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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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O'Hara's Application [2012] NIQB 91

IN THE MATTER OF AN APPLICATION BY PATRICIA O'HARA FOR JUDICIAL REVIEW

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TREACY J

Introduction and Background

[1] The applicant is a former employee of Menzies Aviation PLC ("the employer"). In that capacity she worked on the premises of Belfast International Airport. Access to parts of that airport is designated as restricted and may only be accessed by persons with a security pass. The applicant had been granted a security pass and had worked in the restricted areas of the airport for many years. On 30 January 2011 the applicant accessed a restricted area in an unauthorized manner. Due to this action she was prosecuted under Section 21(c) of the Aviation Security Act 1982 ("the 1982 Act"). Her security pass for the airport was suspended pending this prosecution.

[2] On 14 June 2011 the applicant was acquitted. Following her acquittal the respondent, Belfast International Airport Limited ("BIAL"), continued to refuse to reissue her security pass. Despite the absence of a formal appeal mechanism, Menzies requested that the decision be reviewed and the decision to withdraw the security pass was in fact reviewed by the Managing Director of BIAL who upheld the decision to withdraw the pass.

[3] The incident involved the applicant and others acting jointly to circumvent critical security measures at a time when there was a raised threat level. The consequences included the diversion of security resources and the drawing of attention to previously confidential security measures.

Relief and Grounds upon which Leave is Sought

[4] The applicant seeks the following relief:

(i) A declaration that the decision of the respondent to refuse to reissue the security pass is unlawful;
(ii) An order compelling the respondent to issue the applicant with a security pass;
(iii) An order quashing the decision of the respondent to refuse to issue a security pass;
(iv) A declaration that Section 19 of the Aviation Security Act 1982 is incompatible with the applicant's rights pursuant to Article 6 ECHR and pursuant to Article 1 of the First Protocol ECHR insofar as it may exclude the applicant from pursuing her claim as set out.

[5] The grounds upon which relief is sought are as follows:

(i) The decision is irrational, arbitrary and *Wednesbury* unreasonable;
(ii) The applicant has not been excluded from holding a security pass from any other UK airport;
(iii) A former colleague of the applicant, acquitted in the same criminal proceedings, has been granted a security pass to work in Edinburgh airport.
(iv) The decision is *ultra vires* in that it purports to act as a deterrent and punishment rather than simply determining whether the applicant is suitable to hold a security pass;
(v) The decision is disproportionate. The decision failed to balance the applicant's rights under A1 P1 and Art 6 ECHR;
(vi) The decision fails to take into account/give sufficient weight to the unlikeliness of such an incident occurring again;
(vii) The decision fails to take into account/give sufficient weight to the applicant's employment and security history;
(viii) The decision takes into account an irrelevant consideration, that is the 'signal of how seriously we take our own obligations within the national aviation security framework' and that the decision 'has to be incapable of misinterpretation';
(ix) That the decision maker misdirected herself and applied the incorrect test.

Statutory Framework

What Law was in force?

[6] Before discussing the lawfulness of the impugned decision it is important to understand what actual law was in place at the relevant time. It is clear from all the evidence that in the first instance, the relevant law is complex, highly sensitive, and

was, at the time of the decision, in a state of flux. Secondly, the changing and overlapping documents *containing* the law have caused some confusion which is regrettable but understandable.

[7] The affidavit of Timothy Figures who has overall responsibility for aviation security matters in the Department for Transport ("DfT") has clarified the legal framework.

[8] The overarching regulatory regime is regulated partly through directly-applicable EU regulations and partly through directions made by the Secretary of State under powers contained in the Aviation Security Act 1982.

[9] The EU Regulations are found in EU Reg 300/2008 (the provisions of which are given further detailed definition in Decision 774 which is a restricted document) and EU Reg 185/2010. Reg 300/2008 permits states to apply 'more stringent measures'. The UK has used this discretion to apply more stringent measures by way of directions issued under Part II of the 1982 Act.

[10] Reg 185/2010 sets out an obligation that an airport controller will operate an identity card system.

