



THE SUPREME COURT

Record Number: 2012/947 JR

Appeal Number: 2014/1091

[527/13 SC]

Clarke C.J.
Dunne J.
Noonan J.

BETWEEN/

PATRICK GORMAN AND PERMANENT DEFENCE FORCE OTHER RANKS REPRESENTATIVE ASSOCIATION

APPLICANTS/APELLANTS

- AND -

THE OMBUDSMEN FOR THE DEFENCE FORCES, THE GOVERNMENT OF IRELAND, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 18th day of December, 2019

1. This is an appeal from the judgment and order of the High Court (Hedigan J.) given on 21st November, 2013 by which the court refused the appellants' application for judicial review.

Factual Background

2. The first named appellant ("Mr. Gorman") was at the material time a member of the Permanent Defence Forces enjoying the rank of Corporal. He was voluntarily discharged in July of 2019. The second named appellant, the Permanent Defence Force Other Ranks Representative Association ("PDFORRA"), is a statutory body whose function is, *inter alia*, to represent the interests of enlisted men in the Defence Forces.
3. The first named respondent ("the DFO") is the holder of an office which was created by the Ombudsman (Defence Forces) Act 2004 ("the 2004 Act") and at all times relevant to these proceedings, the office of DFO was held by Mr. Patrick Anthony McCourt. Mr. McCourt is a former officer in the Defence Forces. He joined in 1963. He qualified as a barrister in 1980 and held a number of legal positions in the Defence Forces over the years. In 2001 he was appointed Judge Advocate of the Defence Forces and, in 2007 as the first Military Judge of the Defence Forces. He retired from the Defence Forces in 2010 and in 2012, was appointed to the office of DFO. He retired from the latter position in 2018(?). During Mr. McCourt's tenure as DFO, the position operated on a part-time basis for three days per week. Following Mr. McCourt's retirement from the position, a former judge of the Court of Appeal, Mr. Justice Alan Mahon, was appointed DFO on a full-time basis.
4. The 2004 Act provided a new mechanism for the resolution of complaints by and against members of the Defence Forces. The system is internal to the Defence Forces as the category of persons entitled to make a complaint is confined to serving and former members of the Defence Forces. Such complaints may only concern the actions of serving

and former members of the Defence Forces and civil servants who are, or were, employed in the Department of Defence.

5. In February 2010, Mr. Gorman made a complaint to his commanding officer concerning the actions of his platoon commander while Mr. Gorman was serving overseas with the 102nd Battalion in Chad. The complaint was initially investigated by a Military Investigating Officer appointed by the General Officer Commanding and ultimately, Mr. Gorman requested that his complaint be forwarded to the DFO. His complaint is currently awaiting consideration.

The Appellants' Case

6. The essence of the appellants' claim herein is that Mr. McCourt was not lawfully appointed to the office of DFO because he is a former member of the Defence Forces. The basis for this contention is that s. 2(9) of the 2004 Act provides that a person who holds the office of DFO shall not be a member of the Defence Forces. The appellants argue that the expression "member of the Defence Forces" must be read as including both serving and former members, which would disqualify Mr. McCourt. The second main plank of the appellants' case is that in designating Mr. McCourt to hold the office of DFO on a part-time basis, the respondents acted *ultra vires* the 2004 Act, which requires that it be a full-time position.
7. Although this is not expressly stated in the 2004 Act, the appellants' argument proceeds on the basis that s. 4 of the Act requires that the DFO be independent in the performance of his or her functions and reducing the position from full-time to part-time necessarily interferes with that independence and is thus, *ultra vires* the Act. Counsel for the appellants argued on a *reductio ad absurdum* basis, that if it was lawful for the respondents to reduce the DFO's hours to three days a week, they could equally reduce them to one hour per week.

Some Relevant Provisions of the 2004 Act

8. Section 2 deals with the appointment of the DFO and provides, *inter alia*, for categories of persons who may not hold the office. Subsection (9) is central to this case: -

"(9) A person who holds the office of Ombudsman shall not be a member of the Defence Forces or a civil servant."

