THE HIGH COURT

[2024] IEHC 431

[Record No. 2023/1030JR]

BETWEEN

JOHN CONNORS

APPLICANT

AND

FESHEA LIMITED, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Barr delivered electronically on the 12th day of July 2024.

Introduction.

1. On 28 January 2022, the applicant entered the public house owned and run by the first respondent. He states that the first respondent's barman refused to serve him a drink on the basis that it was "regulars only".

2. The applicant is a member of the Traveller Community. He maintains that the conduct of the first respondent, through its servant or agent, amounted to discrimination on grounds of race, which is prohibited conduct under the Intoxicating Liquor Act 2003, as amended (hereinafter "the ILA 2003").

3. The applicant brought an action seeking redress against the first respondent in the District Court for the alleged discriminatory conduct, pursuant to the provisions of the ILA 2003.

4. In these proceedings, the applicant seeks an order of *certiorari* quashing a ruling made by Judge Cheatle at the outset of the civil trial that was being heard by him in the District Court on 28 June 2023. The applicant also seeks a wide range of declaratory reliefs against the second and third respondents, for alleged failure on the part of the State to properly transpose the provisions of the Race Equality Directive (2000/43/EC).

5. The challenged ruling can be put in context in the following way: A provision providing for the reversal of the burden of proof in cases concerning alleged racial discrimination, is contained in Art. 8 of the Directive. A provision to that effect is contained in s. 38A of the Equal Status Acts 2000-2018, as amended. Discrimination on grounds of race in connection with the sale and supply of intoxicating liquor is governed by the ILA

2003. There is no provision in the ILA 2003 providing for the reversal of the burden of proof.

6. In essence, the applicant's case is that the learned District Court Judge erred in law in ruling that the ILA 2003 could not be interpreted as providing for the reversal of the burden of proof in cases of alleged racial discrimination, which was required by the Directive. In the alternative, it was pleaded that if that was the correct interpretation of the statute, the second and third respondents, acting on behalf of the State, had failed to properly transpose the Directive into Irish law.

7. The first respondent did not participate in this application. The second and third respondents denied the entitlement of the applicant to the reliefs claimed.

8. The second and third respondents raised the preliminary objection that the applicant was not entitled to bring these judicial review proceedings, because when the adverse ruling had been given against him in the District Court, the applicant had instructed his lawyers not to proceed with the action; on which basis, no evidence was heard in the matter. The action was struck out, with an order for costs in favour of the first respondent. It was submitted that the applicant was not entitled to challenge the evidential ruling made by the judge at the start of the hearing, when the applicant had withdrawn his action against the first respondent.

9. Rather than set out all the arguments on the substantive issues raised on this application, I will deal with the preliminary objection first.

Background.

10. It is only necessary to set out a brief account of the procedural and substantive background to this application. As already noted, the applicant's case was that he attended at the public house premises run by the first respondent on 28 January 2022. When he went to buy a drink, the barman employed by the first respondent refused to serve him. He was informed by the barman that it was "regulars only". The applicant then left the premises.

11. He returned to the premises on the following day, 29 January 2022, when he spoke with the bar owner, Mr Coady. He asked why he had been refused service on the previous day. He states that Mr Coady told him that he "backed his staff one hundred percent". It is alleged that Mr Coady said that he did not have to give the applicant any explanation for refusing to serve him. He repeated that the bar only served regulars.

12. The applicant stated that Mr Coady also said that the barman had told him, that the applicant had "got a bit abusive" when he was refused service. The applicant remarked to Mr Coady that it would be difficult for the bar to only serve regulars or locals, given that it had only been open for a few months. The applicant believed that the pub had opened in September 2021.

13. On 26 July 2022, the applicant instituted proceedings in the District Court against the publican, seeking relief for prohibited conduct pursuant to s.19(1) of the ILA 2003. The applicant maintains that he was refused service due to his belonging to the ethnic group known as the Traveller Community.

14. When the matter came before the District Court on 28 September 2022, counsel for the applicant informed the court that she intended to apply to the court by way of a preliminary application for a ruling on the burden of proof to be applied at the hearing of the applicant's case. The court was further informed that it was intended that an application for a protective costs order would be made on behalf of the applicant. The District Court Judge agreed that there should be an exchange of submissions between the parties on these preliminary issues.

