



THE HIGH COURT
JUDICIAL REVIEW

Record No.: 2024/648JR

Between:

ANTHONY MARTIN

Applicant

AND

IRISH HORSE RACING BOARD CLG

Respondent

EX TEMPORE JUDGMENT of Mr Justice Rory Mulcahy delivered on 16 May 2024

1. On 18 January 2023, Firstman, a horse trained by the applicant, a licensed trainer, won a handicap race at Dundalk Racecourse. The horse subsequently tested positive for a substance called lidocaine, an anaesthetic which is a prohibited substance on a race day.
2. A hearing took place before the Referrals Committee of the respondent, the independent regulatory authority for horseracing in Ireland. The Referrals Committee found that there had been a breach of a number of the Rules of Racing (“**the Rules**”), imposed a €10,000 fine and withdrew the applicant’s licence for 6 months. The withdrawal was suspended for two years.
3. The respondent appealed against the leniency of the sentence. The applicant cross-appealed against the severity of the fine, with his cross-appeal being conditional on the respondent’s appeal being successful. He did not appeal the findings that there had been breaches of the Rules or the suspended withdrawal of his licence. An appeal from the Referrals Committee is to an independent body simply known as the Appeals Body.

4. At a hearing on 28 March 2024, the Appeals Body heard both appeals. At the commencement of the hearing, the applicant raised a preliminary objection, without notice to the other side or to the Appeals Body, regarding the status of the barrister representing the respondent. The applicant accepted that the barrister in question was a barrister in good standing in the UK, but argued that he was not registered in this jurisdiction as a foreign lawyer and therefore was not a “qualified barrister” within the meaning of the Legal Services Regulation Act 2015, as amended (“**the Act**”). The applicant argued that the barrister was, accordingly, not permitted to act as a barrister before the Appeals Body.

5. The respondent relied on the fact that Rule 259 of the Rules expressly provides that any person appearing before the Appeals Body may have their case presented by a solicitor or barrister, with the requisite qualification and registration either in this jurisdiction or any other jurisdiction, retained by such person or appellant.

6. In light of this Rule, somewhat inevitably, the Appeals Body rejected the preliminary objection and proceeded to hear the appeal. The applicant then participated fully in the appeal.

7. The Appeals Body concluded that the penalty imposed by the Referrals Committee *was* unduly lenient. It agreed that the applicant’s licence should be withdrawn for 6 months, but rather than suspend the withdrawal in its entirety, it suspended only the last three months of that withdrawal. Having so decided, the Appeals Body then heard the applicant’s cross-appeal. It confirmed the fine of €10,000 but, in light of the withdrawal of the licence, it placed a stay on collection of the fine until 1 January 2025 to provide the applicant with an opportunity “*to see out his suspension and get back into business.*”

8. The Appeals Body fixed 15 May 2024 as the date upon which its decision to withdraw the applicant’s licence would come into effect.

9. On 13 May 2024, the applicant commenced these proceedings in which he seeks to quash the decision of the Appeals Body, and also Rule 259 on which reliance was placed in dismissing the preliminary objection. He also sought a stay on the withdrawal of his licence. In light of the application for a stay, the court (Hyland J) directed that the applications for

leave to seek judicial review and for a stay should be made on notice to the respondent. The application for leave and the stay were heard on the afternoon of 14 May 2024.

The Grounds

10. The applicant's complaint relates entirely to the issue of the respondent's representation before the Appeals Body, notwithstanding his express averment in his verifying affidavit that he makes no complaint as to the manner in which the barrister in question conducted the prosecution of the undue leniency appeal against him.

11. To understand the applicant's argument, it is necessary to consider the provisions of the Act. Section 136 of the Act provides:

(1) Subject to subsection (5), an unqualified person shall not provide legal services as a practising barrister.

12. Subsection 2 makes it an offence to do so.

13. Section 2 of the Act is the interpretation and construction section of the Act and contains many of the provisions on which the applicant relies.

14. The term "legal services" is defined as meaning legal services provided by a person, whether as a solicitor or as a barrister which, it must be said, is not very enlightening.