The expression "member of the Defence Forces" is not defined in the Act or elsewhere. The expression "civil servant" is, however. The interpretation section, s. 1 provides: -

" 'civil servant' has the meaning assigned to it by the Civil Service Regulation Act 1956 but for the purposes of sections 4 (7), 6 (1)(c), 6 (2)(c) and 9 (2) a reference to a civil servant shall be construed as a reference to a civil servant who is or was employed as a civil servant in the Department of Defence..."

The Civil Service Regulation Act 1956, defines "civil servant" in the following manner (in s. 1): -

" 'civil servant' means a person holding a position in the Civil Service..."

9. It will be seen therefore that this is the relevant definition for the purposes of s. 2(9) of the 2004 Act.

10. The appellants place reliance on s. 4(7) which provides: -

"(7) A member of the Defence Forces—

- (a) who makes a complaint to the Ombudsman concerning an action taken by or on behalf of a civil servant shall not, subsequently, make a complaint about the same matter to the Ombudsman appointed under the Act of 1980, or
- (b) who makes a complaint to the Ombudsman appointed under the Act of 1980 in relation to an action taken by or on behalf of a civil servant shall not, subsequently, make a complaint about the same matter to the Ombudsman."

11. It will be recalled that the definition of "civil servant" for the purposes of this subsection is different from the definition for the purposes of s. 2(9). It would appear that under the Ombudsman Act 1980, the Ombudsman has jurisdiction in relation to a wide range of State bodies which include the Department of Defence but exclude the Defence Forces, or actions relating to or affecting military activity. – see s. 5(1)(b) of the Ombudsman Act 1980 and the First Schedule to that Act.

Accordingly, there may be cases arising where overlapping jurisdiction arises between the Ombudsman appointed under the Ombudsman Act 1980 and the DFO, but only where the action concerned was taken by a civil servant who is or was employed as such in the Department of Defence. In respect of such complaints, s. 4(7) provides that a member of the Defence Forces may not complain to both bodies.

12. The appellants' argument in this regard is that if the words "member of the Defence Forces" are to be construed as including only serving members, then while serving members are precluded from complaining to both bodies, former members are not and this gives rise to an absurdity.

13. The appellants also rely on s. 6 of the 2004 Act which provides in relevant part: -

"(1) A serving member of the Defence Forces may, subject to this Act, make a complaint to the Ombudsman concerning an action if it has affected that member and was taken by or on behalf of—

- (a) another serving member of the Defence Forces,
- (b) a former member of the Defence Forces while he or she was a serving member of the Defence Forces, or
- (c) a civil servant.

(2) A former member of the Defence Forces may, subject to this Act, make a complaint to the Ombudsman concerning an action if it has affected that former member and

was taken while he or she was a serving member of the Defence Forces by or on behalf of—

- (a) a serving member of the Defence Forces,
- (b) a former member of the Defence Forces while he or she was a serving member of the Defence Forces, or
- (c) a civil servant..."

14. Accordingly, serving and former members of the Defence Forces may complain about serving and former members provided that the complaint concerns an action taken while the complainant and respondent were both serving members.
15. The appellants' contention in relation to this section is that if the expression "member of the Defence Forces" as it is used in s. 2(9) is to be construed as including only serving members, then the express inclusion in s. 6 of the word "serving" is superfluous. Since the legislature should not be assumed to use superfluous words, the use of the word "serving" in s. 6 can only be consistently construed with s. 2(9) if "member of the Defence Forces" in the latter subsection includes serving and former members.
16. Finally, the appellants refer to s. 9 in support of their case and it provides (in relevant part): -
 - "(2) Where the Ombudsman proposes to carry out an investigation under this Act into an action that is the subject of a complaint he or she shall afford the Minister, a civil servant, any member of the Defence Forces, the person who is alleged to have taken or authorised the action or on whose behalf the action is alleged to have been taken or authorised, and any other person who, in the opinion of the Ombudsman, is appropriate, having regard to the complaint, an opportunity to comment on the action and on any allegation contained in the complaint."
17. Here again, the appellants advance the argument that if the words "any member of the Defence Forces" in this subsection refer only to serving members, then this gives rise to the absurd and illogical result that a serving member is entitled as of right to comment on the complaint but a former member is not and may only do so at the discretion of the DFO. It is said that there is no logical basis for such an interpretation which again must point to the likely intention of the legislature in using the words "any member of the Defence Forces" to include serving and former members.

