Neutral Citation Number: [2011] IEHC 516

THE HIGH COURT

2010 960 JR

AIDAN KEEGAN

APPLICANT

AND

JUDGE OF THE DISTRICT COURT KEVIN KILRANE

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 26th day of October 2011

1. In the present case the applicant obtained leave on the 19th July 2010, to seek orders of *certiorari* to quash decisions made by the first named respondent on 26th February 2010. The contested orders convicted the applicant of various offences under the Road Traffic Acts, including offences of driving under the influence of alcohol and driving without insurance, resulting in the imposition of concurrent sentences of six months imprisonment and disqualification from driving for a period. In summary, the applicant complains about the procedures followed and challenges the decision on the basis that the first named respondent proceeded with the hearing, convicted the applicant and proceeded to sentence him despite having been requested to recuse himself as the presiding judge. The request to Judge Kilrane was put forward on the basis that the judge had, prior to his appointment to the bench while practising as a solicitor, acted on behalf of the applicant in previous proceedings.

2. The sequence of events that led to the present application may be summarised as follows:-

(1) On the 8th May 2008, Mr. Kevin Kilrane, who until this date had been the principal solicitor in the firm of Kevin P. Kilrane and Co., Mohill, County Leitrim, was appointed as a Judge of the District Court;

(2) On 23rd August 2009, the applicant was arrested and was charged with various offences under the Road Traffic Act which were alleged to have occurred on that date at Mohill, County Leitrim. The applicant was brought to the Garda Station at Carrick-on-Shannon, where he provided a breath-sample;

(3) On the 25th September 2009, the applicant appeared before Ballinamore District Court in relation to these charges. He appeared subsequently before the same court on the 23rd October 2009 and on the 27th November 2009. It is of some significance in the context of the present proceedings to note that the Judge of the District Court who presided on these occasions was not the first respondent, Judge Kevin Kilrane;

(4) On an unspecified date in late 2009, which was, in any event, certainly prior to 22nd January 2010, the first named respondent, Judge Kilrane, was assigned to District Court area no. 2, an area that includes Carrick-on-Shannon;

(5) On the 22nd January 2010, the prosecutions of the applicant were back in the District Court. On this occasion the matter was listed before Judge Kilrane. The applicant was in court and was represented by a solicitor, Ms. Doireann Ní Riain. On that occasion a date for the hearing of the case was fixed and the matter was listed for the 26th February 2010 at Carrick-on-Shannon District Court. It appears that the Court was told that there were five prosecution witnesses travelling from Ballyconnell and Carrigallen Garda Stations and that the case would take some time. Of considerable significance in the context of the present case is that no indication was given at this time that there would be any difficulty with Judge Kilrane dealing with the case. The point has been made that prior to the 26th February 2010, it was not certain which judge would deal with the case on that date. While that it is technically true, it has been pointed out also that Judge Kilrane was the judge assigned to the district and there must have been every expectation that he would preside when the case came on for hearing on 26th February 2010. To put it at its lowest, there must have been a recognition on the part of all concerned that there was a very strong possibility that Judge Kilrane would be presiding over the hearing;

(6) The matter was listed for hearing on the 26th February 2010. There is some disagreement about what precisely transpired on that occasion and I will deal with this aspect presently;

(7) Having convicted and sentenced the applicant, the first named respondent as requested fixed recognizances in the event of an appeal. The applicant entered into recognizances and on the 8th March 2010, the applicant lodged his appeal to the Circuit Court;

(8) On the 10th May 2010, the applicant's appeal to the Circuit Court was listed but was adjourned on the basis that an important witness the applicant required was not available;

(9) On the 5th July 2010, the appeal to the Circuit Court was again listed and was adjourned on the basis that the applicant was changing solicitors;

(10) On the 19th July 2010, the application for leave was made and leave was granted. The applicant sought and obtained an order staying the District Court appeal. Again, it is appropriate to note that the solicitors and indeed counsel who are acting in relation to the judicial review proceedings are not the same solicitors and counsel who acted for the applicant in the District Court or who appeared on his behalf when the matter was listed on appeal in the Circuit Court;

(11) On the 15th November 2010, the District Court appeal was listed once more and on this occasion the matter was adjourned on behalf of the applicant despite the fact that a stay had been ordered on the 19th July. Apparently, counsel

moving the application on his behalf made reference to a bereavement experienced by a solicitor.

