Neutral Citation Number: [2011] IEHC 30

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1420 J.R.]

BETWEEN

DENIS O'BRIEN

APPLICANT

V.

THE TRIBUNAL OF INQUIRY INTO PAYMENTS TO MESSRS CHARLES HAUGHEY AND MICHAEL LOWRY, (SOLE MEMBER MR JUSTICE MICHAEL MORIARTY)

RESPONDENT

JUDGMENT of Mr. Justice Hedigan delivered on the 1st day of February 2011.

1. The applicant in this case seeks an order of *certiorari* quashing the decision of the respondent dated 2nd November, 2010, prohibiting the applicant, through his legal representatives, from cross-examining Professor Michael Andersen in relation to various matters and also limiting the time available for his cross examination. The applicant seeks an order of *mandamus* directing the respondent to allow the applicant, through his legal representatives, to cross-examine Professor Andersen in relation to these matters. The applicant also seeks an injunction restraining the respondent from publishing part two of his final report until such time as the applicant has been permitted to cross-examine Professor Andersen. Finally, the applicant seeks various declaratory reliefs.

2. The applicant is a businessman who resides at Suite F, 60 Tigne, St. Sligma SLM 11, Malta, he was Chairman of Esat Digifone Limited when it successfully competed for Ireland's second GSM phone licence in 1995. The respondent is the Tribunal of Inquiry established on 26th September, 1997, by resolution of Dáil Éireann, to inquire urgently into and report to the Clerk of the Dáil and make such findings and recommendations as it sees fit, in relation to certain specified matters of urgent public importance.

3. In these proceedings Mr O'Brien seeks to challenge rulings made by the Sole Member of the Tribunal on Tuesday 2nd November, 2010. These proceedings are the fourth set of Judicial Review proceedings that Mr O'Brien has brought against the respondent. The first set of proceedings also concerned the evidence of Professor Andersen. Those proceedings were instituted in 2005 in response to a ruling by the Tribunal that it would continue with its work despite the absence of evidence from Professor Andersen. Quirke J. in the High Court acknowledged that strenuous efforts had been made by the respondent to procure Professor Andersen's attendance since 2002, and that the respondent had encountered very significant difficulties and delays in seeking to obtain his evidence. The Court held that Mr O'Brien's right to fair procedures were not infringed by the ruling of the Tribunal.

By November 2008 the work of the Tribunal was all but complete and it circulated its provisional findings. Professor Andersen issued a response to these provisional findings in which allegations of bias were made against the Tribunal. Subsequently on 23rd March, 2010, the Tribunal made a ruling holding that it was inappropriate for Tribunal lawyers to be called to give evidence because of the working relationship between the Tribunal and its lawyers, were the Tribunal to hear evidence from its lawyers concerning allegation's of bias on their part and adjudicate thereon, there could be a violation of the principle of *nemo iudex in causa sua*. In consequence, it was also held that it would be unfair to hear evidence of bias against the Tribunal lawyers where they were not entitled to respond. This would involve a breach of the principle *audi alteram partem*. Three weeks after this ruling was made Mr O'Brien's solicitors wrote to the respondent and indicated that Professor Andersen would give evidence. It is apparently the case that Mr O'Brien had provided Professor Andersen with an indemnity in relation to his evidence. He had previously sought that from the Tribunal and had been refused. The Professor agreed to give evidence from the period Tuesday 26th October, 2010, until Friday 5th November, 2010. The respondent made three rulings on Tuesday 2nd November, 2010, in relation to the cross examination of Professor Andersen. In the first two rulings made that morning, the respondent prohibited Mr O'Brien's counsel from cross-examining Professor Andersen in relation to a) meetings and b) notes of meetings that Professor Andersen or his representatives attended with members of the respondent's legal team. In the third ruling made on the afternoon of 2nd November, 2010, the respondent limited the time available to Mr O'Brien's counsel for his cross-examination of Professor Andersen. The applicant seeks to challenge these three rulings.

