Neutral Citation: [2014] IEHC 398

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 299 J.R.]

BETWEEN

CHARLES CHAWKE

APPLICANT

AND

JUDGE ALAN MAHON, JUDGE MARY FAHERTY AND JUDGE GERALD KEYES, MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 24th day of July, 2014

The Tribunal

1. This judicial review is a challenge to the decision of the respondents of the 29th January, 2103, to make a finding that the applicant had failed to co-operate with the Tribunal and/or knowingly gave false or misleading information to the Tribunal in the course of its hearings.

2. The applicant is a publican and was a witness in one module of the Tribunal of Inquiry into Certain Planning Matters and Payments, ("the Tribunal") conducted into certain alleged payments to politicians or others with a decision making role in planning matters. The Terms of Reference of the Tribunal originally appointed by instrument of the Minister for the Environment and Local Government on 4th November 1997, were amended by various instruments between then and 3rd December 2004, and *inter alia*, required the Tribunal to inquire into and make findings and recommendations in regard to the identity of all recipients of payments made to political parties or members of either House of the Oireachtas or members or officials of the Dublin local authority or other public officials named, and to inquire whether the persons so receiving the monies were influenced directly or indirectly by the offer or receipt of any such payments or benefits.

The Quarryvale II module

3. Mr. Chawke's evidence was given in the Quarryvale II module involving an inquiry into the personal finances of Mr. Bertie Ahern, who was, during the relevant times, a Minister of Government. For that purpose the Tribunal investigated certain lodgements into bank accounts of Mr. Ahern, including a composite lodgement of IR£22,500 on 30th December 1993. Mr. Ahern himself had, through his accountant, provided the Tribunal with a report that ten contributions of IR£2,500 each had been received from identified individuals, one of whom was Mr. Chawke. The Tribunal, *inter alia*, was investigating whether payments were made to Mr. Ahern and whether these were potentially corrupt in that the persons making them or were led to believe that they would receive certain advantages in planning matters. The evidence of Mr. Chawke was broadly speaking that he had lent to Mr. Ahern the sum of IR£2,500 to assist him in defraying certain legal bills and that this money had been repaid.

4. On 22nd March 2012, the Tribunal issued its Report in which it, *inter alia*, made a finding that no payment had in fact been made to Mr. Ahern and which expressly rejected the evidence of Mr. Chawke and various other witnesses that these payments had been made to Mr. Ahern and repaid by him.

Chronology of the involvement of the applicant with the enquiry

5. The applicant gave evidence over two hours on 7th December 2007, and prior to this had engaged in some correspondence with and had meetings with members of the Tribunal. He had furnished documentary evidence and a written statement prior to formally being called to give evidence before the Tribunal in December 2007. The first involvement of the applicant in the process of the Tribunal arose as a result of a letter on 4th May, 2006, from the Tribunal addressed to him in which it stated that it had been informed that Mr. Chawke had contributed to payments made to Mr. Ahern in December 1993, and which asked him to provide a comprehensive narrative setting out his involvement and all relevant details of the transaction including documentary evidence of these payments. Mr. Chawke made a written statement on 30th May, 2006, describing events by which he says he was approached by certain friends to contribute to the fund for Mr. Ahern's legal expenses.

6. After the written statement was furnished by Mr. Chawke, the Tribunal wrote to him through his solicitors on 3rd November, 2006, requesting information as to what if any properties Mr. Chawke had which might have benefited from the Urban Renewal Act 1986 or any statutory amendment thereto. This letter came in the context of the Tribunal's inquiry as to whether Mr. Chawke had benefited from being a member of the group who made the monies available to Mr. Ahern. Mr. Chawke through his accountant replied to the Tribunal saying he had not obtained any tax relief or other benefits through the Urban Renewal legislation.

7. There was correspondence in April/May 2007 expressing the Tribunal's concern over the unauthorised disclosure in certain newspapers of confidential information of the Tribunal and an inquiry was made as to whether Mr. Chawke was the source of this. The matter of confidential information went no further after Mr. Chawke denied he had disclosed any documentation to any person.

