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Judgment: approved by the Court for handing down | *Delivered:* **01.06.04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY DAVID ANDREW GLASGOW FOR JUDICIAL REVIEW

MORGAN J

[1] The applicant is a police officer and stands accused of three disciplinary charges under Regulation 4 and paragraphs 3(a) and 4(a) of Schedule 1 of the Police Service of Northern Ireland (Discipline and Disciplinary Appeals) Regulations 1988 ("the 1988 Regulations"). The Respondents have been appointed by the Chief Constable under Regulation 13 and Schedule 4 of the 1988 Regulations to sit as a Disciplinary Board to hear and determine the charges against the applicant. It is agreed that if the charges are made out the Disciplinary Board has power to order the applicant's dismissal from the Police Service of Northern Ireland among other punishments.

[2] The disciplinary charges against the applicant arose out of his investigation of a domestic violence incident in the course of which another officer shot dead a civilian.

[3] At a hearing on 21 October 2003 it was submitted on behalf of the applicant that at the hearing before the Disciplinary Board the applicant was entitled to rely on the procedural protections contained in article 6 of the ECHR. In particular it was submitted that the delay between 21 April 2000 when the disciplinary investigation commenced and the date of the hearing constituted a breach of the reasonable time guarantee in article 6. Accordingly it was contended that the Disciplinary Board as a public authority would be acting unlawfully if it were to proceed to hear the charges.

[4] The Disciplinary Board rejected the argument that article 6 was engaged in the disciplinary proceedings as a result of which the applicant launched these proceedings seeking to quash that decision.

[5] The application to the Disciplinary Board was made before the House of Lords gave their decision in Attorney-General's Reference (No. 2 of 2001) (2004) 1 Cr. App. R. 317. It is now clear that the application to prevent the continuation of the hearing could not have succeeded in the absence of prejudice, which was not argued before the Board. To that extent, therefore, the issue now before the Court is academic.

[6] All parties were anxious, however, to have the matter proceed since it was likely to arise in future hearings before the Board. A decision on the point now would avoid uncertainty and delay in those hearings. In those circumstances I considered it appropriate to proceed to deal with the application.

Arguments

[7] Mr Larkin QC who appeared with Mr Fowler BL for the applicant submitted that the applicant is the holder of the office of constable and enjoys a property interest in that office. He relied upon the following passage in Blackstone (Commentaries) (1766) Volume 2 p. 36:

> "Offices, which are a right to exercise a public or private employment, and the fees and emoluments thereunto belonging, are also incorporeal hereditaments: whether public, as those of magistrates; or private, as those of bailiffs, receivers and the like."

Accordingly he contended that since his property interest in the office of constable was in dispute in the proceedings before the Board it must follow that the Board was determining a civil right of the applicant in the proceedings before it.

[8] Mr Larkin recognised that in his path lay the decision of the Grand Chamber in Pellegrin v France (1999) 31 EHRR 651. He argued, however, that the European Court itself in paragraph 64 of Pellegrin asserted that the exceptions to the safeguards afforded by article 6(1) had to be construed restrictively in accordance with the object and purpose of the convention.

[9] For the Police Service of Northern Ireland Ms Murnaghan BL submitted that the application fell squarely within the principles set out by the Grand Chamber in Pellegrin so that what was in issue was not a civil right. She relied upon Van der Mussele v Belgium (1983) 6 EHRR 163 to establish that the right to exercise an office does not bring with it a property right. Even if there was a property right potentially in issue Pellegrin was ample authority for the submission that article 6 was not engaged in respect of it in these circumstances.

[10] For the presenting officer Ms Kitson BL supported the submissions of Ms Murnaghan and relied upon the admissibility decision in Dimitriadis v Greece (Application No. 13877/88). That was a case in which a civil servant complained that his article 6 rights had been violated during the hearing of disciplinary proceedings in respect of allegations of misconduct. His application was judged inadmissible inter alia on the ground that article 6 was not engaged because the disciplinary code was concerned with the proper functioning of the civil service rather than with the protection of the interests of society generally.

Conclusion

[11] Article 6 of the ECHR provides as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The issue in this case is whether there is a dispute about a civil right. In order to make good that point Mr Larkin relies upon the applicant's property rights associated with the office of constable.