4. Applicants Submissions

4.1 The applicant submits that Professor Andersen's evidence is critical to the outcome of the Tribunal as he is the central witness who can testify on the probity of the bids for the second GSM phone licence in 1995. If his evidence is credible and demonstrates that the process by which the second GSM phone licence was allocated was above board, then there can be no substance in the allegations made against Mr O'Brien that he was party to a lack of integrity. The applicant wished to cross examine Professor Andersen in relation to meetings with Tribunal counsel and the notes of such meetings. He seeks to determine whether counsel for the Tribunal were biased against the Esat Digifone bid, and to determine whether Professor Andersen agreed that the notes of the meetings were accurate. If evidence of bias on behalf of Tribunal counsel was demonstrated this could have influenced the view of the Sole Member as to how he should weigh up the evidence. The only way the Sole Member could find out exactly what happened at these meetings was if evidence about them was given by Professor Andersen. The Sole Member ruled that it was not open to him to decide on the conflicting evidence of Professor Andersen and the Tribunals legal team as to what occurred at meetings between them. The Sole Member took the view that he would effectively be putting himself in a position of being a judge in his own cause by reason of his long association with members of his legal team.

The applicant submits that this ruling is of great significance because the evidence in question is of major importance. The applicants claim they are not asking the Court to micro manage the Tribunal. It is accepted that the Court should not intervene in the day to

day mechanics of the Tribunal. What is at issue here however is a ruling as to the general right to cross examine. The evidence given by Professor Andersen was favourable to Mr O'Brien, if however the applicant was permitted to cross examine the Professor as to his allegations of bias on behalf of Tribunal Counsel this could have further strengthened Mr O'Brien's position.

It is submitted that a person cannot be on risk of grave findings without a full opportunity to defend himself including by cross examination. It is accepted that the Tribunal does not have the power to procure Professor Andersen's attendance, therefore if Professor Andersen was requested to return but would not do so the applicant would accept this. That is not the situation in this case, there is no issue of the Tribunal being indefinitely postponed as Mr Andersen has indicated a willingness to come back to Ireland in the second half of 2011.

4.2 The respondent has argued that the applicant is not entitled to relief sought on grounds of delay. The decision complained of in this case was made on 2nd November, 2010 and Professor Andersen concluded his evidence on 5th November, 2010. The application for leave was made on 8th November, 2010. In these circumstances the applicant submits there is no issue of delay. The respondent has also argued that the applicant is not entitled to relief sought on the grounds that he acquiesced in the ruling of 23rd March, 2010, as it was clear from that date that the applicants would not be allowed to cross examine in relation to meetings with Tribunal counsel. The respondents argue that when it became clear in April 2010 that Professor Andersen would be giving evidence the applicants should have raised any objections to the curtailment of Professor Andersen's evidence at that time. The applicant argues that the ruling of 23rd March, 2010, had nothing to do with Professor Andersen. The tribunal itself had acknowledged that Professor Andersen's evidence could bear on the question of whether the bidding process was fairly conducted. The applicant's therefore submit that it was reasonable for them to assume that they would be allowed to fully cross examine Professor Andersen and that there is no question of acquiescence in these circumstances.

4.3 In the ruling of 2nd November, 2010, the respondent purported to limit the applicants right to cross- examine Professor Andersen. He stated:-

> " I have already held… on the 23rd March last, that the maxim *nemo iudex in causa sua*, precludes me calling Tribunal counsel as to what transpired in the course of meetings or investigations relative to the events that were then considered. Similar aspects here appear to have arisen in that Professor Andersen has been critical not merely of the Tribunal in correspondence and other communications addressed, but of Tribunal counsel in regard to certain meetings had with him, contending, amongst other matters, that what he viewed as a pro-persona bias, was evident on the part of one or more counsel…I am satisfied that, in this instance… I am again precluded from calling or hearing the evidence of Tribunal counsel in relation to these matters. It seems to me that the degree of contact and connection between the Sole Member and the barristers is such as to make it an inherently undesirable and unsatisfactory procedure… the prospect of hearing evidence when hands are tied behind backs in the context of Tribunal barristers being precluded from responding to any matters referred to in that evidence, seems inherently unsafe and improper… I do not propose to entertain evidence in relation to meetings or notes that may have transpired in this regard."