15. The term "barrister" is not defined, but "practising barrister" is. It is defined as meaning a person who:

(a) is a qualified barrister, and

(b) provides, or holds himself or herself out as providing, legal services as a barrister-

(i) whether or not for a fee

(ii) whether or not under a contract of service or a contract for services, and

(iii) whether or not, in so doing, he or she describes himself or herself as a, or otherwise uses the title of, "barrister", "barrister-at-law" or "counsel".

16. Oddly, this definition seems to contemplate a person holding themselves out as a barrister without describing themselves as such. Be that as it may, the first requirement is that a person be a “qualified barrister” which is also defined. A “qualified barrister” is a person who either “*has been admitted by the Honorable Society of King’s Inns to the degree of Barrister-at-Law or has been called to the Bar of Ireland*” and hasn’t been admitted as a solicitor, disbarred or struck off, or:

[I]s a registered lawyer, having the same right of audience as a practising barrister or a solicitor qualified to practise by virtue of Regulation 10 of the European Communities (Lawyers’ Establishment) Regulations 2003 (S.I. No. 732 of 2003).

17. It is common case that the respondent’s counsel was not a ‘qualified barrister’ within the meaning of the Act. He had not been called to the Bar of Ireland, admitted to the King’s Inns or registered pursuant to SI 732 of 2003.

18. Finally, and critically for the applicant’s case, section 2(4)(b) defines the circumstances in which a person provides legal services as a barrister:

[A] person provides legal services as a barrister where he or she does one or more than one of the following:

(i) in relation to proceedings before a court, tribunal or forum for arbitration, whether in the State or in another jurisdiction, or the Personal Injuries Assessment Board—

(I) represents another person before that court, tribunal, forum or Board in those proceedings,

(II) prosecutes or defends such proceedings on behalf of another person,

(III) advises another person in relation to the conduct of the proceedings,

(IV) represents and advises another person for the purposes of arriving at or giving effect to any settlement in the proceedings, or

(V) draws or drafts documents for another person in contemplation of, ancillary to or in connection with, those proceedings;

(ii) provides legal advice to another person;

(iii) draws or drafts legal documents for another person that have the purpose of securing or transferring for a person a legal right or entitlement;

(iv) represents or acts for another person in a situation where legal rights or obligations of a person are being, or are likely to be, created or such rights or obligations are, or are likely to be, in dispute.

19. The Applicant argues that the respondent's counsel was providing services as a barrister within the meaning of section 2(4)(b). In this regard, he contends that the Appeals Body was a 'tribunal' within the meaning of section 2(4)(b)(i)(I) and that the counsel involved was therefore providing legal services as a barrister by representing the respondent before the Appeals Body. In the alternative, he contends that counsel was representing the respondent in a situation where the legal rights of a person were likely to be in dispute within the meaning of section 2(4)(b)(iv).

20. He argues that Rule 259 purported to permit counsel, who was not a qualified barrister within the meaning of the Act, to provide legal services as a barrister in circumstances where that is expressly prohibited by the Act. He argues that the Rule is, therefore, invalid as being inconsistent with the Act and that it was *ultra vires* the power of the respondent to have made the Rule. He further argues that the decision to withdraw his licence, made by an Appeals Body operating in accordance with such an *ultra vires* rule, and in a manner inconsistent with the Act, must also be invalid, notwithstanding that he makes no complaint about the manner in which the hearing before the Appeals Body was conducted.

21. It is argued that the rule is a particularly egregious attempt to avoid the terms of the Act, since it appears that Rule 259 was introduced in response to a similar application made in a case heard before the Appeals Board in early 2023.

22. The applicant's counsel acknowledges, with no enthusiasm, it must be said, that the inevitable implication of the applicant's argument is that counsel for the respondent was committing a criminal offence when representing the IHRB before the Appeals Body.

23. The Appeals Body dealt with the preliminary objection on the basis of its conclusion that it was not a court, tribunal or forum of arbitration within the meaning of the Act. It concluded that the hearing before the Appeals Body was conducted under private law and according to rules which exist as a matter of private contractual arrangement and that it was

from those rules that the Appeals Body derived its authority. Since it was not a tribunal within the meaning of the Act, it concluded that there was no conflict between the Rules and the Act. In truth, in circumstances where Rule 259 was in force and binding upon the Appeals Body, it is doubtful whether it could have acceded to the preliminary objection even had it identified a conflict between the Rule and the Act. It was and is not suggested that the Act imposed any obligations on the Appeals Body, or that it empowered the Appeals Body to disregard the respondent's own rules.