The Judgment of the High Court

18. Hedigan J. considered that four issues arose for determination in the case (at p. 2): -

- "(i) Has the second named applicant herein sufficient *locus standi* to bring these proceedings?
- (ii) Is a former member of the Defence Forces precluded from holding the office of Ombudsman?

- (iii) Does the appointment of a former member of the Defence Forces as DFO give rise to an apprehension of bias?
- (iv) Has the Minister acted *ultra vires* the Act of 2004 by deciding that the office of DFO should be a part-time office?"

19. The first issue identified by the Court no longer arises as the respondent conceded at the hearing of the appeal that PDFORRA has *locus standi*. In dealing with the second issue, the Court considered that some assistance may be found in the definition sections contained in the Defence Act 1954, which defined officers and men as persons who are "for the time being" members of the Defence Forces. In this regard, Hedigan J. stated (at p. 6): -

"Thus, what, on its face, appears the clear meaning of s. 2(9) is further buttressed by the above definition."

The appellants contend that this was an error on the part of the learned trial judge as it is impermissible to examine the words of one statute as an aid to interpreting those of another unless the statutes can be said to be in *pari materia* and the Defence Act 1954 and the 2004 Act are not.

20. With regard to the applicants' arguments concerning ss. 4, 6 and 9 of the 2004 Act to which I have alluded above, Hedigan J. held that these sections could be rationalised and did not in fact give rise to the absurdities and superfluities contended for by the applicants. On this point, the trial judge reached the following conclusion (at p. 7-8): -

"3.10 In my judgment, these other provisions of the Act which I have been referred to do not support the argument of the applicant that s. 2(9) must be interpreted so as to import a meaning that includes former members. Indeed, it seems to me that I am not so much asked to interpret this section, but rather to amend it. This, of course, I cannot do.

3.11 Nothing in the authorities opened to me support such a radical re-reading of the statute as I am asked to make. I can readily accept that even where words seem clear on their face, a Court should consider them in the context of the rest of the statute, and thus do so in an holistic manner. See *The People (Attorney General) v. Kennedy* [1946] I.R. 517. Nonetheless, the clearer the meaning of the words, the harder the Court will find it to interpret them in any way other than that which seems clear. Where they appear completely clear and nothing contrary appears in the Act, then the application of complex canons of construction are not needed. See *Crilly v. Farrington Ltd.* [2001] 3 I.R. 251.

3.12 It seems to me that the wording of s. 2(9) is clear as to its meaning. Only serving members are precluded from holding the office of DFO. A former member, such as the first respondent is thus qualified to hold the office."

21. The third issue was then considered by the Court. The trial judge thought that this could only be dealt with in the context of the facts of the present case. He was of the view that the legal principles are clear (at para 4.1): -

“Does there exist herein a reasonable perception by the first applicant of bias on the part of the first respondent in the hearing of his complaint? The applicant must be taken as a reasonable person apprised of all relevant information. His reasonable perception must be that he will not receive an impartial hearing of his complaint... the only reason proffered for this fear is because the first respondent is a former member of the Defence Forces, and in particular, an officer thereof. This is a proposition that is unsupported by any evidence or by any authority.”

22. The Court considered that no concrete basis for this suggestion was advanced, particularly in the context of the fact that Mr. McCourt had been outside the chain of command for twelve years, during which time he held legal positions requiring impartiality, and that impartiality had never been questioned.
23. Turning finally to the proposition that Mr. McCourt's appointment was *ultra vires* the respondent because it was part-time, Hedigan J. noted that Mr. McCourt's predecessor had occupied the post on a full-time basis but since then, the evidence before the Court indicated that there had been a significant decrease in the number of matters being referred to the DFO. He found that nothing in the reduction of hours should impact upon the DFO's ability to investigate and determine complaints as heretofore. He refused the reliefs sought.

