appointments to the posts of Work Training Officer on foot of selection process carried out under circular 02/2013;*

*(3) a declaration that the respondent, his servants or agents, acted ultra vires and/or in breach of the requirements of natural and constitutional justice in deciding to make appointments to the post of Work Training Officer prior to the Commission for Public Service Appointments completing and making a report of the applicants' complaints;*

*(4) declaration that the respondent, his servants or agents, acted ultra vires and/or in breach of the requirements of natural and constitutional justice in the manner in which it conducted the selection process for the posts of Work Training Officer."*

36. Mr Kelly also sought a stay pursuant to Ord. 84, r. 20(7) of the Rules of the Superior Courts: and an injunction restraining the respondent from taking any further steps to implement the decisions made on foot of the selection process carried out on foot of the circular and damages and costs. He was granted leave to seek reliefs 1, 2, 4 5 and 6. He was refused leave in respect of ground no. 3 and in respect of a claim for damages.

37. On the 29th August 2014 counsel on behalf of Ms. Dunne, Ms. Quinlivan and Ms. Moran applied for similar leave to that granted to Mr. Kelly. MacEochaidh J. granted the applicants leave to apply for judicial relief on grounds matching the reliefs granted by Baker J. in relation to Mr. Kelly. The appellants were given leave to amend the grounds upon which they sought relief by adding the following paragraph:-

*"The applicants' legitimate expectation was that the selection process would be conducted in a fair and transparent manner in accordance with the code of practice of the notice party as set out in the respondents' circular 02/2013, of May, 2013. The notice parties (sic) found that the respondents' management of the selection process in relation to the use of the selection criteria and also its handling of both complaints and requests for review fell short of the standard set out in the code of practice. This breach is a breach of the applicants' rights and amounts to illegality."*

38. On the 3rd October 2014 counsel on behalf of Mr. Onyemekeihia made an application *ex parte* to O'Malley J. for leave to apply by way of an application for judicial review for similar reliefs and O'Malley J. made an order for judicial review of all of the reliefs set forth.

39. In no case was an injunction granted restraining the respondent from making appointments from the various panels to the posts of Work Training Officer pending the hearing of the applications. Despite this, the respondent initially ceased making appointments. However, the panels were due to expire on the 8th March 2015 and the vacancies across the Prison Service were left unfilled. The respondent informed the appellants that it intended to recommence making appointments from the relevant panels and on the 30th January 2015 it commenced to do so. While the appellants objected to this action by the respondent, they did not seek to restrain the actions of the respondent. Indeed, both Ms. Dunne and Ms. Quinlivan accepted appointments as Work

Training Officers, although on a without prejudice basis and reserving their position in their proceedings.

### **Judgment of White J. in the case of Aisling Dunne and Aoife Quinlivan**

40. In light of these developments, the respondent applied to dismiss the cases of Ms. Dunne and Ms. Quinlivan on the basis that they had now become moot. White J. decided that the applications for *certiorari*, prohibition, a stay and an injunction were now moot. He held that the only remaining matter that was justiciable in between Ms. Dunne and Ms. Quinlivan and the respondent was the declaration that the respondent's servants or agents had acted *ultra vires* and were in breach of the requirements of natural and constitutional justice in the manner in which it conducted the selection process for the posts of Work Training Officer. He held that the claim was now limited to that relief arising from the principles of legitimate expectation.

### **The decision of the High Court**

41. The hearing of the five applications lasted six days before the High Court. On day 6 in his reply, counsel for the applicants other than Ms. Dunne and Ms. Quinlivan, conceded that they were no longer seeking the relief of *certiorari*. Thus, the sole remaining ground for seeking judicial review was on the basis of a legitimate expectation and the only relief sought was a declaration that the respondent had acted *ultra vires*. The High Court summarised the claim of the appellants in the following terms-

*"(a) The legitimate expectation of the applicants was that in accordance with the code of practice of the notice party, that appointments would be made on merit, as a result of fair and transparent processes.*

*(b) On the basis of an inquiry and analysis by the notice party, an independent body created by Statute the selection process fell short of the standard set out in the code of practice, adherence to the code was written into circular 02/2013.*