24. During the course of argument before the Appeals Body, there had been some discussion about whether the respondent exercised a public law function, and there was reference to a decision in "Bolger" as authority for the proposition that the respondent was not amenable to judicial review.

25. Unfortunately, the decision referenced in submissions, *Bolger v Osborne* [2000] 1 ILRM 250, as authority for the proposition that the IHRB was not amenable to judicial review concerned proceedings which predated the introduction of the Irish Horseracing Industry Act 1994. In *O'Connell v The Turf Club* [2017] 2 IR 43, which was not referenced before the Appeals Body, the Supreme Court concluded that the changes introduced by the 1994 Act meant that the Turf Club, the predecessor to the respondent, was amenable to judicial review. It should be noted, however, that the court in *O'Connell* also concluded that, though amenable to JR, the Turf Board was not engaged in the administration of justice.

26. If decisions of the respondent, and the Appeals Body, are amenable to judicial review, as would seem to be the case in light of *O'Connell*, then it seems to me that the applicant's argument that the Appeals Body was a tribunal within the meaning of section 2(4)(b)(i) is also, at least arguable. In any event, the fact that the definition also refers to a "forum for arbitration" suggests that the circumstances in which a person is to be regarded as providing legal services as a barrister are not confined to circumstances which involve providing representation before a body exercising public law functions. It is arguable therefore that counsel was providing legal services as a barrister, within the meaning of s. 2(4)(b)(i)(I), by representing the respondent before the Appeals Body. It is also, at least, arguable that he was providing legal services as a barrister, within the meaning of s. 2(4)(b)(iv), by representing the respondent in a situation where the legal rights of the applicant were in dispute.

27. That, of course, is not the end of the matter. Section 2 is merely the interpretation section of the Act, it imposes no obligations. The provision of the Act with which the applicant says Rule 259 is inconsistent is section 136 of the Act, which, the applicant says, prohibits precisely the conduct engaged in here.

28. It's worth pausing to note that the applicant's interpretation of the Act raises the startling prospect that in a whole variety of fora, there are persons unintentionally "providing legal services as a barrister" within the meaning of section 2(4)(b).

29. By way of examples, any trade union official assisting an employee at a Workplace Relations Commission hearing would seem to satisfy the definition. A planning consultant representing a client at a planning hearing would also, inevitably it seems, meet the definition and, therefore, potentially be engaged in criminal conduct.

30. The applicant accepts that that this could not have been the intention of the Act, and does not suggest that this is an inadvertent consequence of the way in which the Act is drafted. Counsel for the applicant argued skilfully that the scope of section 2(4)(b) is limited. He relies on the phrasing a "person provides legal service as a barrister" to argue that it applies only in circumstances where a person provides legal services *qua* a barrister, so that only where a person *purports to be a barrister* and represents another person before a court, tribunal or arbitral body does that person come within the definition.

31. I have to say that I don't find that interpretation entirely convincing, at least not in the context of section 2(4)(b). The entire purpose of the section seems to be to define the circumstances in which a person is to be regarded as providing legal services as a barrister, *i.e.* if the person does one or more of the specified actions, that person will be regarded as a providing legal services as a barrister. In my view, and importantly for present purposes, it is other provisions of the Act which confine its application to those holding themselves out as being barristers.

32. The other startling consequence of the applicant's argument is, of course, that counsel for the respondent should be considered to have committed a criminal offence. When faced with such, to put it at its lowest, surprising implications of the applicant's interpretation, a close analysis of the argument and the statutory provisions seems appropriate. On such further analysis, it becomes unnecessary to resolve the question of the proper interpretation

of section 2(4)(b) here, as there is a more straightforward answer to the potential conundrum thrown up by the applicant's argument which lies in the wording of section 136 itself.