The applicant complains that he did not have notice of the fact that the Sole Member was contemplating making such a ruling nor was he afforded an opportunity to make submissions on the proposed ruling in advance of its delivery. The applicant submits that the ruling is inconsistent in that on the one hand the respondent has refused to allow cross-examination on the allegations of bias on the grounds of *nemo iudex in causa sua /audi alteram partem* however on the other hand the respondent ruled that he would allow Professor Andersen's counsel to cross examine him in relation to the allegations for the purposes of explaining the reason for the delay in his attendance before the tribunal.

4.4 It is well established that the lack of an impartial adjudicator will not be permitted to prevent the only body with the requisite power from adjudicating an issue. This is known as the Doctrine of Necessity. The applicant submits that since there is no other way of adjudicating alleged bias by the respondent's legal team, it is not open to the Sole Member to refuse cross examination on the grounds of *nemo iudex in causa sua*.

It is also well established that the right to object to a breach of the principle of *nemo iudex in causa sua* may be waived by a party with full knowledge of the facts, which entitle him or her to raise an objection. The respondent should have afforded the applicant and other affected parties the opportunity to waive any objection based on bias. In taking the course of action that he took the respondent unilaterally deprived the applicant of this opportunity.

4.5 The applicant submits that the principle of *audi alteram partem* cannot be advanced as a basis for the decision of 2nd November, 2010. The respondent had previously indicated when hearing the evidence of Mr Peter Bacon that he was willing to hear evidence from members of his legal team in circumstances where the conduct of the respondent was being criticised by the applicant. The respondent also indicated on 23rd March, 2010, that he was bound to make a decision on a matter which was disputed by his legal team and witnesses from the Office of the Attorney General in circumstances where he heard evidence from the latter only. There was therefore nothing to stop the respondent from hearing evidence from members of his legal team in relation to what transpired at the meetings they attended with Professor Andersen

4.6 The applicant submits that he had a legitimate expectation that he would be allowed to cross-examine the witness in relation to the said meetings /notes. The applicant submits that the provision of the documentation in books entitled 'O'Callaghan Production' in letter's dated 24th July 2004 and 12th October 2010, in circumstances where the O'Callaghan decision requires the disclosure of documentation for the purposes of cross-examination on issues of credibility, amounted to a representation that the applicant would be allowed cross-examine Professor Andersen in relation to the said meetings/notes. The applicant submits that he had a reasonable expectation that the respondent would abide by the representation and that he would be allowed to cross-examine Professor Andersen in relation to the subject matter of these proceedings. The applicant submits that it would be unjust to allow the respondent to draw back from that representation.

4.7 The applicant submits that the respondent's approach is not permissible having regard to the nature of the inquiry. One of the requirements of an effective public inquiry is that the public have confidence in the inquiry. It is submitted that the public cannot have confidence in a Tribunal if affected parties are not permitted to cross-examine a witness who makes very serious allegations of bias against members of the Tribunal's legal team. The applicant argues that the public have a right to be allowed to draw its own conclusions on the allegations of bias made by Professor Andersen and that right is only meaningful if a proper cross-examination of the witness is allowed.

4.8 It is well established that affected parties before Tribunals of Inquiry are entitled to fair procedures. In the seminal case of *In re Haughey* [1971] I.R. 217, Ó Dálaigh C.J. identified the minimum protection's to be afforded to an affected party:-

> "(a) he should be furnished with a copy of evidence which reflected on his good name. (b) he should be allowed to cross-examine, by counsel, his accuser or accusers, (c) he should be allowed to give rebutting evidence; and (d) he should be permitted to address, again by counsel, the Committee in his own defence."