3. With regard to the adjournments of the District Court appeal on the 5th July 2010, and the 15th November 2010, counsel for the applicant stated that he is quite bemused about what had transpired in court on those dates. On the 5th July 2010, the applicant's former solicitor was aware of the fact that his new solicitors were actively pursuing the possibility of obtaining judicial review. By the 15th November, a stay had been placed on the District Court appeal by the High Court when granting leave and the order had been served on the Chief State Solicitor. Indeed, it appears to be accepted that some days prior to the listing on the 15th November 2010, the Gardaí became aware of the judicial review proceedings.

4. As I have indicated there is some disagreement about the sequence of events on the 26th February 2010.

5. In his grounding affidavit, the applicant dealing with events that occurred in his absence says that his solicitor sought to adjourn the matter first on the basis, "that I had been subject of an assault some weeks previous and was then unwell and second on the basis that the first named Respondent was asked to recuse himself from the matter on the basis of the past solicitor-client relationship between your deponent and the first named Respondent."

6. Garda Inspector James Delaney who was the presenting officer on the 26th February 2010, states that what was averred by the applicant does not accord with his own recollection. Inspector Delaney's account is supported by Garda Bernard Gallagher and is as follows. He avers that when the case was first called, the applicant did not appear in court and an application was made by the solicitor on behalf of the applicant to adjourn the hearing of the case on the ground that the applicant was unable to attend court that day due to being involved in an incident. He says that the presiding judge enquired into the nature of the accident and the injuries involved and was informed that the applicant had injured his leg. The judge asked whether there was medical evidence to support the application for an adjournment and was informed that there was not. Inspector Delaney objected to the adjournment pointing out that all of the witnesses for the State were present in court and the prosecution was ready to proceed. According to Inspector Delaney the judge told the defending solicitor that an application to change the status of the listing from a hearing date to a mention date could have been made at any earlier court-sitting in the District provided that all parties were on notice, in accordance with a local practice direction. It appears that he was referring to a practice direction in the area which directs that where a matter is listed for hearing it remains so listed unless an application is made at least seven days in advance to change the listing. Inspector Delaney avers that Judge Kilrane then informed the defence solicitor that he was declining her application for an adjournment, that in the absence of medical evidence the case would proceed at second calling and that her client was required to attend. According to Inspector Delaney's account, the case was then called a second time and on this occasion the applicant was in court without any obvious signs or symptoms of injury, such as walking with a limp. The inspector stated that on this second calling a request was made that the judge recuse himself; the defence solicitor stated that her client had previously been a client of the judge and that her client had previous convictions. Judge Kilrane asked the solicitor why the matter was not mentioned or had not been raised on 22nd January 2010 and, according to the inspector, the solicitor was unable to offer any answer. Inspector Delaney averred that Judge Kilrane considered the application but rejected it as he did not believe it to be a genuine application, referring to the fact that the case had been listed for mention on a number of occasions and no reference to any difficulty with him dealing with the case had been made on any occasion. He pointed out that it was only when the application to adjourn, on the basis that the applicant was not in court and was not in a position to attend court, failed, that the application for the judge to recuse himself was made.

7. Ms. Ní Riain's recollection does not accord with that of the inspector and Garda Gallagher. She says that the case was being dealt with initially by the principal of her firm but that he found himself unable to deal with the hearing and requested her to deal with it. In doing so, he told her that her first application to the court should be to request Judge Kilrane to recuse himself due to his previous knowledge of the applicant. She says that she did so, to the best of her recollection, at the call-over and again when the case was called on for hearing. She says that when she made the application, the first named respondent said that he believed the application was made purely for the purpose of delay.

8. One matter that is not in dispute is that when the request to Judge Kilrane to recuse himself was rejected, the hearing proceeded in the normal way; there is no controversy relating to the conduct of the hearing as such.