[12] Economic rights associated with employment can indeed give rise to a dispute about civil rights for the purposes of article 6 of the convention (see Buckholz v Germany (1981) 3 EHRR 597). Mr Larkin argued that the holding of an office was a possession whether or not economic benefits were attached to it. At paragraph 91 of his opinion in Parochial Church Council of the Parish of Aston Cantlow v Wallbank (2003) 37 Lord Hobhouse equated possessions with assets. That is consistent with the view that in the absence of some economic consequence article 1 of protocol 1 is not engaged. Since, however, economic rights are attached to the office in this case the point need not be determined here.

[13] It does not follow, however, that every dispute concerning economic rights associated with employment must necessarily give rise to civil rights. Support for that view can be found in the decision of the European Court in Huber v France (1998) 26 EHRR 457. In that case a teacher had been suspended from duty and payment of his salary had also been suspended. He applied to quash those decisions. The Commission concluded that the proceedings had a purpose which was at least partly pecuniary and the dispute, therefore, concerned a civil right. The Court dealt with the argument at paragraph 37 where after setting out the facts it said:

> "The applicant's disputes thus related essentially to his having been sent on compulsory leave and the consequences of that; they therefore primarily concerned his 'career'. The mere fact that the consequences were also partly pecuniary does not suffice to make the proceedings in issue 'civil' ones."

Similarly in Pellegrin itself the Court recognised at paragraph 60 of its judgment that the previous criterion for the determination of whether a dispute was civil relating to the economic nature of the dispute left scope for arbitrariness.

[14] Any decision concerning the recruitment, career or termination of service of a civil servant nearly always has pecuniary consequences. I conclude, therefore, that the existence of an economic right does not of itself lead to the conclusion that a civil right is in dispute.

[15] The answer to the question whether a dispute concerning a right to a possession gives rise to a civil right must in my view be resolved by applying the new criterion in Pellegrin. That is a recent decision of the Grand Chamber which by s. 2(1)(a) of the Human Rights Act 1998 I am obliged to take into account. Lord Bingham commented on the approach to be taken to this provision at paragraph 18 of his opinion in R (Anderson) v Secretary of State for the Home Department (2002) UKHL 46 where he said that the House would not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber.

[16] Pellegrin has been considered by the Court of Appeal in Matthews v Ministry of Defence (2002) EWCA Civ 773. I accept the view of the Court of Appeal that Pellegrin is concerned with disputes raised by employees in the public sector over their conditions of service and does not apply to tort claims such as arose in Matthews. The dispute with which this application is concerned potentially raises the issue of termination of the applicant's service and accordingly is a dispute directly concerned with his conditions of service.

[17] The new functional criterion to be applied is set out at paragraphs 64 to 66 of Pellegrin:

> "64. To that end, in order to determine the applicability of Article 6(1) to public servants, whether established or employed under contract, the Court considers that it should adopt a functional criterion based on the nature of the employee's duties and responsibilities. In so doing, it must adopt a restrictive interpretation, in accordance with the

> object and purpose of the Convention, of the exceptions to and safeguards afforded by Article 6(1).
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> 65. The Court notes that in each country's public-service sector certain posts involve responsibilities in the general interest or participation in the exercise of powers conferred by public law. The holders of such posts thus wield a portion of the State's sovereign power. The State therefore has a legitimate interest in requiring of these servants a special bond of trust and loyalty. On the other hand, in respect of other posts which do not have this 'public administration' aspect, there is no such interest.
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> 66. The Court therefore rules that the only disputes excluded from the scope of Article 6(1) of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police."

[18] There may be circumstances where disputes concerning the duties of police officers would not give rise to disputes over their conditions of service. Those would fall outside the new Pellegrin criterion for the reasons explained in Matthews. What is clear is that a dispute concerning the consequences for the applicant's career as a result of his actions in the course of investigating allegations of criminal activity undoubtedly falls to be determined in accordance with the new criterion.

[19] Although the Order 53 Statement pursued the issue of whether the disciplinary proceedings fell within the criminal charge provisions of article 6 Mr. Larkin indicated at the hearing that he did not feel able to advance that case and I do not have to deal with it.

[20] Since I have found that the test in Pellegrin is decisive in determination of the issue as to whether the matter in dispute is a civil right it follows that the application must fail. That does not mean, however, that the applicant is bereft of procedural protection. The 1988 Regulations and the common law will ensure that the applicant has a fair hearing of the disciplinary charges against him. I express my gratitude to all counsel for their helpful written and oral arguments.