Tribunals of Inquiry have the power to gravely impair the personal rights of the citizen therefore the full panoply of constitutional protection should be afforded to those embroiled in such proceedings even if the proceedings are "inquisitorial" rather than "adversarial" in nature. The Courts have considered the right to cross examine as enunciated by Ó Dálaigh C.J. in a number of cases. In *Maguire v. Ardagh* [2002] 1 I.R. 385, the Supreme Court held that the procedure adopted by a parliamentary sub-committee whereby cross-examination by affected parties was restricted to one day and was postponed until the end of all the examination in chief violated the minimum standards of protection identified *in Re Haughey*. In that case Hardiman J. stated-

> "It must be firmly understood that, when a body decides to deal with matters as serious as those in question here, it cannot deny to persons whose reputations and livelihoods are thus brought into issue, the full power to cross-examine fully, as a matter of right and without unreasonable hindrances."

It is submitted that the time limit imposed by the Sole Member amounted to an unreasonable hindrance. On the afternoon of Tuesday 2nd November, 2010, the Sole Member ruled that:-

> "With a view to maximising the limited further availability of Professor Andersen this week and to enabling the respective representatives of affected persons to have as fair and reasonable an opportunity of putting matters to him as is manageable, what has seemed to me as the fairest scheme of arrangement has been devised by me."

Under the scheme of arrangement the applicant was allocated five hours for the purpose of cross-examining Professor Andersen. In fact he was ultimately allowed six hours, when one of the other parties 'gave' him one of their hours. The applicant complains that it did not have notice of the fact that the Sole Member was contemplating the imposition of a time limitation, nor was the applicant afforded the opportunity to make submissions on the proposed ruling in advance of its delivery. The applicant submits that this curtailment unfairly infringed his right to cross-examine Professor Andersen. In *Maguire v Ardagh* [2002] 1 I.R. 385 where the right to cross-examine was limited to one day. McGuiness J stated "It does not seem to me that a cross examination so limited in time … could adequately meet the standards set by this court *In re Haughey*"

5. Respondents Submissions

5.1 The respondent submits that this challenge in effect seeks to postpone the Tribunal indefinitely, and this is similar to the effect of the challenge heard before Quirke J. in 2005. In that case it was held that Mr O'Brien's rights were not infringed by the non-attendance of Professor Anderson before the Tribunal. It seems illogical given that ruling that the applicant would now seek to indefinitely postpone the Tribunal notwithstanding that his lawyers have had the opportunity to cross examine Professor Anderson for six hours.

The respondent argues that due to the ruling of March 23rd, 2010, it should have been clear to the applicant that he would not be allowed cross examine Professor Andersen in relation to his meetings with Tribunal counsel. In April 2010, it became apparent that Professor Andersen would be giving evidence before the Tribunal, yet at no time between April 2010 and November 2010, when Professor Andersen gave evidence did the applicant raise this issue. The respondent therefore argues that there has been delay on the part of the applicant.

The applicant submits that the respondent should have afforded the applicant the opportunity to waive any objection based on bias. The respondent submits that it was not for the applicant to waive an objection of bias as it is not just Mr O'Brien who is affected by the work of the Tribunal.

5.2 The respondent submits that it is well established that the Courts have limited scope to interfere with decisions made by administrative decision-makers in the exercise of their discretion. The Irish Courts have frequently reaffirmed the following principle stated by Lord Brightman in R*. v. Chief Constable of North Wales Police ex parte Evans* [1982] 1 WLR 1155:-

> "Judicial review is concerned not with the decision but with the decision making process. Unless that restriction on the power of the court is observed, the court will…under the guise of preventing the abuse of power, be itself guilty of usurping power… Judicial review, as the words imply is not an appeal from a decision but a review of the manner in which the decision was made."

In order for the Court to intervene the decision-maker must have acted irrationally. In *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642, the Supreme Court stated that "the test of irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense" In *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 Finlay C.J. stated that in order for an applicant for judicial review to satisfy a court that the decision-making authority had acted irrationally so that the court could quash its decision, it was "necessary that the applicant should establish that the decision making authority had before it no relevant material which would support its decision". The burden of proof is on the applicant to satisfy the court that the decision-making authority has acted irrationally.