8. On 4th May, 2007, the Tribunal wrote to the solicitors for the applicant indicating that it had come to understand that the payments to Mr. Ahern had been repaid together with interest. That letter asked for information with regard to the repayment and referred expressly to "*the monies paid for the benefit of Mr. Bertie Ahern*". Mr. Chawke made a handwritten and signed statement to the Tribunal on 23rd May, 2007, with regard to the repayment by Mr. Ahern of the monies advanced to him and that Mr. Chawke had directly endorsed the cheque to a named charity.

9. Mr. Chawke was subsequently ordered on 30th May, 2007, to make discovery and this was done by formal affidavit of discovery on 2nd July, 2007.

10. In early January 2008, a further issue with regard to the alleged disclosure of confidential information was raised in correspondence and Mr. Chawke again denied he had any involvement in the disclosure of any such documents to third parties.

11. Approximately a year after Mr. Chawke gave formal oral evidence to the Tribunal he received a letter, which I am advised is a standard form letter issued by the Tribunal, on 13th October, 2008, indicating that the Tribunal anticipated that it would conclude its public hearings of evidence shortly and that it would then commence the preparation of the report to the Oireachtas. Mr. Chawke was invited to make submissions as he saw fit prior to the conclusion by the Tribunal of its determination and the preparation of a final report. The letter contained a statement that the absence of submissions would not be taken by the Tribunal to amount to an acceptance by Mr. Chawke of the evidence of others or of any submissions made by others touching upon his evidence.

12. On 15th October, 2008, the solicitors acting for Mr. Chawke wrote to the Tribunal in response to its letter pointing out that Mr. Chawke did not see a necessity for submissions but did make the following comment:-

> *"However, if the Tribunal has any adverse comment to make regarding our client or his evidence we would asked to be advised of same prior to the finalisation of its report so that our client will have an opportunity of clarifying any point which may require clarification and of defending any adverse accusation which could reflect on our client's good name and character. "*

13. In response to this letter, on 20th October, 2008, the Tribunal merely confirmed that the contents of same had been noted. I return to this thread of correspondence later.

The power to award costs

14. The Tribunal has power under s. 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, as amended by s. 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, to make awards of costs. The primary power is contained in s. 6 of the Act of 1979 which enables a Tribunal to order that the part of the costs of any person appearing before the Tribunal by counsel or solicitor shall be paid to the person by any other person named in the order. The costs order may be an order that a person appearing before the Tribunal be awarded some or all of his or her costs, or that such person should pay some or all of the costs of any other person so appearing. The amending legislation added in parenthesis the relevant matters to which the Tribunal must have regard in coming to its decision on costs. The full amended s. 6(1) reads as follows:

> *"(1) Where a tribunal or, if the tribunal consists of more than one member, the chairperson of the tribunal, is of opinion that, having regard to the findings of the tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal, or the chairperson, as the case may be, may, either of the tribunal's or the chairperson 's own motion, as the case may be, or on application by any person appearing before the tribunal, order that the whole or part of the costs-*
>
> > *(a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;*
> >
> > *(b) incurred by the tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order. "*

The two stage process

15. The jurisdiction of tribunals of inquiry in respect of costs has been considered in a number of cases. It has been made clear in these cases that the decision to award costs is one which must be separated from the substantive decisions of a tribunal itself. The clear statement of McCarthy J. in *Goodman v. Hamilton* [1992] 2 I.R. 542, sets out the different process or decision making activities involved in the making of findings by a Tribunal on the one part, and its determination on costs on the other, at p. 605:-

> *"The liability to pay costs cannot depend upon the findings of the Tribunal as to the subject matter of the inquiry. When the inquiry is in respect of a single disaster, then, ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds. The whole or part of those costs may be disallowed by the Tribunal because of the conduct of or on behalf of that party at, during or in connection with the inquiry. The expression "the findings of the tribunal" should be read as the findings as to the conduct of the parties at the tribunal. In all other cases the allowance of costs at public expense lies within the discretion of the Tribunal, or, where appropriate, its chairman. "*

