Neutral Citation Number [2007] IEHC 107

THE HIGH COURT
JUDICIAL REVIEW

2006 No. 1156JR

BETWEEN

JOHN WHITE

APPLICANT

AND

JUDGE FREDERICK MORRIS, SOLE MEMBER OF THE TRIBUNAL OF INQUIRY INTO COMPLAINTS CONCERNING SOME GARDAI OF THE DONEGAL DIVISION

RESPONDENT

Judgment of Finnegan J. delivered on the 21st day of March 2007

1. I propose referring to the respondent herein as the Tribunal hereafter. The Tribunal was established by Resolution passed by Dáil Éireann and Seanad Éireann on the 28th March 2002 and by Instrument made by the Minister for Justice, Equality and Law Reform on the 24th April 2002. The Tribunals of Inquiry (Evidence) Acts 1921 to 2002 apply to the Tribunal. The Tribunals of Inquiry Act 1921 section 1 provides as follows:-

> "1(1) Where it has been resolved (whether before or after the commencement of this Act) by both Houses of Parliament that it is expedient that a Tribunal be established for enquiring into a definite matter described in the Resolution as of urgent public importance..."

2. The Resolutions of the Dáil and Seanad resolved that it was expedient that a Tribunal be established under the Tribunals of Inquiry (Evidence) Acts 1921-2002 to enquire urgently into the definite matters of urgent public importance therein set out relating to complaints concerning some Gardai in the Donegal Division. The applicant here is one of the Gardai against whom complaints have been made.

3. On the 27th September 2006 the applicant was granted leave to apply by way of an application for judicial review for a number of reliefs. The circumstances underlying the application are that on the 19th September 2006 the Tribunal made a decision to hear evidence in relation to the applicant's medical condition in public. The applicant was due to attend before the Tribunal on the 18th September 2006 for the purposes of giving evidence. On the 11th September 2006 the applicant's solicitor contacted the solicitor to the Tribunal by telephone and informed him that the applicant was undergoing medical treatment and that it was likely that he would not be in a position to give evidence as requested on the 18th September 2006. By letter dated the 12th September 2006 the applicant's solicitor wrote to the solicitor to the Tribunal and informed him that the applicant's consultant psychiatrist, Dr. Lewis O'Carroll, had confirmed that the applicant was medically unfit to attend the Tribunal to give evidence and that it had been arranged for the applicant to be admitted for residential medical care and that a medical report would be furnished to the Tribunal to confirm. The solicitor to the Tribunal responded by letter dated 30th September 2006 to the effect that the applicant would be required to give evidence on the 18th September 2006 notwithstanding his medical condition. Further to the said letter the solicitor to the Tribunal informed the applicant's solicitor that if evidence was to be adduced in respect of an application for an adjournment that evidence would be taken orally, that any written report should be forwarded to the Tribunal by Friday, 15th September 2006 and that the author of such report should be available to give oral evidence. Finally by letter dated 14th September 2006 the applicant's solicitor informed the solicitor to the Tribunal that he could not confirm that Dr. O'Carroll would be available to give evidence on the 18th September 2006 and further that an application would be made to have Dr. O'Carroll's evidence heard in private session "as it would not be helpful that his (the applicant's) present medical condition be disclosed in public".

4. On the 18th September 2006 the applicant was called to give evidence before the Tribunal. His solicitor appeared and informed the Tribunal that the applicant was not present and advised the Tribunal in relation to the applicant's health. The Tribunal determined that the applicant had an obligation to attend before it and that it was not satisfied that the applicant was medically incapable of attending. It required Dr O'Carroll to attend on the following day to provide the Tribunal with evidence as to the applicant's condition.

