

Judicial review – decision not to promote constable subject to a criminal charge – whether Article 1 Protocol 1 engaged – whether office of constable a possession – whether decision proportionate – whether public perception of promotion a relevant consideration.

Neutral Citation No. [2005] NIQB 27

Ref: **GIRC5237**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **08/04/2005**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY CAROLINE CHAMBERS
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

GIRVAN J

[1] The applicant, a serving officer in the Police Service of Northern Ireland, (“the PSNI”) seeks an order of certiorari to quash a decision of PSNI dated 21 October 2004 confirmed by letter of 22 November 2004 that she was not to be promoted to the rank of sergeant effective on 1 November 2004. She also seeks an order of mandamus requiring the PSNI to reconsider the applicant’s case in accordance with the law together with a declaration that the decision was unlawful, ultra vires, disproportionate and in breach of Article 1 Protocol 1 of the Convention.

[2] The applicant had been a serving police officer for some 7 years. In 2003 she successfully underwent a series of PSNI promotion examinations and was placed on a select list for promotion. It was subsequently confirmed to her that she was to be promoted to the rank of sergeant with effect from 1 November 2004. However, on 22 October 2004 she was verbally informed by PSNI Human Resources that she was not to be promoted as she was a subject of a criminal disciplinary investigation relating to a driving incident while on duty that occurred at 6.00 am on 24 June 2003. This incident occurred during an incident when she was a driver of a police vehicle that assisted in the arrest of individuals in a vehicle alleged to have been involved in the kidnap of a child. The offenders’ vehicle, according to the applicant, collided with the police vehicle. The driver of the offenders’ vehicle was eventually arrested and was subsequently charged with a number of serious

offences. The driver alleged that the police vehicle had rammed his car. The applicant was investigated for dangerous driving and is being prosecuted with her trial scheduled for March 2005.

[3] Mr Cox, Deputy Director of PSNI Human Resources, in correspondence with the applicant relied on paragraphs 41 and 45 of the PSNI Code. The applicant in her affidavit contended that these paragraphs did not relate to her situation and contended that the PSNI should have considered paragraph 8(1)(c) of General Order 9-2003 Appointments - Interim Policy dated 18 April 2003.

[4] In his affidavit sworn on 9 February 2005 Mr Cox stated that he made the impugned decision on 22 October 2004. He referred to paragraph 41 in section 11 of the Code which provides that a member below the rank of Chief Superintendent is ineligible for promotion for two years from the date of the imposition of a disciplinary punishment other than a caution. Paragraph 45 states that nothing in section 11 restricts the right of the Chief Constable to remove from a select list the name of any member whose conduct, efficiency or general suitability for promotion has been unsatisfactory. Mr Cox accepted that the applicant did not fall directly within paragraphs 41 and 45 but he did not accept that the Chief Constable is constrained by the wording of those paragraphs to ignore the fact that the applicant was facing a criminal trial for a matter which could have considerable consequences for her future career and which could reflect on the PSNI generally. The PSNI could not ignore the fact that the applicant may face disciplinary charges held in abeyance pending the outcome of her criminal charge. He pointed out that the General Order 9-2003 relates to posts other than that of "core policing". The post to which the applicant was to be promoted to was a "core policing" post and thus outwith the provisions of the General Order. The Chief Constable's general functions are set out in section 33 which provides that the police shall be under the direction and control of the Chief Constable. The code was merely an outworking of the prerogative powers to define the manner in which they would generally be used in certain specific situations and it was no more than a firm indication of the Chief Constable's views on certain matters. No such code could allow for every contingency. Mr Cox considered that it was instructive to look for guidance to other provisions that did not cover the instant case and which dealt with analogous situations. In light of those factors he took the view that in this period between charge and trial the Chief Constable could not properly ignore the existence of a forthcoming trial and, thus, should not proceed to promote the applicant at present. At the same time she should not be removed from the list as she had not been convicted or subjected to disciplinary sanctions. He considered that this decision was in line with current practice.

[5] Mr Cox considered that the prosecution by PSNI of persons currently facing criminal trial was something which might attract adverse attention. It

was appropriate to consider that if the applicant were to be promoted and was then convicted this could appear incongruous to many right-thinking people. He considered that it was inappropriate to promote a person who was facing a trial and that this approach was appropriate and proportionate. He had to have regard to the fact that a decision had been made to prosecute and that that decision was made independently by the Director of Public Prosecutions.

