[2019] IEHC 663

THE HIGH COURT

[2019 No. 172 J.R.]

BETWEEN

THE PHARMACEUTICAL ASSISTANTS ASSOCIATION COMPANY LIMITED BY GUARANTEE, ELAINE MCGRATH, RUTH DOYLE, PAULINE KAVANAGH AND PATRICIA COYLE

APPLICANTS

AND

THE PHARMACEUTICAL SOCIETY OF IRELAND, THE MINISTER FOR HEALTH, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGEMENT of Mr. Justice Barr delivered on the 10th day of October, 2019

Introduction

1. This is an application in which the second, third and fourth respondents (hereinafter referred to as "The Minister") are seeking to have the trial of the action split, so that the court would first consider the challenge made by the applicants to draft rules which it is proposed by the first respondent (hereinafter "P.S.I.") to implement, with the consent of the Minister, on what may be termed administrative law grounds and only in the event that the court did not find in favour of the applicants, would it go on to hold a second hearing, which would consider the grounds of challenge to the proposed rules on the basis of alleged breach of the Constitution and the European Convention on Human Rights.

Background

2. For the purposes of this judgement, it is only necessary to set out the background to the dispute between the parties in very brief terms. The first applicant is the Pharmaceutical Assistants Association. The remaining applicants are each employed as pharmaceutical assistants. The last course which provided for people to train and qualify as pharmaceutical assistants commenced in 1982. No new pharmaceutical assistants have qualified in Ireland since 1985. Broadly speaking, pharmaceutical assistants are permitted to carry out the work of a pharmacist during his or her "temporary absence". Given the part-time nature of this work, most pharmaceutical assistants are female and tend to be aged 55 years or over.

3. In these proceedings the applicants challenge draft rules which were drawn up by the P.S.I. in or about February 2019. Those rules would only become effective with the consent of the Minister. The Minister has agreed not to furnish his consent to the rules, pending the determination of this action. The applicants challenge the proposed rules on a number of grounds. These will be looked at in slightly more detail later, but they can be broadly divided into two categories: those grounds which challenge the rules on normal administrative law grounds, such as non-compliance with the statutory procedure, lack of vires and lack of rationality. The second category are the grounds on which it is alleged that if the P.S.I. did have the power to implement such rules, then having regard to the far-reaching economic effects of those rules on the applicants, such provisions would be in breach of the applicants' rights under the Constitution and under the European Convention on Human Rights.

The Present Application

4. The present application is brought on behalf of the Minister. Mr. Leonard S.C. on behalf of the Minister submitted that where the rules were being challenged on both ordinary administrative law grounds and on constitutional grounds, it is appropriate that the court should direct that there should be a split trial, whereby the court would deal firstly with the challenge on the administrative law grounds and would only proceed to hold a hearing on the constitutional aspects and on the challenge under the European Convention on Human Rights if the applicants were unsuccessful in their challenge under the administrative law headings.

5. Counsel submitted that when one looked at the Statement of Grounds it was clear that the applicants were challenging the draft rules on the following basis: that the correct procedure under the Pharmacy Act 2007 had not been followed; that the consultation process provided for under the Act had not been properly followed in this case; that the provisions of the rules as drafted were irrational and that the rule-making power provided for under the Act did not envisage or extend to rules the nature of which were proposed to be implemented in the draft rules of February 2019.

6. The second main limb of challenge put forward by the applicants would only arise if they were unsuccessful on the other grounds of challenge. In that event, the applicants go on to make the case that the provisions of section 30 (2) of the 2007 Act are contrary to the provisions of the Constitution and in breach of the European Convention on Human Rights.

7. It was submitted that in these circumstances, it was appropriate for the court to direct a split trial so that the issues which might arise under the Constitution and under the European Convention on Human Rights, would only fall to be considered and determined by the court in the event that the applicants failed on their other grounds of challenge. Counsel submitted that such a course of action was in keeping with the long-standing principle that the court should only determine constitutional issues if it were necessary to do so. In other words, if the court had reached a decision which disposed of the substantive matter completely, such that the constitutional issues become moot, it would not proceed to determine those issues.