5. The matter was listed for hearing at 2 p.m. on the 19th September 2006. Prior to the hearing Dr O'Carroll had a meeting with counsel for the Tribunal during the course of which he had a telephone conversation with the applicant. The applicant informed him that he did not wish to have matters concerning his health heard in public and that he was concerned at the impact that publication of such matters would have on his family and on his own health. When the matter came on for hearing counsel for the applicant applied to have any evidence in relation to the applicant's medical condition heard in camera on the grounds that intimate details of the applicant's mental health should be heard in private. He relied upon the applicant's constitutional rights to privacy and to bodily integrity. The sole member made a request that members of the media would not publish any of the evidence of Dr. O'Carroll. He refused to hear the evidence as was requested in a closed court but instead made an order that the evidence should be heard in the presence of the Tribunal counsel and solicitor, Mrs McConnell whose complaints against the applicant were in issue, her sisters and mother and another member of her family. Counsel for the applicant then applied for an adjournment to allow his solicitor to take instructions from the applicant which application was refused.

6. Dr. O'Carroll was then called but before being sworn asked to address the Tribunal. He informed the Tribunal that he had received the applicant's permission to give evidence but in the course of a telephone conversation that consent had been withdrawn. The applicant would only consent to his giving evidence in a closed court there being present only the legal teams. The Tribunal having considered the situation determined to make an order pursuant to the Tribunals of Inquiry (Evidence) (Amendment) Act 1997 section 4. In consequence the applicant instituted the present proceedings.

7. The starting point for this inquiry must be the Act of 1921 section 1. The subject matter of the Tribunal must be a matter of urgent public importance. Section 2 of that Act provides as follows:-

> "A Tribunal to which this Act is so applied as aforesaid –
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> > (a) shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the Tribunal unless in the opinion of the Tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given;"
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> The Tribunals of Inquiry (Evidence) (Amendment) Act 2002, section 2 amended section 2(a) of the 1921 Act by the addition of the words "and in particular where there is a risk of prejudice to criminal proceedings".

The Applicant's Submissions
8. On behalf of the applicant it was submitted that the provisions of Article 34 of the Constitution have no application to Tribunals as they do not administer justice. This is indeed correct: *Goodman International v Mr. Justice Hamilton* [1992] 2 I.R. 557. In these circumstances the issue falls to be determined first and foremost under the provisions of the Tribunals of Inquiry (Evidence) Acts 1921-2002 and in particular the provisions of section 2 of the 1921 Act as amended. Reliance was placed on the decision of the Supreme Court in *Patrick Meenan v Commission to Inquire into Child Abuse* delivered 31st July 2003. The Commission was established pursuant to Statute, The Commission to Inquire into Child Abuse Act 2000. Before the Commission it was contended on behalf of the appellant in that case that he was incapable of responding to an inquiry or giving evidence. The Commission determined that in these circumstances an application should be made to the Commission, that the fact of the application and its outcome would have to be in public but that this did not mean that the Commission would disclose personal details of the appellant's medical condition to the public at large. On the appellant's behalf reports were furnished to the Commission on a strictly confidential basis and on the understanding that the contents would not be disclosed to any third party other than an independent medical doctor who might assess the appellant on behalf of the Commission. The Commission was unwilling to accept these terms. The Commission reserved the right to furnish reports to interested third parties. The appellant relied on his constitutional right to privacy and his constitutional right to bodily integrity. While the Supreme Court held that the appellant had not been accorded fair procedures Keane C.J. had this to say:-

> "We were invited during the course of argument to treat this inquiry as in some sense analogous to inquiries at present being conducted by Tribunals of which, in one instance Moriarty J. is the sole member, and in another Judge Alan Mahon is the chairman. Those inquiries have been conducted into serious allegations of political corruption arising out of events in comparatively recent times. They have been mandated by the Oireachtas on foot of resolutions authorising the establishment of inquiries into, in the language of the Tribunals of Inquiry Act 1921, 'definite matters of urgent public importance'. The inquiry under consideration could not be further removed in its nature and scope from such inquiries."

9. I respectfully agree with the *dicta* of Keane C.J.

10. In relation to the applicant's right to privacy reliance is placed on *Kennedy v Ireland* [1987] I.R. 587 and *Barry v Medical Council* [1998] (3 I.R. 387). I have no difficulty with the proposition derived from the former that communications of a private nature be they written or telephonic cannot be deliberately, consciously and unjustifiably intruded upon and interfered with. Likewise I accept the latter as authority for the proposition that any intrusion into privacy must be proportionate in all the circumstances to the objective of the inquiry and must have regard to the rights of the public at large and the rights of others involved in the inquiry.