Mootness

24. The first issue that arises for consideration in this Court is whether the Court should entertain this appeal substantively, having regard to the facts noted above, that both Mr. Gorman and Mr. McCourt have retired and the office of DFO is now held by a person who is not a former member of the Defence Forces and operates on a full-time basis. One of the recent leading authorities on the issue of mootness is *Lofinmakin v. The Minister for Justice, Equality and Law Reform and others* [2013] 4 I.R. 274.
25. The applicants sought an order of *certiorari* quashing a deportation order against them. The High Court refused the relief but granted a certificate for leave to appeal to the Supreme Court. Between the hearing in the High Court and the hearing of the appeal, the Minister revoked the relevant deportation order. The Minister argued successfully before the Supreme Court that it should not hear the appeal as being moot. The majority judgment was delivered by Denham C.J. who said (at p. 278-9): -

“[16.] As has been cited by this Court previously, including by Hardiman J. in *Goold v. Collins* [2004] IESC 38, the dictum of the Supreme Court in *Borowski v. Canada* [1989] 1 S.C.R. 342 reflects the law of this jurisdiction where it is stated: -

‘An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live

controversy must be present not only when the action or proceeding is commenced but also when the Court is called upon to reach a decision. The general policy is enforced in moot cases unless the Court exercises its discretion to depart from it.' "

26. The Chief Justice went on to note that the rule was not absolute, but that the Court had a discretion and observed at p. 279: -

"[18.] In *Irwin v. Deasy*, Murray C.J. said: -

'In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance the court may in the interests of the due and proper administration of justice determine such a question.'

- [19.] In some cases an exception may arise if the issue determined in the High Court affects many other cases. Thus, in *O'Brien v. PIAB (No.2)* [2007] 1 I.R. 328, Murray C.J. pointed out: -

'Where, as in this case, a party has a bona fide interest in appealing against a declaratory order of the High Court which is not confined to past events peculiar to the particular case which has been resolved in one way or another, the Court should be reluctant to deprive it of its constitutional right to appeal. In this case the respondent continues to be constrained in the exercise of public powers under statute by virtue of the declaration granted in the High Court at the instance of the applicant.'

Denham C.J. noted that an exception to the general rule may also arise if the matter under consideration is a test case, such as arose in *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152.

27. In a concurring judgment, McKechnie J. having set out the parameters of the rule, observed (at p. 208-9): -

"(v) That rule is not absolute, with the Court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two-step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness;

(vi) In conducting this exercise, the Court will be mindful that in the first instance it is involved in potentially disapplying the general practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved. It will be guided in this regard by both the rationale for the rule and the by the overriding requirements of justice.."

28. In the present case, the appellants argue that while it might be said that Mr. Gorman's appeal is moot, there remains a justiciable issue on appeal in the case of PDFORRA, whose members may be affected by the Court's decision in the context of future

complaints referred to the DFO. They argue that it is perfectly possible that the issues herein will arise again and accordingly this Court should determine them in the interests of justice.

29. Having regard to these matters, to the fact that the issues concern a large cohort of people, namely the membership of the Defence Forces, and in particular to the fact that counsel for the respondents indicated at the hearing of this appeal that the respondents considered it appropriate for the Court to rule on these issues, I am persuaded that the Court should do so in the interests of justice.

Discussion

30. The primary issue to be resolved in this case is one of statutory interpretation. The function of the Court in construing any piece of legislation is to ascertain the intention of the legislature. That is to be gleaned from the words used themselves. In general, the Court is not entitled to look behind the words at, for example, policy considerations that may have influenced any particular provisions. Thus, whether the wording could be improved upon or augmented to bring about a more desirable result is immaterial.
31. The first rule of statutory interpretation is that the words used by the legislature must be given their natural and ordinary meaning. There may be rare cases where according a literal meaning to words used gives rise to such anomalies and absurdities that the object of the legislation when viewed as a whole is defeated. Indeed this is expressly provided for by s.5 of the Interpretation Act 2005. The Court may, in such limited circumstances, conclude that the literal meaning of the words does not represent the intention of the legislature. The fact that a particular provision, whose language is unambiguous, could be said merely to give rise to some anomaly is not, without more, sufficient to bring it within that exceptional category.
32. In *Howard v. Commissioner of Public Works* [1994] 1 I.R. 101, this Court approved the dicta of Lord Blackburn in *Direct United States Cable Company v. Anglo American Telegraphic Company* [1877] 2 App Cas 394: -
- “The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Act themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver.”
33. There are many canons of construction then may be availed of to assist in the interpretation of provisions that are doubtful, ambiguous or otherwise uncertain. But, where the natural and ordinary meaning of the words is clear, resort to such rules of construction is unnecessary – see *Crilly v. T. and J. Farrington Ltd.* [2001] 3 I.R. 251.
34. It seems to me that the words used in s. 2(9) cannot, as the learned trial judge held, be open to serious doubt. In my view, the words “shall not be a member of the Defence

