THE HIGH COURT

JUDICIAL REVIEW

[2019 No. 212 J.R.]

BETWEEN

R.V. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND K.M.)

APPLICANT

AND

SECRETARY GENERAL OF THE DEPARTMENT OF EDUCATION AND SCIENCE, JAMES HAYES, NORA MARY O'RIORDAN AND ELAINE COLLINS

RESPONDENTS

AND

THE BOARD OF MANAGEMENT OF A SCHOOL

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered on the 31st day of July, 2019

Facts

1. The applicant is a teenage boy and is a former student at the notice party secondary school ("the School"). The applicant commenced his second year at the school in late August 2018. On Monday the 24th September, 2018, two students at the school, not including the applicant, arranged to fight each other at a designated location on Wednesday the 26th September. The applicant brought a knife into the school on Tuesday the 25th and Wednesday the 26th September as a show of support for one of the students involved in the fight. The applicant showed the knife to a number of students in the school on Tuesday and on Wednesday. He brought the knife to the prearranged fight at the designated location on the 26th with the intention of using it if someone else showed up with a knife/weapon. The applicant subsequently admitted this behaviour and expressed remorse for it.

2. The matter came to the attention of the school principal who suspended the applicant on the 27th September, 2018. The principal referred the matter to the Board of Management who convened a meeting on the 5th November, 2018 at which the applicant's mother attended. On the 6th November, 2018, the Board wrote to the applicant's mother conveying its decision to expel the applicant from the school. The letter noted that the Board was required under the provisions of the Education (Welfare) Act, 2000 to allow for a period of 20 school days before reaching a final decision during which period a facilitation process would be available. At the expiry of the 20-day period, the Board decided to confirm its decision to expel the applicant and communicated that decision to the applicant's mother by letter of the 7th December, 2018.

3. On the 11th December, 2018, an appeal against the Board's decision was entered on the applicant's behalf pursuant to s. 29 of the Education Act 1998. Subsection (4)(b) of this section provides that hearings are to be conducted with the minimum of formality consistent with giving all parties a fair hearing. Both prior to and during the course of the appeal process, the applicant's mother was at all times assisted by her advocate, Mr. Kevin Finn, who describes himself as a consulting engineer, and is a representative of an entity known as the Federation of Catholic Secondary Schools Parent Associations. The appeal was convened for the 9th January, 2019 and the panel consisted of the second, third and fourth respondents with the second respondent in the chair. The applicant was represented by Mr. Finn.

4. Prior to the hearing of the appeal and almost from the outset of the process, Mr. Finn played a very active role in the matter. In particular, he engaged in very lengthy, voluminous and protracted correspondence with the parties raising a myriad of issues. Over an approximately six-week period, Mr. Finn submitted some 78 pages of requests, demands and submissions to the respondents. On the 24th January, 2019, Mr. Finn prepared a schedule of documents comprising 244 items, many emanating from himself, between the 15th October, 2018 and the 24th January, 2019. On the same date, in one email alone Mr. Finn submitted what he described as "preliminary issues" which comprised 44 items, with item 44 being broken down into 12 sub-categories.

5. One of the issues that arises in these proceedings concerns the alleged refusal of the first respondent ("the Department") to disclose what is described as "background" information concerning the members of the appeal panel. On the 12th December, 2018, Mr. Finn wrote to the Department stating:

> "6.0 Please confirm if the credentials (background, expertise and experience) of the appeal committee will be notified to the parties."

6. In his own affidavit, Mr. Finn avers that on the 3rd January, 2019, he spoke to an official in the Department, Ms. Mairead Reynolds, by telephone and asked her to furnish him with background information and credentials of the three appeal committee members. Ms. Reynolds in response informed Mr. Finn that one was a school inspector/former inspector and that the other two members were former school principals. He complains that no further information was forthcoming. Mr. Finn again at the hearing on the 9th January, 2019 asked the appeals committee members for their credentials individually and was told in response by the second respondent that these were already given by Ms. Reynolds.

