

**THE HIGH COURT
JUDICIAL REVIEW**

**2005 No. 1186, 1187, 1188,
1189, 1190, 604 & 535 J.R.**

BETWEEN

**SEAMUS FITZGERALD, EDWARD MONAGHAN, BRIAN O'NEILL,
PATRICK JOSEPH BLACK, MARY GILMARTIN, TIMOTHY WALSH
AND CONLAITH MULHALL**

APPLICANTS

AND

GARDA SÍOCHÁNA COMPLAINTS BOARD

RESPONDENT

Judgment of Mr. Justice John Hedigan delivered on the 22nd day of April, 2008.

The Applicants

1. The applicants herein are members of the Garda Síochána against whom a complaint was made concerning their conduct by a member of the public. The applicants allege the complaint was not properly made because it was not made within the statutory timeframe and/or as a result thereof the decision made by the chief executive of the respondent Board to declare the complaint admissible was ultra vires and invalid. The applicants seek an order of certiorari quashing this decision.

2. The respondent argues the complaint was made within the statutory timeframe and that the applicants in this regard have miscalculated the period when they claim it is one day out of time. Because the complaint was made within time the decision of the chief executive of the Board was a correct and valid one. By way of a preliminary point the respondent argues this application is not brought within the six month period prescribed by rules of Court.

The Background

3. On Friday the 3rd September, 2004, in or about 5pm the chief executive of the Garda Complaints Board received a telephone call at the offices of the Board from a Dr. David Cloran. Dr. Cloran in the course of that telephone call made a complaint in relation to the conduct of the applicants herein. He alleged this conduct had occurred during an incident on the 5th March, 2004, in respect of the second, third, fourth, fifth, sixth and seventh applicants and on the 25th June, 2004, in respect of the conduct of the first and second applicants and in respect of his subsequent attempts to make a complaint in respect thereof. He indicated that he wished to lodge a complaint. He was told by the chief executive that his complaint was in time but that he should follow up with a document he was then working on which detailed his complaints. The chief executive furnished Dr. Cloran with the Board's fax number.

4. At forty nine minutes past midnight on the 5th September, 2004, a fax was transmitted by the complainant to this fax number and was recorded as received at 00.49.20. This fax was a document which contained the full complaint made by Dr. Cloran. On the 6th September, 2004, the chief executive decided to admit the complaint as valid. The applicants were subsequently notified of this decision. Initially the Board considered the complaint had been made on the 3rd September, by way of the telephone call. In their submissions herein however, at D(2) and in their oral submissions, it was conceded that this telephone call to the chief executive could not amount to a valid complaint because it was an "oral communication transmitted by electronic means". In the result, the validity of the decision rests upon the fax which was sent and received at 00.49.20 on the 5th September. In its submissions at D(4) the respondent rests its case on the argument that this fax embodied a complaint in writing sent to the office of the Board on the 5th September, 2004, and as such, it was a complaint made for the purposes of s. 4(1)(a) and 4(3)(a)(iv) of the 1986 Act.

The relevant legislation

5. The Garda Síochána Complaints Act 1986 provides the statutory framework whereby members of the public may make complaints about the conduct of members of the Garda Síochána and whereby those complaints may be investigated and adjudicated. The relevant part of the legislation for this case is:-

"Section 1(1) – "orally" does not include an oral communication transmitted by electronic means;

Section 4(1)(a) – A member of the public who is directly affected by, or who witnesses, any conduct of a member and who wishes to have a complaint concerning that conduct considered by the Board shall himself or through his solicitor or, in the case of a person under the age of seventeen years, through a parent or guardian or, in the case of a person who is mentally handicapped or mentally ill, through a parent or guardian or some other person interested in his welfare make a complaint in relation thereto orally, or send or give it in writing, to the Board at the office of the Board, to a member at a Garda Síochána station or to a member above the rank of chief superintendent at a place other than a Garda Síochána station within six months of the date of the conduct.

(b) – A complainant who makes a complaint to a member under paragraph (a) of this subsection shall be presumed, for the purpose of that paragraph, to wish to have his complaint considered by the Board unless, at the time of the making of the complaint, he himself or the person through whom he makes the complaint requests otherwise in writing.