15. On 23 November 2022, when the matter came back for mention before the District Court, counsel for the applicant advised that written submissions on behalf of the applicant would be filed six weeks in advance of the hearing date, thereby allowing time for the first respondent to reply thereto. The matter was listed for hearing on 22 February 2023.

16. On 11 January 2023, legal submissions were filed on behalf of the applicant. Legal submissions on behalf of the respondent were filed on 15 February 2023.

17. When the matter came before the District Court on 22 February 2023, counsel for the applicant requested the court to state a question of law to the High Court pursuant to s.52 of the Courts (Supplemental Provisions) Act 1961 on the preliminary issues. The District Court judge acceded to the applicant's application and directed that there would be a consultative case stated to the High Court on the two preliminary issues raised by the applicant.

18. By email dated 03 March 2023, the applicant's solicitor was advised by the court office in Wexford that "Judge Cheatle has vacated his order of 22 February 2023 at Gorey District Court and has now listed the matter for hearing at Gorey District Court on 04 May

2023, not before 2pm". That hearing date was subsequently adjourned on consent to 28 June 2023, owing to a difficulty for the first respondent's witnesses.

The Hearing and Ruling of the District Court made on 28 June 2023.

19. The court was furnished with a transcript of the hearing that was held in the District Court on 28 June 2023, which was taken from the DAR.

20. When the case was called on for hearing, counsel on behalf of the applicant sought a ruling from the court to the following effect: (a) that a reverse burden of proof would be applied, as applied in the WRC, such that if the applicant proved a *prima facie* case of conduct that appeared discriminatory, it would be for the first respondent to prove the absence of discrimination; and (b) that the court would make a protective costs order, such that each side would bear their own costs in the application.

21. Counsel addressed the court on the provisions of Art. 8 of the Race Equality Directive and the statutory provision in relation to the reversal of the burden of proof as provided for in s.38(a) of the Equality Status Act, as amended. It was submitted that while no similar provision was contained in the ILA 2003, the court should apply the principle of equivalence and effectiveness; and having regard to the obligation of harmonious interpretation of EU law; and also, having regard to the duty on the court to disapply rules of national law that conflicted with EU law, the court should interpret s.19 of ILA 2003, as providing that there would be a reversal of the burden of proof in the event that a *prima facie* case of discrimination was made out by the applicant.

22. Counsel also made legal submissions as to why the court should make a protective costs order in the case, particularly in light of the fact that in similar discrimination cases heard in the WRC, each party would bear their own costs. Counsel concluded by stating that if the court was not satisfied that the applicant was entitled to either of the rulings in his favour, counsel would repeat the request that the court should state a consultative case stated to the High Court.

23. Counsel for the first respondent resisted the application that had been made on behalf of the applicant. It was submitted that the ILA 2003 postdated the Race Equality Directive. It was submitted that if the Oireachtas had intended that the ILA 2003 should follow the provisions of the Directive in relation to the reversal of the burden of proof, they would have enacted that provision when the Act was implemented in Irish law. It was

submitted that it was not for the court to reverse the burden of proof, as s.19 of the ILA 2003, did not make provision for that in the case before the court.

24. In relation to the application for a protective costs order, it was submitted that the normal rules in relation to costs should apply, as provided for in the Rules of the District Court and under s.169 of the Legal Services Regulation Act 2015. Counsel pointed out that it was the third occasion on which the case had been listed for hearing before the court. She resisted any application for an adjournment of the matter for the purpose of making a case stated to the High Court.

25. Having read the written submissions of counsel and having heard their oral argument in court that day, the learned District Court Judge gave his ruling in the following way: -

> *"I have read through the folder of submissions which – excellently drafted and very clearly set out the issues between you. Ms Duff you are quite right that this Court, as in any court, is bound to interpret these matters in line with the Directive. But I am only empowered to interpret – I am not empowered to impose the section that is not there. I am swayed by the fact that the ILA 2003 postdated the Directive and that it was open to the legislature to include a burden shift provision, but I can only assume that maybe there was lobbying from the Vintners Association and barring some other factors to be taken into account – rather not to do that. So I am not going to accede to your application that the burden of proof should in this case – similarly there doesn't seem to be any – statutory provisions that compel me to make a protective costs order in proceedings such as this. So I am not minded to make a ruling in that regard either.*
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> *In relation to stating a case, I don't know what I would be stating a case on. There just seems to be an absence of statute provisions to point to these things, so whilst you are right in your submission that the legislature made provision in the courts for the Directive – they haven't done so and it is not a matter for me to state a case on it in these proceedings. So I am ruling against you in that regard and I will hear the case now."* [It was accepted at the hearing in the High Court, that there are one or two gaps in the transcript of the DAR recording.]

