THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 822

[2020 No. 825 JR]

BETWEEN

DECLAN J. GANLEY

APPLICANT

AND

MINISTER FOR HEALTH

RESPONDENT

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Meenan delivered on the 20th day of December 2021.

Introduction

1. The restrictions brought in to halt the spread of Covid-19 have affected almost every aspect of the lives of persons living within the State. This application concerns restrictions imposed on the practice of religion under regulations brought in by the respondent and notice parties.

2. The applicant is a practising Roman Catholic. Under level 5 regulations, which I will detail later, the applicant was not lawfully allowed to attend Mass. He states in his amended Statement of Grounds: -

> "The Mass is the pre-eminent form of public worship of Almighty God in the Roman Catholic religion."

3. In broad terms, the applicant maintains that such restrictions are *ultra vires* the empowering legislation, the Health Act, 1947 (as amended), and contrary to Articles 15.2, 15.4, 44.1 and 44.2 of the 1937 Constitution.

Application for Judicial Review

4. On 6 November 2020, the applicant made an application, *ex parte*, to seek certain reliefs by way of Judicial Review to strike down the said regulations. At the time it was the stated intention of the Government to remove these restrictions imposed by the regulations as and from 1 December 2020. In light of this, I directed that the leave application be on notice to the respondent and notice parties and adjourned the matter to 8 December 2020. The applicant appealed this decision to the Court of Appeal.

5. The appeal did not proceed, but the parties agreed to a *"telescoped"* hearing and the respondent and the notice party agreed not to raise the issue of *"mootness"*, notwithstanding that the impugned regulations had expired on 1 December 2020. The respondent and notice party abided by their agreement and the applicant sought to proceed with his application. I directed that the parties address the issue of mootness, as it was clearly now a central issue. The parties exchanged written legal submissions and a hearing was held as to whether or not the application was now moot. This is my judgment in respect of this issue.

Impugned regulations

6. Section 31A of the Health Act, 1947 (as amended) authorises the respondent to make regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19. Such regulations may provide for the following: -

(i) Restrictions to be imposed upon travel to, from or within geographical locations to which an affected areas order applies (s. 31A (1) (b));

(ii) The prohibition of events, or classes of events (s. 31A (1) (d)).

7. Section 31A (6) provides that a person who contravenes a provision of a regulation made under s. 31A (1) that is stated to be a penal provision shall be guilty of an offence. These regulations give effect to what was termed as *"level 5"* restrictions.

8. Regulation 5 (1) of the said regulations provided that an applicable person shall not leave his or her place of residence without reasonable excuse. An *"applicable person"* is a person whose place of residence is located anywhere in the State. The applicant was an *"applicable person"*.

9. Regulation 5 (2) provides, without prejudice to the generality of what constitutes a reasonable excuse for the purposes of Regulation 5 (1), that a reasonable excuse for travel includes travelling or moving for certain specified purposes. These purposes include: -

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"(o) in the case of a minister of religion or a priest (or any equivalent thereof in any religion):

(i) lead worship or services remotely through the use of information and communications technology, or

(ii) minister to the sick, or

(iii) conduct funeral or wedding services, …"

10. The effect of these regulations was that it was an offence for the applicant to leave his residence for the purposes of attending Mass.

"Mootness"

11. The impugned regulations expired on 1 December 2020. There was no disagreement between the parties as to what the mootness doctrine is. Reliance was placed on the following passage from the judgment of O'Donnell J. (as he then was) in *O'Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75, where he stated: -

> "… It is difficult to improve on the observation of Murray CJ in *Irwin v Deasy* [2010] IESC 35:
>
> > 'The mootness doctrine is applied by the courts to restrain parties from seeking advisory opinions on abstract, hypothetical or academic questions of the law by requiring the existence of a live controversy between the parties to the case in order for the issue to be justiciable'."

As with many other doctrines, the mootness doctrine is subject to exceptions. The applicant submitted that he fell into an exception identified by a number of legal authorities.