It is submitted on behalf of the respondent that the decision to limit the applicant's right to cross examine in relation to allegations of bias was not irrational, both sides could not fairly be heard in relation to those meetings therefore the Sole Member was entitled to conclude that cross examination on these matters was improper. In relation to the decision to limit the applicant's time, this decision was not irrational. The Sole Member was faced with very significant difficulties in ensuring that affected persons had as fair an opportunity to put matters to Professor Andersen as was possible. The evidence had to be taken within two weeks. The Tribunal had encountered serious difficulties in getting Professor Andersen to give evidence and had no confidence that they would ever get Professor Andersen back. In these circumstances it is submitted that the decision to limit the applicant's time to cross examine was not irrational.

5.3 The issue of the courts jurisdiction to review a decision of a Tribunal of Inquiry was addressed by Morris P. in the case *Bailey v. Flood*, (Unreported, High Court, 6th March, 2000) where it was held:-

> "The effective administration of a tribunal of inquiry would be impossible if it were compelled at every turn to justify its actions to the High Court. The legislature has entrusted a broad measure of discretion to such tribunals, including the discretion to decide how the inquiry will proceed and what evidence will be admitted, and it is no part of the duty of this Court to whittle down that discretion, with the inevitable deleterious effects that would have on the effective discharge of the important tasks with which tribunals are burdened."

The discretion afforded to Tribunals of Inquiry was again addressed in the case of *Flood v. Lawlor*, (Unreported, Supreme Court 24th November, 2000) where Keane C.J held as follows:-

> "The Tribunals must be afforded a significant measure of discretion as to the manner in which they carry out the important task which has been entrusted to them by the Oireachtas, because if that principle is not borne in mind then the very important objectives which the establishment of the Tribunal of this nature was intended to achieve can only be frustrated… the Courts will not interfere with them (Tribunals) save where the decision reached is irrational or flies in the face of common sense…"

5.4 By virtue of his terms of reference, the respondent is required, *inter alia*,

> "To inquire urgently into and report to the Clerk of the Dáil and make such findings and recommendations as it sees fit, in relation to [certain specified] definite matters of urgent public importance". The respondent is required to complete his inquiry "in as economical a manner as possible and to the earliest date consistent with a fair examination of the matters referred to it."

The respondent submits that the applicant's claims ignore the respondent's terms of reference, the power which the respondent has to interpret his terms of reference and the deference which must be accorded to the interpretation of the terms of reference adopted by the respondent.

The Sole Member has emphasised the importance of concluding the work of the Tribunal urgently and in a manner consistent with the rights of all parties affected by the work of the Tribunal. In this regard the Tribunal's solicitor Mr. Stuart Brady observes in his first affidavit that:-

> "The Respondent and persons affected by the work of the respondent (including the State and citizens of the State) would suffer severe prejudice (including potentially significant additional costs) in the event that publication of the report of the respondent is delayed until these proceedings are determined and/or until further cross-examination of Michael Andersen is completed".

It is submitted that the applicant's claims are rooted in the fundamentally erroneous premise that he is the only person affected by the work of the Tribunal.

5.5 *In re Haughey* [1971] I.R. 217, Ó Dálaigh C.J. identified certain rights to fair procedures including the right of an accused to cross-examine his accuser or accusers. It is well established that there is a distinction between the inquisitorial proceedings of a Tribunal and a criminal trial. Greater entitlements to fair procedures arise in the later context. The issue of an alleged interference with the right to cross- examine in a criminal trial arose in The *State (Healy) v. Donoghue* [1976] 1 I.R. 325. The Supreme Court held that an accused person should have the opportunity to, "hear and test by examination the evidence offered by or on behalf of his accuser". A Tribunal of Inquiry has the power to curtail the exercise of the right to cross-examine in particular circumstances. In *O'Callaghan v. Mahon* [2006] 2 I.R. 32 Geoghegan J. stated