16. This statement of the process with which a tribunal engages for the purposes of coming to a decision with regard to costs finds legislative expression in s. 6 of the Act of 1979, as amended by the Act of 1997. The matter was considered by the Supreme Court in *Murphy v. Flood* [2010] 3 I.R. 136. The plaintiffs in those proceedings were persons against whom the Flood Tribunal had made findings of obstruction and hindrance, and the Supreme Court held that this finding was *ultra vires* the Tribunal, the finding amounting to criminal offences. The Supreme Court also held that the Tribunal had erred in relying on this finding in its decision to refuse the plaintiffs their costs.

17. As a matter of law and in accordance with the statutory regime provided by the Acts, the Tribunal must decouple its findings in its substantive report from those matters which guide its discretion in its costs decision. The legislation, and the case law, clearly envisages a two stage process, the second stage being the decision or determination with regard to the conduct or behaviour of a witness which leads a tribunal to its decision on costs. In that context the Tribunal came to consider the question of cooperation and costs, after it had published its substantive Report.

The second stage of the process

18. By letter of 9th October 2012, the Tribunal wrote, saying that it had identified matters which it considered might constitute non-cooperation on the part of Mr. Chawke. The letter said that the Tribunal proposed to make a finding of non cooperation against Mr. Chawke and invited submissions by an identified date. The letter said that actual findings of non-cooperation, if they were to be made, might adversely affect any entitlement Mr. Chawke might otherwise have to recover all or a portion of his Tribunal-related costs. The proposed finding of cooperation was identified in a separate paragraph as follows:

> *"Proposed Finding of Non-Cooperation*

1. The Tribunal rejected as untrue Mr. Chawke's evidence that he was involved with or contributed to a collection of monies totalling IR£22,500 from Mr. Bertie Ahern in 1993. Mr. Chawke gave his evidence in circumstances where he knew that the said evidence was untrue." [Emphasis in original]

19. The solicitors for Mr. Chawke engaged with the Tribunal and furnished lengthy submissions on 31st October 2012, with regard to the proposed finding of non cooperation. The actual finding of non-cooperation was made and communicated to Mr. Chawke on 29th January 2013, in terms which were identical to those set out in the letter of October 2012, and repeated above. This letter also said that the Chairperson proposed to make an order that Mr. Chawke was entitled to 30% of his costs on a party and party basis for the four reasons set out in that letter. This was expressly identified as a proposed determination as to costs and further written submissions were invited and furnished. The factors which the Tribunal said it regarded as relevant to the question of costs were identified as follows:

"1. The central issue with which Mr. Chawke was required to provide information and to attend and give sworn evidence to the Tribunal related to the claim that he, Mr. Chawke, had contributed a sum of IR£2,500 to Mr. Bertie Ahern in or about December 1993.

2. Mr. Chawke's claim that he had in fact contributed such a sum was found by the Tribunal to have been untrue. Furthermore, Mr. Chawke's claim that Mr. Ahern had acknowledged and thanked him for such payment was found by the Tribunal to have been untrue.

3. Having regard to the fact that Mr. Chawke gave his evidence relating to the foregoing on the basis that such information was based on his own personal knowledge, and in the absence of any suggestion that his recollection was unclear or had faded because of the passage of time or lack of record keeping, such untrue evidence as was given must have been given in the knowledge that it was false, and for the purpose of misleading the Tribunal.

4. In the premises, Mr. Chawke 's cooperation with the Tribunal was limited to correspondence with the Tribunal prior to his sworn evidence to the Tribunal."

