

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 405 J.R.]

BETWEEN

STEPHEN BENNETT

FIRST APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

FIRST RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 607 J.R.]

BETWEEN

FERDIA O'BRIEN

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice White delivered on the 10th of May, 2017

1. These are applications for prohibition to prevent, prosecutions by way of summons for alleged breaches of s. 12 of the Water Services Act 2007.

2. The First Applicants statement required to ground application for judicial review was filed on 10th June, 2016, with an affidavit verifying the grounds sworn by the First Applicant on 10th June, 2016. Leave was granted on 27th June, 2016. A notice of motion issued on 28th June, 2016, returnable for 10th July, 2016. A statement of opposition was filed and served on 7th October, 2016. An affidavit of Dara Byrne, Solicitor, in support of the statement of opposition was filed and served on 17th October, 2016.

3. The Second Applicant's statement required to ground an application for judicial review was filed on 25th July, 2016. An affidavit in support was filed by David Thompson, Solicitor, sworn on 25th July, 2016. Leave was granted on 25th July, 2016. A notice of motion issued on 26th September, 2016, returnable for 25th October, 2016. The Applicant swore an affidavit on 25th July, 2016, verifying the matter set out in the statement of grounds. The Respondent filed a statement of opposition on 2nd December, 2016, together with a verifying affidavit of Dara Byrne, Solicitor, filed on 5th December, 2016. The matters were at hearing on 1st and 2nd February 2017 and judgment was reserved.

4. There is one common ground between the two applications and a separate ground on the application of the Second Applicant The common ground is a challenge to the power of the DPP to prosecute offences contrary to the Water Services Act 2007.

5. Paragraph. 6 of the First Applicant's statement required to ground application for judicial review states:-

"The power given to the Minister under s. 9(2) to designate other persons as competent prosecutors of summary proceedings under the Act no longer exists since the repeal of s. 9(2) by s. 45(1) of the Water Services (No. 2) Act 2013. It is the submission of the Applicant that the only person entitled to prosecute summary proceedings under the Act is the Water Services Authority. The Respondent is the Director of Public Prosecutions and not a Water Services Authority. As such, it is the Applicant's submission that the prosecutions referred to herein are without a lawful basis and their continued prosecution should be prohibited. The legislation properly construed indicates that a Water Services Authority is the only party with competence to prosecute summary proceedings under the Act." This ousts any residual power of the Respondent to prosecute summary offences under s. 9(2) of the Criminal Justice (Administration) Act 1924.

The statement of grounds of the Second Applicant submits that

"(i) The Respondent has no power to prosecute the Applicant for an offence of interference or obstruction contrary to s. 12 of the Water Services Act 2007 (as amended). The power to prosecute under the Water Services Act 2007 as it was enacted was set out at s. 9(1) and (2) of the Act.

"(1) Summary proceedings for an offence under this Act may be brought by a Water Services Authority whether or not the offence is committed in its functional area.

(2) Notwithstanding subsection 1 the Minister may by regulations provide that summary proceedings for an offence specified in the Regulations may be brought by such a person (including the Minister) as is so specified."

Section 9(2) of the Water Services Act 2007 was repealed by section 45(1) of the Water Services Act (No. 2) 2013.

(ii) "Only the Water Services Authority is competent to prosecute the applicant. Section 9(1) Water Services Act 2007 (as amended). *Expressio unius exclusio alterius*. The Respondent's power to prosecute summary offences is statutory rather than constitutional in nature; section 9(2) of the Criminal Justice (Administration) Act 1924.

"Save where a criminal prosecution in a court of summary jurisdiction is prosecuted by a Minister, Department of State or person (official or unofficial) authorised in that behalf by the law for the time being in force, all prosecutions in any court of summary jurisdiction shall be prosecuted at the suit of the Attorney General of Saorstát Éireann."

(iii) The repeal of s. 9(2) of the Water Services Act 2007, taken together with the Respondent's general statutory power to prosecute criminal offence summarily, elucidates that the Respondent does not have jurisdiction to prosecute the Applicant for an offence contrary to section 12(1)(a) of the Water Services Act 2007 (as amended) in District Court case No. 2016/36184."

6. The Second Applicant in the separate ground on his application for judicial review has argued,

"(i) the Applicant is charged with an offence of obstructing "the exercise of a prescribed person of the powers vested in him by virtue of the Water Services Act 2007 contrary to s. 12(1)(a) of the Water Services Act 2007 and s. 8(4) of the Water Services Act 2007". The said charge is invalid because it does not disclose an offence known to law.....