[11] The contents of the National Aviation Security Programme ("NASP") have been the subject of some confusion. Mr Figures avers that the contents of the NASP are Reg 185/2010, Reg 300/2008, Decision 774 and the Single Consolidated Direction (SCD). The SCD was published in April 2010. This document revoked all previous directions under the 1982 Act. The SCD is also accompanied by a Frequently Asked Questions pack.

[12] A critical point of confusion in relation to the applicable law in this case has been the application of the term NASP to two different things. One being the full and changing contents of that programme, and the other being two large A4 folders containing 'A single source document that seeks to consolidate all international, European and UK Legislation along with pertinent advice, guidance and recommended best practice' [From SCD FAQ at page 146]. It seems to have been standard in the industry to refer to these folders as the NASP. It is the *legal status* of these folders which has caused problems.

[13] Briefly, the folders, in the forward to the documents therein, purport to *inter alia* 'detail... the legal requirements ... that constitute the standards and recommendations that constitute the standards and recommended practices that are necessary to safeguard civil aviation against acts of unlawful interference'. Within the document, the effect of the content therein is codified by different coloured pages and by different typefaces. This is so that the reader can understand whether, for example, the information is a non-binding piece of guidance, purely informational or (if it appears in 'bold normal type') 'the legal requirements of the programme'.

[14] Within these folders, in bold normal type (indicating a legal requirement) there is a process set out indicating when the aerodrome manager **shall** withdraw a pass:

> "12.84. The aerodrome manager shall withdraw:
>
> a) any pass issued by him to any person under 12.3 where he is no longer satisfied that that person is suitable to hold that pass;
>
> b) any pass issued by him under 12.30 (b) to any person by a particular undertaking where he has reason to believe that:
>
> i) a certificate from that undertaking pursuant to 12.30 (b) has been given without proper care in any particular case, whether in respect of the employee referred to, or otherwise; or
>
> ii) the undertaking does not maintain or enforce provision for disciplinary action against its employees in the cases described in 12.66; or
>
> iii) the undertaking has not exercised due diligence in ensuring that persons employed by the undertaking who are holders of temporary passes are escorted by holders of full passes while in restricted zones; or
>
> iv) the undertaking has not exercised due diligence in ensuring that passes issued to persons employed by the undertaking are recovered in accordance with 12.88; or
>
> v) the undertaking concerned is no longer reliable or reputable.
>
> c) any pass issued by a recognised body referred to in 12.40 and 12.43 where the aerodrome manager has reason to believe the person is no

longer suitable to hold a pass, with the exception of those listed in Annex C; and

d) recognised body status where he is no longer satisfied that such a body is reliable and reputable and / or considers that it has failed to comply with any of the requirements set out in either 12.40 and 12.66."

[15] However, recall that the SCD 2010 **revoked** all previous directions of which this process is one. Further in the FAQs of the 2010 SCD these folders are addressed:

> "Much of what is in the folders will be out of date as of 29 March 2010 but they will still contain much that is helpful (though not legally binding). In the first instance it is recommended that you seek up to date advice and guidance from the FAQ pack which has been specifically designed to assist in understanding the new EC and UK requirements before consulting the NASP. Where you encounter any inconsistencies the most up to date guidance should be treated as the more pertinent."

Therefore, it would appear that the contents of the folders were retained as guidance only with no legally binding effect. That means that the legend at the front of these folders has become outdated and misleading i.e. text which is in 'bold normal type' can no longer be considered, without more, to be the 'legal requirements' of the NASP.

[16] Instead of the previous guidance, the SCD document (i.e. the *new* legal requirements) which purports to help the aerodrome manager to understand the new requirements, merely says, in relation to withdrawal:

> "It is for the airport operator concerned to decide whether or not the card should be withdrawn."

[17] In summary, the requirement to install and maintain an ID card system is a requirement of EU law. The decision to **withdraw** the pass while evidently forming part of that scheme, is not clarified either in the EU Regulations or in the SCD. The only guidance in relation to how to make that decision is contained in documents which have been revoked inasmuch as they no longer have binding legal effect, but whose contents have been maintained as guidance. Further, the new mandatory requirements of the NASP say little about how, when or why to withdraw a pass other than that it is entirely up to the operator.