The submissions

20. Leave to seek judicial review was granted by order of Peart J. on 26th April 2013, for an order of *certiorari* quashing the decision of 29th January 2013, on the grounds that the decision was made in breach of fair procedures and/or natural and constitutional justice. The decision to award Mr. Chawke 30% only of his costs remains at the stage of being a proposed decision, but it was urged upon me by counsel for the applicant that the process would inevitably result in a conclusion confirming this proposed decision. Mr. Chawke received a bill from his solicitor in the sum of €5,200 + VAT making a total of €6,396. This has been accepted in the course of the hearing as being a relatively small amount of money.

21. Mr. Chawke's focus is the actual finding of non-cooperation which he argues carries with it an imputation of poor character and impinges directly on his personal and business reputation. It is emphasised in his affidavit that these proceedings are not motivated principally by financial considerations, but rather by what he calls his "extreme agitation" at what he believes was a wholly unfair finding which damaged his reputation in a serious way. He says that he cooperated with the Tribunal, furnished it with the documentation and evidence that it sought, and at no stage was it flagged to him or indicated in any way, whether before, during or after he gave his evidence and before the final Report was published, that the Tribunal was likely to come to the conclusion that the payment was never made to Mr. Ahern. He says that the enquiries of him and the evidence elicited from him at the hearing led him to unequivocally believe that the Tribunal operated on an assumption that the monies had been given to Mr. Ahern, and the conclusion of the Tribunal that no such payments had ever been made came as a surprise to him and was never flagged in the course of the hearing, nor did any witness give evidence that might have thrown doubt on the payments. He says he was given no opportunity to deal with fact of the payment to Mr Ahern as this was never put in issue.

22. More important, he avers on affidavit that had he a prior warning that the Tribunal might come to a finding that the monies were not advanced to Mr Ahern by the identified persons, he would have engaged the services of counsel and would have wished to attend and be represented at the giving of evidence by other relevant witnesses "with a view to the possibility of seeking to ask questions of those witnesses designed to support my position". He says he would have considered how best to protect his personal position. His evidence is not contradicted and there is nothing in the transcript of the evidence of the hearing itself or the documents considered by the Tribunal that would doubt these assertions, and accordingly I accept that Mr Chawke would have acted differently had he know of the possible finding that the monies were not paid.

23. The respondents deny that there was any breach of fair procedures and indeed point to the correspondence with Mr. Chawke after the issue of the final Report in March 2012, by which Mr. Chawke made substantial submissions with regard to the finding of non-cooperation and the proposed cost finding. It is argued that Mr. Chawke gave evidence under oath and knew or must be deemed to have known that his evidence ought to have been truthful. It is argued that what the applicant is seeking is to mount a collateral challenge on the substantive findings of the Tribunal itself, which are not challenged.

Preliminary issue: delay

24. It was argued by the respondents that the applicant is out of time for making this application and what the applicant is, in essence, seeking to do is to impugn the substantive findings of the Tribunal which were published in March, 2012. Counsel for the applicant says, however, that his client chose not to challenge the substantive Report, and indeed that to do so would have involved a considerable task having regard to the length of the Tribunal and the number of issues and witnesses with which the Report dealt. He says that Mr. Chawke is entitled to challenge the finding of non-cooperation having regard to the moral weight that it carries, and the possible legal consequences for him in his application for costs.

25. Having regard to the clear statement in the Supreme Court decision in *Murphy v. Flood* that a finding of non-cooperation, and a decision with regard to costs, cannot be made by a Tribunal based on its substantive findings, and that the decision on costs and non-cooperation are part of a separate process, I accept the argument advanced by counsel for the applicant that he is entitled to challenge the second procedural stage of the process and that he is in time to do this.