26. When the ruling had been given by the judge, counsel for the applicant applied for an adjournment. That was refused. The judge stated: *"No, the case goes on. The case*

goes on. It is listed for today. This must have been in your consideration that the ruling would go against you".

27. The judge allowed counsel for the applicant a short adjournment so that she could discuss his ruling with her client and take further instructions thereon. Having done so, counsel returned to the court and indicated that her instructions were not to proceed with the application based on the ruling that the court had given. She stated that she was instructed not to proceed until the applicant had had an opportunity to take the advice of senior counsel in the matter. She stated *"So, I am simply not in a position to proceed, Judge".*

28. While the judge had formally ruled against the applicant on his application for a reversal of the burden of proof, later in the proceedings, when counsel for the applicant had indicated that she had received instructions not to proceed with the matter, the judge gave the following indication as to how he would approach the issue, which seems to go very close to a reversal of the burden of proof in real terms:

> "*Would Mr Connors not just run his case? We are all in agreement that he is a member of the travelling community, he was refused service in the pub and he says it's because he was informed that it was regulars only, that is what is in dispute. Would he not be better off just to run it and see where it goes and it will still be up to the respondent to give an explanation that is plausible to this court as to why Mr Connors was – come back again and your instructions are clear.*
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> *Counsel: Judge, I really appreciate what the court is saying and I really am not trying to be difficult in any way. Unfortunately I am not instructed to proceed without Mr Connors having had the opportunity to take senior counsel's advice on the rulings that have been given and the statutory provisions that are there. So I am simply not in a position to proceed, Judge. I appreciate what the court is saying and that the court is trying to facilitate us, but my application is to adjourn it at this point, Judge*."

29. The judge stated that he had no option but to strike out the proceedings. Upon the application of counsel for the first respondent, an order for costs was made in its favour.

Conclusions.

30. The applicant's civil action in the District Court was listed for hearing on 28 June 2023. At the outset of the hearing, counsel for the applicant sought certain rulings in

relation to a number of matters concerning the substantive hearing; namely, whether there would be a reversal of the burden of proof and whether the court would make a protective costs order in favour of the applicant.

31. When the applicant did not get the required rulings in his favour, his counsel asked for an adjournment of the hearing of the action. That was refused. The applicant's request to the judge to make a consultative case stated to the High Court, was also refused.

32. The applicant's counsel was given a short adjournment to consult with her client. Having done so, she informed the court that in light of the rulings that had been made by the court, her instructions from her client were that he did not wish to proceed with the matter.

33. In these circumstances, no evidence was called by either party. The District Court Judge had no option but to strike out the applicant's action against the first respondent. The court awarded the costs of the action to the first respondent.

34. It is not uncommon for rulings to be made at the outset of the hearing of a civil action, or during the trial of the civil action itself. Once an action has started, if an adverse ruling is obtained by a party, that party cannot decide to abandon the hearing for the purpose of challenging the correctness of the ruling. The correct procedure to adopt, is for the party against whom the ruling is given, to proceed with the action as best they can. If and when they obtain an adverse judgment at the end of the hearing, their option is to either appeal the judgment, or challenge it by way of an application for judicial review.

35. A challenge by way of judicial review is more appropriate where the trial judge has exceeded his or her jurisdiction, or has made an error of law, or has acted in breach of natural or constitutional justice. Proceeding by way of judicial review has the advantage that, if successful, the decision will be set aside and the case will be remitted to the court or tribunal of first instance, thereby affording the applicant another first instance hearing. The other option is to simply appeal the judgment given at first instance, which may have certain advantages depending on the type of appeal that is available.

36. What the parties cannot do when they get an adverse ruling in the course of a civil trial, is abandon the action and seek to challenge the ruling by way of a standalone application for judicial review.

37. The reasons for this are twofold. First, there would be chaos in the civil administration of justice, if parties could leave the hearing of a civil action, whenever they got an adverse ruling, which they believed to be incorrect.