(viii) as there is no prescribed person or powers vested in such person known to law for the purpose of the 2007 Act, the prosecution of the Applicant on the charges in District Court case No. 2016/36184 by the Respondent would be a breach of the Applicant's constitutional right to be tried on a criminal charge in due course of law as the offence for which he is charged is invalid because it does not disclose an offence known to law.....

3.(iii) "It appears that persons may be authorised in writing by the Minister to carry out certain functions under the relevant legislation without such authorisation being promulgated as law in the form of a statutory instrument or regulation and there appears to be no obligation under the relevant criminal legislation to inform the accused that a particular person has been prescribed and/or authorised to carry out certain functions and that obstruction or interference or a continuation of same would amount to a criminal offence with penal sanctions. Having regard to the above circumstances, the said criminal provisions are unconstitutional on the grounds that they are vague and uncertain and on the grounds that it is not possible for a person to know in advance that particular conduct amounts to a criminal offence."

7. The First Applicant is charged before the District Court on five separate summonses for offences contrary to s. 12 of the Water Services Act 2007.

8. The Second Applicant is charged before Tallaght District Court by summons for one offence where it is alleged he obstructed the exercise of a prescribed person of the powers vested in him by virtue of the Water Services Act 2007, contrary to s. 12(1)(a) of the Water Services Act 2007.

Submissions by the Parties

Jurisdiction of the DPP to bring Prosecution

9. The relevant section of the Water Services Act 2007, as originally enacted is Section 9 which states:-

"(1) Summary proceedings for an offence under this Act may be brought by a water services authority (whether or not the offence is committed in its functional area).

(2) Notwithstanding subsection (1), the Minister may, by regulations, provide that summary proceedings for an offence specified in the regulations may be brought by such person (including the Minister) as is so specified."

10. Section 9(2) was subsequently deleted by the provisions of the Water Services (No. 2) Act 2013 (50/2013).

11. The First Applicant has submitted that the net issue to be determined is the meaning to be given to the words "may be brought". Is it merely an enabling provision providing that the Water Services Authority may bring such cases in addition to the DPP or does it mean that offences under this Act may only be brought by the Water Services Authority or such persons designated under section 9(2).

12. The First Applicant submitted that the plain and ordinary meaning of s. 9(1) and (2) when read together is that the Oireachtas directed that summary proceedings must be brought by a Water Services Authority or another person designated by the Minister and relies on the maximum *expressio unius est exclusio alterius* (to express one thing is to exclude another). He argues where express provision is made for two prosecutors and could have included others but did not, the inference arises that the omission is deliberate and that the Oireachtas intended the unmentioned matter to be excluded from the provision.

13. The First Applicant relies on other sections of the 2007 Act to support his case, namely ss. 10 and 11.

14. He further argues that section 9 is ambiguous as it is a penal statute, it should be construed in the manner most favourable to the accused. He has argued that the High Court decision of *A.G. v. Healy* [1928] 1 I.R. 460, in applying s. 9(2) of the Criminal Justice (Administration) Act 1924, can be distinguished in the present case because of the particular wording of s. 9 of the Water Services Act 2007. In the alternative, the first applicant submits that the decision in *Healy* was incorrectly decided.

15. The Second Applicant in his submissions to this Court on this issue has supported the arguments made by the First Applicant.

16. The respondent has submitted that a long standing rule applies that absent any specific statutory power of the DPP to prosecute all summary offences, the DPP has the power to prosecute and as the legislation states that the statutory authority, Irish Water, may also prosecute such offences, there is no ouster of the jurisdiction of the DPP.

Decision

17. I cannot see any ambiguity in s. 9 of the Water Services Act 2007, either in its original or in its amended form. Summary proceedings for an offence under the Act may be brought by a Water Services Authority. There is no suggestion in the Act that the Water Authority is the only legal person who can bring a prosecution.

18. The long standing jurisprudence and statute laws have been set out comprehensively in the written submissions of the Director of Public Prosecutions which I set out hereunder.

Legal Backdrop to Power of DPP to Prosecute Summary Offences

19. Prior to the Prosecution of Offences Act 1974, the Attorney General was the main officer of the State with responsibility for the initiation and prosecution of criminal offences.