7. It is clear from the affidavits that the hearing on the 9th January, 2019 was protracted and difficult. The evidence suggests that appeals of this nature are normally concluded in one to two hours. At the outset of proceedings, Mr. Finn informed the committee that he required three days for a full hearing. The second respondent avers that in hearing s. 29 appeals over a twelve-year period, he had never experienced an appeal not having been completed in one hearing. His evidence is that Mr. Finn's opening statement continued for 3 hours and 5 minutes and was still not concluded when the hearing had to be adjourned. Most of Mr. Finn's presentation was concerned with procedural issues.

8. It is clear from all the evidence before the court that there were robust and sometimes testy exchanges between Mr. Finn on the one hand and the second respondent on the other. However most of this arose as a result of attempts by the second respondent to get Mr. Finn to focus on the actual issues with which the appeal was concerned. It would appear that Mr. Finn viewed these

interventions as a denial of fair procedures and evidence of bias on the part of the second respondent. That much is evident from a letter sent the next day, the 10th January, 2019, by Mr. Finn to the Department complaining about the chairperson's "outrageous, abusive and highly prejudicial behaviour" towards him.

9. Mr. Finn expressed the view that "the chairperson by his attitude and outrageous behaviour showed bias and prejudice towards the appellant [K.M.], and that he was and is biased and prejudiced against the appellant." The purpose of the letter was to request a new hearing before a new appeal committee. Mr. Martin McLoughlin on behalf of the Department replied to Mr. Finn's email later the same day saying:

> "In relation to your question on the chair of the appeals committee, there is no provision in legislation or procedures to replace a chair during an appeal hearing, once the appeal hearing has commenced."

10. A short time later, Mr. Finn responded to Mr. McLoughlin saying:

> "The Act also requires impartiality, absence of bias or prejudice and any appearance of bias or prejudice on the part of the appeal committee, particularly the chair."

He went on in this letter to demonstrate his keen awareness of the concept of the appearance of bias or prejudice and reiterated his complaint about not getting adequate information on the member's backgrounds other than their occupations. He complained that there was no person with a child welfare background on the committee which meant that it could not consider the matter in an impartial and fair manner in accordance with fair procedures.

11. It seems clear therefore that Mr. Finn's requests for background information on the committee members were directed to whether their professional backgrounds were appropriate to their function.

12. On the 12th January, 2019, Mr. Finn became aware for the first time that the second respondent had himself attended the school as a child. He appears to have become aware of this as a result of a search of the internet and in particular of the second respondent's Facebook page which referred to this fact. Mr. Finn made a hard copy of this page and brought it with him to the resumed hearing on the 24th January, 2019.

13. It is important to note that in the interregnum between the hearing on the 9th January, 2019 and its resumption on the 24th January, 2019 Mr. Finn continued to correspond with the Department on matters of concern to him. In a four-page email sent by Mr. Finn to the Department on the 19th January, 2019, one week after he had by his researches established that the second respondent had been a pupil at the school, Mr. Finn makes no mention whatever of this fact. This is despite the fact that in that email, Mr. Finn continued to complain that the original appeal committee were going to continue to hear the applicant's case. Mr. Finn relied on his earlier letter of objection of the 10th January, 2019 in that regard.

14. The hearing was due to resume at 2 pm on the 24th January, 2019 and at 11.57 am, Mr. Finn sent a further email to the Department, to which I have already alluded, raising the 44 "preliminary issues". Nowhere in this email is there mention of the fact that the second respondent was a past pupil of the school.

15. When the hearing resumed, Mr. Finn attempted to introduce two documents into evidence, including the second respondent's Facebook page. He did not identify the nature of the documents and the second respondent ruled that he was not entitled to introduce further documentation at this stage of the proceedings. Mr. Finn's evidence in this regard is to be found at para. 6 of his affidavit where he avers:

> "I say, however, that, at the resumed hearing on 24th January, 2019, to which we had previously objected to proceedings, the pattern of obfuscation continued, with Mr. Hayes ruling me out of order when I attempted to raise questions about himself and the appeals committee. I expressly sought to raise the document showing his past association with [the School] but I was ruled out of order and not permitted to do so."