38. Judges often have to make rulings on all sorts of evidential matters, such as on the admissibility of various types of evidence; the shifting of the burden of proof; the jurisdiction of the court to deal with particular matters, to name but a few. Often these rulings have to be made well into the hearing of a lengthy trial. It would be chaotic if parties who were dissatisfied with a ruling, could abandon their action, but retain the right to challenge the ruling on a standalone basis.

39. The second reason why this is not possible, is because a ruling does not exist on its own. It is a ruling given in the course of a trial, it does not exist in a vacuum. It relates to the conduct of the civil action. Once the civil action has concluded, the ruling ceases to have any practical effect. If an action stands struck out, a preliminary ruling made during the course of the trial must suffer the same fate.

40. In the present case, the applicant effectively withdrew his case from the court by instructing his counsel not to proceed with the application for redress. No evidence was called. In these circumstances, the judge had no option but to strike out the matter. Once that was done, the preliminary ruling ceased to have any legal effect, because it related to the burden of proof that would apply at the hearing of the action, but such hearing did not proceed, due to the instructions that had been given by the applicant to his counsel. Therefore, the ruling ceased to have any legal effect, once the case was withdrawn from the court. In these circumstances, the ruling cannot be challenged subsequently in a standalone judicial review application.

41. The District Court Judge could have granted the adjournment sought by the applicant. However, he was entitled to refuse that application having regard to the fact that all the parties and their witnesses were present, and having regard to the fact that the matter had been before the District Court on a number of occasions. This Court cannot interfere with that decision of the judge, which was made within jurisdiction and in relation to a hearing that was proceeding before him.

42. Similarly, it was a matter for the discretion of the District Court Judge, whether he thought it appropriate to adjourn the matter to state a consultative case stated to the High

Court. This Court cannot review his decision not to take that course. That was a matter entirely within his discretion.

43. If the preliminary applications in this case had been heard as a separate trial of a preliminary issue, rather than as an application as part of a unitary trial, then the applicant could have appealed the rulings, or challenged them by way of judicial review. However, in this case, the matter had been listed for hearing on 28 June 2023. The preliminary applications were merely an application for certain rulings that were made at the outset of the trial. It was a unitary hearing. It was not the trial of a preliminary issue.

44. Once the rulings were made, the applicant had no choice but to continue to the end of the trial and then challenge the outcome or judgment, either by appeal or by judicial review proceedings.

45. I turn now to deal with the legal submissions and authorities cited by the applicant in support of the proposition that this Court has jurisdiction to grant the reliefs sought by the applicant in his notice of motion.

46. The applicant submitted that the District Court's ruling in this case, in refusing to apply EU law, either by way of harmonious interpretation, or disapplication of conflicting national law, amounted to a refusal by the District Court to exercise a power which it should properly have exercised. It was submitted that the applicant was entitled to challenge that refusal by way of judicial review, notwithstanding that he had effectively withdrawn his action in the District Court.

47. It was submitted that judicial review was available in respect of a ruling on a preliminary issue, where the issue being ruled upon was clear cut and important. In support of that proposition, the applicant referred to a number of cases. The court has read these cases and does not find that they are persuasive in this regard.

48. The applicant referred to the decision in *Salinas de Gortari v Smithwick (No. 2)* [2000] 2 IR 553. In that case, the respondent Circuit Court Judge was taking evidence from the applicant pursuant to s.51 of the Criminal Justice Act 1994 in aid of a French criminal investigation. An issue arose as to whether the Circuit Court Judge could hold the applicant in contempt of court for refusing to answer questions. The Circuit Court Judge had held that the applicant had to answer the questions.

49. On consent of the parties, an adjournment had been sought and obtained by the applicant to enable him to bring judicial review proceedings in relation to whether the

procedure breached his constitutional right to silence. This case is not of particular relevance, because an adjournment was granted by the Circuit Court Judge, who was conducting the investigation on behalf of the French authorities, so as to permit the judicial review application to be brought.

50. The applicant also relied on the decision in *Re National Irish Bank (No. 1)* [1999] 3 IR 145. Inspectors had been appointed under s. 8(1) of the Companies Act 1990, to inquire into banking practices carried on in NIB. The inspectors sought directions of the High Court on the following matters: (a) as to whether people interviewed by them could refuse to answer questions, or provide documents on grounds that their answers, or the production of documents, might incriminate them in the commission of criminal offences; and (b) whether the procedures proposed by the inspectors were consistent with natural and constitutional justice.