[18] Therefore the only sensible statement that can be made about what BIAL could have understood their responsibility to be was to:

(i) Make a decision for which they were entirely responsible; and
(ii) That is in line with the general policy of the SCD/EU Regs.

Applicant's Arguments

[19] The applicant argues that in reaching the decision to withdraw the security pass – i.e. in deciding whether the applicant is 'suitable' to hold such a pass, the Respondent has considered irrelevant factors and ignored relevant factors.

[20] It is argued on behalf of the applicant that she is in fact suitable to hold a security pass. The fact that the applicant is suitable to hold a security pass is borne out by the fact that she alleges that it has been communicated to her that she would be considered suitable to hold a pass at any other airport.

[21] The applicant argues that the decision, in seeking an outcome which is either punitive, or deterrent or both is ultra vires the power contained in the statute. It is further argued that the decision is arbitrary and disproportionate.

[22] The applicant submits that the decision maker applied the incorrect test.

[23] The applicant argues that her right to a fair trial was breached in that:

(i) She was not allowed to participate in the decision making process;
(ii) She was not allowed to make representations, call witnesses or cross examine any witnesses; and
(iii) She did not know the case against her or have an opportunity to make any response.

[24] Further, the applicant rejects the affidavit evidence of Glynn Jones stating that it is self-serving and irrelevant and cannot cure the defects of the original decision.

Respondent's Arguments

[25] The Respondent argues in response that in making the decision to withdraw the pass all and every relevant factor was given consideration and all irrelevant tenders were excluded from consideration. Lack of trust in the applicant's suitability to hold a pass, in particular, is very relevant – it is for the respondent to consider what action should be taken and, critically, whether it (as aerodrome manager) has sufficient confidence in the applicant to permit her the important security access she previously enjoyed. The statutory context emphasises the paramount importance of maintaining the security of airports and the wide powers which should be available for this purpose.

[26] The respondent argues that there is no sufficient public law element. BIAL is a private body operating as the manager of the airport which it owns. 'In the absence of any breach of contractual provision, or employment or discrimination law, someone excluded from a particular part of the airport has no remedy.' BIAL is entitled to grant access to its property to whom it wishes, and likewise to decline such permission. Permission to be on the premises is signified by the pass, but, in law, the property owner is free to grant or refuse such permission in a manner which does not engage public law.

[27] This issue is a merits challenge and the court should only intervene if *Wednesbury* irrational. The critical test is whether the applicant is suitable to hold a security pass. 'It is not for BIAL to determine that the applicant is unsuitable to hold a security pass. Rather, it can only do so if it is satisfied that she is suitable'. The authority is entitled to apply a precautionary approach. Even the evidence from the employer seems to suggest that the option was legally open to the respondent.

[28] The respondent submits that the applicant had clear guidance in relation to how to use the airport premises included in her handbook. It states:

> "The ... handbook also makes clear that the security pass is the property of the issuing authority which will 'reserve the right to withhold or withdraw an identification document from any person without explanation."

Therefore there could be no legitimate expectation of continuing to hold a pass.

[29] The response was within the reasonable range of responses. BIAL is an expert in security measures and the courts should be slow to intervene. It would be undesirable for the court to require BIAL to issue a security pass in respect of someone who it is not satisfied is suitable. There is no evidence supporting that she was told that she may work at any other UK airport or that she would be suitable to hold a pass elsewhere.

[30] Edinburgh Airport did not know of the background of Alana Margey.

[31] In relation to the punitive issue, this is based on one sentence where in fact a clear basis for the decision was set out. The decision was based solely on the merits of the case. Even if this was a consideration it would not have rendered the decision unlawful as the respondent was entitled to take in to account how others would interpret the decision.

[32] The respondent submits that the point about misdirection does not aid the applicant because in substance there was no change in the test to be applied. The question is only whether the respondent is satisfied that the applicant is suitable to hold a pass. The portion of guidance referred to by Ms Blair is materially replicated.