8. In support of this submission senior counsel referred to the decision of the Supreme Court in *Murphy v Roche and Others* [1987] I.R. 106, where Finlay C.J. stated as follows at paragraph 110:

> *"There can be no doubt that this court has decided on a number of occasions that it must decline, either in constitutional issues or in other issues of law, to decide any question which is in the form of a moot and the decision of which is not necessary for the determination of the rights of the parties before it. Secondly, it has also clearly been established that where the issues between the parties can be determined and finally disposed of by the resolution of an issue of law other than constitutional law, the court should proceed to consider that issue first and, if it determines the case, should refrain from expressing any view on the constitutional issue that may have been raised."*

9. Counsel pointed out that in the Murphy case the Supreme Court directed that having regard to the fact that the Attorney General had no interest in arguing the issue based on club membership, as distinct from any constitutional issue, it was appropriate to divide the issues which were to be tried and accordingly the court directed that the issues should be split so that the issue as to whether a member could sue his own club would be tried separately as a preliminary issue.

10. Counsel also referred to the decision in *McDaid v His Honour Judge Sheehy & Others* [1991] 1 I.R. 1, where the Supreme Court again stated that the settled jurisprudence of that court was against deciding issues of constitutional validity, unless it was necessary to do so. In the course of his judgement Finlay C.J. stated as follows at paragraph 19:

> *"To ascertain whether any statutory order purporting to be made pursuant to s.1 of the Act of 1957 was an impermissibly wide piece of delegated legislation, consideration would have to be given to its precise terms, to its intended duration and to the actual effect it had on the interests of the citizen who has challenged it. These and cognate questions which would be raised in a constitutional challenge properly made by an aggrieved individual against this statutory provision underlined the necessity for this Court to abstain from deciding that issue in this case where the validity of this section is no longer of importance to and where it has no effect in law on the interests of the applicant."*

11. Counsel also referred to the decision in *Prendiville v The Medical Council* [2008] 3 I.R. 122, where the learned High Court judge had dealt at the trial with the grounds of challenge to the Medical Council decision which had not involved the constitutional grounds. They had been left over to be decided on another occasion.

12. Counsel submitted that the court should only embark on a consideration of the constitutional issues where it was necessary to do so and that eventuality would only arise where the applicants had been unsuccessful on what might be termed the administrative law grounds of challenge. Accordingly, it was appropriate in this case to deal with the grounds on which relief had been sought as set out at paragraphs (d) 2-4 of the Statement of Grounds at one hearing and then proceed on to consider the constitutional grounds and the grounds pursuant to the European Convention on Human Rights at a subsequent hearing, if that should become necessary having regard to the determination made by the trial judge after the first hearing.

13. In response, Ms. Siobhan Phelan S.C. on behalf of the applicants submitted that the application put forward by the Minister was flawed in a number of respects. Firstly, this was not a case where the Minister was uninterested in the administrative law grounds put forward by the applicants. It was clear from paragraph 5 of the Statement of Opposition filed on behalf of the Minister, that he was challenging the vires argument, as he had specifically pleaded that section 30 (2) of the 2007 Act permitted the first respondent to make the rules which it had drawn up in February 2019. In these circumstances, it was clear that the Minister would participate in the hearing which would be held to determine the validity of the challenge made by the applicants on what has been termed the

administrative law grounds. This fact distinguished the present case from the Murphy case, because in that case the Attorney General was not proposing to take part in any hearing as to whether there was a rule at common law that a member could not sue his own club.

14. Counsel further submitted that the present application was based on an incorrect interpretation of the cases which have been cited to the court. Those decisions did not provide that where there were constitutional issues raised in an action, that there should be a split trial dealing with other issues first and then a further hearing dealing with constitutional issues. Those decisions merely stated that where there were constitutional issues raised at the hearing, the judgement of the court should only deal with constitutional issues and in particular issues concerning the constitutional validity of legislation, where it was necessary to do so in order to reach a final decision in the matter. In other words, if the case was going to be decided on other issues, such that the constitutional issues had become moot, then the court should refrain from giving any judgement on the constitutional issues.

