

THE HIGH COURT

[2004 No. 95 JR]

BETWEEN

C. G.

APPLICANT

AND

THE APPEAL COMMISSIONERS

RESPONDENTS

AND

THE REVENUE COMMISSIONERS (CRIMINAL ASSETS BUREAU)

NOTICE PARTY

Judgment of Ms. Justice Finlay Geoghegan delivered on the 18th day of March, 2005.

On the 9th February, 2004, O'Neill J. granted leave to the applicant to apply by way of judicial review for the following substantive reliefs:

1. An Order of Certiorari by way of an Application for Judicial Review of the Order of the Respondent dated 23rd day of January 2004 refusing the Applicant's application for an adjournment of his Appeal to the Respondents against the Income Tax Assessments made by the Revenue Commissioners (The Criminal Assets Bureau) pending the determination of criminal proceedings against the Applicant for failure to make tax returns.
2. An Injunction by way of an Application for Judicial Review restraining the Respondents from proceeding with the Applicant's Appeal to the Respondents against the Income Tax Assessments by the Revenue Commissioners (the Criminal Assets Bureau) pending the determination of criminal proceedings against the Applicant for failure to make tax returns.

Background facts.

On the 7th February, 2003, the applicant was assessed by the Criminal Assets Bureau (the notice party) to income tax in respect of each of the following years of assessment.

- (a) The period ended 31st December, 2001;
- (b) The year ended 5th April, 2001;
- (c) The year ended 5th April, 2000;
- (d) The year ended 5th April, 1999;
- (e) The year ended 5th April, 1998;
- (f) The year ended 5th April, 1997;
- (g) The year ended 5th April, 1996;
- (h) The year ended 5th April, 1995;
- (i) The year ended 5th April, 1994.

On the 31st January, 2003, the applicant was charged with failing to deliver tax returns on or before the relevant specified date in respect of the years of assessment:

- (a) The year ended 5th April, 1994;
- (b) The year ended 5th April, 1995;
- (c) The year ended 5th April, 1996;

In each case contrary to s. 94(2)(e)(i) of the Finance Act, 1983, as amended. The applicant was sent forward for trial to the Circuit Court on the said charges on the 3rd February, 2004.

The applicant appealed against the tax assessments raised on him by the notice party in respect of the 9 years referred to above. A hearing date for the appeal was fixed for the 21st January, 2004. On that date, the applicant applied to the Appeal Commissioner for an adjournment of the tax appeals pending the determination of the criminal proceedings. The Appeal Commissioner refused to grant the requested adjournment. He did grant a short adjournment to enable the applicant apply for leave to issue judicial review. On the application for leave, the applicant was also granted an order restraining the respondent from proceeding with the applicant's appeal pending the determination of the judicial review.

The application for judicial review has been opposed by the notice party who delivered a statement of opposition dated 30th March, 2004, and a verifying affidavit. The respondents have not participated in this application.

Application to Appeal Commissioner

The application made by the solicitor for the applicant to the Appeal Commissioner was for an adjournment of the appeal hearing until after the determination of the criminal proceedings. The transcript of the hearing has been exhibited in this application by Mr. Staines, solicitor for the applicant. It appears therefrom that at the commencement, the Appeal Commissioner was unaware of the criminal proceedings. Further, the application was made (and not disputed by counsel for the notice party) upon the basis that the criminal proceedings and the appeals before the Appeal Commissioner related to the same years of assessment. The application for an adjournment was essentially based upon the applicant's right under Article

38.1 of the Constitution to a fair trial and the applicant's right to silence and privilege against self incrimination.

The application was opposed by counsel for the notice party by submissions on the law relating to the constitutional rights asserted and also on the basis that there were two entirely separate issues in dispute before the Appeal Commissioner and the criminal court. It was submitted on behalf of the notice party that the Appeal Commissioner was concerned simply with assessments, the amount of any income and gains due in the relevant years and whether the assessment for each year had been properly raised; whether tax has been over assessed or under assessed. It was submitted that the issue before the criminal court was the failure to make returns.

Following the hearing of submissions the Appeal Commissioner gave his decision in the following terms:

"This is an appeal which was taken out by the taxpayer against assessments that were raised. The role of the Appeal Commission is to deal with that appeal. Our responsibilities and there are duties upon the taxpayer, which is really to -- comes down to the Appeal Commissioner dealing with it to find out what is the right amount of tax payable in relation to each of the years on the assessments which are open before.

I am not satisfied that I should cause these proceedings to adjourn until such time as unconnected, that is to say, they are not dealing with the quantum of the assessment issues in another place, are resolved. However, if a decision is taken in another place to cause this not to proceed, I will, of course, need to take account of that instruction. In terms of how I see the duty and responsibility of the Appeal Commissioner, it seems to me I should proceed on this, unless I am advised I am not to by a court. I do not have that instruction to me. It is my decision that I should proceed on this case."