9. On behalf of the applicant it is alleged that this is a case of objective bias. It is immediately acknowledged that there is no suggestion of actual bias on the part of the judge in the District Court. It is further acknowledged that it is not a case of presumed or apparent bias, such as where a decision maker has a pecuniary or other personal interest in the outcome. It is said that the prior connection between the applicant and the first named respondent was such as to cause a reasonable, objective and informed observer to apprehend, on reasonable grounds, that the first named respondent did not, would not, or could not bring an impartial mind to bear on the matter. It is said that the recognition in Irish Law that bias can be of two types: 'conscious,' also referred to in some of the authorities as actual or subjective, and 'perceived,' also referred to as objective or unconscious, is mirrored in the jurisprudence of the European Court of Human Rights. In this regard, a number of decisions including *Panyik v. Hungary* (Application No. 12748/06) [2011] ECHR 1105. *Hauschildt v. Denmark* (1989) 12 EHRR 266, *Micallef v. Malta* (Application No. 17056/06) [2009] ECHR 1571, *Piersack v. Belgium* (Application No. 8692/79) [1982] ECHR 6 and *Meznaric v. Croatia* (Application No. 71615/01) [2005] ECHR 497 and *Dorozhko v. Estonia* (Application No. 14659/04) [2008] ECHR 344, were referred to. For my part I find myself in agreement with the observations of Mr. Paul Anthony McDermott, B.L., on behalf of the respondents, who contended that the jurisprudence of the European Court of Human Rights does not advance matters significantly. In my view the law in Ireland in relation to bias is well-established, well-known and can be described fairly as robust. The approach taken by Irish jurisprudence and the jurisprudence of the ECHR is very similar indeed. In particular, both recognise the need to guard against perceived or objective or unconscious bias, howsoever labelled.

10. In truth the legal principles that apply are not, and cannot be, seriously in dispute. The difficulty arises in applying well-established principles to the facts of this case. Despite the diligence of counsel on both sides of the case no analogous case whether from Ireland or any other jurisdiction has been identified. There are numerous cases where a party to litigation objects to the fact that the person judging him has on some prior occasion acted for an opponent but there does not appear to be any precedent for somebody objecting to being tried by a person who had in the past acted as his lawyer. The issue was canvassed as a ground of appeal in the case of *D.P.P. v Griffin* [2009] IECCA 75, however, in a situation where the trial judge, to whom objection was taken, indicated he had no recollection of so acting having been on the bench for many years at that stage, the argument was not considered.

11. The respondents oppose the granting of relief on a number of grounds. It is said there has been delay in seeking relief. The application for judicial review was made four months and three weeks after the orders of conviction were made in the District Court. The respondents argue that where an alternative remedy exists in the form of his appeal to the Circuit Court, that the appeal is the appropriate forum in which to address any complaints regarding his convictions. It is said that the applicant's conduct disentitles him to relief. In particular, it is said that he failed to raise any issue of bias when the trial date was being fixed and instead did so only

after an application to adjourn had been unsuccessful. This is a case where the first named respondent decided that the application was not a bona fide or genuine one and was one that should have been made when the trial date was set. It is said that that was a conclusion that the judge in the District Court was entitled to reach and if there was any error on the part of the first named respondent, it was an error within jurisdiction or was not such as to require the intervention of the High Court. It is stressed that judicial review is a discretionary remedy and that in all the circumstances this is a case where the Court should exercise its discretion against granting relief.

12. The applicant's approach to this issue, in my view, has been singularly unimpressive. When a date for hearing was fixed on 21st January 2010, the applicant, more than anyone else, was aware of all of the details of such prior contact as he had with Judge Kilrane. If he had any concerns about being tried by Judge Kilrane, that was the time to say so. His failure to do so raises suspicion that the subsequent application was prompted by nothing more than a desire to postpone the evil day. It is also very much to the applicant's discredit that no application was made between the 22nd January 2010 and the 26th February 2010. It is clear that it was recognised as likely that Judge Kilrane would be presiding on the 26th Februaruy 2010. Ms. Ní Riain, defence solicitor, has averred that her instructions from her principal were that the first issue she should raise was a request to the presiding judge to recuse himself, these instructions only make sense if the expectation was that Judge Kilrane would be presiding. In my view the cynical behaviour of the applicant militates strongly against the grant of relief and strongly in favour of the exercise of the court's discretion to refuse relief.

13. So far as the question of delay is concerned, it is true that the application has been made within six months but it cannot be said to have been made particularly promptly. The applicant must have been aware since the 22nd January 2010 that his case was likely to be dealt with by Judge Kilrane. According to the affidavit of Garda Gallagher when the case concluded on the 26th February, reference was made by the defence solicitors to the possibility of an application for judicial review. Despite the fact that the possibility of an application for judicial review would seem to have been on the agenda from the 26th February 2010, no explanation has been offered for the delay that subsequently occurred.

14. As Delaney & McGrath, Civil Procedure in the Superior Courts (2nd Ed, Dublin, Round Hall, 2005) at 690 points out:-

> "There have been relatively few examples of cases in which judicial review has been refused on the grounds of lack of promptness within the three and six months time periods specified in the rules."