16. Mr. Finn is careful to avoid saying outright in this paragraph that he objected to the second respondent continuing because he was a past pupil of the school. In fact, I am satisfied from the other unchallenged evidence in the case that no such objection was raised. This is clear from the sworn evidence of the other persons present as is the fact that Mr. Finn did no more than state that he wanted to introduce additional documents without giving any indication to the committee what they were. There is no suggestion that he was inhibited in any way from advancing any objection he wished to advance about the second respondent and indeed such a suggestion would be hard to credit given the robust manner with which Mr. Finn dealt with matters at the previous hearing.

17. Following the conclusion of the hearing, the committee delivered a written decision on the 26th February, 2019 rejecting the appeal.

The Applicant's Case

18. In these judicial review proceedings, the applicant seeks an order of *certiorari* quashing the decision of the 24th February, 2019 on the grounds that there was a reasonable apprehension of objective or perceived bias by the second respondent by virtue of his attendance at the school as a child, 55 years earlier. The alternative ground is advanced that the applicant's right to fair procedures was breached by the Department's failure to furnish him with the backgrounds of the members of the appeals committee. A further ground of complaint is that the respondents refused to allow the applicant to object to the presence of the second respondent on the committee and I have dealt with that.

19. The grounds upon which leave to seek judicial review was granted include the bias point already referred to. Alternatively, it is pleaded that the applicant's advocate, Mr. Finn, was treated with disrespect and the second respondent was argumentative, disparaging, wholly disinterested in submissions concerning fair procedures and was generally disrespectful and offensive and allowed the appeal continue in the absence of the appellant's party. It is fair to say that this ground was not pursued at trial and was effectively abandoned. Therefore, apart from the bias point, the only remaining ground is the alleged failure to provide background information on the committee members.

20. During the course of argument before me, counsel for the applicant, whilst not expressly abandoning the bias point, repeatedly emphasised that it was not necessary for the court to conclude that there was objective bias in circumstances where there was a clear breach of fair procedures in not allowing Mr. Finn to introduce the documents in question including, in particular, the Facebook page, at the resumed hearing. Counsel argued that this deprived the committee members, and in particular those other than the second respondent, of the opportunity of considering whether the committee should continue or recuse itself.

Objective Bias
21. The relevant test for objective bias was stated by Denham J. (as she then was) in *Bula v. Tara Mines Ltd (No. 6)* [2000] 4 I.R. 412 at 441. It was reiterated more recently by Denham C.J. in *Goode Concrete v. CRH Plc* [2015] 3 I.R. 493 where the Chief Justice said:

> "[54] The test to be applied when considering the issue of perceived bias is objective. It is whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts."

22. A reasonable person is one who is not over cautious or unduly sensitive - see *O'Callaghan v. Mahon* [2008] 2 I.R. 514 at 672. In considering whether an apprehension of bias might arise, a relevant factor to be considered is the lapse of time between the event that is said to give rise to the bias and the hearing – see *Bula (No. 6)* per Denham J. at pp. 460-461.

23. An authority of particular relevance in the context of this case is *Kelly v. Trinity College Dublin* [2007] IESC 61. The applicant was a student at Trinity College Dublin who complained that he was bullied by a member of staff. Ultimately the matter came by way of an appeal before the Visitors of the College who determined that they had no jurisdiction to hear the complaint. The applicant sought judicial review on grounds which included that there was a reasonable apprehension of bias against one of the Visitors involved, Professor Sagarra, who was previously employed in a teaching role in the college. When the matter came before the Supreme Court, comprising Fennelly, Macken and Finnegan J.J., a separate bias issue arose by virtue of the fact that Macken J. had attended Trinity College as a student and had also lectured there for a period of time. The latter issue was dealt with by the court in its judgment delivered by Fennelly J. as follows (at p. 19):

"Objection to a member of the court.

