

## THE HIGH COURT

[2009 No. 1304 J.R.]

BETWEEN

JAMES HERLIHY

APPLICANT

AND

SUPERINTENDENT OF GURRANABRAHER GARDA STATION AND THE COMMISSIONER OF AN GARDA SIOCHANA

RESPONDENTS

Judgment of Ms. Justice Iseult O'Malley delivered the 12th day of November, 2012

## INTRODUCTION

1. The applicant is a serving member of An Garda Siochana and has been such for about 33 years. He lives in Ballincollig in County Cork and for almost 30 years was based at Blarney Garda Station. These proceedings concern the circumstances in which he came to be transferred, in September 2009, to Gurrabraher Garda Station in Cork City. Both stations are within the Garda District of Gurrabraher, which is in the Division of Cork City.

2. The first named respondent is Superintendent Con Cadogan, who is and was at all material times the District Officer of An Garda Siochana in the Gurrabraher District. He is named by the applicant as a respondent due to a misapprehension on the part of the applicant as to his role in the transfer. The applicant believed, mistakenly, that Superintendent Cadogan had purported to direct the transfer on his own authority. As will become apparent, this is a power that a District Officer does not have.

3. Some time between 9.15 and 9.30 a.m. on the 7th September, 2009 there was an altercation between the applicant and his wife in the family home at Ballincollig. Members of An Garda Siochana arrived at the scene as the result of a 999 call at 9.20 from a member of the public. They found the applicant's wife in a state of distress. She was bleeding from a cut on her hand and had an injury to her back. The applicant had already called an ambulance and his wife was taken to hospital where she received stitches to her finger. She did not require further treatment.

4. The Gardai who had arrived at the house naturally contacted their senior officers.

5. During the course of the morning Inspector Gary McPolin took formal statements, firstly from the applicant and then, at the hospital, from his wife. It is clear that there had been a row between the two and that Mrs. Herlihy fell against a glass door in the family home but there was a conflict between the two accounts as to how that happened. The statements are exhibited by the first respondent in his affidavit.

The Court is not concerned in these proceedings to establish the truth of either statement but it is necessary to quote from them because of steps taken as a result of what was said in them.

6. The applicant stated that he was sorting out some photographs in the computer room when his wife came in. According to him there had been no words between them earlier that morning. He went on to say:

*"She grabbed one of the photos and tore it up. She grabbed the bunch of photos and went to tear them up. I tried to pull them out of her hand. She fell back against the single glazed door; the glass broke and came down in sheaths (sic). She said that she had hurt her back and fell down on the ground. I dialled 999 immediately. She had a cut on her finger I wrapped tissue paper around her finger it just happened split second We had a row before and the guards were called This was about 4 years ago, Iris Brosnan was the guard We are not getting on; there is tension all the time. She is doing everything to vex me so I would hit her. Neither of us is on medication. There is a Solicitor involved I did nothing wrong, I didn't assault her; I never had or have the intention of assaulting my Wife. "*

7. In her statement, Mrs. Herlihy said that they had been arguing about something else when her husband told her he had burned all photographs with her in them. She said that there was one with her and that she would take it. The statement goes on:

*"I said 'There everybody's photographs as the kids are in them ' meaning the children. He grabbed me and pushed me against the door. The door would be hard glass and p.v. c. The glass shattered as my back hit it. I felt something had happened to my back and I fell to the floor. My husband was cross and crying. I was afraid I know my husband can get angry but never physically angry like this....*

*My husband and I have not been getting on for the last 3 years. I made a complaint against him before and I have been living a life of mental torture since then. I have been to solicitor Patrick Mullan over this. He seems to blame me for everything going wrong in his life. The mental torture entails calling me names, taunting me about being adopted, accusing me of affairs and all sorts. I have had enough. "*

8. After taking the statements, Inspector McPolin and the Sergeant who had accompanied him met with Superintendent Con Cadogan, the first named respondent. The Superintendent avers that it was specifically outlined to him that Mrs. O'Herlihy was in fear of her husband and that she had informed them that she had made complaint in the past and the Gardai had done nothing about it. This latter point was of particular concern to him. He subsequently notified the Garda Siochana Ombudsman Commission ("GSOC"), who appointed an investigator that afternoon, and contacted his Chief Superintendent, Liam Hayes. He says that he also checked the Garda PULSE system and found that there had been two earlier incidents in relation to the applicant and his wife. (In this regard the applicant says that there had only been one, that no complaint had been made by his wife and that he is seeking to have the PULSE record corrected.)