*(c) The applicants have exhausted all the respondent's procedures and the applicants refer the matter to the notice party, which despite finding breaches of the code of practice, cannot effect changes in the result of a flawed selection process.*

*(d) The applicant (sic) was subject to a process lacking fairness and transparency at the ends of an emanating of the State, but without any firm redress in the internal system."*

42. Counsel for the respondent argued that all of the proceedings had been brought outside the time allowed by Ord. 84, r. 21. An application for judicial review must be brought within three months "from the date when the grounds for the application first arose". This was when they were notified that their formal appeals under s.8 of the code were unsuccessful, not when they each received the report of the Commission in July 2014. Accordingly, they were not entitled to the relief sought.

43. The trial judge gave his decision in paras 93-97 of the judgment which provide as follows:-

*"93. With regard to the preliminary point of the failure to move the application within the time allowed, this Court is of the view that whilst the applicants did use the appeals process, nevertheless in the circumstances of the case it appears to this Court that it was appropriate to await the decision of the Commission. In these circumstances the Court will not rule against the applicants on having failed the bringing of the proceedings within the time allowed by the Rules of the Superior Courts.*

*94. It is also the view of the Court that the only argument that remained open to the applicants in the case was that of legitimate expectation.*

*95. The applicants place reliance on the report of the Commission in this appeal. The Court finds that the applicants are precluded from relying on this report by reason of s. 48(2) of the Public Service Management (Recruitment and Appointments) Act, 2004.*

*96. The Court's view is that the applicants have not established any legitimate expectation or breach of same by way of the operation of the competition in question. The competition was operated in accordance with the circular, save that the CPSA did have some criticisms of the process which insofar as these proceedings are concerned relate to the fact that fresh arrangements had to be put in place in respect of the HCCC. The Court agrees that this was a fair and reasonable response by the respondent to a particular circumstance that arose in the course of the competition as acknowledged by the Commission.*

*97. Fourthly, the Court agrees with the counsel for the respondents in that the main complaint of each of the applicants concerned their placement in the competition, and in these circumstances the Court dismisses these proceedings."*

### **The Appeal**

44. The appellants appealed the dismissal of their proceedings and the respondent cross appealed the High Court's refusal to dismiss the proceedings for failure to comply with the provisions of Ord. 84, r. 21. I shall deal with this point first in this judgment as, if it is successful, it will dispose of the cases in their entirety.

### **Are the proceedings out of time?**

45. Order 84, r. 21 provides as follows:-

*"21.(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.*

*(3) Notwithstanding sub rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court may only extend such a period if it is satisfied that:*

*(a) there is good and sufficient reason for doing so, and*

*(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub rule (1) either:*

*(i) were outside the control of, or*

*(ii) could not reasonably have been anticipated*

*by the applicant for such extension.*

*(4) In considering whether good and sufficient reasons exist for the purpose of sub rule (3), the Court may have regard to the effect which an*

*extension of the period referred to in that sub rule might have on a respondent or third party.*

*(5) An application for an extension referred to in sub rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub rule (4) and shall verify any facts relied on in support for those reasons."*

46. The following points emerge from this rule. Time commences to run from the date when the grounds for the application first arise. The application must be brought within three months from that date. The court has power to extend the period but the power is circumscribed by the rule. If an application is outside of the prescribed period, the applicant must seek an order extending the time under r. 21(3). That application must be grounded upon an affidavit sworn by or on behalf of the applicant which sets out the reason for the applicant's failure to make the application for leave within the period prescribed by sub rule (1). The affidavit must verify the facts relied upon to support those reasons. The court may only extend the time if the court is satisfied that there is good and sufficient reason for so doing. In reaching this assessment, the court may have regard to the effect which an extension of the period might have on a respondent or third party. If a court is satisfied that there is good and sufficient reason for extending the time, it must also be satisfied that the circumstances that resulted in the failure to make the application for leave within the three-month period either were outside the control of the applicant or could not reasonably have been anticipated by the applicant.