> I should note one other matter. Prior to the commencement of the hearing, the Court drew the attention of the applicant to the fact that one member of the Court, Macken J, had been a student at Trinity College and had also for a time in the past lectured there in law. The Court asked the applicant whether he had any objection to the composition of the Court. After some hesitation, the applicant said that he had not. During the course of the hearing, the applicant changed his mind and said that he objected to the presence on the Court of Macken J. The Court, having risen to consider the objection, rejected it. It held that the fact that a member of the Court was a graduate of and had formerly taught at the University, whose affairs were in issue, was not a ground establishing objective bias. Judges are drawn from a broad cross-section of society. Their past associations do not disqualify them from performing their duty as judges."

24. In considering whether the allegation of objective bias was made out against Professor Sagarra, Fennelly J. approved the earlier statements of the law on objective bias including *Bula (No. 6)* and the dicta of Keane C.J. in *Orange Communications Ltd v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159. He also approved a passage from the judgment of the Court of Appeal in England (delivered by Lord Bingham, Lord Woulfe and Sir Richard Scott V.C.) in *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] QB 451 (at p. 887-888):

> "It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers ..."

25. In dealing with Professor Sagarra's position, Fennelly J. said (at pp. 13-14):

> "I do not think that the applicant has established even an arguable case that Professor Sagara's participation in the decision as one of the Visitors is infected or tainted by objective bias. Firstly, her period of employment by the University had ended on her retirement. I do not accept that former employments or associations are sufficient, in the absence of other evidence, to disqualify a person from participating in disciplinary or similar tribunals related to that former employment. Secondly, her position as Pro-Chancellor is an honorific position, which casts no doubt on her ability to bring a fresh and independent mind to the matters confided to the Visitors."

He continued (at p. 15):

> "It would need a considerable and, in my view, unjustified step to disqualify a qualified person from performing the valuable service of adjudicating on disputes merely because of past professional associations or social links or background. A vast number of administrative and adjudicative bodies draw on a pool of persons qualified by their experience, including past and present professional or career links, to bring balanced judgment and common sense to the resolution of disputes. This Court, in the case of *Bula Ltd. v Tara Mines Limited and others*, cited above, rejected as unfounded a challenge to one of its own judgments which was founded on the past professional associations of two of the judges, who had, when barristers, provided advice or legal representation to one or other of the parties to the litigation.
>
> I can see no basis for attributing bias to Professor Sagarra based on her cited career involvement with the College. In particular, I fail to understand why her undoubted obligation and natural wish to vindicate the best interests of the College should render her more likely to favour a member of staff over a student. I specifically reject the suggestion advanced by the applicant in his affidavit that the Professor has an interest in the outcome of appeal to the Visitors. She has none whatever other than that of seeing that matters are justly and correctly decided."

26. It is common case that the second respondent attended the school between 1958 and 1963 and has had no involvement with the school since that time. The authorities to which I have referred demonstrate clearly that such circumstances could not and do not give rise to a reasonable apprehension of bias on the part of the second respondent. It would to my mind be extraordinary indeed if the mere fact of attendance at a school over 50 years ago were to be regarded as sufficient to disqualify a person from hearing a statutory appeal involving that school. The applicant has not even attempted to explain how a perception of bias could arise. Is it to be inferred that such attendance would predispose the decision maker in favour of or against the school, presumably dependant on

whether the experience of attending there had been happy or not?

27. Given the fact that the respondent has had no involvement with the school for over half a century and only then as a young schoolboy, I cannot conceive of any basis upon which any reasonable independent observer could conclude that this gives rise to a reasonable apprehension that the applicant would not get a fair hearing from an impartial committee. It is to be noted that such reasonable observer is deemed to be in possession of all the relevant facts. Those facts undoubtedly include the fact that the second respondent previously chaired an appeal committee involving the same school which found against the School on that occasion.

28. I am therefore satisfied that as a matter of law, no reasonable apprehension of bias arises in this case.

Fair Procedures
29. Counsel for the applicant makes a number of complaints in this regard. First and foremost is the complaint that the second respondent ought to have disclosed to the Department that he was a past pupil of the school. This is said to arise from the Department's own protocol, expressed in *inter partes* communications, that any "personal connection" with the parties should be disclosed. What "personal connection" means is vague and undefined and whether being a past pupil in the distant past is a personal connection is impossible to determine. However, were a personal connection to be of any relevance to the proceedings before the appeals committee, it would presumably have to be one that might give rise to a reasonable apprehension of bias. Thus if that is what is intended, it does not arise.