9. In the afternoon of the same day Superintendent Cadogan and Inspector McPolin met with the applicant at his home. He was informed that GSOC were to be involved. Beyond this point there is disagreement.

#### **THE INVESTIGATION AND ITS AFTERMATH**

10. Having received the referral from Superintendent Cadogan on the 7th September, GSOC commenced an investigation on the same day. By letter dated the 5th December, 2009 Senior Investigating Officer Nicholas Harden reported his findings to Assistant Commissioner Louis Harkin, Strategy, Training and Professional Standards. The report sets out, inter alia, the accounts of the original incident given to GSOC by the applicant and his wife. Each differs somewhat from the statements given to Inspector McPolin.

11. The applicant said that he was seated at his computer when his wife came into the room following an argument. She grabbed a pile of photos that he was scanning, stated that half of each photo belonged to her and started to tear them in half. He attempted to stop her by grabbing the photographs. While they were pulling against each other Mrs. Herlihy had her back to the door with the glass panel. During the struggle her elbow came in contact with the glass and broke it. She fell to the floor. He saw that she was bleeding from the finger and also had a scrape on her back sustained from the metal door handle when she fell. He denied assaulting his wife.

12. Mrs. Herlihy said that there had been a row over domestic issues. She followed her husband into the computer room where she was told by him that he was scanning the family photos and deleting her image from them. She saw a pile of photographs, grabbed them and started to tear them up. He told her to stop, she refused and he attempted to grab them from her. She said that she was "forced backwards" by this but "was not being pushed by Jim". She said that the upper part of her body hit the pane of glass and caused it to break.

13. According to Mr. Harden a number of other statements were obtained but no further evidence was identified in relation to the alleged assault.

14. GSOC reported that it was of the opinion that no misbehaviour or misconduct on the part of the applicant had been disclosed. A file had been prepared and sent to the DPP, who stated that the matter had been thoroughly investigated but that there was insufficient evidence to warrant a prosecution.

15. The GSOC report also refers to the actions taken on the day of the incident and describes the transfer as "entirely appropriate and proportionate considering the nature of the investigation and the proximity of the family home to Garda Herlihy's original posting". This comment is made in the context of describing the need to take immediate steps to ensure the safety of Mrs. Herlihy.

16. Although the report is dated the 5th December, 2009 it is said by Superintendent not to have been received in Garda Headquarters until the 11th January, 2010. In the meantime the Applicant had sought and been granted leave to bring these proceedings on the 21st December, 2009. The applicant's grounding affidavit, sworn on the 18th December, was obviously drafted in ignorance of the report and makes no reference to it.

17. According to Superintendent Cadogan, Chief Superintendent Finn then directed, in the light of the report, that the applicant should be restored to full operational duties but should remain at Gurrabraher Station. The Superintendent says that this happened on the 25th January (not the 23rd March, as averred to by the Chief Superintendent). Again this decision does not seem to have been put in writing to the applicant or to his legal advisors. The applicant says that he received a telephone call from his Sergeant in Gurrabraher on the 5th February telling him that he would be permitted to resume outdoor duties from the 7th of that month. He says that he met Superintendent Cadogan in the station on the 8th and was told that he had been exonerated by GSOC. The Superintendent agrees that they met but says that the applicant told him that he had "been aware" of the GSOC report for some time.

18. It will be seen from the GSOC investigator's report that there was clearly a significant alteration in the account of the incident given by Mrs. Herlihy and there could not have been any realistic prospect of a conviction in the event of a prosecution.