47. The starting point is an analysis of the grounds for the application for leave to seek judicial review. Once they are identified, it is then possible to identify the date from which the grounds for the application first arose.

48. In this case the grounds for the application are the alleged failure by the respondent to conduct the selection process in accordance with the code and in particular the manner in which it dealt with the HCCC qualification. In submissions to this Court counsel for the appellants submitted that the legitimate expectation they assert was that the respondent would comply with the code in carrying out the selection process. The manner in which it dealt with the HCCC issue was inconsistent with its obligation to conduct the process in an open and fair manner and breached the merit principle. It altered the process by reference to an agreement with the POA of which the appellants were unaware and which was not part of the circular or the code. He submitted that the respondent ought to have started the entire process again.

49. In August 2013 the respondent became aware of the problem in the process in relation to the HCCC. It cancelled the first panels and determined, in order not to disadvantage prison officers who had been recruited prior to 2008 and in furtherance of the agreement with the POA, that a minimum of 25 marks would be awarded to all candidates in respect of the qualifications criteria. That decision was made and notified to all candidates including the appellants by the office notice of 23rd August 2013.

50. From that date all candidates knew that (on the appellants' view of events) there had not been strict adherence to the code in the conduct of the process up to that date and that the process was to continue on the basis that all candidates were to receive at least 25 marks in respect of the qualifications criteria. The appellants knew that the respondent was not going to terminate the existing process and start afresh.

51. It follows that it is the decision of the 23rd August 2013 and the subsequent new panels which issued following on from that decision on the 9th September 2013 which constitutes the grounds for judicial review in these cases. That being so, the grounds for the application arose on the 23rd August 2013. It might be argued that the appellants would not individually have had any grounds for their applications until they ascertained how they were affected by the decision, and thus their grounds for their applications only arose when the new panels were published on the 9th September 2013. If the appellants are given the benefit of this argument, nonetheless all of the applications for judicial review were brought well outside the time limit established in r. 21(1).

52. Counsel for the appellants submitted that the process included an appeal process and that they were required to exhaust that appeal process before they could seek judicial review of the decision of the respondent. He argued that the appeal process set out in the code was expressly adopted by the circular. This involved an informal review, a formal review, followed by an appeal to the Commission. This was reinforced by the notice of the 23rd August 2013 which states:-

*"Following the conclusion of the entire process, candidates will be afforded the opportunity to appeal, if they so wish...In addition, candidates may also appeal to the Commission for Public Service Appointments. Candidates should await receipt of marks and feedback forms before submitting an appeal."*

53. Counsel for the appellants argued that the appeal process concluded when the appellants were notified of the report of the Commission on the 9th July 2014. He argued that the grounds for the applications first arose when the appeals process concluded and therefore all of the applications were brought within the three-month period set by r. 21(1).

54. In response, counsel for the respondent argued that, even if the appellants could argue that they were obliged to exhaust their appeal remedies before seeking judicial review, their appeal remedies had been exhausted by the time they each received notification that their formal appeals pursuant to s. 8 of the code had each been rejected. She argued that the further appeal to the Commission should not be considered in assessing when the appellants had exhausted their review remedies for the purpose of determining when their grounds to apply for judicial review first arose. The decision of the Commission could never affect their applications for the position of Work Training Officer. All of the appellants acknowledged that they knew that the result of the appeal to the Commission could not affect their individual positions. Counsel emphasised the provisions of s. 48(2) of the Act 2004 which provided that any instruction of the Commission to the respondent that any aspect of the recruitment process has been compromised may not affect any particular appointment or purported appointment or the recruitment process related to that appointment or purported appointment.

55. I agree with the submissions of the counsel for the respondent. It is clear from the provisions of s. 48(2) that whatever the outcome of the appeals by the appellants to the Commission, it could not give rise to any grounds upon which the appellants could seek judicial review in respect of the respondent. This means that the report of the Commission was not relevant to their cause of action; at best the findings and conclusions of the Commission supported and corroborated their argument. That is very different from saying that it forms the basis or an additional ground for the application for judicial review.

