

Neutral citation No. [2008] NIQB 78

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

<i>Delivered:</i> 23 June 2008

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY PAUL ANTHONY PETER ARKINS
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

STEPHENS J

[1] The applicant, Paul Anthony Peter Arkins, seeks leave to apply for judicial review in respect of various decisions taken during the course of a police disciplinary process. The decisions were taken by the Misconduct Panel on 30 March 2007, by the Chief Constable of the Police Service of Northern Ireland in May 2007, and by the Police Appeals Tribunal on 18 February 2008. The disciplinary process was initiated against the applicant subsequent to his conviction on 15 December 2006 for a drink driving offence, contrary to Article 161(a) of the Road Traffic (Northern Ireland) Order 1995. He was fined £120 and disqualified from driving for a period of 12 months though the period of disqualification was reduced to 9 months on completion of a Drink Drivers' Course. The outcome of the disciplinary procedure was that the applicant was required to resign from the Police Service.

[2] The applicant's criminal conviction related to events which occurred on Sunday 6 August 2006. At 9.50 pm a uniformed police motorcyclist, Sergeant Craig, was stationary on Victoria Road, Carrickfergus waiting to turn right into Larne Road. Sergeant Craig stated that as the traffic lights changed to green and as he began to move off a vehicle driven by the applicant contravened the red traffic signal on the Larne Road and turned right into Victoria Road. Sergeant Craig spoke to the applicant. He detected a smell of alcohol and a breath test revealed 67 microgrammes of alcohol in 100 millilitres of breath. That is 32 microgrammes over the prescribed legal limit. The applicant denied contravening the traffic signal and was not convicted of that offence.

[3] Mr Coyle appeared on behalf of the applicant and he submitted, and I accept that the test at the stage of an application for leave is a modest hurdle. That a court will refuse permission to claim judicial review unless satisfied that there is an arguable ground for judicial review on which there is a realistic prospect of success.

[4] Mr Coyle set out 3 main grounds upon which the applicant sought leave to apply for judicial review.

[5] The first ground was that there was a reliance at all stages by the disciplinary bodies and persons on public confidence and public opinion in coming to their decision. It is contended that this was inappropriate. I reject that contention. One of the obligations of any disciplinary procedure, and particularly police disciplinary procedure, is to maintain public confidence. In order to fulfil that obligation it is necessary for the public body to form its own view as to the public's perception. The public's perception including the question as to whether a police officer who is himself prepared to break the drink driving laws would enforce those laws in order to keep the public safe. The disciplinary bodies are made up of experienced members who are well placed to decide exactly that issue, namely what is necessary for the maintenance of public confidence. I refuse leave in respect of that ground.

[6] The second ground relates to a policy document issued by the Police Service of Northern Ireland entitled "Discipline Sanctions for Police Officers Convicted of Drink Driving Offences". That policy document is General Order No 26/2006 dated 5 June 2006. It defines one of the aggravating factors as being that the alcohol reading is particularly high. It is contended that this feature which was held to be present in this case is so imprecise that it fails to inform the disciplinary bodies so that consistency as between one case and another cannot be achieved. That it also deprives serving police officers of the ability to foresee the consequences which a given action will entail.

[7] Mr Coyle, on behalf of the applicant, poses the question "What is particularly high as opposed to high?" Furthermore, "From what baseline is high to be measured?" Is particularly high a level applicable to the general community or is it particularly high for a police officer? Mr Coyle concedes that whilst an actual blood alcohol or breath alcohol reading would bring exact definition to this factor that would not be required or appropriate in a document such as General Order No 26/2006. To bring definition to this aggravating factor by a certain percentage increase over a legal limit would result in excessive rigidity preventing factors such as location, speed, manner of driving and time of day to be taken into account. Accordingly, Mr Coyle on behalf of the applicant accepts that there has to be a degree of imprecision in this aggravating feature. I consider that a high alcohol reading is one which is above the legal limit. Particularly high is sufficiently in excess of the legal limit for the disciplinary body concerned to consider it to be an aggravating feature taking into account the facts of the individual case. I consider that this aggravating feature is inevitably couched in terms which are imprecise, complete precision being unobtainable. In this case the applicant was at nearly twice the permitted legal limit. I refuse leave in relation to this ground.

[8] The third ground is that the policy document entitled "Discipline Sanctions for Police Officers Convicted of Drink Driving Offences" is prescriptive of the sanction that should be imposed depriving the respective disciplinary bodies of

discretion. It is a rule of administrative law that a public authority entrusted with discretion must retain for itself the option of exercising that discretion on a case by case basis. It is, however, appropriate in a policy document to set out the usual consequences of a drink driving conviction and in doing so to recognise the seriousness of such a conviction and the impact that it would ordinarily have on a police officer.

[9] Ms Murnaghan, who appeared on behalf of the proposed respondent, contended that the policy document did not prevent discretion being exercised in each individual case. She acknowledged that such discretion should exist. She called in aid paragraph 2.1 of the General Order which is in the following terms:

“The usual sanction to be applied is either dismissal or a requirement to resign to reflect the serious view which is taken both inside the Service and by society generally.”

That paragraph envisages that there can be an unusual sanction as opposed to a “usual” sanction. Accordingly that as an unusual sanction could be a lesser sanction the disciplinary body has discretion. Ms Murnaghan also referred to paragraph 2.2 which is in the following terms:

“A discipline panel will always treat each case on its merits, but officers presiding at such hearings must apply their judgment to the facts of the case to consider whether an alternative sanction could be justified.”

Again, that quite clearly gives discretion to the disciplinary process. However, paragraph 2.2 continues by listing out 6 potential aggravating factors. The list is non-exhaustive. That part of paragraph 2.2 is as follows:

“Aggravating factors in considering the seriousness of an offence include, where –

- (a) the offence was committed on duty;
- (b) there is an attempt to avoid arrest;
- (c) there is an attempt to interfere with due process, particularly by leaving the scene or improperly using their position as a police officer;
- (d) the alcohol reading is particularly high;

- (e) the offence derives from a traffic collision or another incident involving a member of the public;
- (f) given the nature of policing within Northern Ireland, cognisance will also be given to whether the officer is in possession of a firearm."

Paragraph 3 then states:

"Only in cases where none of these circumstances exist, and there are exceptional circumstances, *should* a lesser sanction be imposed. When this happens the reasons should be clearly set out and recorded." (emphasis added)

[10] I consider that there is a realistic prospect that a case can be made that the words "only" and "should" in paragraph 3 of General Order No 26/2006 are prescriptive, removing discretion, so that it is only in those cases where none of the aggravating factors are present and there are exceptional circumstances that a lesser sanction should be imposed. It may be that at the hearing the true construction of paragraph 3 is limited by paragraphs 2.1 and 2.2. It may also be that, regardless as to the proper construction of General Order No 26/2006, no different outcome would have applied in the applicant's case. However, at this leave stage the question is whether there is a realistic prospect of success. Applying that modest test I grant leave to apply for judicial review in respect of that ground.