Forces” are clear in their meaning. Any reasonable person reading these words would conclude that the reference can only be current serving members. A member of something is obviously different from a past member. They are an altogether separate category and the appellants invite the Court to construe the expression as if it were “shall not be **or have been** a member of the Defence Forces”. There is no warrant for the Court adding such words into a provision which is otherwise clear on its face.

35. Although the phrase “member of the Defence Forces” is not defined in the 2004 Act, the other category referred to in s. 2(9), namely “civil servant”, is defined as meaning a person holding a position in the Civil Service. There is, therefore, no doubt that the words “civil servant” in s. 2(9) cannot refer to former civil servants. That is to be distinguished from the definition of “civil servant” adopted for the purposes of ss. 4, 6 and 9 of the 2004 Act, which explicitly includes current or former civil servants in the Department of Defence. As the words “civil servant” in s. 2(9) are without doubt referable only to currently serving civil servants, if the accompanying words “member of the Defence Forces” were to be construed somehow differently, one might have expected the draftsman to state that explicitly.
36. The appellants nonetheless contend that this case must be viewed as falling into the exceptional category where the words used do not mean what they appear to mean because of the anomalies and absurdities to which this gives rise elsewhere in the Act.
37. One such absurdity is said to arise in the context of s. 4(7). This section concerns complaints about civil servants in the Department of Defence and provides that a member of the Defence Forces may make a complaint about such civil servant either to the DFO or the Ombudsman under the Ombudsman Act 1980. This means that former members of the Defence Forces can complain to both. The appellants say that this is an anomaly pointing to the fact that the legislature intended that “member of the Defence Forces” must relate to serving and former members to avoid the anomaly.
38. The suggestion is that it cannot have been the intention of parliament to allow former members to complain to both bodies simultaneously. Even if this were to be viewed as anomalous, in practical terms it is difficult to see how it might give rise to a genuine difficulty. Both the DFO and Ombudsman under the 1980 Act have similar powers under s. 4 of each Act. They each have a discretion to initiate an investigation or not. Thus, the DFO and Ombudsman can decide not to investigate complaints which are deemed to be trivial or vexatious or where the complainant has sought redress which has not been refused. It is difficult, therefore, to see that either the DFO or the 1980 Act Ombudsman would be likely to entertain a complaint already subject to investigation by the other.
39. While the learned trial judge sought to rationalise this so-called anomaly, it is not in my view strictly necessary to do so for the purposes of these proceedings because even if it is an anomaly, properly so regarded, that of itself could not be viewed as sufficient to do violence to what is otherwise the plain and unambiguous meaning of s. 2(9). The distinction created by the Oireachtas, between serving and former members’ entitlement to complain was a legitimate choice open to it, whatever its reasons may have been.