56. The trial judge asked himself whether it was reasonable for the appellants to await receipt of the report of the Commission before instituting their respective proceedings. With respect, in my opinion he misdirected himself as to the question he ought to have addressed. The issue to be determined was when the grounds for judicial review first arose. It is clear that they first arose on the 23rd August 2013. If the court follows the line of jurisprudence which requires applicants for judicial review to exhaust the appellate process prior to instituting judicial review, this must be interpreted as referring to the appellate process which could affect the claim or case of the individual applicant for judicial review. In other words, it could not include the outcome of their appeals to the Commission.

57. Mr. Kelly, Ms. Dunne and Mr. Onyemekeihia were informed of the rejection of their appeals on the 11th November 2013 and Ms. Quinlivan was so informed on the 14th March 2014. Mr. Moran did not seek an individual appeal under s.8 of the code. Thus, even affording the appellants the benefit of the exhaustion principle, as it was described by counsel for the appellants, their grounds for seeking relief arose on 11th November 2013, or 14th March 2014 in the case of Ms. Quinlivan. Therefore, the trial judge ought to have concluded that the applications had in fact been brought outside the three-month time limit provided in r. 21(1).

58. While the trial judge did not address the issue of an extension of the period pursuant to sub rule 3, in my opinion there were no grounds upon which he could have extended the time. No appellant brought an application to extend the time as required by r. 21(3). There were no affidavits setting out the reasons for the appellants' failure to make their respective applications for leave within the period prescribed. No appellant advanced good and sufficient reasons for extending the period and there was no indication that the failure to make the application within the prescribed period arose from circumstances which were outside their control or which could not reasonably have been anticipated by them. Absent these necessary proofs, there is no discretion to extend the prescribed period. Specifically, there is no reasonableness test as may have been applied by the trial judge.

59. Insofar as the trial judge formed the view that the applications were brought outside the prescribed time limit, he was not entitled to extend the time to seek judicial review on the grounds that it was reasonable to await the report of the Commission. The appellants did not attempt to comply with the provisions of Ord. 84, r. 21(3) and (4). In the absence of an application to extend the time for leave to apply for judicial review in accordance with the Rules it was not open to the High Court to extend the time. For these reasons I would allow the cross appeal of the respondent and dismiss the proceedings for failure to comply with the provisions of Ord. 84, r. 21.

#### **Legitimate expectation**

60. Notwithstanding my holding on the cross appeal, I nevertheless consider it appropriate to address the arguments of the appellants that the trial judge erred in refusing their applications for judicial review on the basis that he concluded that they had failed to establish a legitimate expectation or any breach of a legitimate expectation by reason of the operation of the competition in question.

61. It was not contested that the High Court correctly identified the relevant legal principles. The starting point is the judgment of Fennelly J. in *Glencar Explorations plc v. Mayo County Council* (No. 2) [2002] 1 I.R. 84 at p.162 of the report. He held:-

*"In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."*

62. The High Court concluded that the appellants had not established any legitimate expectation or any breach of any such legitimate expectation by way of the operation of the competition in question. It found as a fact that the competition was operated in accordance with the circular "save that the Commission did have some criticism of the process which insofar as these proceedings are concerned relate to the fact that fresh arrangements had to be put in place in respect of the HCCC."

63. The appellants argued that the trial judge erred in failing to find that they had a legitimate expectation, based on the circular, that the code would be complied with. They submitted that the representation, for the purposes of the test in *Glencar*, was that the process from commencement to conclusion would comply with standards established by the code. The appellants claimed that they had acted upon this representation by applying for the position of Work Training Officer and that the respondent had resiled from its representation by acceding to the representations of the POA (which breached the transparency principle) and by awarding all candidates a minimum of 25 points for the qualification criteria (which breached the merits principle). They submitted that the trial judge erred in failing to find that the faults in the selection process were not merely procedural shortcomings or administrative imperfections. The conduct of the process by the respondent was fundamentally flawed and in August 2013 it ought to have recommenced the process from the beginning.