In a situation where the applicant stands convicted of a criminal offence and the application was brought within the statutory six months period, albeit well into that period, I would be reluctant to shut the applicant out from relief solely by reason of such delay as occurred. However, the fact that there has been a delay seems to me to be a relevant matter to take into account alongside other considerations when deciding how the court should exercise its discretion whether to grant or refuse judicial review.

15. So far as the argument in relation to the existence of the alternative remedy of an appeal to the Circuit Court is concerned there is no doubt that the existence of an alternative remedy is not, *per se*, a bar to relief. The relevance of the existence of an alternative remedy by way of appeal has been considered by the courts in a number of different contexts, including District Court criminal appeals and planning and asylum matters to name but some. In my view, in a situation where the complaint made is one of bias at first instance it is understandable that a party will wish to proceed by way of judicial review thereby achieving a fair and objectively unbiased hearing at first instance and preserving the possibility of an appeal if dissatisfied with the outcome. All else being equal, I am satisfied that this certainly would have been an appropriate case for the applicant to proceed by way of judicial review.

16. With regard to the argument that the judge, in deciding that the application was not genuine, was acting within jurisdiction such that any error made in reaching that decision was made within jurisdiction and accordingly, that the decision is not amenable to judicial review; for my part, I find that argument unconvincing. There is no doubt that a judge is not obliged to recuse himself simply because that request is made of him. He has a decision to make and indeed has a duty to hear cases unless it is proper to recuse himself. A judge, therefore, will from time-to-time be required to make a decision whether or not to sit. That decision is subject to review by a higher court. In the case of *Livesey v. New South Wales Bar Association* (1983) 151 C.L.R. 288, it was stated:-

> "Once it is accepted that a judge should not automatically stand aside whenever he is requested so to do, it is inevitable that appellate courts, removed from the pressure of a possible need for immediate decision and enjoying the advantages both of hindsight and, conceivably, further material and information, will on occasion conclude that a decision of a judge at first instance that he should sit was mistaken and has resulted in a situation where one of the parties or a fair-minded observer might entertain a reasonable apprehension of bias or pre-judgment. Such a conclusion does not involve any personal criticism of the judge at first instance or any assessment of his qualities or of his ability to have dealt with the case before him fairly and without pre-judgment or bias."

The passage to which I have just referred was approved by Denham J., as she then was, in *Bula Limited v. Tara Mines Limited* (No. 6) [2000] 4 I.R. 412. It seems to me that a corollary of the fact that a judge to whom an application is made has a decision to make, is that the decision when made is subject to review.

17. Coming to the core issue which is whether the decision of the first named respondent to proceed with the case leads to a conclusion of objective bias, it seems to me to be useful to consider what the position would have been had the issue been raised on the 22nd January 2010. If, on that occasion, Judge Kilrane had been informed or reminded that he had on a number of occasions represented the applicant in relation to various criminal charges, that alcohol appeared to be a factor in all or most of those, and that accordingly the applicant was concerned that Judge Kilrane had a very detailed knowledge of his background and circumstances, indeed a unique level of knowledge, such that accordingly it was inappropriate for him to deal with the case; what would the position have been? It seems to me that had such a submission been made, it would have been a very persuasive one and indeed might have been seen as compelling.

18. A review of the Irish cases to date shows that the more common situation is the opposite to what pertains here, i.e., all such cases are concerned with some prior involvement as a lawyer on behalf of an opposing party. The case-law suggests that a mere relationship in the past is not sufficient to give rise to a perception of bias and that something more than that is required. By analogy, the mere existence of a lawyer- client relationship without more, may not give rise to difficulty. It seems to me that it is necessary to consider the nature and extent of the prior relationship.

19. As was pointed out by Denham J. in *Bula Limited v. Tara Mines Limited* (No. 6) [2000] 4I.R. 412, a judge is not disqualified from adjudicating in a case merely because one of the parties was in receipt of his or her professional legal services at an earlier time. In the context of the independent bar which operates in Ireland, such a link is not a connection sufficient to disqualify. It requires special additional circumstances to disqualify a judge from adjudicating on a case:-

> "Thus, a long recent and varied connection may disqualify a judge. The circumstances must be cogent and rational so as to give rise to a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the issues in the case."