11. The applicant relies upon the European Convention on Human Rights, Article 8, which provides as follows:-

> "8.1. Everyone has the right to respect for his family and private life, his home and his correspondence.
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> 2. There should be no interference by a Public Authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

12. I do not see that these provisions add anything to the constitutional right to privacy and in particular the Convention, as does the Constitution, requires a balancing of interests.

13. Finally the applicant relies on the right to bodily integrity. The problem for the applicant here is that it was his decision that his treating doctor should not give evidence and in these circumstances I do not consider it open to him to make the case which he now seeks to make that to give evidence would represent a real risk to his health and wellbeing.

Respondent's Submission
14. On behalf of the respondent it was urged that having regard to the terms of the 1921 Act, section 1 the Tribunal was concerned with a matter of urgent public importance. It was clear from section 2 of the 1921 Act, as amended, that the legislative intention was that the proceedings of a Tribunal to which the Act is applied should be in public. Insofar as section 2 of the 1921 Act, as amended, was concerned the balancing exercise required of the Tribunal is one between the public interest in the matter being enquired into and the nature of the evidence to be given. In this case the trial judge had requested that the evidence should not be reported. He remarked that in the past where he had made this request the media had complied with the same. The limited number of persons to be permitted in the court on the hearing of the medical evidence were those intimately affected being the complainant into whose complaint the Tribunal was inquiring and immediate members of her family. This represented a proportionate response to the applicant's concerns.

Conclusion
15. The scheme of the Tribunals of Inquiry (Evidence Acts) 1921-2002 is that hearings should be conducted and evidence given in public save where permitted by section 2 of the 1921 Act, as amended. The power to hold a hearing otherwise than in public under the 1921 Act, section 2(a), arises where in the opinion of the Tribunal it is in the public interest expedient to do so for reasons connected with the nature of the evidence to be given. The Tribunal is concerned with matters of urgent public importance. The nature of the matters into which the Tribunal is inquiring is the conduct of certain Gardai including the applicant. The Tribunal was I am satisfied entitled to have regard to these circumstances. The Tribunal was then required to balance the public interest against the interest of the respondent in keeping confidential particulars of his medical condition. It must, of course, be recognised that disclosure of details of such condition might well occasion embarrassment or indeed exacerbate a medical condition. However I am satisfied that such interests of the applicant is well outweighed by the public interest in the proceedings of the Tribunal being conducted in public. Proceedings in public are more likely to engage the confidence of the public in its findings and recommendations. The nature of the inquiry upon which the Tribunal is engaged is such that it is all the more important that there should be no cause for concern to the general public that a member of the Gardai whose conduct was a subject matter of the Tribunal's inquiry was being dealt with other than in public in a matter which would delay or prevent his giving evidence and the consequence of which could well be that the inquiry would fail to requite public concern. The sole member made very considerable concessions to the applicant in agreeing to request the media not to report on the evidence and in allowing into court only the complainant against the applicant and close members of her family. I am satisfied that this was a proportionate and indeed a considerate and generous response to the applicant's concerns. I am satisfied that the Tribunal was acting within its jurisdiction and in conformity with the policy of the Tribunals of Inquiry (Evidence) Acts 1921-2002.

16. The leave granted here related to grounds set out in the statement required to ground application for judicial review in paragraphs (i) to (viii). Having dealt with the matter as I have done I do not think it necessary to set out each of the said grounds and deal with the same seriatim. It is sufficient that I say that the Tribunal acted in accordance with the scheme of the Statutes and had proper

regard to the terms of the resolutions of the Dáil and Seanad which led to its being established and the matters of urgent public importance therein referred to and the necessity for public confidence in the proceedings of the Tribunal and balanced the same against the interests and constitutional and convention rights of the applicant and having done so responded to the applicant's concerns in a proportionate way and within its jurisdiction.

17. Accordingly the applicant is not entitled to the reliefs which he seeks.