15. Counsel submitted that it was clear from the authorities that the court should hear all arguments on all the issues at the trial and it was only at the stage where the court was delivering its judgement, that it would refrain from deciding the constitutional issues if it was not necessary to do so. Counsel submitted that the decision of the Supreme Court in *Reid v IDA* [2015] 4 I.R. 494, made it clear that in the case where constitutional issues had been raised on the pleadings, there had been full argument on those issues at the trial, notwithstanding that it had not been necessary to deal with those issues in the judgement, because the case had effectively been decided on other grounds thereby rendering the constitutional issues moot; see paragraph 35 of the judgement of McKechnie J.

16. Counsel pointed out that while there had effectively been a split trial in the *Prendiville* case, that had been done by agreement between the parties. While counsel accepted that in the Murphy decision a split trial had been directed, there were no similar circumstances in this case, as the Minister proposed to participate in the hearing on the administrative law issues, in particular in relation to the vires issue.

17. Counsel further submitted that there were no logical reasons which would justify directing a split trial. Indeed, she went further and submitted that were the court to do so, it would only serve to increase costs substantially and lead to a most inefficient use of court time. In such circumstances, it was submitted that there were compelling reasons from both a cost and time management point of view in having all the issues argued before the court at a single hearing and then leaving it to the trial judge to decide when formulating his judgement whether it was necessary for him or her to determine the issues arising under the Constitution and the European Convention on Human Rights.

18. Finally, Ms. Barrington S.C. on behalf of the P.S.I. stated that her client was essentially neutral on the application being made by the Minister. Her only concern was that the matter should proceed in as cost-effective a manner as possible. She stated that if a split

trial were directed, it would be necessary to ensure that both limbs of the hearing were heard by the same trial judge.

Conclusions

19. Having carefully considered the arguments and authorities cited by counsel for the Minister and counsel for the applicants and having regard to the position adopted by counsel for the PSI, I am of the opinion that the application on behalf of the Minister must be refused.

20. It seems to me that the argument put forward by Ms. Phelan S.C. is compelling. While it is undoubtedly true that the courts have on occasion directed split trials where constitutional or other issues are clearly separable from either preliminary issues or other main issues in a case; the cases cited do not established that where there is a constitutional issue in a case there should be a split trial, but rather that where constitutional issues fall to be determined, the trial judge should not make a determination on those issues if he or she has already reached a decision in the matter, thus rendering the constitutional issues moot. In other words, the clear practice is that at the determination stage, the trial judge should not make a determination on constitutional issues if it is not necessary to do so to enable him or her to reach a judgement in the case.

21. Secondly, while it is true that constitutional issues and issues under the European Convention on Human Rights have been raised in this case, I am not satisfied that the Minister has set out good reasons in practice why the court should direct a split trial. Indeed, seems to me that there is much weight in the submission made by Ms. Phelan S.C. that to do so, would only serve to increase the overall costs substantially and would also lead to a grossly inefficient use of court time. It seems to me that it would be a much better use of time and money to have all the issues argued at the one hearing, rather than having the administrative law issues determined first and then possibly having another full-blown hearing a number of months later on the constitutional issues. I am not convinced that there is any good reason why that should be done.

22. Finally, the court must have regard to the circumstances of the applicants. These are by and large women of 55 years or older. They are bringing this action because they feel that the draft rules will have a very severe impact on their incomes. This has been set out very clearly in the grounding affidavits is sworn by the individual applicants. To bring an action such as this is a very costly and stressful exercise for them. The court must be vigilant to ensure that procedural rules, or case management is not used in a way that may effectively frustrate the applicants exercising their constitutional right of access to the courts in a full and proper manner. For these ladies to face the prospect of having to mount not one, but two judicial review proceedings before the High Court, would run the risk that they may be financially deterred from pursuing their claim before the court. Having regard to the affidavits sworn by the applicants, I am satisfied that they are unlikely, either individually or collectively, to have unlimited funds. In these circumstances it seems to me that both the justice and logic of the case weigh in favour

of the action proceeding as a unitary hearing. Accordingly, I refuse the application made on behalf of the Minister.