30. This is equally applicable to the demands for "background" information. It is evident from Mr. Finn's correspondence that he was concerned with the professional qualifications of those sitting on the committee because his complaint was that no person with child welfare expertise was on the committee. His request for background information was thus not related to what the members' social or family background was or indeed what their hobbies might be. Even if such "background" disclosure might have revealed that the second respondent was a past pupil, nothing turns on this because as I have already held, as a matter of law it was irrelevant. Regardless of that, the applicant had no statutory or other right to such information in the first place.

31. The same necessarily applies to complaints about want of fair procedures in the context of not allowing the admission of documents including the second respondent's Facebook page. Fair procedures do not exist in a vacuum. They exist to ensure that a just and lawful result is arrived at. A complaint about lack of fair procedures cannot be sustained unless such lack has at least the potential to have a detrimental effect on the rights of the party concerned.

32. In the present case it is said that the unfairness lay in the second respondent's refusal to allow documents to be admitted. But even if they had been admitted, they would merely have shown that the second respondent was at one time in the distant past a pupil at the school, which I have already held could not give rise to a reasonable apprehension of bias as a matter of law. The document was therefore irrelevant so that even if it could be said that the refusal to admit it was unfair, which I do not accept, that had no bearing on the outcome of the appeal. The committee had a statutory duty to hear the appeal and even if this document had been admitted, would still have been bound to hear it as I have explained.

33. Accordingly, in my view, there was no denial of fair procedures to the applicant in this case.

Waiver/Estoppel
34. As noted above, on the 12th January, 2019, Mr. Finn became aware that the second respondent attended the school as a result of his own internet searches. This information was publicly available on the second respondent's Facebook page. Mr. Finn does not explain his reasons for conducting this search when he did so. He could have done so at any time before the 9th January, 2019. His evidence is that he brought a hard copy of the Facebook page to the resumed hearing on the 24th January, 2019 with a view to having it admitted into evidence.

35. Clearly therefore he considered it to be relevant but its only conceivable relevance was in support of an application to the committee that the second respondent should recuse himself. It was said in the course of submissions by counsel for the applicant that as Mr. Finn was not a lawyer, he could not have appreciated the legal significance of his discovery and this would explain why he never raised the matter in his subsequent detailed and lengthy correspondence nor by making an oral submission to the committee.

36. I cannot accept that proposition. Mr. Finn according to his own evidence wanted to rely on this document and was, he says, prevented from doing so. This did not preclude him from making any oral submission he wished to make. At the previous hearing, he had spoken for over three hours and would not brook any attempt by the second respondent to shorten his submission.

37. In my view, it is impossible to avoid the conclusion that Mr. Finn deliberately refrained from referring to this information in his correspondence between the 12th and 24th January, 2019 so that he could spring a trap at the resumed hearing. When refused admission of the unidentified document, his conduct in declining to raise the matter then or at any time during the resumed hearing can only be viewed as a deliberate decision to keep the matter in reserve for later deployment if the committee's decision was unfavourable.

38. That such a manner of proceeding is impermissible is clear from the judgment of Henchy J. in *Corrigan v. Irish Land Commission* [1977] I.R. 317 who observed (at p. 324):

> "I consider it to be settled law that, whatever may be the effect of the complaining party's conduct after the impugned decision has been given, if, with full knowledge of the facts alleged to constitute disqualification of a member of the tribunal, he expressly or by implication acquiesces at the time in that member's taking part in the hearing and in the decision, he will be held to have waived the objection on the ground of disqualification which he might otherwise have had."

The court continued at p. 326:

> "It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that nature in the hope that the tribunal will decide in his favour, while reserving to himself the right, if the tribunal gives an adverse decision, to raise the complaint of disqualification. That is something the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways".

39. Accordingly, even if the point now raised by the applicant were considered to be relevant, I am satisfied that the applicant, through the conduct of his advocate, is now estopped from raising it.

40. For these reasons therefore, I propose to dismiss this application.