Mr. Staines then (following an unsuccessful application for a case stated) applied for an adjournment to allow him to apply to the High Court. This was not opposed on behalf of the notice party and the adjournment was granted.

Grounds

The applicant was granted leave to seek the order of *certiorari* and injunction set out above on 10 grounds. These may be summarised as follows:

(1) That the Appeal Commissioner in determining the application for an adjournment was under an obligation to act judicially.

(2) That in failing to consider the applicant's submissions concerning the alleged violation of his legal and constitutional rights to a fair trial and his privilege against self-incrimination should the appeal proceed the Appeal Commissioner failed to act judicially.

(3) That the failure of the Appeal Commissioner to adjourn the appeal is a violation of the applicant's constitutional right to a fair trial and his privilege against self-incrimination.

(4) That the Appeal Commissioner failed to act in accordance with law in refusing an adjournment by reason of the fact that the criminal proceedings were unconnected with the appeal and that it was his duty and responsibility to proceed.

The nature of the power and function of the Appeal Commissioners was considered by Barron J. in *The State (Calcul International Limited and Solatrex International Limited) v. the Appeal Commissioners and the Revenue Commissioners*, Unreported, High Court, 18th December 1986, in the context of a claim that they were exercising a judicial power and function other than the limited power and function permitted by Article 34.1 and Article 37 of the Constitution. In that case Barron J. determined that the essential function of the Appeal Commissioners "is to decide whether the assessment raised by the tax inspector should be reduced or increased". He decided that they were not exercising a judicial power.

Notwithstanding this, it is well established that there are circumstances in which a tribunal exercising administrative functions may be under an obligation to act judicially. It is not disputed on behalf of the notice party that the Appeal Commissioners are under an obligation to act judicially in hearing and determining appeals. It follows that an Appeal Commissioner must also be obliged to act judicially in any application in relation to the appeals including an application such as that at issue herein, namely, an adjournment of the appeal hearing by reason of an alleged potential interference with the constitutional rights of the applicant.

Counsel for the applicant drew the Courts attention to the agreement expressed by Blayney J. in *Gallagher v. The Revenue Commissioners* [1991] 2 I.R. 370 with Barron J. in *Flanagan v. University College Dublin* [1988] I.R. 724 where at p. 730 he stated:

"Once a lay tribunal is required to act judicially, the procedures to be adopted by it must be reasonable having regard to this requirement and the consequences for the person concerned in the event of an adverse decision. Accordingly, procedure which might afford a sufficient protection to the person concerned in one case, and so be acceptable, might not be acceptable in a more serious case. . .".

The obligation to act judicially must similarly apply to any decision to be made as to the procedure to be followed. In this case the matter at issue was the procedure to be followed in the sense of the timing of the holding of the appeal. The assertion that the holding of an appeal at a particular time posed a serious risk of an unfair trial or of an interference with the applicant's privilege against self incrimination required consideration of that issue by the Appeal Commissioner before he could determine that he should proceed with the appeal.

I have concluded that the Appeal Commissioner did not consider the submissions made on behalf of the applicant on these issues in reaching his decision that the appeal should go ahead. He appears to have taken a narrower view of his functions. There is nothing in the Taxes Consolidation Act, 1997, which supports the view that an Appeal Commissioner is obliged to proceed with the hearing of an appeal even if the timing of doing so would risk a breach of the constitutional rights of the appellant tax payer. To so construe it would be in breach of the well known principles stated by Walsh J. in *East Donegal Co-Operative Limited v. Attorney General* [1970] I.R. 317 at p.341:-

“The presumption of Constitutionality carries with it not only the presumption that the Constitutional construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of Constitutional justice.”

If the applicant’s claim that to proceed with the appeal hearing is in breach of his constitutional right to a fair trial or his privilege against self incrimination is well founded then the Appeal Commissioner would be acting contrary to the presumed intention of the Oireachtas that the appeal procedure prescribed by the Taxes Consolidation Act, 1997, be conducted in accordance with the principles of constitutional justice if he were to proceed.

Accordingly, I have concluded on this ground that the applicant is entitled to an order of *certiorari*.

At the hearing, it was submitted by both parties that even if I were to so decide this issue I should not remit the matter to the Appeal Commissioner for determination in accordance with law without deciding the applicant’s claim for an injunction restraining the holding of the appeal pending the determination of the criminal proceedings. It was submitted *inter alia* that if the applicant was so entitled then there was no point in the matter being remitted to the Appeal Commissioner for a fresh determination on the application for the adjournment. It appears appropriate that I should determine the application for the injunction for which leave has been granted.