Although not legally binding, it is still guidance which should be taken into account. The decision would have been the same anyway since BIAL had lost confidence in the applicant's suitability and removal of the pass was the only outcome. In fact the guidance was a secondary consideration. The earlier decision was confirmed by Mr Jones in which the correct position was considered.

[33] The respondent submitted that the relevant standard is not proportionality and the applicant's Convention rights are not affected in that she has no right to a pass, it is not her possession therefore no A1 P1, there is no right to employment under the Convention, plus the withdrawal of the pass did not terminate her employment and even if A1 P1 was engaged, the interference was justified given the security issues.

[34] The respondent submits that Art6 is not engaged as there was neither a determination of a criminal charge nor a determination of her civil rights and obligations. In terms of common law fairness, the requirements were met – the key elements of the incident were not disputed, she defended herself in criminal proceedings, her employer made representations for her and she had the opportunity to represent herself. There was a fresh decision making process which she did not take part in.

Discussion

Is there a sufficient public law element?

[35] It is clear that the issuing of security passes is done under EU Regulations. While the withdrawal of same is at the aerodrome manager's discretion the whole process is part of a generally regulated scheme and therefore I have no difficulty in finding that this is a public law matter amenable to review in these courts.

Was the decision irrational, arbitrary or unreasonable?

[36] The applicant puts forward two contentions in support of her claim that the decision was irrational, arbitrary and unreasonable. They are (A) because she was not excluded from holding a pass in other UK airports and (B) because a colleague who was involved in the same incident has been successful in obtaining a security pass for another UK airport. I shall deal with these in turn.

[37] In relation to point (A): The decision in relation to withdrawing a pass is entirely up to the issuing authority – in this case BIAL. The existence of the security regime as applied outside Belfast International Airport is an irrelevant consideration to whether BIAL considers an individual suitable to hold a pass. Also, while it is clear that she remains entitled to *apply* for a pass elsewhere, she is by no means guaranteed such a pass as the other authorities would have to apply their own reference/security checking procedure.

[38] In relation to point (B) it seems clear that, worryingly, Edinburgh Airport Authority issued a pass to the applicant's former colleague ***without*** knowledge of either the fact of withdrawal of her pass at Belfast International Airport or the reasons for that withdrawal. In an email dated 26 January 2012 the Security Operations Manager at that airport confirmed "Menzies Aviation have not ... advised us... that the Menzies Aviation employee ... had previously had her security pass withdrawn at Belfast due to her part in a security breach". Therefore the facts of that colleague's current employment add nothing to the applicant's case.

Does the decision fail to take into account relevant factors, specifically the unlikeliness of recurrence and the Applicant's employment history?

[39] BIAL operate a security regime which involves a series of systemic controls. An important part of this regime is the access controls. The relationship between BIAL, Menzies and the applicant can be summarised as follows:

(a) BIAL has control of the critical zone. As well as complying with security regimes, there are also operational needs to be fulfilled within that space to facilitate travel by air. Those operational needs must be fulfilled by staff;
(b) BIAL engages Menzies to provide trained and qualified staff to fulfil those operational needs;
(c) Menzies employs staff (like the applicant) and trains them to the agreed level;
(d) BIAL then issues a security pass to Menzies employees (after that person passes the relevant security checks) to allow them to fulfil those operational needs in the critical zone. The access controls around who can enter the critical zone, where they can so enter, how they can so enter and how they may behave when they have so entered are fundamental to the protection of the security regime.

[40] The decision to issue a security pass is a key element of the security regime. BIAL has a responsibility to only issue passes to agents who will comply with that security regime. This is the core condition of the pass issuing. In exchange for compliance with the security regime, Menzies employees are permitted access to the critical zone where they can perform their duties and earn their living. All employment rights lie with Menzies. The issuing of the pass is purely a security measure.