20. Denham J. was speaking in the context of a challenge to the participation in the case of persons who had previously acted as barristers. In my view, the observations that she makes have a clear relevance to the solicitor-client relationship also. However, it must also be acknowledged that the relationship between a solicitor and client will sometimes be quite different to the relationship between a barrister and lay client. The nature and depth of the relationship between a solicitor instructed in a criminal matter and his client may vary very widely indeed. On one end of the spectrum it is possible to imagine a situation where a solicitor might have received instructions in relation to responding to a speeding summons on a single occasion, perhaps having received instructions by telephone or via a solicitor from some other part of the country. In such circumstances, it seems to me that no rational independent observer could conclude that there was any difficulty with that solicitor, when subsequently appointed to the bench, hearing a case involving that former client. On the other end of the spectrum it is possible to imagine a situation where a solicitor acted for a client on a number of occasions in relation to offences bearing a striking similarity to the offence with which the former client is now charged, perhaps so striking that evidence in relation to the earlier incidents might be admissible as evidence of a system or similar facts evidence. In such a situation the inappropriateness of the former solicitor proceeding to hear this latest in a series of cases as judge would, I think, be obvious to all.

21. In this case the relationship of a solicitor and client between the applicant and Mr. Kilrane, as he then was, was an on-going one, as distinct from one where Mr. Kilrane, had received instructions on a single occasion. On occasions, numbering seven in all between 2001 and 2007, the applicant consulted Mr. Kilrane and sought representation from him. He has averred, and I have no reason to doubt, that on each of these occasions, his initial contact was with Mr. Kevin Kilrane, though on some occasions some or all of the court appearances were dealt with by other solicitors in Mr. Kilrane's office. The offences in question included public order offences, assaults and offences under the Road Traffic Act. Alcohol would seem to have been a feature in many of them. In these circumstances I think an observer would have taken the view that, prior to the appointment of Mr. Kevin Kilrane to the bench, the applicant was a regular client of his and that he was the applicant's regular or standing solicitor.

22. A complicating factor is that when the application to Judge Kilrane that he recuse himself was made no details of the extent of the previous solicitor-client relationship were referred to. The details of the contact and the period over which the contact occurred, came to light only in the judicial review proceedings and indeed the full details only late in the judicial review proceedings. However, I do not believe that this is a decisive factor. If Judge Kilrane was in any doubt about the extent or nature of his prior professional relationship it was open to him to make inquiries from the bench. It has been stated on oath that Judge Kilrane was in a position to recognise the applicant's sister when she appeared in court at a later stage as a potential surety and that it was the applicant's mother who first introduced him to Mr. Kilrane as a client. In the circumstances I think it is proper to proceed on the basis that Judge Kilrane was aware, at least in general terms of the nature of the prior professional relationship.

23. The question then is how all of this would strike an informed, objective observer? At the outset, it seems to me that such a person would have been quite unimpressed with the behaviour of the applicant and might well have shared the view of Judge Kilrane that the application made so late in the day was not a "genuine one", in the sense that it was not meritorious and it was merely the latest ploy in a series of attempts to postpone the evil day when the case came on for hearing. However, I think it is likely that such an observer might also have concluded that it would have been very difficult for Judge Kilrane to put out of his mind his prior knowledge of the applicant. The defence solicitor who has interacted with a client over a period of years acquires a unique insight into that person's character. Such a solicitor is likely to know far more about the individual for whom he has appeared regularly than others such as the prosecuting Gardaí, opposing lawyers, or judges that dealt with the earlier cases. The doctrine of legal professional privilege exists so that clients can open up to their lawyers and be fully frank with them. It seems to me that if a client has reposed confidence in a lawyer, that the lawyer has the opportunity to gain a greater insight into him than almost anybody else. It seems to me that someone who has invested confidence in a person may have an understandable anxiety that the person in whom confidence was reposed will not at a later date act as a judge in strikingly similar proceedings in which he or she is a party.

24. I have made clear my views about the applicant's conduct in the proceedings, but notwithstanding the strength of those views, it seems to me that the overriding consideration is that a fair, reasonable and objective observer in possession of the facts, should have confidence in the fact that the applicant was being tried by a judge who was capable of bringing an open mind to bear. In my view, such an observer might well believe that it would be very difficult for the judge to put out of his mind the prior information that had come to him in his unique role as a defence lawyer, and in these circumstances, while believing that the applicant was in large measure, the author of his own misfortune, view the proceedings with a significant degree of disquiet. Accordingly it seems to me that confidence in the administration of justice is enhanced by the quashing of the challenged orders and that is what I propose to do.