

THE HIGH COURT

[2005 No. 1249 J.R.]

JUDICIAL REVIEW

BETWEEN

JOHN WHITE

APPLICANT

AND

THE SOLE MEMBER, THE HONOURABLE MR. JUSTICE FREDERICK MORRIS

RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgment of Mr. Justice Paul Butler delivered the 22nd. Day of November, 2005

1. This is an application, on notice to the Respondent, seeking leave, by way of judicial review, to apply for an Order of Certiorari quashing the decision of the respondent to proceed with the hearing of what is called the Burnfoot Module on the 21st. of November, 2005 and for an interim injunction restraining the Respondent from proceeding as aforesaid

"before Tuesday 29th. November, 2005 or until further Order of this Honourable Court, so as to enable the applicant to prepare a full application for judicial review of the respondent's order dated 18th. November, 2005 refusing to postpone the hearing of the said module until after the applicant's criminal proceedings have been resolved".

Chronology of Events

2. 6th. December, 2001 Applicant was charged with unlawful possession of a firearm.

3. That charge is still pending. The applicant sought a prohibition of those proceedings. The same have been stayed by the High Court pending determination of those proceedings which concluded last term and in which judgment is awaited.

4. 28th. March, 2002 pursuant to resolutions of the houses of the Oireachtas the Tribunal (of which the respondent is the sole member) was set up to enquire urgently into a number of matters of urgent public concern including

"the circumstances surrounding the arrest and detention of seven persons at Burnfoot, County Donegal on the 23rd. May, 1998 and the investigation in relation thereto".

5. 4th. November, 2002 The Tribunal opened its proceedings.

6. 7th. September, 2005 The tribunal posted a notice on its website to the effect that the Burnfoot module was to commence on the 14th. November, 2005 and drawing attention to the fact that the module could be held in private.

7. 28th. September, 2005 The Solicitors for the applicant wrote to the Tribunal indicating that the criminal trial had been adjourned, informing it of the judicial review proceedings and seeking an adjournment of the module pending determination of the criminal case on the basis that

"the witnesses and evidence appears to be identical in the matters to be investigated by the Tribunal and the criminal trial".

8. 6th. October, 2005 In a detailed letter (exhibit HD5 in Mr. Dockry's affidavit), the Tribunal, inter alia, indicated that it was not acceding to the foregoing application.

9. 4th. November, 2005 In a letter to the Tribunal the Solicitors for the applicant referred to the letter of the 6th. of October, accepted "that the Tribunal must continue with its work as directed by the Oireachtas" and indicated that the applicant wished to have the module heard in public "in the normal way".

10. 4th. November, 2005 In a further letter of that date the applicant's Solicitors sought a deferral of the hearing of the module for just 2 or 3 weeks.

11. 7th. November, 2005 At a public hearing of the Tribunal Counsel for the applicant indicated that he would be satisfied to commence with the hearing of the Burnfoot module on the 21st. November, 2005 (yesterday).

12. 8th. November, 2005 The DPP wrote to the Tribunal expressing concern that any public hearing of the Burnfoot module might result in prejudice to the pending prosecution of the applicant.

13. 9th. November, 2005 The respondent adjourned hearing of the Burnfoot module to the 21st. November (yesterday). At this stage no indication was given by or on behalf of the applicant that objection was to be taken to proceeding on the 21st.

14. 15th. November, 2005 By letter of this date the Solicitors for the applicant indicated that the applicant wished to have all matters concerning him to be heard in public and seeking postponement of the hearing of the module until the completion of the criminal trial.

15. 15th. November, 2005 Application to have the Burnfoot module heard in private was listed. Counsel for the application sought postponement of the hearing of the module pending determination of the criminal proceedings.

16. 19th. November, 2005 In a considered 10 page Ruling, Mr. Justice Morris directed that the Burnfoot module be heard in private and refused the application to postpone it as aforesaid.

17. In the course of that ruling Mr. Justice Morris dealt at length with the rights of the applicant in regard to the criminal prosecution and with the right of the applicant, and many other persons, including the seven arrested under the Offences Against the State Act to have their good names protected and the allegations laid to rest if that is the correct result as soon as possible.

18. It is just the latter part of that ruling that is the subject matter of this application.

19. The applicant seeks the orders sought on the basis that, without them, his criminal trial would be irreparably prejudiced in that his right to silence would be interfered with and in that the hearing would provide the prosecution with a "dry run" of the criminal proceedings.

20. By reason of the fact that the proposed module is to be heard in private the question of influencing jurors in the criminal trial does not arise.

21. I accept that what is referred to as the "right to silence" in the context of this application amounts to what is a right not to incriminate oneself. It is quite clear from the legislation under which the Tribunal of Inquiry operates and, in particular, section 5 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 that a statement of admission made by a person before a tribunal shall not be admissible as evidence against that person in any criminal proceedings. The application cannot succeed on this basis.

22. The "Dry run" argument is to the effect that the proceedings before the tribunal (which all accept will probably involve almost all if not all of the potential witnesses in the criminal trial) will adversely affect the (undoubted) right of the accused to cross-examine at the trial. Here I accept the argument advanced on behalf of the respondent to the effect that were that to be the case the criminal justice system would grind to a halt. The Court of Criminal Appeal frequently orders re-trials in cases where the same necessarily involve a complete re-run of the evidence heard in the first trial. I am satisfied that the application cannot succeed on this basis either.

23. Finally and separately the issue of delay has been raised. On the basis or the chronology of events set forth above the applicant knew from 7th. September last or shortly thereafter that preparations had been put in place and that it was proposed to commence the Burnfoot module on the 14th. November. After initial objection this was accepted on the 4th. of November and again objected to following submissions from the DPP. No amount of moving of the goalposts can get away from the fact that this application could and should have been made as early as mid September last.

24. This alone would be a sound basis for refusing the application. In coming to this conclusion I put out of consideration the obvious suspicion that the application is entirely opportunistic following the application for a private hearing which was strangely opposed by the applicant.

25. I refuse the applicant's application.

26. I have been told of an interim Order made herein last Saturday but I have not had sight of it. For the sake of clarity, if it is needed, I declare the same to be discharged.