> "… Tribunals exercising quasi-judicial functions are frequently allowed to act informally- to receive un-sworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like- but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do for, to quote the frequently cited dictum of Tucker L.J. in Russell v. Duke of Norfolk [1949] 1 All E.R. 109:-
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> > 'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

The respondent submits that insofar as the impugned rulings of the respondent interfered with the rights of the applicant, (which is denied), they were proportionate, valid and lawful having regard to the legitimate objectives pursued by the respondent in circumstances where, *inter alia*

> (i) Michael Andersen is not a citizen of the State and does not reside within the jurisdiction of the State.
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> (ii) The respondent encountered very significant difficulties and delays in seeking to obtain evidence of Michael Andersen since 2002.
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> (iii) Michael Andersen was only available to give evidence during the period, 26th October 2010 to 5th November 2010.
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> (iv) The solicitors for Michael Andersen confirmed on 27th October, 2010 that Michael Andersen had "very challenging family commitments" and as such he could not "make any additional time available until the second half of next year" [2011].
>
> (v) The respondent considered that there was no certainty or guarantee that Michael Andersen would ever return to give evidence.
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> (vi) If Michael Andersen were to decide that he did not wish to further assist the respondent, the respondent would not have any means of compelling his attendance to give evidence.

In all the circumstances it is submitted that the impugned decisions and rulings of the respondent were in accordance with the common good, the terms of reference of the respondent to inquire urgently into these matters and the function of the respondent in interpreting his terms of reference.

6 Decision of the Court

6.1 (a) These proceedings centre on three issues.

> a) Was the respondent entitled in the ruling of 2 November 2010 to prohibit the applicant from cross examining Professor Andersen in relation to meetings which Professor Andersen or his representatives attended with members of the respondent's legal team in circumstances where Professor Andersen has made very grave allegations of bias against members of the respondent's legal team on the ground that to allow such cross–examination would infringe the principles

of *nemo iudex in causa sua* and *audi alteram partem* ?

b) Was the respondent entitled in the Ruling of 2 November 2010 to prohibit the applicant from cross examining Professor Andersen in relation to notes of the meetings which Professor Andersen or his legal representatives attended with members of the respondent's legal team in circumstances where Professor Andersen had made very grave allegations of bias against members of the respondent's legal team on the grounds that to allow such cross examination would infringe the principles of *nemo iudex in causa sua* and *audi alteram partem* ?

c) Was the respondent entitled in the Ruling of 2 November 2010 to curtail the time available to the applicant to cross-examine Professor Andersen?

6.1 The role of the Court in Judicial Review proceedings has recently been addressed in the important case of *Meadows v. Minister for Justice Equality and Law Reform*, [2010] IESC 3. Denham J. articulated the core principles as follows:

(i) In judicial review the decision-making process is reviewed.

(ii) It is not an appeal on the merits.

(iii) The onus of proof rests upon the applicant at all times.

(iv) In considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense.

(v) The nature of the decision and the decision maker being reviewed is relevant to the application of the test.

(vi) Where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the Court should be slow to intervene in the technical area.

(vii) The Court should have regard to what Henchy J. in *The State (Keegan) v. Stardust Victims Compensation Tribunal*, referred to as the "implied constitutional limitation of jurisdiction" in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision."

It is clear from this decision that there is limited scope to interfere with the exercise of discretion by an administrative body.