40. Regarding s. 6, the appellants say that the references to a “serving member of the Defence Forces” can only be consistent with the expression “member of the Defence Forces” embracing both current and past members since otherwise, the words “serving” is surplusage. They argued that since the draftsman must be assumed not to have used surplus or redundant words, this logically means that “member of the Defence Forces” must be taken as including both serving and former members. Section 6 is concerned with complaints to the DFO and specifies the persons who may make such complaints, the matters in respect of which they may complain and the time within which such complaints may be brought.
41. It provides that two distinct categories of person may make a complaint, namely, serving and former members of the Defence Forces. Whilst it is arguable that the word “serving” is surplus, I would agree with the view of the learned trial judge that it is utilised in this section for the purpose of drawing a distinction between two defined categories of members, serving and former. It may be that the draftsman felt it appropriate to employ the word “serving” to avoid potential confusion, or perhaps provide emphasis, but it is certainly at least possible that it is a surplus word. Even if it were to be so regarded, here again I cannot see how that can, without more, justify the Court interpreting s. 2(9) in a manner contrary to its plain meaning.
42. Turning now to s. 9(2), this provides for a range of parties who are entitled to comment on a complaint. This section appears to envisage entitling parties who have no direct involvement in the complaint to comment thereon. Such parties include the Minister, a current or former civil servant in the Department of Defence and any member of the Defence Forces. The respondent to the complaint is naturally also entitled as of right to comment. Aside from these parties, the DFO has a discretion to permit any other person to comment on the complaint if appropriate. It should also be borne in mind that under s. 7(6), the DFO may not make a finding or criticism adverse to a person without providing that person with an opportunity to consider and make representations in respect of the finding or criticism.
43. In their written submissions, the appellants argue that this subsection creates a distinction between serving members of the Defence Forces who may be involved in a complaint and former members who have such involvement, but are not entitled to comment. I think this is a misreading of the subsection. The person alleged to have taken the action the subject of the complaint, or anybody who may be subject to criticism arising from it, has a right under the Act to respond. The other parties mentioned in s. 9(2) would therefore appear to be parties not directly concerned in the complaint. In that regard, it is perfectly understandable that the Oireachtas may have considered it appropriate to confine the right to comment to serving members of the Defence Forces concerned with current operations. There is nothing anomalous or absurd about this, but at a minimum, it is a legitimate choice the Oireachtas was entitled to make. There is therefore, nothing to my mind in s. 9(2) which supports the appellants’ case.

44. Another contention advanced by the appellants is that the 2004 Act must be construed as a whole and as the Act is intended to create an independent office for adjudicating on complaints in the Defence Forces, it ought to be assumed that the Oireachtas intended that a person unconnected with the Defence Forces should hold the office. By this logic, the appellants submit that the prohibition on a serving member of the Defence Forces becoming DFO must by extension apply equally to former members. I cannot accept that proposition. One can immediately appreciate why the Oireachtas considered that a serving member of the Defence Forces would not be an appropriate person to act as DFO.
45. A serving member would still be subject to the chain of command in the Defence Forces and might be called upon to adjudicate, for example, on complaints concerning superior officers. It is obvious how this might be considered undesirable by the Oireachtas. The same considerations do not, of course, apply to former members of the Defence Forces. Indeed, such persons might on one view be thought to be well suited to adjudicating on complaints concerning the Defence Forces given their familiarity and experience with the day-to-day workings of that body.
46. I also reject the contention that a former officer would not be viewed as independent by enlisted men. Beyond a mere assertion in that regard, there is no evidence put forward by the appellant which supports this contention and, as the trial judge pointed out, the respondents' evidence is entirely to the contrary. For a period of twelve years prior to his retirement from the Defence Forces, Mr. McCourt acted as both Judge Advocate and Military Judge, positions requiring him to be impartial and to act judicially. No allegation or suggestion of bias or apparent bias was levelled at him during this period merely on account of him being an officer, and indeed a serving one, at that time.
47. Turning finally to the issue of Mr. McCourt being appointed on a part-time basis, no evidence of any kind has been advanced by the appellants to support the contention that his independence or impartiality was somehow compromised at any relevant time by virtue of the fact that he was engaged for three days a week only. The reason for the reduction is explained in the respondents' affidavits and corresponds directly to a reduction in the workload of the office at that time. While it might be true to say that if there was clear evidence that the DFO's hours had been reduced to such an extent as to compromise his or her ability to properly execute the functions of the office, then there may be a point to be made about that, but only if and when it arises. It is at present a purely hypothetical issue to be considered in the future. As matters stand, there is in my view no basis for the contention that the office of DFO must be a full-time position.
48. For these reasons therefore, I am in agreement with the conclusion of the learned trial judge and would dismiss this appeal.