There are two factual issues of relevance to a consideration of the application for an injunction. Firstly, it should be noted that at the time of the application before the Appeal Commissioner it was submitted on behalf of the notice party that the issues in dispute before the Appeal Commissioner and before the criminal court were entirely separate. At the hearing before this Court it was conceded on behalf of the notice party that in relation to the three years of assessments to which the criminal charges relate the same factual issues as to whether or not the applicant was in receipt of income in the relevant year and therefore was or was not a chargeable person within that year would arise. It is only if he was a chargeable person within the year in question that he is obliged to make a tax return.

Secondly, at the hearing before the Appeal Commissioner no point was taken on behalf of the notice party that the criminal charges only related to 3 years of assessments whereas the appeals related to 9 periods of assessment. The point was taken before this Court and in the notice of opposition it is expressly contended that an appeal hearing in respect of assessments for the periods of assessments that are not the subject of criminal proceedings would not and could not violate the applicant’s legal and constitutional rights.

I propose to consider initially the claim for an injunction in relation to those years of assessment to which the criminal proceedings relate.

There is no real disagreement between the parties on the applicable principles. Rather it is a question of the correct application of the principles to the facts of this case.

The parties are in agreement that there is no absolute obligation to adjourn civil proceedings or as in this instance a tax appeal because of a pending criminal trial relating to the same factual issues. The parties referred to the decision of the Supreme Court in *Dillon v. Dunnes Stores* [1966] I.R. 397. In that case at p. 403 Ó Dálaigh C.J. stated:-

“As the plaintiff could not have had an order to postpone the criminal proceedings until the termination of her civil action, equally the hearing of the civil action cannot be required to await the conclusion of the criminal proceedings. No considerations of public policy are in question.”

Likewise it is common case between the parties that each application to adjourn proceedings of a civil nature pending the determination of criminal proceedings must be determined on its own facts. Counsel for the notice party submits in reliance on three decisions of the Court of Appeal, *Jefferson Limited v. Bhetcha* [1979] 2 AER 1108; *R. v. Institute of Chartered Accountants of England & Wales ex parte Brindle* [1994] BCC 297; and *R v. Panel on Takeover and Mergers, ex parte Fayed* [1992] BCLC 938, that the onus on the applicant is to establish that there is a real risk of prejudice or injustice if the tax appeal proceeds.

I agree that such an approach is consistent with the constitutional guarantees in this jurisdiction and the procedures established by the Taxes Acts. The notice party has raised assessments on the applicant. The applicant has appealed them and as a result any tax due on the assessments cannot be collected until after the determination of the appeals. The notice party is entitled to have the appeals determined in a timely manner provided doing so does not interfere with the applicant’s right to fair procedures or any other constitutionally or legally protected right.

The parties agree in accordance with the decision of the Supreme Court in *Re National Irish Bank Limited (No. 1)* [1999] 3 I.R. 145 that unless evidence given at the tax appeal by the applicant is considered to have been voluntarily given it would not be admissible against him at the criminal trial.

Counsel for the applicant submits that there is a real risk of prejudice or injustice to the applicant if the appeal proceeds in

advance of the criminal trial as to prosecute the appeal the applicant must give evidence and such evidence may be considered voluntarily given as the applicant has voluntarily decided to bring an appeal. Further that applicant could not be certain in accordance with the decision in *Re National Irish Bank limited (No. 1)* [1999] 3 I.R. 145 that such evidence would not be admissible against him at the criminal trial and hence he was effectively being forced to waive his privilege against self incrimination or there was a risk of an unfair trial.

A second submission was made that if the applicant gave evidence at the tax appeal he would be cross-examined and might be required to answer questions of a self incriminating nature. This latter submission may be shortly disposed of. Insofar as the Appeal Commissioner required the applicant to answer any question put in cross-examination such statement would not be voluntary and hence excluded in any criminal trial in accordance with *Re National Irish Bank Limited (No. 1)* [1999] 3 I.R. 145 or the broader principle of fairness referred to below.

The response on behalf of the notice party to the first submission is twofold. Firstly, it is submitted that on the present facts relating to these appeals there is no probability that any evidence of a self incriminating nature might be given. The applicant under s.957(2)(a)(i) of the Taxes Consolidation Act, 1997, was obliged to deliver a return in respect of each year as a condition of the Appeal. He did so and declared no income during the years in question. Furthermore, the appeal is brought on the grounds listed on the Form A.H.1, namely that the applicant had no income in any of the years in question (other than unemployment assistance which is not taxable). The applicant has not suggested an intention to apply to rely on any other ground (which he may only do with leave of the Appeal Commissioner in limited circumstances under s. 957(6)). Any evidence in support of his existing grounds that he had no taxable income in the relevant years would only go to show that he was not a chargeable person and hence not obliged to make returns. It is submitted that there is hence no risk of prejudice or injustice to him in giving evidence in support of his existing grounds.

