Neutral Citation no. [2002] NICA 37

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

Ref: CARF3741

Delivered: 06/09/2002

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

SAMUEL A McLEAN, VINCENT PAUL McLEAN, WILMA McLEAN, SAMUEL J McLEAN and CATHERINE A NEESON

(Applicants) Respondents;

-and-

AGNES KIRKPATRICK, OWEN JOSEPH O'CALLAGHAN, PATRICK GERARD HANNON and SP GRAHAM LIMITED

(Objectors) Appellants.

Before: Carswell LCJ, Nicholson LJ and Weatherup J

CARSWELL LCJ

[1] This is an appeal brought by way of case stated from a decision of Her Honour Judge Kennedy given on 12 October 2001 in Belfast Recorder's Court, in the course of hearing an appeal against the dismissal by Belfast Magistrates' Court on 17 May 2001 of an application for a provisional grant to the respondents of a bookmaking office licence for premises 132-134 Cavehill Road, Belfast. She held on a preliminary point of law, which she heard with the agreement of the parties, that the appellants were not entitled to pursue the objections which they had made to the grant of the licence.

[2] The respondents made application for the provisional grant of a bookmaking office licence for the premises pursuant to Article 14(1) of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 (the 1985 Order), which provides:

> "14.-(1) Where premises are about to be constructed, altered or extended or are in the course of construction, alteration or extension, an application may be made to a court of summary jurisdiction for the provisional grant of a bookmaking office licence for those premises."

The procedure is governed by Schedule 2 to the 1985 Order, which prescribes in detail the steps to be taken by an applicant relating to notice and advertisement of the application. Provision for objections to the grant of the licence is made in paragraphs 4 and 5 of Schedule 2:

> "4. Any person shall be entitled to appear at the hearing of the application and object to the grant of the bookmaking office licence on any of the grounds mentioned in Article 12(4) and (6).
>
> 5. A person intending to object under paragraph 4 shall, not less than 1 week before the time mentioned in paragraph 1(*a*) –
>
> (*a*) serve upon the applicant notice of his intention to object briefly stating his grounds for so doing;
>
> (*b*) serve a copy of the notice upon the clerk of petty sessions."

The time mentioned in paragraph 1(*a*) is the time of the court sitting at which the application is to be made.

[3] It was not in dispute that the respondents had, with the exception of one minor error, taken all the steps prescribed in due form and at the proper times. None of the objections lodged by the appellants complied with paragraph 5 of Schedule 2 and the issue before the judge was whether the requirements of the paragraph were mandatory or whether she had a discretionary power to dispense with them and admit objections which did not comply with those requirements.

[4] The judge made the following findings of fact set out in paragraph 4 of the case stated:

> "4. The following matters were proved or admitted before me on 7 September 2001:

(a) The Notice of Application dated 14 December 2000 was advertised in the Belfast Telegraph newspaper on Thursday 21 December 2000 and in the News Letter newspaper on Friday 22 December 2000. The advertisement that appeared in the said Belfast Telegraph newspaper on 21 December 2000 was defective in that the word 'from' appeared instead of the word 'upon'.

(b) Save for the error referred to in (a) above, the Respondents had complied with their statutory obligation in relation to the service of formal notices and documents and the publication of notices in newspapers. A copy of the Notice of Application together with a copy of the said Advertisement in the said Belfast Telegraph newspaper are pinned together and attached hereto and marked 'A'.

(c) A letter dated 26 December 2000 from one of the Appellants, Mr Owen J O'Callaghan was received in the Office of the Clerk of Petty Sessions on 29 December 2000.

A letter dated 27 December 2000 from another of the Appellants, Mrs Agnes Kirkpatrick, was received in the Office of the Clerk of Petty Sessions on 29 December. A letter dated 29 December 2000 from another of the Appellants, Mr Patrick Gerard Hannon, was received in the Office of the Clerk of Petty Sessions on 2 January 2001. All three letters referred to the fact that, at the date thereof, the Respondents had not obtained planning permission enabling them to use the said premises as a Bookmaking Office and each letter requested the adjournment of the application pending a decision on the application by the Respondents for such planning permission. None of these letters from the said three Appellants, had been served on the Respondents or the Solicitors acting fro the Respondents.

(d) A Notice of Intention to Object to the said application, in which the fourth Appellant, S P

Graham Limited, was the objector, was served upon the Respondents and their Solicitors and upon the Clerk of Petty Sessions who received it on 3 January 2001. The said Notice of Intention to Object was dated 3 January 2001. Copies of the said three letters and Notice of Intention to Object are attached hereto and marked 'B'.