The status of Mr. Chawke as a witness

26. Mr. Chawke was a witness in the Tribunal and no alleged wrongdoing on his part was being investigated. In *Boyhan & Ors. v. The Tribunal of Inquiry into the Beef Processing Industry* [1993] 1 I.R. 210, Denham J. made it clear that the right to fair procedures does not apply to a person who is a witness. In that case, the applicant was a member of the United Farmers Association (U.F.A.) who had

been given limited representation by that Tribunal. The applicant sought an injunction requiring the respondents to give it full representation at the proceedings of the Tribunal and the High Court rejected its claim. Denham J. pointed to the fact that the UFA was not an accused and its conduct was not being investigated by the Tribunal. She went on to say, at p. 219, as follows:-

> *"It is a witness which has proffered itself As such, while its constitutional rights must at all times be protected it does not appear that its rights-to good name, for example-are in jeopardy in any way at all. The position of the UF.A. at this time in relation to the Tribunal is analogous to a witness in a trial and as such it is not entitled to the protection as set out at (a) and (d) by Ó'Dalaigh C.J Its position, as a witness, is fully protected by the limited legal representation awarded by the Tribunal."*

The reference to the judgment of O'Dalaigh J. was a reference to his seminal judgment in *Re Haughey* [1971] I.R. 217 which identified the minimum protection that the State should afford to a person entitled to fair procedural rights.

27. In the light of that clear statement by the High Court, Mr. Chawke, insofar as he was a witness, was not entitled to fair procedures. It is urged upon me, however, that once the Tribunal entered upon the process which led to its conclusion that Mr. Chawke had not cooperated with the Tribunal, he came into jeopardy that a decision could be made which would have an impact on him, and his good name, and would or could have adverse consequences with regard to an award of costs, and that at this point he became entitled to fair procedures.

The inquisitorial nature of a tribunal hearing: the role of fair procedures

28. The Tribunal was inquisitorial in nature but an inquisitorial process can in certain circumstances require that the persons conducting the process comply with natural or constitutional justice. The principles have been developed by the court since the decision of the Supreme Court in *Re Haughey* and while these might also exist in common law, they find true origin in constitutional or natural justice. What is equally clear, however, from the case law is that there are no rules for determining when the need to regarding when natural justice or the right to fair procedure applies, and how the requirement is best met. As stated by Fennelly J. in *Dellway Investments Limited v. NAMA* [2011] 4 I.R. 1 at para. 460:-

> *"It does not appear to me that it has been established that the right to be heard before a contemplated decision is made depends on establishing interference with a specific and identifiable legal right. It is difficult to discern a principled basis for restricting the right in that way. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject matter. The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard. "*

29. As stated by Clarke J. in *Idiakheua v. Minister for Justice, Equality and Law Reform & Anor* [2005] IEHC 150:-

> *"However the substantial obligation to afford a party whose rights may be affected an opportunity to know the case against them remains. In those circumstances it seems to me that whatever process or procedures may be engaged in by an inquisitorial body, they must be such as afford any person who may be affected by the decision of such body a reasonable opportunity to know the matters which may be likely to affect the judgment of that body against their interest. "*

30. In that case, Clarke J. was dealing with a body of inquisitorial and not adversarial structure and he accepted as a matter of first principles that the rights as explained in *Re Haughey* would apply to the determinations of such an inquisitorial body when the decision of that body might materially affect the rights of a person, and that imperative was properly met by giving the applicant an opportunity to comment on matters which might materially affect the decision of the Tribunal or as he put it, following White J. in *Nguedjdo v. Refugee Applications Commissioner*, (unreported ex tempore judgment of White J. 23rd July, 2003) sufficient to meet a test of "*drawing reasonable attention to factors which may influence the Tribunal's determination*".

Did the decision on co-operation require fair procedure?