33. Section 136 prohibits an unqualified person providing legal services as a *practising barrister*. Into this prohibition, the applicant imports the definition in section 2(4)(b) of what providing legal services *as a barrister* involves (see paragraph d.xiv of the Statement of Grounds). But that is to elide the distinction between “providing legal services as a barrister”, the wording of section 2(4)(b), and “providing legal services as a practising barrister”, the wording of section 136.

34. It can be recalled that the wording of section 136 is that “an unqualified person shall not provide legal services as a practising barrister.” It does not simply prohibit the provision of legal services as a barrister. Put otherwise, it does not necessarily prohibit the conduct defined in section 2(4)(b).

35. The definition of practising barrister is a qualified barrister, who provides, or holds himself or herself out as providing, legal services as a barrister. Thus section 136 of the Act can be read as follows: “An unqualified person shall not provide legal services as a qualified barrister, who provides or holds themselves out as providing legal services as a barrister.”

36. On an excessively literal view, this would place a prohibition on an unqualified person providing services as a qualified person. Since an unqualified person could never be a qualified person, this would render the provision meaningless. The only sensible meaning of this provision is that an unqualified person shall not provide legal services *as if they were* or, put another way, *on the basis that they are* a qualified barrister.

37. On no view did counsel for the respondent before the Appeals Body provide legal services as, or as if he were, a practising barrister, because at no time did he purport to be a qualified barrister. In fact, it was at all times clear that he was *not* a qualified barrister, because he hadn't been called to the Bar and hadn't registered pursuant to the Regulations; indeed, that was the very basis of the applicant's original objection. I pause here to stress that I mean qualified *within the meaning of the Act*, as it certainly appears that counsel was eminently qualified in the UK.

38. There is no question, therefore, of counsel having been engaged in a breach of section 136 of the Act.

39. I note for completeness that section 137 of the Act imposes a separate prohibition on a person who is not a qualified barrister pretending to be a qualified barrister and makes it an offence to do so. This makes it an offence to hold oneself out as a qualified barrister, even when not providing legal services. This is entirely consistent with the interpretation of section 136 suggested above.

40. In circumstances where there is no breach of section 136 of the Act, there is no conflict between Rule 259 and the Act. Rule 259 is concerned with rights of audience before the Appeals Body, not with who is entitled to provide legal services as a solicitor or barrister. Conversely, the Act is not concerned with rights of audience, rather it is concerned with the regulation of the legal profession.

41. A qualified barrister is defined as a person called to the Bar of Ireland or a person registered under the Regulations. The purpose of the Regulations is to facilitate the permanent establishment in practice of foreign lawyers in the State. A person registered under the regulations shall, pursuant to Regulation 10, have the same rights of audience as a practising barrister or solicitor. In circumstances where counsel was not so registered, he does not have the same rights of audience as a qualified barrister. There is no basis for suggesting, however, that merely because a barrister from another jurisdiction has not registered and does not have the same rights of audience as a barrister called to the Bar here, that it is a criminal offence for that person to, for instance, provide legal advice to a client in Ireland *as a foreign qualified barrister*. Nor is there anything in the Act which prevents any particular body, by its rules, granting any person a right of audience before it, still less preventing them from granting a barrister qualified in the UK a right of audience *as a barrister qualified in the UK*. That is precisely what Rule 259 does and there is nothing in section 136 to prohibit it. Although the applicant criticises the respondent for having introduced the Rule in apparent response to a prior complaint about representation before the Appeals Body, in circumstances where the respondent regulates the horseracing industry on the whole island, it is entirely understandable, in my view, that the respondent might wish to make express provision for the right of audience of lawyers other than those qualified in the State.

42. I accept that the threshold for the grant of leave is low, but I cannot see any interpretation of section 136 which simply prohibits, as the applicant contends, the conduct defined in section 2(4)(b) or which prohibits what occurred before the Appeals Body.

43. In the circumstances, where there is no arguable basis for challenging Rule 259, it is not necessary to consider the question of whether an arguable basis for challenging Rule 259 would, in turn, provide an arguable basis for challenging the Appeals Body's determination on the appeals.

44. In the circumstances, I refuse the applicant's application for leave to seek judicial review. The question of a stay does not, therefore, arise.