12. The applicant relied to a considerable extent on the decision of the Supreme Court in *Condon v. Minister for Labour* [1981] I.R. 62. In this case the plaintiffs were members of an association of bank officials who refused to be bound by the terms of national wage agreements. The association had concluded a separate agreement with a committee (representing the Irish banks) on the remuneration and conditions of service of the employees of the Irish banks during the period from 1 June 1975. On 15 December 1975, by order of the first named defendant, the Regulation of Banks (Remuneration and Conditions of Employment) (Temporary Provisions) Act, 1975 was brought into operation. Under this Act an order was made prohibiting payment by the banks of the increase in remuneration that was specified in the separate agreement. In the High Court the plaintiffs sought a declaration that the Act and the prohibition order were

unconstitutional. After the defendants had filed their defence, the Act expired as a consequence of a ministerial order to that effect. At the trial of the action the defendants applied for liberty to amend their defence by adding a plea that the plaintiff's statement of claim disclosed no cause of action in view of the expiry of the said Act. The High Court allowed the amendment, but held that the statement of claim still disclosed a cause of action. The defendants appealed this decision. The Supreme Court dismissed the appeal. In his judgment, Kenny J. stated: -

> "As a general rule, the Court does not determine constitutional issues when some non-constitutional point makes it possible to dispose of the case; nor does the Court do so when its decision would be an academic exercise only or, to use the language of judges in the United States of America, when the case is moot."

and: -

> "Since the year 1970 it has become customary in this country to have an annual revision of salaries and wages, resulting in increases, in an attempt to preserve standards of living that are threatened by the inflation which has become such a feature of modern life. Everyone is very conscious of the necessity to have uniformity in these increases. …"

and: -

> "In 1975 the associated banks and their officials were negotiating increases in salaries and working conditions: the officials have always maintained that they were not bound by national agreements. … The Government decided that they would restrain the banks from paying their officials more than was prescribed by the national agreement by imposing draconian penalties on any bank that did so. …"

and: -

"In my opinion, it is highly probable that legislation similar to the Act of 1975 will have to be introduced in the future. The banks' officials have always maintained that they are not bound by national agreements and are free to negotiate their own terms of employment without regard to national agreements. Inflation shows no signs of slowing down; a national agreement will probably be necessary each year for some years to come and the same problem will almost certainly arise again. It cannot be said with certainty that an Act similar to Act of 1975 will not be introduced in the future. It is proper that the Minister and the officials should be aware of the constitutional validity of similar legislation in the future."

13. The applicant also relied on the Supreme Court decision in *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2007] 1 I.R. 328. This action concerned certain provisions of the Personal Injuries Assessment Board Act, 2003. The applicant was granted a declaration by the High Court that the respondent, in refusing to accept or act upon the authorisation signed by the applicant which requested that the respondent deal directly with his solicitors, was acting in breach of s. 7 of the said Act. After the proceedings were determined by the High Court, and the filing of an appeal, the applicant received an authorisation permitting him to institute court proceedings in respect of his claim. At the hearing of the appeal, the applicant admitted that his claim now fell outside the control of the respondent and so question of the lawfulness of the respondent's practice of refusing to communicate with his solicitors was moot and the appeal should not proceed. In giving the judgment of the Court, Murray C.J. stated: -

"19. In this case is it quite evident that the respondent has a real current interest in the issues pending on appeal before this court for the purpose of a final determination of the controversy between the parties regarding the exercise of its statutory powers and of course the substantial question of costs. …"

and: -

"21. In these circumstances I do not think it can be truly said that a decision on the appeal would not have the effect of resolving further *'some controversy affecting or potentially affecting the rights of the parties'*. Nor do I consider that the passage of time has caused these proceedings to *'completely lose "its character as a present, live controversy"'*. In fact both parties, although in different forms, have an interest in the outcome of the appeal."

A more recent statement on the doctrine of mootness was set out in the judgment of McKechnie J. in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 I.R. 274, as follows: -

"**[82]** From the relevant authorities thus reviewed and leaving aside the issue of costs which is dealt with separately (para. 102, *infra et seq.*), the legal position can be summarised as follows:-

(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing;

(ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined;

(iii) the rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying

reasons as well, including the issue of resources and the position of the court in the constitutional model;

(iv) it follows as a direct consequence of this rationale, that the court will not – save pursuant to some special jurisdiction – offer purely advisory opinions or opinions based on hypothetical or abstract questions;

(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 by the overriding requirements of justice;

(vii) matters of a more particular nature which will influence this decision include:-

> (a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for the case to retain its essential characteristic of a legal dispute;
>
> (b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;

(c) the type of relief claimed and the discretionary nature (if any) of its granting, for example, *certiorari*;

(d) the opportunity for further review of the issue(s) in actual cases;

(e) the character or status of the parties to the litigation and in particular whether such be public or private: if the former, or if exercising powers typically of the former, how and in what way any decision might impact on their functions or responsibilities;

(f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law;

(g) the impact on judicial policy and on the future direction of such policy;

(h) the general importance to justice and the administration of justice of any such decision, including its value to legal certainty as measured against the social cost of the *status quo*;

(i) the resource costs involved in determining such issue, as judged against the likely return on that expenditure if applied elsewhere; and

(j) the overall appropriateness of a court decision given its role in the legal and, specifically, in the constitutional framework."