20. Section 6 (1) of the Ministers and Secretaries Act, 1924 provides that:-

"There shall be vested in the Attorney-General of Saorstát Éireannthe business, powers, authorities, duties and functions formerly vested in or exercised by the Attorney-General for Ireland, the Solicitor-General for Ireland, the Attorney-General for Southern Ireland, the Solicitor-General for Southern Ireland, the Law Adviser to the Lord Lieutenant of Ireland and any or all of them respectively, and the administration and control of the business, powers, authorities, duties and functions of the branches and officers of the public servicesalso the administration and business generally of public services in connection with the representation of the Government of Saorstát Éireann and of the public in all legal proceedings for the enforcement of law, the punishment of offenders and the assertion or protection of public rights and all powers, duties and functions connected with the same respectively, together with the duty of advising the Executive Council and the several Ministers in matters of law and of legal opinion."

21. Section 9 of the Criminal Justice (Administration) Act 1924 provides:-

"(1) All criminal charges prosecuted upon indictment in any court shall be prosecuted at the suit of the Attorney General of Saorstát Éireann.

(2) Save where a criminal prosecution in a court of summary jurisdiction is prosecuted by a Minister, Department of State, or person (official or unofficial) authorised in that behalf by the law for the time being in force, all prosecutions in any court of summary jurisdiction shall be prosecuted at the suit of the Attorney General of Saorstát Éireann."

22. These powers in respect of criminal matters were transferred to the DPP, upon the enactment of the Prosecution of Offences Act 1974. Section 3 provides:-

"(1) Subject to the provisions of this Act, the Director shall perform all the functions capable of being performed in relation to criminal matters and in relation to election petitions and referendum petitions by the Attorney General immediately before the commencement of this section and references to the Attorney General in any statute or statutory instrument in force immediately before such commencement shall be construed accordingly."

23. Thus, the correct interpretation of Section 9(2) of the 1924 Act is that in all instances where a person authorized by law to prosecute does not initiate a prosecution, then the DPP has the power to prosecute such offence. This principle of law was established by a three Judge High Court (Sullivan P. and Hanna and O'Byrne JJ) in the case of *Attorney General v. Healy* [1928] 1 I.R. 460. In that case, a District Justice refused to hear a summons charging an offence under the Customs Act because the complainant was the Attorney General and not a Customs or Excise officer. Section 11 of the Customs and Inland Revenue Act, 1879 provided that proceedings before Justices *may be brought in the name of some officer of Customs or Excise* and the District Judge was of the opinion that because of this provision, an officer of Customs or Excise must be the complainant. In a case stated, the High Court held that the objection was unsustainable, and that the Attorney retained his ability to prosecute.

24. In answering the Case Stated, Sullivan P. (Hanna and O'Byrne JJ. concurring), held that the complainant did not have to be an officer of Customs or Excise and could be the Attorney General. He first cited Section 9(2) and then held as follows:

"That subsection is as follows: 'Save where a criminal prosecution in a Court of summary jurisdiction is prosecuted by a Minister, Department of State, or person (official or unofficial) authorised in that behalf by the law for the time being in force, all prosecutions in any Court of summary jurisdiction shall be prosecuted at the suit of the Attorney General of Saorstát Éireann.' I do not think we should construe the words 'is prosecuted.' in that subsection as equivalent to 'may be prosecuted.'; and I am therefore of opinion that the subsection authorises the Attorney General to prosecute in any Court of summary jurisdiction in all cases in which a prosecution is not instituted by a Minister, Department of State, or authorised person (Emphasis added)."

25. This reasoning was followed in the case of *Attorney General v Dillon* [1959] Ir. Jur. Rep. 53. The defendants were convicted in the District Court of being accessory to the unlawful obtaining of game, contrary to the provisions of the Poaching Prevention Act, 1862. On appeal to the Circuit Court, the defendants contended that the summonses, which were brought in the name of the Attorney General must be brought by the officer or constable making the seizure. Section 2 of the Poaching Prevention Act provided that when an officer or constable found a person in possession of unlawfully obtained game, they could bring such a prosecution. The court held that section 9 (2) of the Criminal Justice (Administration) Act, 1924, gave power to the Attorney General to bring proceedings where the person authorised by statute had not done so.