[6] Mr Cox made the further point that the situation in which the applicant found herself was due to her lack of candour in dealing with the authorities in relation to her promotion. She filled in a self-nominating form and replied "No" to the question whether she "was currently being investigated or processed under the Misconduct or Unsatisfactory Performance Regulations." The applicant signed the declaration on 1 October 2003 when she had been served with papers by the Police Ombudsman stating that she was the subject of an investigation in relation to potential criminal and disciplinary matters. The applicant states that when she was completing the form she knew that the Unsatisfactory Performance Regulations portion of the question related to performance below standard reports and as she was not subject to those the question did not relate to her. In relation to the issue whether she was being investigated or processed under the Misconduct Regulations investigations into her alleged misconduct were only being conducted by the Police Ombudsman at this point. She sought advice from Inspector Tucker and he advised her that she should answer "No" to the question. She believed that an Ombudsman investigation and a misconduct investigation were different. It must be said that the formulated question in the questionnaire is not well drafted and it would be advisable for those concerned with the formulation of the questionnaire to review the wording. There is much to be said for the proposition that an applicant seeking promotion should be given an opportunity in some portion of the form to spell out details of any investigation to which he or she may have been subject.

[7] Although initially the applicant's case had focused on the argument that the PSNI had wrongly applied paragraphs 41 and 45 of the code at the substantive hearing the case proceeded not on that basis but rather on the basis that the PSNI had acted in breach of the applicant's Article 1 Protocol 1 rights. A separate point was taken that the PSNI had taken into account an irrelevant consideration, namely a policy of denying promotion to officers subject to disciplinary or criminal investigation.

[8] The applicant's case proceeded on the basis that the office of constable was a "possession" for the purposes of Article 1 Protocol 1. The PSNI had interfered with (i) the peaceful enjoyment of the applicant's office as constable; and/or (ii) the applicant's promotion to the rank of sergeant; and/or (iii) if it is the policy of PSNI to deny promotion to officers subject to disciplinary/criminal charges the PSNI was operating a scheme to control the

use of property. The PSNI's interference with the applicant's office as constable could not be said to be the least intrusive means to achieve any legitimate objective. The PSNI could and should permit officers subject to disciplinary/criminal investigation to continue with the promotion examinations and in this case be promoted. If subsequently the applicant were convicted and disciplined the PSNI had authority to impose a range of sanctions on the applicant. A less intrusive means of dealing with such an officer would be to permit the officer to be promoted. Severe prejudice to the officer would be avoided if that less intrusive means were employed.

[9] The respondent did not accept that any right of property was engaged. It rejected the proposition that the office of constable was a possessory right. In any event the impugned decision did not affect the right to hold the office of police constable. The decision merely temporarily prevented the applicant from enjoying promotion within the office. At most what is lost is the hope or expectation of immediate as opposed to deferred promotion. A promotion is not recognised as a possessory proprietary right in domestic law. A concern as to one's career is generally not held to be a civil right within the terms of the Convention (see Huber v France [1998] 26 EHRR 475). The respondent did consider the applicant's rights and carried out an appropriate proportionality exercise. What the applicant was submitting was that there is another course that could have been taken that was less intrusive on her. Mr McMillen argued that this is a misapprehension of the applicable test. It must be a less obtrusive means of achieving the relevant objective. Here the true objective was to promote a rationally based police force with persons being promoted who were fitted for promotion. The objective could not be promoted by promoting a person whom the respondent considered may have committed an act rendering her unfit for promotion.