31. The following express findings of non cooperation were made with regard to Mr. Chawke:

> *"41.27 The Tribunal did not accept as true the evidence of Messrs. Chawke, Collins, McKenna and Nugent, that they had been requested by Mr. Richardson and/or Mr. Brennan to contribute to a collection for Mr. Ahern or that they contributed money to Mr. Ahern as claimed by them.*
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> *41.28 It therefore follows from the above that the Tribunal rejected the evidence of Messrs. Richardson, Chawke, Collins, Nugent and McKenna that between 1993 and 2006, Mr. Ahern had acknowledge an intention or desire on his part to repay money to them. Likewise, it rejected Mr. Ahern's evidence that he had, on occasion, acknowledged or indicated his intention or desire to repay any such monies within this period.*
>
> *41.33 Despite the claimed assertions of Mr. Ahern, and those of Messrs. Richardson, Chawke, Collins, Nugent and McKenna, that the issue of repayment was raised on occasions by Mr. Ahern, it appeared equally incredible to the Tribunal, that notwithstanding the claimed reluctance on the part of the aforementioned donors to accept payment, that Mr. Ahern would not have sought to regularise his affairs by furnishing cheques to these individuals prior to 2006, even if he anticipated their rejection by them of his actions in this regard. "*

32. The Tribunal made a finding that Mr Chawke had knowingly given false evidence. A finding of untruth does not inevitably mean that the untruth was told knowingly. For evidence to be knowingly untrue, there must be some degree of intention or deliberate concealment of the facts and to describe evidence as knowingly untrue connotes a degree of morally poor behaviour. In no sense could a statement that a person gave knowingly untrue evidence be described as morally neutral, and such finding is not legally sterile and can have legal consequences in the decision to award costs. Because the decision being made at this stage could potentially impact on Mr Chawke's good name, and on the decision yet to be taken with regard to costs, in my view Mr Chawke became a person entitled to fair procedures after the final Report was delivered and when the Tribunal came to consider the question of cooperation and costs. Such a view is in accordance with the existing jurisprudence of the High and Supreme Courts.

Was constitutional justice achieved at the hearing?

33. Mr. Chawke was a witness and not under challenge at the time he gave evidence or at any time during the conduct of the Tribunal. In this he differs from Mr. Fox in *Fox v. Judge Alan Mahon & Ors* [2013 No. 938 J.R.] the process engaged in with him can be distinguished from that identified by me in that case, and in regard to which I took the view that Mr. Fox had been given every

opportunity to deal with versions of the narrative different from those offered by him. I have had the benefit of reading the transcript of Mr. Chawke's evidence before the Tribunal and it would be fair to say that the tenor of the evidence would suggest that Mr. Chawke was being treated as a cooperative witness whose evidence is supportive of the general approach of the Tribunal. There was nothing in the way in which the Tribunal engaged with Mr. Chawke that alerted him to the possibility that the Tribunal would hold that no payment had been made to Mr. Ahern. No witness gave evidence to contradict Mr Chawke's evidence, nor was his evidence doubted in any way by the Tribunal lawyers themselves during the hearings or at any time before the final Report issued.

34. However, the last question put to Mr. Chawke is of some note. It is relied on by counsel for the respondents in its assertion that Mr. Chawke was given an opportunity to change his story. Mr. Chawke said he had received a repayment from Mr. Ahern of his portion of the monies raised for him together with interest. That money came by cheque. Mr. Chawke gave evidence that he endorsed it to a named charity. The following sequence of questioning took place:-

> *"Q476. Alright. Is it possible, Mr. Chawke, that you treated the cheque in this way, namely, instead of lodging it to your account you gave it to this charity, because in fact you had never made a contribution of 2,500 pounds in the first instance in December '93?*
>
> *A. That is totally incorrect.*
>
> *A477. Thank you, Mr. Chawke."*

35. It is urged upon me by counsel for the respondents that this question was one by which counsel for the Tribunal would confirm the veracity of his evidence, and was an opportunity for him to mend his hand or change his story. A lawyer acting in an inquisitorial Tribunal might not always engage in an aggressive or robust class of cross-examination such as one might sometimes find in an adversarial system. I am of the view that Q.476 was more of a wrap-up of the evidence, and did not go far enough to alert Mr Chawke to the possibility that the Tribunal might disbelieve him entirely. As a result Mr Chawke had to be afforded a sufficient degree of fair process after the hearing if the finding that he knowingly gave untrue evidence was to be properly made.