26. The point was also addressed, albeit somewhat *obiter*, in the case of *Wedick v Osmond* [1935] 1 I.R. 820, where Hanna J. mused at p.852 that Section 9(2) may well have been enacted to make it clear that the Attorney General always has an alternative right of prosecution even when some other entity was also authorized to prosecute:

"This Court considered the point in *Attorney-General v. Healy* but only to the extent of determining the meaning of the words 'is prosecuted' which were held to mean 'is prosecuted in fact' and not 'may be prosecuted.' I confess it is difficult to see what was the intention of the Legislature in the second sub-section, for the Attorney-General always had the right on behalf of the State to prosecute in any case. The only suggestion I can make is that it may have been inserted to cover cases where a statute directed a prosecution to be undertaken by a Minister, or Department, or special official, and, in such, to give the Attorney-General a clear and unequivocal alternative right (emphasis added)."

27. This principle has been accepted as correct for almost a century, such that the issue merits only two paragraphs in Professor

Casey's treatise on *"Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutions."*. At p.281, he cites the Healy case and having referred to the Attorney General, he states as follows (at p282):-

"Since the DPP inherits this power it will always be competent for him to institute proceedings in respect of summary offences, save where another authorised person has acted first. The Director may consequently be regarded as having a reserve power to bring a prosecution if, for whatever reason, any other authorised complainant fails to do so. Given the independent status of the Director (on which see Chapter 7) this may be seen as a safeguard against possible abuse of power by other competent prosecutors."

28. This line of authority was also endorsed by the Supreme Court in *DPP v Roddy* [1977] I.R. 1 177.

29. This court adopts those submissions.

Healy was properly decided. It is appropriate and important in summary matters, that the independent statutory office for conducting impartial prosecutions in our jurisdiction has the right reserved to it to initiate prosecutions unless specifically excluded. This is an important safeguard in the administration of the rule of law.

30. This Court strongly endorses the comments made by Casey in his text which has already been quoted, "given the independent status of the Director, this must may be seen as a safeguard against possible abuse of power by other competent prosecutors".

Submission of the Second Applicant on Section 12 of the Water Services Act 2007

31. Section 12(1)(a) of the Water Services Act 2007 states:-

"(1) A person who obstructs or interferes with—

(a) the exercise by a water services authority or any other prescribed person of powers vested in it or him or her under, or by virtue of, this Act,...

commits an offence."

32. The Second Applicant has submitted that prescribed person is not defined in the Water Services Act 2007, as amended, and that the offence of obstructing the exercise of a prescribed person thus lacks the legal certainty required of criminal statutes. It is not clearly ascertainable who a particular prescribed person might be.

33. It is argued that this presents confusion for the putative, consciously, peaceful protestor as to who might or might not be a prescribed person. A putative, peaceful protestor can thus never know in advance whether a particular obstruction may amount to a criminal offence.

34. The test for prohibition in a judicial review application is whether there is a real risk of an unfair trial that cannot be remedied by appropriate rulings and directions of the trial judge. Not only must an applicant show that the trial would be unfair but he must also show that it would be unavoidably unfair. Finlay C.J. in *Z. v. Director of Public Prosecutions*[1994] 2 IR476 at p.506 stated:-

"where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

35. In the affidavit of David Thompson, Solicitor, for the Second Applicant sworn on 25th July, 2016, he stated at para. 3:-

"The applicant was before Tallaght District Court on 21st June, 2016, in District Court case No. 2016/3614, prosecuted at the suit of Garda Michael Healy for the following offence: 'that he did obstruct the exercise of a prescribed person of the powers vested in him by virtue of the Water Services Act 2007 contrary to s. 12(1)(a) of the Water Services Act 2007. District Judge Brigid Reilly made an order for disclosure and joint proceedings wherein vocation of plea to Monday 25th July, 2016, at Tallaght District Court."

36. No application has been made by or on behalf of the Second Applicant to the District Court to strike out the proceedings for want of jurisdiction on the basis that there is no such prescribed person prescribed in the incident where he is alleged to have caused an obstruction. This Court accepts that this is a substantive point of law of some merit. The second applicant has not discharged the onus of proving there is a real risk of an unfair trial such that the remedy of prohibition is warranted. The validity of that charge is a matter to be determined by the trial court in accordance with law. He has not availed of the alternative remedy which is an application to the court of trial to strike out the charge and it is for that court to determine, subject to its discretionary powers to amend the summons whether the offence is made out against the accused.

37. The second applicant has relied on the decision in *K.M. v. DPP* [1994] I.R. 514, a judgment of Morris P. This case can be clearly distinguished as this was an application to prohibit a retrial of the accused on charges when the evidence of the complainant which had already been tendered at the first trial could not have justified two counts on the indictment. In this application for prohibition, no hearing has taken place other than preliminary matters and the application is thus premature.

38. In the circumstances, the relief of prohibition is refused.