A second and distinct submission was made that even if contrary to the above any evidence of a self incriminating nature was given at the appeal it would be a matter for the trial judge at the criminal trial to determine whether it would be in breach of the applicants rights under Article 38.1 of the Constitution to admit such evidence against the applicant and that if it were so in breach it would not be admitted. It was further submitted that the admission of such evidence in the criminal trial would not only depend on whether the evidence was or was not given voluntarily but also whether by reason of the manner or circumstances in which it was obtained it fell below the required standard of fairness. In this connection I was referred to a ruling of His Honour Judge White in criminal proceedings against George Redmond on the admissibility of tax returns made for the purposes of an appeal under s. 957 of the Taxes Consolidation Act, 1997, and evidence of the accountant who prepared the return.

In that ruling Judge White refused to admit Mr. Redmond's tax returns. He initially observed:-

"Mr. Redmond had a right of appeal pursuant to Section 957 of the Taxes Consolidation Act 1997. It is quite clear from the Act that once the tax assessments were raised, in order to deal with the appeal George Redmond had to file an appeal and also was obliged to file returns and provide comprehensive information. The accused, in order to avoid huge liabilities, had to appeal. There was no other option open to him. He had to make a tax return. The Director of Public Prosecutions is seeking to rely on that return and admit in evidence the evidence of Mr. Brendan O'Brien, who prepared the return."

The trial judge accepted that both the tax returns and evidence of the accountant were outside "criminal proceedings" however he considered that an issue of fairness arose. He then referred to the following passages from *Charleton on Criminal Law* (Dublin, 1999) at p. 131 under a heading of "Fairness":-

"2.43 While considering the controversy over what rule would be applied to dealing with evidence obtained either illegally or in breach of the accused's constitutional rights, Griffin J., giving the majority judgment, subsequently overruled, delivered the following pronouncement *obiter* in [The People \(DPP\) -v- Shaw](#) I.R. 1, at p.61:

'...because... our Constitution postulates the observance of basic or fundamental fairness of procedures, the judge presiding at a criminal trial should be astute to see that, although a statement may be technically voluntary, it should nevertheless be excluded if, by reason of the manner or the circumstances in which it was obtained, it falls below the required standard of fairness.

The reason for exclusion here is not so much the risk of an erroneous conviction as a recognition that the minimum or essential standard must be observed in the administration of justice."

2.44 The passage has been approved many times and rulings in the Central Criminal Courts, an example of its application is [The People \(DPP\) -v- Paul Ward](#), Special Criminal Court, Unreported, 27th November 1998.

There a finding by the Trial Court that the accused's mother and girlfriend, when brought to see him without his request, led to the exclusion of alleged verbal admissions made by him on the ground that these visits constituted an unfair procedure deliberately engineered by the gardai to put pressure on him. Thus, even short of finding an oppression a confession may be excluded if the circumstances of taking it fall below fundamental standards of fairness. The difficulty with the rule is the problem of precision and prediction."

The trial judge then continued:-

“The reality of this particular situation is that George Redmond had no other option but to make a tax return and to get assistance from a chartered accountant subsequent to a criminal investigation undertaken by the Criminal Assets Bureau. In my view it would be fundamentally unfair to him if having to deal with that particular matter in that way that subsequent documentary evidence and evidence, which he was obliged to deal with, would be admissible against him in a criminal trial. I rule that those matters are inadmissible evidence. That is the tax return of 5th April 1999 to 5th April 2000 and the evidence of Brendan O'Brien, the chartered accountant.”

I am satisfied that each of the above submissions is well founded. On the particular facts of this appeal I do not consider that the applicant has established that there is a real risk of prejudice or injustice if he were now to be required to proceed with his tax appeal which warrants this court granting an injunction even in respect of the appeals relating to the same years assessment as the pending criminal charges. There is no evidence at present which suggests that the applicant will require to give evidence of a self incriminating nature at the hearing of the tax appeal. If there are different relevant facts then it is a matter to be considered and decided by the Appeal Commissioner bearing in mind that it will be a matter for the Trial Judge at the criminal trial to ensure by appropriate rulings that there is no breach of the applicant's rights under Article 38.1 of the Constitution in accordance with the above principles.

It is important to note that there was agreement between the parties that there was no question that any evidence to be given at the tax appeal by the applicant was such as to lead to any further line of enquiry by the notice party in relation to other evidence or witnesses in relation to the pending charges. If it were different considerations may apply. The only alleged breach of constitutional rights and prejudice was the potential admissibility at the criminal trial of the applicant's own evidence at the tax appeal.

Accordingly I refuse the injunction and make the order of *certiorari* and remit the matter to the Appeal Commissioner.