14. The applicant also relies on Article 13 of the European Convention on Human Rights, which provides for a *"right to an effective remedy"*.

15. The applicant submitted that, as the Covid pandemic is ongoing, the impugned regulations may well be re-imposed at a future time thus bringing himself within the exceptions identified within the authorities referred to above.

16. The respondent and notice party submitted that the lawfulness of the regulations cannot be determined definitively, or at an abstract level of principle, as the justification for the restrictions will always turn on the particular circumstances at the time they are introduced. It was further submitted that a hearing on the lawfulness of the regulations would not be an efficient use of court resources. It was suggested a hearing on the lawfulness of the regulations would take a minimum of eight days.

Consideration of issue

17. The constitutional rights of freedom of conscience and the free profession and practice of religion are not absolute. Article 44.2.1° provides: -

> "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."

It necessarily follows that any restrictions on such rights must be *"proportionate"*. What is or is not proportionate in the circumstances of a pandemic is going to depend on the extent and effects of the particular disease. Were the disease to have a high mortality rate (or high morbidity), significant restrictions may be more proportionate than would be the case of a disease with lesser effects.

18. It seems to me that the gravamen of the applicant's case is that the restrictions on the attendance at Mass are disproportionate, rather than that there should be no restrictions at all. The applicant's own actions would support this view in that he only made his application to court when *"level 5"* restrictions were imposed, and made no application when such restrictions were at a lower level.

19. In my view, the applicant's reliance on *Condon v. Minister for Labour* is misplaced. In *Condon*, the anticipated future legislation was directed towards a specific issue, namely: whether it was constitutionally permissible to enact legislation to prohibit pay agreements outside national pay agreements. In the case of *O'Brien v. PIAB*, the statutory provisions in

question were ones that were going to be used time and time again into the future. In the instant case, the legality, or otherwise, of any future regulations is going to depend on whether the restrictions imposed are proportionate to the danger being faced. Finding that the now rescinded restrictions were disproportionate would be of little value in considering the legality of similar restrictions that could be introduced in the future to deal with a different threat.

20. The provisions of Article 13 of the European Convention on Human Rights are not of assistance to the applicant. Firstly, the impugned regulations are now rescinded so the applicant, in fact, does not require a remedy. Secondly, I do not believe the provisions of Article 13 should be read literally as, otherwise, statutes, such as the Statutes of Limitation, would be contrary to the Convention. Further, I refer to the following passage of Hyland J. in *Right to Know CLG v. Commissioner for Environmental Information* [2020] IEHC 392, in a similar context concerning the principle of effectiveness and EU law: -

> "78. I am not persuaded that the mere fact that a national procedural rule, such as the one at issue in this case i.e. mootness, operates to preclude an applicant from arguing a case involving the application of principles derived from an EU Directive, can *ipso facto* mean that the rule in question breaches the principle of effectiveness. This is the somewhat simplistic approach adopted by the appellant in this case. Many procedural rules, such as those concerning standing or time limits or *res judicata*, have the potential effect of operating to bar a litigant. That does not inevitably mean they breach the principle of effectiveness. The case law of the Court of Justice indicates that what must be asked is whether the national procedural provision makes it impossible or excessively difficult to apply EU law. In answering this question, it is necessary to take into account the objective of the procedural rule and the values which it protects, such as, for example, the principle of legal certainty or the proper conduct of the procedure."

21. The respondent and notice parties submitted that it would not be an *"efficient management of judicial resources"* for this application to proceed to a hearing as *"a minimum of eight days would be required for the hearing of this matter..."*. I have to say that I find this very difficult to accept. Though I agree that judicial resources have to be efficiently managed, all the more so because of the limited judicial resources that are currently available, I find it hard to accept that it would take a minimum of eight days of court hearings to justify regulations that were, apparently, made on short notice.

Conclusion

22. By reason of the foregoing, I am satisfied that the applicant's application herein is moot and should be dismissed. As for costs, the respondent and notice parties have been successful on this issue. However, it was the case that the respondent and notice parties agreed with the applicant not to raise the issue of mootness. I invite the parties to make short written submissions (no more than 1,500 words) on costs on or before 14 January 2022 and will list the matter before me on 21 January 2022 to deal with this issue.