(e) Planning permission enabling the Respondents to use the said premises as a Bookmaking Office was granted on 25 April 2001."

[5] Article 12(5) of the 1985 Order is applied to applications for provisional grants of licences by Article 14(4). Article 12(5) provides:

> "(5) A court may grant a bookmaking office licence notwithstanding that the procedure relating to the application set out in Schedule 2 has not been complied with if, having regard to the circumstances, it is reasonable to do so."

The appellants submitted before the judge that Article 12(5) should be construed in such a way as to apply to objections as well as to applications and that the judge could receive objections which had not been served in compliance with paragraph 5 of Schedule 2 if, having regard to the circumstances, it was reasonable to do so. The judge held that Article 12(5) on its proper construction applies only to applications and not to objections. She also held that if she was wrong in this construction she would not exercise her discretion in favour of the objectors and hear any of their objections.

[6] By a requisition dated 23 October 2001 the appellants applied to the judge to state and sign a case for the opinion of this court on the points of law set out therein. The judge stated and signed a case dated 12 March 2002, in which she asked the following questions:

> "(1) Was I correct in law in holding that objectors, who had not complied with the provisions of paragraph 5 of Schedule 2 of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985, were not entitled to rely on the provisions of Article 12(5) of the said Order for the purpose of having their objections heard.
>
> (2) If the objectors were entitled to rely on the provisions of Article 12(5) of the said Order was I

> correct in law in exercising my discretion to exclude the objectors on the basis of the facts which I found."

[7] We should have been very slow to upset the judge's exercise of her discretion, although the appellants submitted that it was premature. This might well have been sufficient to determine the appeal without considering the first question, but since the issue is one of importance, both in respect of bookmakers' licences and in other licensing fields where the legislation is similar, and we received detailed argument on the point, we felt that we should express our views on it.

[8] It is to be noted that identical provisions, *mutatis mutandis,* are contained in Article 63(5) of the 1985 Order, relating to bingo club licences, and Article 85(9), relating to gaming machine certificates or permits. Similar wording is contained in Article 7(5)(a) of the Licensing (Northern Ireland) Order 1966 in respect of licensed premises. The common feature of all these types of application is that there are detailed and specific steps to be taken, of similar nature in each type, by the applicant for a licence. If there were no dispensing power applications could fail on very narrow and technical grounds of non-compliance. In some instances that might occur without any fault on the applicant's part, eg if the notice to be affixed to the premises were torn down by vandals and not replaced at once, so bringing about a failure to comply with paragraph I(*c*) of Schedule 2 to the 1985 Order. The provisions which objectors must observe, on the other hand, are materially less detailed. It was submitted by Mr McSparran QC for the respondents that it is desirable that there should be certainty, finality and expedition in the receipt and consideration of objections.

[9] Mr O'Reilly for the appellants acknowledged that in attempting to construe Article 12(5) to include objections in the dispensing power he faced strong contrary authority in the decision of this court in *Re O'Loughlin's Application* [1985] NI 421. In that case O'Donnell LJ, with whom Kelly LJ agreed, stated categorically in the course of his judgment at page 424 that the requirements of Schedule 1 to the Licensing Act (Northern Ireland) 1971, which contained a similar provision in relation to objections, were mandatory. That view was accepted as correct and followed by Kerr J in a licensing appeal in *Re Russell's Application* (1993, unreported).

[10] The mainstay of the appellants' argument on this part of the case was the decision of the Recorder of Belfast, His Honour Judge Hart QC, in *Doran v Atkinson* (2000, unreported). The objectors to the grant of a provisional off licence failed to comply with the requirements of the Licensing (Northern Ireland) Order 1996, in that they did not serve copies of their objections on the applicant within the time specified or at all. The Recorder held that the dispensing power contained in Article 7(5) could be exercised in favour of an

objector as well as in favour of an applicant. He stated at pages 1-2 of his judgment:

