Freedom of Assembly

On the 14th of May of this year, Justice Sanfey in the High Court delivered an important judgement on the right to freedom of assembly for members of the Defence Forces[1].

The ruling stemmed from a request by Martin Bright, who was, coincidentally, the Deputy General Secretary of PDFORRA, seeking clarity regarding his entitlement to attend the "Dignity and Respect" parade that was being held in Dublin on the 19th of September 2018.

The request, submitted to the Department seeking clarity, followed the issuing of a written order within the DFTC on the 29th of August 2018, which stated that:

> *"The General Staff have been made aware that there may be some unofficial parades and protests on behalf of members of the DF in the coming weeks.*
>
> 2. *D COS (Sp) Maj Gen COTTER has requested that all members of the DF are cognisant that attendance in uniform or civilians at such events in [sic] NOT compatible with military service.*
> 3. *Members of the DF should be aware that they should NOT attend such unofficial parades and protests.*
> 4. *For your information,"*

As clarity had previously been provided to PDFORRA, that members could attend public gatherings, the order was believed to be at variance with previous guidance. This gave rise to the request for clarity to the Dept.

As the necessary level of certainty was not forthcoming before the parade, it was necessary to subsequently issue proceedings to the courts.

The arguments put forward by Mr Bright were to the effect that the Order was "(i) ultra vires the power of the Defendants, their servants or agents pursuant to the provisions of the Defence Acts 1954-2007, as amended ('the Defence Act') and (ii) constituted a violation of his rights to free expression, assembly and association, as guaranteed by the Constitution of Ireland and the European Convention of Human Rights and Fundamental Freedoms 1950 **('the Convention')**."

The State counter-argued that Mr Bright had no legal standing to bring the case as he was the Deputy General Secretary of PDFORRA. Secondly, the claim was moot, insofar as the order was not directed at him. Thirdly, the parade was a political parade- as it related to the pay and conditions of service of members of the Defence Forces. Fourthly, Mr Bright could have used the RoW process to make a complaint (and not the courts) and lastly, the order was proportionate and reasonable and did not disproportionately infringe upon the plaintiff's Constitutional rights.

It is important to point out that PDFORRA, in its own right, cannot attend/organise marches, this was noted in the judgement of Justice Sanfey in paragraph 27 of his ruling, where he referenced Circular 6/2013, which stated that:

> *"While it is contrary to the regulations for PDFORRA to attend the marches collectively under our own banner because it constitutes public agitation – there is nothing to preclude members attending public meetings in their capacity as private citizens provided such activity does not involve membership of, or subscription to, political societies. This does not arise in this case."*

Giving evidence during the trial, it was noted by Justice Sanfey in his judgement that Mr Emmanuel Jacob, President of EUROMIL stated that:

> *[t]he "fundamental rights and freedoms of members of the armed forces" to which Mr Jacob refers as one of the goals of EUROMIL, Mr Jacob referred to Articles 10 and 11 of the European Convention on Human Rights in the context of freedom of expression, freedom of assembly and freedom of association rights. EUROMIL's position is that these articles do not exclude military personnel from the right of association. In particular – as Mr Jacob puts it at p.2 of his report – he is of the view that "almost everywhere in Europe, participation at demonstrations is allowed, however never in uniform and during service time". He goes on however to comment that "political neutrality is always an issue of concern."*

It was further noted by Mr Jacob on evidence that while members of armed forces across Europe can engage in protests and demonstrations that:

> *"[o]f course you have then your responsibility as a citizen and in case there is something where you misbehave this consequence as a citizen can also have a military consequence. It can be that at that point you have a disciplinary problem" [day 4, p.68, lines 13 to 25]."*

Justice Sanfey, in summing up the positions of the parties, undertook, inter alia, an extraordinary examination of the various issues, including the meaning that could be assigned to "subscribe to" and examined the law about the principle of "doubtful penalisation".

In summing up he determined that the order of the 29th of August was a blunt instrument which went much farther than necessary. Further, he went on to point out that:

"It is not apparent to me why attendance at these events without more would have been contrary to the oath, which mirrors the wording of s.103(1). While the evidence of Mr Jacob is not directly relevant to the issues at hand, it does provide some

comfort that a broad selection of Council of Europe countries permits attendance at events concerning pay and conditions by members of the military in civilian clothing. It is difficult to see how passive attendance "in civilians" by members at a well-organised and non-confrontational event concerning matters so fundamental to their wellbeing could be in conflict with the oath taken by all members."

In conclusion, Justice Sanfey found that Mr Bright had "succeeded in establishing that the Order of 29 August 2018 was ultra vires and issued in breach of the plaintiff's constitutional rights."

Finally, he acknowledged- "[t] he good faith and sincerely held convictions on both sides of the dispute. It was very clear to me that the case involved important points of principle from the point of view of both plaintiff and defendants. The issue of what members of the Defence Forces may or may not do off duty in relation to matters which might be deemed "political" is a difficult issue; however, it is an area which requires regulation by the Minister in a manner which takes account of the interests and sensitivities of all concerned."

Following the judgement, the Defence Act has been amended, to provide the following:

Section 11 of the Defence (Amendment) Act 2024 amended section 103 of the Defence Act 1954 Act, and inserted subsection (1A) which reads as follows:

> "(1A) Without prejudice to the Defence (Amendment) Act 1990 and any regulations made thereunder, a member of the Permanent Defence Force shall not—
>
> (a) while in uniform or otherwise making himself or herself identifiable as a member of the Permanent Defence Force—
>
> (i) make, without prior authorisation from the member's commanding officer, a public statement or comment in relation to a political matter or matter of Government policy, or
>
> (ii) attend a protest, march or other gathering in relation to a political matter or matter of Government policy,
>
> (b) canvass on behalf of, or collect contributions for, any political organisation or society, or
>
> (c) address a meeting of a political organisation or society.".

As the law expresses a particular point, it has to be assumed that the opposite of what is prescribed as prohibited is not prohibited. Thus, members can attend protests, marches or other gatherings in relation to a political matter, provided they do not attend in uniform or make themselves identifiable as a member of the Defence Forces.

It must be considered that it would still be within the entitlement of the military authorities to make a lawful order prescribing that members not attend a specific event, providing that such an order was reasonable and proportionate to the aims to be achieved. However, the threshold for such an order would, in line with the judgement of Justice Sanfey, be very high.

Finally, as remarked by Mr Emmanuel Jacob, President of EUROMIL, members while attending protests, marches etc remain subject to criminal law and any breach through being, for example, involved in a riot, could have second-order effects, through military discipline/ administrative processes.

Special thanks to Mr Fergus O Regan solicitor for PDFORRA who took on the case and has been instrumental in securing rights for members of the Defence Forces, the Senior Counsel's.....Mr Gerry Rooney, former General Secretary, PDFORRA, Emmanuel Jacob, President EUROMIL, Tom Cloonan.

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[1] MARTIN BRIGHT v. THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL, High Court, ***[Record No. 2018/8484P], 14th May 2024***