64. The respondent submitted that the appellants had not identified any error on the part of the High Court judge in his application of the principles relating to legitimate expectation to the facts and the circumstances in the proceedings. Counsel for the respondent argued that the code did not establish a system designed to confer rights on individuals. Accordingly, it could not give rise to a legitimate expectation within the meaning of the authorities. Furthermore, as a matter of fact, none of the appellants said that they relied upon any particular representation in the circular or code when they applied for the position of Work Training Officer. The circular does not say that if there was criticism by the Commission or any other party in relation to how the process was conducted that it would be cancelled and recommenced. The code establishes standards and best practice for licence holders and is not by its very nature designed to confer rights on individuals. It follows that it could not give rise to an expectation that individuals could rely personally on provisions of the code.

65. The High Court was satisfied that the competition had been run in an appropriate manner, in accordance with the circular. In those circumstances, no legitimate expectation could arise on foot of the facts of the cases. The High Court found that the manner in which the respondent considered the HCCC was fair and reasonable having regard to all the circumstances. It followed that the respondent had not resiled from any representation (assume one could arise) by reason of the publication of the circular. She said that applying for promotion could not be considered to be acting to their detriment, and, therefore the appellants could not show that it would be unjust for the respondent to resile from the alleged representation, even if they succeeded in satisfying the court on this point.

66. Counsel for the respondent submitted that the report of the Commission amounted to a criticism of the manner in which the respondent conducted the process in relating to the HCCC issue. She said there could never be a representation that there would never be a criticism by the Commission of a licence holder in relation to the conduct of a selection process and the subsequent appointment. The code established best practice and the finding of the Commission was that there was a falling short of best practice, no more. This could not amount to a breach of a representation.

#### **Decision**

67. In my opinion the trial judge was correct in concluding that the appellants failed to establish any legitimate expectation or breach of same by operation of the competition in question. While he did not elaborate on his reasons for his conclusion in para. 96 of his judgment, he may be taken to have endorsed the submissions of the respondent which were set out comprehensively in paras 88-92 and so to have adopted those arguments.

68. I accept the submission of the respondent that the provisions of the code cannot amount to a representation for the purposes of legitimate expectation. The code is not designed to confer rights upon individuals who apply for positions in organisations governed by the Act of 2004. It is artificial to say that the code amounts to a representation for the purposes of the doctrine of legitimate expectation. It establishes best practices and as such cannot amount to a representation. To hold otherwise would be to ignore s 48(2) which provides that any instruction issued by the Commission to a licence holder, such as the respondent, may not affect any particular appointment or recruitment process relating to that appointment.

69. Secondly, as a matter of fact there was no basis for alleging that the appellants had applied for positions of Work Training Officers in reliance on any

particular provision of the code. Thirdly, it cannot be said that that they acted to their detriment in participating in the competition. It follows therefore that there was no legitimate expectation as asserted by the appellants.

70. The Commission criticised the process relating to the fact that fresh arrangements had to be put in place in respect of the HCCC. The Commission held that there had been a breach of the merit principle and that certain candidates, including Ms. Dunne and Ms. Quinlivan, had been adversely affected. The High Court held that this was a fair and reasonable response by the respondent in the circumstances. Counsel for the appellants argued that once the difficulty had arisen, the respondent ought to have halted the process and recommenced a new competition. The High Court clearly felt that this was disproportionate and unnecessary and, in my opinion, the appellants have failed to demonstrate any error in principle in the approach of the High Court. In my opinion, the trial judge was entitled to conclude that the matter had been dealt with in a manner that was both fair and reasonable. It was a proportionate response in all the circumstances. It would not have been reasonable for the appellants to expect in the circumstances which occurred in this case, that the process would be halted and recommenced in its entirety. As Fennelly J. pointed out in *Glencar*, the principles he set out are qualified by considerations of the public interest and it was clearly in the public interest, given the number of candidates and positions to be filled across the Prison Service, that the process should continue in the manner in which it did.

71. For these reasons I am of the opinion that the High Court was correct to conclude that the appellants had not established a legitimate expectation or breach of same by operation of the competition to appoint prison officers to the position of work training officers. Therefore, I dismiss the appeal of the appellants.