51. It was held by the High Court, and affirmed on appeal to the Supreme Court, that the right to silence was not absolute. It could be abrogated in certain circumstances. The court held that the curtailment of the right to silence was permissible in the circumstances of that case, and the procedures proposed were consistent with the requirements of natural and constitutional justice. Again, this decision is not of particular relevance to the facts of this case. That case involved the trial of a standalone preliminary issue. It was heard as a preliminary issue in the High Court, and was appealed thereafter to the Supreme Court.

52. In *Dillon v Director of Public Prosecutions* [2008] 1 IR 383, the applicant was charged with begging in a public street contrary to s.3 of the Vagrancy (Ireland) Act 1847. The applicant brought judicial review proceedings to challenge the constitutional validity of the section in the 1847 Act. The respondent submitted that the applicant's application was premature, as it was brought prior to the determination of the charge.

53. The High Court held that the application was not premature. Where an applicant was charged with an offence which he claimed would violate his constitutional rights, he had a reasonable apprehension of a determination which would affect his constitutional rights and was therefore entitled to seek judicial review prior to the determination of the charge.

54. In the *Dillon* case, the High Court had followed the earlier decision in *Curtis v Attorney General* [1985] IR 458. In that case the applicant had been charged with

fraudulent evasion of payment of customs duties, contrary to s.186 of the Customs Consolidation Act 1876, as amended. The Act provided that if a defendant challenged the value of the goods on which it was alleged there had been an underpayment of customs duty, the value of the goods could be determined by a District Court Judge, whose determination on that question was final and unappealable. The determination made by the District Court Judge as to the value of the goods, would apply whether the substantive charge was tried summarily in the District Court, or was tried on indictment in the Circuit Criminal Court.

55. The defendant had served a notice challenging the valuation placed on the goods by the customs authorities. Prior to the District Court Judge embarking on a valuation of the goods, the applicant brought judicial review proceedings challenging the constitutionality of this provision in the Act.

56. In the High Court, Carroll J held that the plaintiff had the necessary *locus standi* to challenge the constitutionality of the section, because he was in imminent danger of a determination affecting his rights. It was not necessary that a determination adversely affecting his rights must first be made, before a constitutional challenge could be mounted. It was sufficient if there was a reasonable apprehension of such determination.

57. In reaching her decision, Carroll J had relied on the decision in *Cahill v Sutton* [1980] IR 269, where it was held that a person had *locus standi* to challenge the constitutional validity of a statute, if his interests have been adversely affected, or stood in real or imminent danger of being adversely affected by the operation of the statute.

58. I am not satisfied that any of the authorities cited by the applicant, support the proposition that this Court can review a ruling given in the course of proceedings, when the applicant has abandoned their claim at first instance and has not gone into evidence. Once the applicant effectively withdrew his action in the District Court, by instructing his counsel not to proceed with the action, he thereby dictated the outcome of the case. He cannot challenge a ruling made in the course of proceedings which he effectively withdrew from the court. Had he allowed the action to proceed, he could subsequently have appealed the judgment, or challenged it by way of judicial review, on the basis that an incorrect ruling had let to the judgment.

59. The court is also satisfied that the applicant cannot pursue the second and third respondents in relation to an alleged failure by the State to properly transpose the

Directive, notwithstanding the potential merit in that argument, because having effectively withdrawn his action for redress for discrimination, and in the absence of any appeal from the order of the District Court, there is no *lis* in being which would give him the right to seek the declaratory reliefs as sought in his notice of motion.

60. Having effectively withdrawn his action against the publican in the District Court, the applicant cannot bring any further proceedings against the publican arising out of the events of 28 January 2022, by virtue of the rule in *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313: see *Munnelly v Hassett & Ors* [2023] IESC 29.

61. There is no *actio popularis*. As there are no proceedings in being against the publican, wherein he alleges his rights have been infringed, nor can there be any proceedings arising out of the events of 28 January 2022, the applicant lacks *locus standi* to make the case that the State has failed to properly transpose the Directive into Irish law, and the court cannot embark on that question.

62. For the reasons set out in herein, the court refuses all the reliefs sought by the applicant in his notice of motion.

63. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

64. The matter shall be put in for mention at 10.30 hours on 30th July 2024 for the purpose of making final orders.