#### **EVIDENCE IN RELATION TO THE TRANSFER**

##### **THE APPLICANT**

19. The applicant says that he was told by Superintendent Cadogan to report to Gurrabraher Station on the 9th September. He says that he "understood" that he was being transferred temporarily and that he would be assigned to the radio room in that station. On reporting to Gurrabraher he was told that he was confined to indoor duties and was assigned the role of permanent public officer and member in charge with responsibility for prisoners. No D20 or "history form" was ever forwarded.

##### **SUPERINTENDENT CADOGAN**

20. Superintendent Cadogan avers that on the direction of Chief Superintendent Hayes he met with the applicant and informed him that he was being transferred to Gurrabraher and that he would be confined to indoor duties until the investigation was completed. He says that the view of the Chief Superintendent (as confirmed on affidavit by the latter) was that this was necessary because of the nature of the incident and of the investigation, the fact that the incident was known in the locality, the concerns of Mrs. Herlihy in relation to her previous complaint and the proximity of the family home to Blarney Garda Station. The Chief Superintendent believed the transfer to be necessary for the purposes of the investigation and good management of Garda personnel and further that it was necessary to effect it immediately. He says that the applicant agreed to this and did not question it. There was no basis on which the applicant could have believed that the transfer was temporary.

21. The superintendent's contemporaneous note records telling the applicant "I was transferring him to Gurrabraher in light of incident".

22. In his written report to Chief Superintendent of the same date, Superintendent Cadogan says "I informed him that I was transferring him from Blarney Garda Station to Gurrabraher Station pending the outcome of this investigation...He said he clearly understood the position he was in".

##### **INSPECTOR MCPOLIN**

23. There are two undated witness statements by Inspector McPolin dealing with the events of the 7th September. In one he says that Superintendent Cadogan informed the applicant that "he would be transferred to Gurrabraher Garda Station from Blarney pending this investigation". In the other he says that "Superintendent Cadogan informed Garda Herlihy that on the direction of the Divisional Officer that he was being transferred to Gurrabraher Garda Station and confined to indoor duties until the matter was fully investigated." In an affidavit sworn shortly before the hearing of these proceedings he denies that there was any mention of the radio room.

**ASSISTANT COMMISSIONER K.G. LUDLOW**

24. On the 8th September Assistant Commissioner Ludlow wrote to the Deputy Commissioner, Operations and the Assistant Commissioner for Strategy, Training and Professional Standards in the following terms:

*I refer to the attached correspondence in this matter from the Divisional Officer, Cork City which is forwarded for your information. The Garda Ombudsman Commissioner has been notified and Mr. Nick Harden, S.I.O. has been appointed to investigate this incident pursuant to Section 98 of the Garda Siochana Act. Garda Herlihy has been transferred to Gurranabraher Garda Station pending the outcome of the investigation and he has accepted this. I will keep you advised of developments.*

25. It should be noted that the attached correspondence included the report of Superintendent Cadogan.

**CHIEF SUPERINTENDENT WILLIAM HAYES**

26. On the 9th September Chief Superintendent Hayes wrote to the Assistant Commissioner, Human Resource Management as follows:

*Re: Inter-District Transfer- Gurranabraher District- Cork City Division. With reference to the above, I recommend the following transfer within Gurranabraher District, Cork City Division with effect from today 9th September, 2009:-'*

*Garda J Herlihy 20677F Blarney to Gurranabraher*

*Transfer is in the interest of efficiency and the member has been spoken to by his District Officer and agreement reached. Garda Herlihy will transfer at his own expense.*

*Forwarded for inclusion in the next Personnel Bulletin, please.*

27. In his affidavit, Mr. Hayes (now retired) confirms that that the decision to transfer the applicant was his, that it was to be permanent and that the applicant was to be restricted to indoor duties pending the outcome of the investigation. He goes on to say that:

*"I also confirm that Garda Herlihy's situation would be reviewed on receipt of the final report of the investigation. "*

**CHIEF SUPERINTENDENT MICHAEL FINN**

28. Chief Superintendent Finn replaced Chief Superintendent Hayes at some point in November, 2009 while the investigation into the incident was still ongoing. In an affidavit sworn on the 8th February, 2012 he avers that on the 23rd March, 2010 he made a decision that the applicant should remain at Gurranabraher. He says that he made this decision because he held (and continues to hold) the view that the applicant's credibility as a member of An Garda Siochana was damaged within the community in Blarney. He bases this view on the high profile of the applicant within the local community as the author of a number of books and commentator on policing affairs, the proximity of Blarney and Ballincollig and what he believes to be the knowledge of the community of the facts relating to the incident including the facts that GSOC were investigating it and that the applicant's wife had applied for a Safety Order in November, 2009. In the circumstances it was in the best interest of the good and proper management of An Garda Siochana that Garda Herlihy remains attached to Gurranabraher rather than Blarney.