[41] The 'unlikeliness' of a future occurrence is unknowable and vague. Far more powerful is actual evidence of actual breach. Given the interests that are at stake in any airport security regime (national security, loss of life) 'unlikeliness' of a future occurrence is not a useful criterion for deciding on the suitability of an individual to hold a pass, this is especially so in the face of evidence of an actual security breach where the individual intentionally acted in concert with other security pass holders to deliberately breach one of these fundamental controls.

[42] As above, employment history would similarly weigh weakly in the balance of an assessment of 'suitability' in the face of the evidence of the actual breach. In fact, employment history has been considered as the breach forms the most tangible expression of the applicant's attitude to her work and workplace.

Was the decision reached intended to have a deterrent effect and would such intention render the decision Ultra Vires?

[43] I can find no support for the contention that the decision was made in order to act as a deterrent. Throughout, in communications by the decision maker(s) it is clear that the operative concerns in the decision were the behaviour of the applicant. In an email dated 29 June 2011, Suzanne Blair requests from David Evans at DfT clarification of the legal repercussions of her decision stating that:

> "My issue is that the females are now requesting that their passes be reinstated. Given their behaviour and intent to circumvent the security procedures I don't believe they are suitable to hold an airport pass. If I deny them the reinstatement where do we stand as a company if they decide to pursue this further with a legal challenge?
>
> In the old SDAM there was a text which covered the withdrawal of a pass giving the aerodrome manager the right to withdraw any pass where he / she were no longer satisfied that the person(s) were no longer suitable to hold a pass.
>
> As stated previously I don't think that these staff members are suitable and if we give them the pass back I'm concerned at the message that this sends to other staff members who will think that there is no penalty for any breach."

[44] From an ordinary reading of this passage it is clear that the decision was based on behaviour and intent. Ms Blair was attempting to obtain advice on the legal ramifications of this decision. While the matter in relation to the message that a contrary decision would send out is mentioned, it is clearly an ancillary and subsequent concern to the decision itself. It is also a fully appropriate concern for an airport security manager.

[45] Similarly in the letter of John Doran (MD of BIAL) to Menzies in response to a request to reconsider the matter, it is made consistently clear that the decision was made on the basis of the evidence available in relation to the suitability of the applicant to hold a security pass and that the best evidence available was the positive act of collusion to breach the security regime at the airport. Again while the

fact that the decision would inevitably be viewed as a signal of how seriously BIAL take their responsibility, this is clearly an ancillary concern *after* the substantive decision had been taken, and in the case of Mr Doran, reviewed.

Did the decision maker misdirect herself in law?

[46] Given that at the time of the decision there was no legally binding test by which to make such a decision it is difficult to see how Ms Blair could have misdirected herself between two tests neither of which have binding legal effect.

Is the appropriate test 'unsuitability' or 'lack of suitability'?

[47] It seems clear that the criterion which was used in the instant case was whether the individual is not suitable to hold a pass. While there is a certain amount of semantics in relation to the difference between 'unsuitability' and 'lack of suitability' (especially since the actual wording of the test in the NASP folders is no longer legally binding), the test that was in fact used (lack of suitability) seems to imply:

(a) A greater level of discretion vested in the decision maker; and
(b) A lower standard required before withdrawal of the pass is lawful.

[48] It seems to me that this test is to be preferred as being entirely in line with BIAL's overarching duty to ensure the security of the critical zone.

Convention Arguments

[49] As to the applicant's argument that the decision is disproportionate and failed to balance the applicant's rights under A1P1 and art 6 ECHR this adds little. Even if one assumes that there are 'possessions' at stake (whether in relation to the pass itself, or in relation to possessions when taken to mean the labour and consequent earnings of the applicant) it is clearly in the public interest that the Airport Operator be entitled (indeed obliged) not to issue a pass to someone whom it has determined is not suitable to hold such a pass. The nature of the relationship between BIAL and the applicant was solely one whereby the respondent granted permission to the applicant to be present in the critical part of the airport. Even if one accepts that this permission is a civil right recognised in national law the respondent was fully entitled at all times to revoke this permission. This is made clear in the pass holders handbook. I therefore reject the applicant's argument under this head.

Conclusion

[50] For the reasons above I dismiss the application.