> "Both the Rev Atkinson and Mrs Brown lodged objections as required by paragraph 6 of Schedule 1 of the Licensing (NI) Order 1996 (the 1996 Order), but failed to serve copies of their objections upon the applicant within the time specified as required by paragraph 6, nor did they serve them on the applicant at all. Mr O'Reilly for the applicant drew this to my attention at the beginning of the hearing, and although he candidly accepted that he could probably anticipate the nature of the objections, he nevertheless submitted that these objectors should not be heard as they had not complied with paragraph 6. He argued that the dispensing power now contained within Article 7(5) of the 1996 Order could only be invoked in favour of an applicant, and not by an objector, because only an applicant could obtain the grant of a licence. Article 7(5) was, no doubt, included in the 1996 Order to mitigate the rigour of the rule in O'Loughlin's case [1985] NI 421, and it is not a general dispensing power. For example, it does not apply to an application under Schedule 8 for consent to alterations under Article 31. However, the requirement that an objector serve a copy of his notice of objection upon the applicant is part of the procedure set out in Part 1 of Schedule 1, yet, if Mr O'Reilly's submission is correct, the court could relieve an applicant of his obligation to comply with important procedural requirements under Part 1 but not do so where there has been a failure by an objector. This does not appear to be a meritorious argument and I do not think I should accept that Article 7(5) has such a restricted scope in the absence of the clearest language, particularly as the court must consider whether, having regard to the circumstances, it is reasonable for the court to grant an application notwithstanding that the procedure set out in Part 1 of Schedule 1 has not been complied with. This gives the court a discretion whether to relieve an objector of the consequence of a failure to comply with the requirements of the Schedule, and provides ample protection for the applicant in such circumstances."

The Recorder exercised his discretion in favour of the objectors and permitted them to present their objections to the grant of the licence (which he eventually granted).

[11] We do not consider that either Article 12(5) of the 1985 Order nor Article 7(5) of the Licensing (Northern Ireland) Order 1996 can be construed in this manner. We observe that in the Betting and Lotteries Act (Northern Ireland) 1957 there was no provision prescribing the time at which or the manner in which objections had to be lodged to the grant of bookmaking office licences. The legislature thought it right to limit in the manner provided for in the 1985 Order the right to appear and put forward objections, just as it had done in the case of premises licensed for the sale of intoxicating liquor. We are quite satisfied of the correctness of the received view, as expressed in *Re O'Loughlin's Application,* that the requirements of the licensing and bookmaking legislation relating to the making of applications for licences and objections are mandatory. The dispensing wording of Article 12(5) is in our opinion clear, referring only to applications, which are circumscribed by detailed and technical requirements, and not to objections, in the case of which the requirements are simpler. If the legislature had wished to extend that dispensing power to objections it would have been very simple and easy to do so. In these circumstances it is not in our view legitimate to construe Article 12(5) to extend to objections.

[12] The alternative argument was then put forward on behalf of the appellants that it is unfair and disproportionate that they should be barred from presenting their objections by failure to comply with the technical requirements of Schedule 2. Mr O'Reilly submitted that this constituted a breach of Article 6(1) of the European Convention on Human Rights, and that, basing ourselves on our decision in *Foyle, Carlingford and Irish Lights Commission v McGillion* (2002, unreported), we should either construe the requirements of Schedule 2 as directory or read Article 12(5) in such a way as to extend the dispensing power to objections.

[13] We do not consider that it would be possible to construe Schedule 2 as directory, even if we were persuaded that there would otherwise be a breach of Article 6(1). The existence of Article 12(5) negates that – if the provisions of Schedule 2 were directory, there would be no need for Article 12(5). Nor, as we have already held, is it easy to see how Article 12(5) could be construed so as to include objections as well as applications.

[14] The matter is, however, settled by the conclusion which we have reached that there is no breach of Article 6(1) of the Convention and no need for attempts to rectify a breach by a strained interpretation of the 1985 Order. The cases concerning the validity of limitation provisions in the light of Article 6 afford a useful analogy. In *Stubbings v United Kingdom* (1996) 23 EHRR 213 it was claimed that the operation of the provisions of the

Limitation Act 1980, which placed a time bar on the bringing of civil claims, in that case for child abuse, constituted a breach of Article 6(1). The European Court of Human Rights did not accept the claim, holding at paragraph 54 of its judgment:

> "However, since the very essence of the applicants' right of access was not impaired and the restrictions in question pursued a legitimate aim and were proportionate, it is not for the Court to substitute its own view for that of the State authorities as to what would be the most appropriate policy in this regard."

With this decision may be contrasted that in *Perez de Rada Cavanilles v Spain* [1999] EHRLR 208, where a three-month time limit had effectively expired before the claimant was informed of a court decision in a property dispute and the time for appeal was a mere three days.

[15] Applying these principles to the present case, we do not think that it is unfair for objectors to have to adhere to a definite timetable in order to have their objections considered. It is true that an objector who has a good case to put forward may be barred from presenting it if he is a very short time late, when the applicant may not be at all prejudiced. But this restriction on access to the court does have a legitimate aim, that of preventing delay and uncertainty, and it is in our judgment proportionate.

[16] We accordingly answer the first question in the case stated in the affirmative. The second question does not arise and we do not answer it. The appeal will be dismissed.