Section 4(3)(a) – On receipt by the Board of a complaint or of a notification under subsection (2) of this section, the chief executive shall consider whether the complaint is admissible and the complaint shall be admissible if the following conditions are satisfied –

(i) the complainant was a member of the public,

(ii) the complainant was directly affected by or witnessed the conduct alleged in the complaint,

(iii) the said conduct would constitute an offence or be conduct specified in the Fourth Schedule to this Act,

(iv) the date on which the said conduct was alleged to have occurred was on or after the establishment day and within six months before the date on which the complaint was made,

(v) the application of this Act to the said conduct did not, by virtue of section 15 of this Act, stand excluded on the date on which the complaint was made, and

(vi) the complaint is not frivolous or vexatious."

6. As noted, the respondent also relies upon the alleged delay of the applicants in making this application. Order 84, rule 21 of the Rules of the Superior Courts provides:-

"An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."

7. This Rule was considered by Denham J. in *De Roiste v. Minister for Defence* [2001] 1 I.R. 190 where she pointed out that the Rule sets out a scheme "which indicates a specific, short time span in which to bring an application." Denham J. further indicated the factors which should be considered by a Court in exercising its discretion to extend the time period for seeking relief:-

"In analysing the facts of the case to determine if there is good reason to extend time or to allow judicial review, the Court may take into account factors such as;

(i) the nature of the Order or actions the subject of the application;

(ii) the conduct of the applicant;

(iii) the conduct of the respondents;

(iv) the effect of the Order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the Order to be reviewed;

(v) any effect which may have taken place on third parties by the Order to be reviewed;

(vi) public policy that proceedings relating to the public law domain takes place promptly except where good reason is furnished. Such a list is not exclusive. It is clear from precedent that the discretion of the Court has ever been to protect justice. When criminal convictions are in issue the matter of justice may be very clear. However, it is the circumstances of each case which have to be considered."

8. As to what might constitute "good reasons" Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301 at 315 stated:-

"the phrase 'good reason' is one of wide import which would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and that the Court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under Order 84, rule 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay."

9. It is clear from the background to this case that following the notification of the decision to the applicants there was considerable uncertainty on both sides as to when the complaint had actually been made. Initially the respondent considered that the complaint had been made on the 3rd September, by way of a telephone call followed up by a fax. Subsequently it seems to have taken the view that the complaint made on the 5th September together with the complaint made on the 3rd September by telephone constituted the complaint. This uncertainty, together with uncertainty as to whether the statutory requirements were that the complaint should be made at the latest on the 4th or the 5th, were explored in subsequent correspondence between the parties. It appears to me that there were more than reasonable grounds for the uncertainty which prevented the applicants from moving more quickly than they might otherwise have done. It seems to me that on any fair reading of the correspondence that took place herein, the applicants moved to set aside the decision of the chief executive at the earliest time after it became clear what the respondent was actually relying upon to constitute a complaint against them. This being the case it seems to me that it is an appropriate case in which to extend the time for the application for *certiorari* and I therefore do so.

10. The central question herein is as to whether the complaint of the 5th September, 2004, was made properly and within the statutory period. It seems to me that communication by fax clearly constitutes "sending in writing". This complaint was received in the early hours of the 5th September. It was thus, on the applicants' case, just forty nine minutes and twenty seconds outside the period limited for the making of a complaint. On the respondent's case it is just within that period being in fact the beginning of the last day. How does one compute the statutory period limited herein? I have been referred to a number of cases by both sides but find the case of *Carapanayoti & Co. Ltd. v. Comptoir Commerciale Andre* [1972] 1 Lloyd's Reports 139 the most on point herein. In that case a contract for the sale of Nigerian ground nuts contained a clause which read:-

"If the ground nuts are sold to two or more ports northern range at buyer's option, the port of destination shall be declared by the last buyer to his seller no later than twenty one days before commencement of the shipping period."

11. The English Court of Appeal held that the day of commencement of the shipping period was to be excluded in making the calculation.

12. In this case the statutory provision is similar in that the conduct complained of must have occurred six months before the date on which the complaint was made. It is agreed that the complaint was made on the 5th September, by fax and that six months since the conduct had ended the day before that on the 4th. Applying the simple interpretation of the wording of s. 4(3), which is clearly the part of the legislation that specifies how the period is to be calculated, means the 5th September was the last day on which the complaint could be made because the conduct complained of must have occurred within six months of the day before the day on which the complaint was made. The complaint therefore was made, in my view, on the last day of the period limited by the relevant legislation and it follows that as the complaint was properly made by fax on the 5th September, the decision of the chief executive on the 6th that the complaint was admissible was a correct decision validly made. I therefore refuse the application.