Was constitutional justice achieved after the hearing?

36. The Tribunal engaged in correspondence with Mr. Chawke following the publication of its final Report and this engagement was expressly for the purpose of inviting Mr. Chawke to make submissions with regard to a proposed finding that he had knowingly told untruths and, as a consequence, that he had not cooperated with the Tribunal. Counsel for the Tribunal is correct that the Tribunal did afford Mr. Chawke an opportunity to comment and make submissions before the finding of knowing untruth or non-cooperation was made.

37. The applicant argues that the invitation to Mr. Chawke to make submissions on the question of non-cooperation was illusory, in that the decision not to accept his evidence and to characterise it as untrue, was one that led inevitably and inexorably to a finding that the untruth was told knowingly, as at no time did Mr. Chawke pray in his aid that his memory was frail.

38. I accept that if fair procedure is to be anything other than illusory, the person making a submission must have the possibility of persuading the decision making body to alter its proposed findings or to come to a decision that is not pre-ordained. A process which has the appearance of giving an opportunity to a person to engage with the decision making body prior to the making of a materially adverse finding, cannot be said to be a true process and to truly reflect the rights of natural and constitutional justice if the thought process is merely a deductive one from a fixed or already decided first premise.

39. In my view, the thought process engaged in by the Tribunal was one of such a nature that the decision of non-cooperation inevitably flowed from another decision, namely, that no payment had been made to Mr. Ahern and once it made this finding it had no other way to characterise Mr Chawke's evidence other than as knowingly untrue, and therefore to characterise him as an uncooperative witness. Had Mr. Chawke been challenged on the veracity of his evidence the result, while it might have flowed from the finding that no payment had been made to Mr Ahern, would not have been made in breach of fair procedure because Mr Chawke would have been afforded fairness before the decision was made. Equally, had the Tribunal set up another version of events and balanced the evidence of various witnesses in a forensic and analytical way, as it did in *Fox v. Judge Alan Mahon & Ors* the process would not have resulted in an inevitable conclusion arrived at as a result of a reasoning process which was not merely deductive.

40. The Tribunal certainly made effort to appear to give Mr. Chawke an opportunity to address it with regard to its findings, but the Tribunal itself had no real choice in the conclusion to which it came, once it had already decided in its primary findings that it disbelieved Mr. Chawke.

41. It was argued by the respondents' counsel that every witness faces the prospect that his evidence will be disbelieved and he must be correct in this assertion. Counsel points to the fact that Mr. Chawke was giving evidence on oath, and every person giving evidence on oath knows, or is deemed to know, the imperative, both moral and legal, that the truth be told. In an adversarial trial, one would expect in cross-examination that a witness whose evidence was crucial to the ultimate decision would have that evidence tested, and alternative versions of events put with force as was required for a challenge. A witness charged with perjury following a criminal or civil trial in which he or she gave evidence would have the full armoury of protection at trial. Mr Chawke's evidence was given in what I have found to have been a hearing in which he was not afforded fair process, but at a time when none was required at law, as he was at that point a mere witness and not in jeopardy. I turn now to analyse how fairness might have been achieved in the somewhat unusual circumstances in which the Tribunal found itself at the second stage of its process.

How was fairness to be achieved?

42. It seems clear that a second hearing for the purposes of coming to a determination of non-cooperation is not always, or perhaps never, necessary, and this is clear from the decision of the Supreme Court in *Murphy v. Flood,* and in particular the statement of Fennelly J. at para. 343 as follows:-

> *"In applying the rules of natural justice to these procedures, it must be borne in mind, as is acknowledged by the plaintiffs, that the requirements of natural justice vary according to the character of the proceedings and the gravity of findings. The fact that the Tribunal is entitled to have regard, inter alia, to its view as to whether a person has failed to cooperate with it does not necessarily mean that there has to be a separate hearing on that issue, so long as persons potentially affected have reasonable notice of the possibility of such findings. It might well, nonetheless, be good practice for a Tribunal to give some advance notice of the relationship between cooperation with the Tribunal and any decision regarding costs, which it might later make."*