29. It must be noted here that this is the only reference in the papers before the Court to a decision being made in March, 2010. Chief Superintendent Finn does not suggest that it was reduced to writing and does not say that the applicant was informed of it. He goes on to remark that he has not received any request from the applicant to be reassigned to Blarney since that date.

30. In summary, the state of the evidence is as follows:

- (a) the applicant believed that he was being transferred pending the outcome of the investigation;
- (b) Inspector McPolin believed that the applicant was being transferred pending the investigation;
- (c) Superintendent Cadogan believed that he had made it clear to the applicant that he was being transferred permanently but reported to Chief Superintendent Hayes that he had told the applicant that it was pending the outcome of the investigation;
- (d) Chief Superintendent Hayes, whose decision it was in the first instance, says that he intended it to be permanent but with a review of the situation after the investigation;
- (e) Assistant Commissioner Ludlow believed it was pending the outcome of the investigation;
- (f) Superintendent Finn made a separate decision in March 2010, not notified to anyone, that the transfer should be permanent.

31. In the circumstances the situation can most charitably be described as confused.

**TRANSFERS AND THE GARDA SIOCHANA CODE**

32. Pursuant to the provisions of Chapter 8 (1) (a) of the Garda Code, a Divisional Officer (in this case Chief Superintendent Hayes) has authority to transfer Gardai within the Division. District Officers - Superintendents - do not have transfer authority. Chapter 8 (1) (b) provides that:

*"The transfer of members within the various Regions/Divisions must, before implementation, be forwarded to Assistant Commissioner, Human Resource Management for inclusion in a subsequent Personnel Bulletin. Transfers will not be effected unless and until directed in the Personnel Bulletin. "*

33. The Personnel Bulletin is published on the 1st and 3rd Wednesday of each month.

34. Chapter 8 (3) provides that:

*Members of An Garda Siochana directed on unrequested transfer (other than those on promotion or appointment) should*

*be notified in advance of the transfer and the reason for such transfer.*

35. Chapter 8 (10)(1) is similar to 8(1)(a):

*Transfer orders will not take effect until such time as the matter is confirmed in the Personnel Bulletin issued by Assistant Commissioner, Human Resource Management.*

36. Chapter 8. 13 deals with the appeals procedure. The relevant parts are set out below.

*(1) Members directed on unrequested transfers, other than those allocated on promotion or appointment, shall have the right to appeal in writing if they feel that the transfer is harsh or unjust.*

*(2) A member affected by a transfer order issued by the Divisional Officer or Regional Commissioner may appeal to Assistant Commissioner, Human Resource Management ...*

*(3) Such appeals shall be submitted in writing and forwarded to Assistant Commissioner, Human Resource Management at least three days prior to the transfer date. Only in exceptional cases will appeals received after this date be entertained.*

*(4) ...*

*(5) A member will not be at liberty to ask for an appeal to be placed before the Commissioner until the appeal has been formally rejected by Assistant Commissioner, Human Resource Management.*

*(6) ...*

*(7) ...*

*(8) If the Commissioner decides to reject the appeal a member is then at liberty to ask to have the appeal heard before the Review Body. "*

37. The procedure for hearings before the Review Body is set out in 8.14 and is not relevant here.

38. The status of the Code, which is an internal document akin to a staff handbook or manual, was considered by McKechnie J. in *Noonan v. Commissioner of An Garda Síochána* (Unreported, 17th July, 2007). Having considered the doctrine of legitimate expectation as discussed in *Glencar Exploration Plc v. Mayo County Council [2002] 1 I.R. 84* McKechnie J held that a legitimate expectation on the part of a member stems from the existence and publication of the Code. Standing to rely on it arises from membership of An Garda Síochána to whom the Code is addressed. It is accepted by the respondent in these proceedings that this principle applies to the applicant.