[10] In essence a police force is a number of individual constables whose status to rise from the common law, organised together in the interests of efficiency. Historically the parish constable was a holder of an office and as the holder of such office was responsible by virtue of that office, firstly, for the preservation of the peace within his bailiwick and, secondly, for the execution of orders and warrants of the justices of the peace. A member of the police force, of whatever rank, in carrying out his duties as a constable acts as an officer of the Crown and a public servant. His powers are exercisable by him by virtue of his office. He is not in law an employee. Coke considered that constable was the holder of an incorporeal hereditament but as pointed out in Harvey on Industrial Relations and Employment Law that aspect of the law is now largely obsolete. Describing the post of constable as an office does not of itself mean that Article 1 Protocol 1 is engaged or relevant. For the purpose of possessions under Article 1 Protocol 1 the term "possession" will have a Convention meaning. As Lord Hobhouse pointed out in Aston Cantlow PCC v Wallbank [2003] 3 All ER 1213 at 1241 the term applies to all property and is the equivalent of "assets". Where economic rights are attached to an office

Article 1 Protocol 1 may become engaged but that will come about when some economic rights such as payment of salary or pension rights is or are at stake. From Huber v France [1998] 26 EHRR 475 it is clear that in the context of public sector posts “disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside Article 6(1).” Having regard to the nature of a constable’s position as a public servant the principle in Huber will apply to the applicant’s case. In any event as pointed out by Simor and Emerson in Human Rights Practice at paragraph 15.009 the possibility of acquiring a possession in the future is unlikely to constitute a proprietary right protected by Article 1 Protocol 1 being a possession only when it has been earned or an enforceable claim to it exists.

[11] In this case the applicant has no entitlement as such to be promoted. The information that she was going to be promoted was corrected before her promotion took effect. In any event she failed to state that she was being prosecuted. The information given by the applicant was objectively misleading even if the applicant can be acquitted of knowingly misleading PSNI. In the result I consider that the applicant has not been deprived of any Article 1 Protocol 1 possession or economic right.

[12] If I am wrong in that conclusion it would be necessary to consider whether the respondent’s decision can be justified as an interference with her ex hypothesi Article 1 Protocol 1 right. The applicant contends that the respondent failed to explicitly recognise the engagement of Article 1 Protocol 1 and thus the decision must be regarded as bad (see Re Jennifer Connor [2004] NICA, AR v Homefirst [2005] NICA 8 and Re Landlords Association of Northern Ireland). The applicant contends that the respondent failed to employ the least intrusive means in that it could have permitted the applicant to be promoted and then demoted if she was subsequently convicted. While accepting the respondent’s argument that it is more difficult to demote someone than to promote them, it is not inevitable that the respondent would have reached the same conclusion if it had specifically had Article 1 Protocol 1 in mind as being engaged when Mr Cox came to make the decision. In paragraph 2 of his second affidavit Mr Cox stated that it was the respondent’s purpose to draw a proper balance between the applicant’s interests and the public interests and that he was fully aware of the need to recognise an individual’s rights or potential rights in the concept of proportionality drawing a fair balance. This was precisely the sort of task that he was engaged in on a daily basis in his professional life. This passage in Mr Cox’s affidavit however does not explicitly recognise the engagement of Article 1 Protocol 1, which is not surprising since it has been the respondent’s case consistently throughout this case that Article 1 Protocol 1 was not engaged. While it may be that the decision-maker would have reached exactly the same decision if he had explicitly recognised the engagement of Article 1 Protocol 1, if I had come to the conclusion that the Convention right was engaged then I would have come to the conclusion that the decision made by Mr Cox would

have to be revisited in the light of the need to explicitly recognise the engagement. In view of my conclusion, however, that the Convention right claimed by the applicant was not engaged this does not arise.

[13] The applicant's further argument was that, apart from the Convention point, the decision was bad because PSNI took into account an irrelevant consideration, namely the potential unfavourable perception if the PSNI promoted a person subject to a criminal prosecution. Mr Cox in his affidavit stated that he did not suggest that his decision was formed by the fear of adverse publicity but he did contend that it was appropriate to consider that if the applicant were to be promoted and then convicted of a criminal charge this could appear incongruous to many right-thinking people and could be the proper subject of adverse comment. In his role within the PSNI he considered that it was inappropriate to promote a person who was facing a criminal trial. It cannot be said that such an approach on the part of the decision-maker was irrational or perverse. To promote a person who was the subject of a criminal charge (and who thus potentially, if convicted, could be subject to a disciplinary proceeding) would, indeed, appear incongruous. It could, moreover, be perceived as indicating that the respondent considered that the decision to prosecute the officer made by the independent officers of the DPP was ill advised or that the prosecution was willing to succeed.

[14] In the result I dismiss the application.