43. The Supreme Court judgments variously considered the process and Denham J. envisaged that a person entitled to fair procedures

should have been given notice of an intended ruling on obstruction and hindrance. Hardiman J. also addressed the question of notice at para. 223 of the judgment as follows:-

> *"I am also of the view that the plaintiffs' complaints to the effect that they were not put on notice that the Tribunal was considering making the finding of obstruction and hindrance, and that this was not communicated to them even when their solicitors specifically raised in correspondence the topic of the matters required to be addressed in the costs phase, are borne out. Indeed, this is not disputed Such notice was manifestly necessary, especially in light of the significance the tribunal placed on this finding in refusing costs. "*

44. In *Idiakheua v. Minister for Justice, Equality and Law Reform* and the Refugee Appeals Tribunal, Clarke J. pointed out that a Tribunal Member considering his or her determination, might, subsequent to a hearing, raise an issue. Clarke J. said the following:-

> *"If a matter is likely to be important to the determination of the RAT then that matter must be fairly put to the applicant so that the applicant will have an opportunity to answer it. If that means the matter being put by the Tribunal itself then an obligation so to do rests upon the Tribunal. Even if, subsequent to a hearing, while the Tribunal member is considering his or her determination an issue which was not raised, or raised to any significant extent. .. there remains an obligation on the part of the Tribunal to bring that matter to the attention of the applicant so as to afford the applicant an opportunity to deal with it ... the obligation to fairly draw the attention of the applicant or the applicants advisors to issues which may be of concern to the Tribunal arises only in respect of matters which are of substance and significance in relation to the Tribunal's determination ... A mere casual reference to a matter which turns out to be central to the Tribunal's determination may be insufficient to meet a test of 'drawing reasonable attention to factors which may to influence the Tribunal's determination'."*

45. As a matter of law, then, a second hearing is not mandated. It is not for this Court to direct the Tribunal in how it achieves fairness, but certain steps might have been taken by it. The Tribunal might have offered to interview Mr. Chawke and identified the matters which it might take into account in coming to a conclusion that he was knowingly untruthful. It ought to have replied in substance to the letter of 15th October from Mr Chawke's solicitor. No criticism or challenge to the veracity of Mr. Chawke's account was made by the Tribunal in any letter to Mr. Chawke before he gave his formal oral evidence or between the dates he gave his evidence and the publication of the final Report. In my view the failure to give notice that the Tribunal had in mind to make a finding that the payments were not made to Mr Ahern in time to permit Mr Chawke to engage amounts to an absence of fairness.

Conclusion

46. Accordingly, I am of the view that the process which led to the decision that to Mr. Chawke was not a cooperating witness, was not arrived at following the affording to Mr. Chawke of fair procedure. Because Mr. Chawke had no inkling from anything that had occurred in his engagement with the Tribunal before the final Report was published in March, 2012 that his version of events was likely to be disbelieved in substance, he had no opportunity to advance evidence or test the evidence that lead the Tribunal to its findings of fact. The Tribunal finding that he was not a cooperating witness was arrived at by a process of deductive reasoning from the premise that his evidence was not truthful, as there was not present any of the vitiating factors, such as frailty of memory, that might have allowed it to conclude that he had not knowingly been untruthful. Arguments by Mr. Chawke after the final Report issued could not have changed the finding of untruth, nor how it was subsequently characterised. The application in the adjudicative process of the rules of fair procedure cannot be achieved by a process of mere deductive reasoning, as were it such, the results of the reasoning process would be inevitable or would flow inexorably from a first premise, such that the fairness would be illusory. I am of the view that the process of adjudication by the Tribunal which resulted in the finding challenged in these proceedings was deductive in that sense and must fail for breach of fairness.

47. Accordingly I make the order sought quashing the decision of 29th January 2013 as having been made in a manner that was contrary to fair procedures.