#### **THE APPLICANT'S APPEAL**

39. The applicant says that on the 20th September, 2009 he was contacted by his brother, who is also a serving member, who told him that he had seen the transfer listed as permanent in the Personnel Bulletin. The applicant thereupon sent an appeal in writing, dated 20th September, to the Assistant Commissioner, Human Resource Management. In it he refers to the transfer directed on the 7th September and says that he feels it is both harsh and unjust and claims that the consequences thereof are injurious to his health. He specifically makes the point that:

*"Due to the short notice afforded me of my transfer I was unable to give three days notice in advance of lodging my appeal in accordance with Code 8.13(3)."*

40. On the 30th September Assistant Commissioner Fanning wrote as follows:

*"I note the member transferred from Blarney Garda Station on the 9th September 2009. He then retrospectively appealed the transfer to this branch. There is no provision for retrospective appeals of transfers.*

*Please inform the member accordingly."*

41. It is not clear when the applicant received notification of this communication.

42. In accordance with the provisions of the code the applicant then appealed to the Commissioner, by letter dated the 5th November. In this, more detailed letter, he sets out his initial belief that the transfer had been temporary, the fact that he had received no notification other than the oral direction of Superintendent Cadogan, his discovery as to the publication in the Personnel Bulletin and the rejection of his appeal by Assistant Commissioner Fanning. Inter alia, he specifically claims that the transfer was not in accordance with the provisions of the Code and that the method of transfer did not afford him the facility to appeal in accordance with the Code. Receipt of the appeal was acknowledged on the 10th of November. The substantive response came by way of another letter to the Chief Superintendent from Assistant Commissioner Fanning dated the 24th November reading as follows:

*"I am directed by the Commissioner to advise Garda Herlihy of the terms of An Garda Síochána Code section 8.13 Transfer Appeals Procedure, which deals with this matter.*

*Please inform the member accordingly. "*

43. The applicant argues that this is, in effect, a decision by Assistant Commissioner Fanning to uphold his own earlier decision but I see no reason to go behind the statement that the letter is written at the direction of the Commissioner. It is somewhat cryptic in its terms and does not, as such, set out a decision. However I am of the view that, in the context of the Assistant Commissioner's previous letter, it is undoubtedly a refusal to engage with the merits of the applicant's appeal based on the time limits in the appeals procedure.

44. In the meantime the applicant had engaged a solicitor, who, also on the 24th, wrote to the Commissioner seeking the response to the applicant's appeal. The two letters obviously crossed in the post. A letter of acknowledgement was sent to the solicitor on the 26th November and on the 16th December, 2009 Assistant Commissioner wrote a substantive reply as follows:

"Dear Sirs,

*I refer to your letter of the 24.11.09 in the above subject. Before this transfer was activated local management spoke to Garda Herlihy and advised him of his transfer. Garda Herlihy accepted this transfer and transferred at his own expense on the 9th September 2009 from Blarney Garda Station to Gurranabraher Garda Station.*

*A subsequent letter was received at this office from Garda Herlihy stating that at this point he wished to appeal the transfer. Garda Herlihy was advised that there was no provision for a retrospective appeal of transfer.*

*The criteria in relation to transfers and appeals of transfers is outlined in An Garda Síochána Code, Volume 1, a copy of which was issued to Garda Herlihy.*

*I trust this clarifies the matter for you."*

45. The application for leave to bring these proceedings was moved on the 21st December, 2009.

#### **SUBMISSIONS**

46. As mentioned above, the applicant conceded at the hearing that he had been incorrect in his contention that the decision to transfer him was made, wrongfully, by Superintendent Cadogan. This assertion, sustained through several affidavits and involving various allegations against his senior officers, should really not have survived a reading of the discovery documentation which included the letter directing the transfer from Chief Superintendent Hayes.

47. At the hearing, Senior Counsel for the applicant concentrated on the applicant's right to have the appeals procedure fairly implemented. He argued that the procedure envisages a member getting his or her appeal in before the transfer is effected but that there is provision for exceptional circumstances (in 8.(13)(3) of the Code). The applicant was shut out from the appeal process. In the circumstances there was no point applying to the Review Body, since the applicant had not actually had an appeal.

48. Much of the content of the respondent's affidavits is concerned with justifying the transfer itself. Emphasis is placed on the need to ensure the well-being of the applicant's wife and the need to assure her that action was being taken. There is also reference to the perceived danger that the applicant's behaviour might be "deteriorating" and that he needed supervision to ensure the safety of the public. Again, it might be thought that the report of the GSOC investigator, with the more considered statement from Mrs. Herlihy, should have dispelled that concern. Further, one might think that a member who was thought to pose any level of threat to members of the public should not really be given the position of member in charge of the station, a post carrying key responsibility for the welfare of prisoners.

49. At the hearing, Senior Counsel for the respondents submitted that the letter of the Code cannot always be followed and that in the circumstances three days notice of the transfer would not have been appropriate. She accepted that if a mistake had been made, it was to apply the three-day time limit for appeals too strictly. However, she said, the second letter to the applicant referred him to the Code. By implication, it is submitted, he was referred to the Review Body procedure. He failed to pursue that remedy and should therefore not be entitled to judicial review. In that respect reliance is placed on the following passage from the judgment of O'Higgins CJ in *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381:

*"The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate. "*

50. It was submitted that what was in issue here was not a disciplinary sanction but, having regard to the facts, an administrative decision made in the interests of the good and proper management of the Gardai.

#### **CONCLUSIONS**

51. Having regard to the evidence relating to the manner in which the transfer came about it is difficult to avoid feeling that in fact what was intended was a temporary transfer which transmuted into a permanent one more or less by accident. There can be little doubt but that Mr. Harden, the GSOC investigator, was correct in characterising a transfer of the applicant to a station further away from his home as being appropriate and proportionate in the immediate circumstances that the applicant's superiors had to deal with on the day of the incident. The applicant himself appeared to accept this on that day. The situation required some such action to be taken and I do not believe that the right of a member to greater advance notification would necessarily apply. Nearly all the evidence points to an intention to transfer temporarily pending the outcome of the GSOC investigation (and, one might add, the decision of the Director of Public Prosecutions). Even the evidence of retired Chief Superintendent, to the effect that it was a permanent transfer to be reviewed after the final report, can be seen to some extent as supporting this view.

52. I make these observations, not as evidential findings but to highlight the degree of confusion in the case. These impressions are, of course, contradicted by the sworn evidence by those responsible for the decision and in any event could not apply to Chief Superintendent Finn's decision of the 23rd March.

53. In any event, the central fact of the case is that the transfer was effected within two days, thereby making it impossible for the applicant to give three days notice of an appeal as required by the Code. I am satisfied, on the evidence, that it was not unreasonable for the applicant to believe that he had been told that the transfer was temporary - that, after all, was the impression of Inspector McPolin, the only other witness to the conversation. It was also what Superintendent Cadogan reported having told him. In those circumstances the applicant acted as promptly as possible after the publication of the Personnel Bulletin. To refuse to entertain his appeal, as the Assistant Commissioner and the Commissioner did, on the basis that it was "retrospective" was both unfair and unreasonable.

54. In deciding on the 23rd March, 2010, to confirm the permanency of the transfer Chief Superintendent Finn gave no notification to the applicant either before or indeed after the decision.

55. The applicant was at all stages deprived of an opportunity to make his case against a permanent transfer.

56. It follows that it is unnecessary for the Court to consider whether the arguments put forward as justifying the permanent transfer are correct. These are, for the most part, matters which should have been considered in an appeal on the merits. The applicant has not had such an appeal.

57. In these circumstances the Court is entitled, in accordance with the decision of the Supreme Court in *Abenglen*, to hold that the existence of a right of final appeal to the Review Body is immaterial..

58. I will hear the parties on the appropriate order.