6.2 Case law indicates that decisions made by Tribunals of Inquiry in the exercise of their discretion are afforded a high level of deference in the context of judicial review applications. In *Bailey v Flood* (Unreported, High Court, 6 March, 2000, Morris P.) emphasised that the question of whether evidence which the Tribunal proposed to admit was relevant was "first and foremost a question for the Sole Member himself". In addressing the Courts jurisdiction to review decisions of a Tribunal, Morris P. stated that the Court must generally ask itself whether or not the impugned decision is so unreasonable that no reasonable decision-maker could have arrived at it. Morris P. stated:-

"The effective administration of a Tribunal of Inquiry would be impossible if it were compelled at every turn to justify its actions to the High Court. The Legislature has entrusted a broad measure of discretion to such Tribunals, including the discretion to decide how the Inquiry will proceed and what evidence will be admitted, and it is no part of the duty of this Court to whittle down that discretion, with the inevitable deleterious effects that would have on the effective discharge of the important tasks with which Tribunals are burdened."

Ultimately, Morris P. held that the applicants had failed to establish a case justifying the grant of any of the relief's sought and dismissed their claim. His judgment was affirmed on appeal. The case of *Flood v Lawlor*, (Unreported, Supreme Court, 24th November 2000) provides a very useful summation of the discretion, which must be afforded to Tribunals of Inquiry. Keane C. J. at paragraph six of the judgment explained the position:-

"It is not necessary to stress, because it has been repeatedly said in this Court, that Courts in interpreting the relevant legislation, must afford a significant measure of discretion to the Tribunal as to the way in which it conducts these proceedings. It must of course, observe the constitutional rights of all persons who appear before it or upon whom the decisions of the Tribunal or the manner in which they conduct their business may impinge, but making every allowance for that important qualification, the principle remains as I have indicated."

6.3 (a) From the above cases it is clear that there is limited scope to interfere with the exercise of discretion by an administrative body. This is particularly so when it comes to Tribunals of Inquiry, whose decisions are afforded a high level of deference. As judicial review is not an appeal from an administrative decision but a review of the manner in which the decision was made, the Court cannot substitute its opinion for that of the decision-maker merely because it would have reached a different conclusion to the decision maker.

6.3 Before applying these principles to the facts of the case, I will turn firstly to the objection of delay raised by the respondent. I find that the respondent's complaint of delay is without substance. The rulings which the applicant seeks to challenge were made by the Sole Member on 2nd November, 2010. Professor Andersen concluded his evidence on 5th November 2010, the application for leave was made on 8th November, 2010. I am satisfied that the applicant did act promptly and therefore the issue of delay does not arise.

6.4 The case law that has been opened to the court seems to deal only with the right to cross-examine an accuser as opposed to a general right to cross examine. The same may be said of the European Convention on Human Rights and indeed the US Constitution. *In re Haughey* [1971] I.R. 217 Ó Dálaigh C.J. identified the right of an accused to cross examine his accuser as being one of the entitlements contained in the right to fair procedures. The right to cross-examine may however be curtailed by a Tribunal of Inquiry in certain circumstances. This is clear from the judgment in *Maguire v. Ardagh* [2002] 1 I.R. 385 where Geoghegan J. states at 740:-

"It is well established by decided cases that in respect of any kind of tribunal or inquiry body, as to what is or is not fair procedures may vary depending on the nature of the matters being investigated. There is, for instance, no absolute right to cross-examine. As to whether there should be a right to cross-examine or not in any given instance depends on the circumstances."

The discretion of a Tribunal in controlling the taking of evidence before it was addressed by the Supreme Court in *O'Callaghan v. Mahon* [2006] 2 I.R. 32. Geoghegan J. states at 281:-

> "… Tribunals exercising quasi-judicial functions are frequently allowed to act informally- to receive un-sworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like - but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do for, to quote the frequently cited dictum of Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All E.R. 109:-
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> > 'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

Where there is a clear public interest involved such as is the case with any Tribunal of Inquiry, then even the right to cross examine ones accusers may be controlled, subject to not imperilling a fair hearing or a fair result. The right to cross examine ones accuser may therefore be curtailed but only within a firm basis in law consistent with the constitution.

6.5 However none of the cases deal with a right to cross examine a witness who is not an accuser. It seems to me that there must be such a right particularly when a reputation might be damaged by evidence. I would think this right should weigh in the balance according to the extent by which that reputation might be prejudiced. Thus the proportionality of the interference with this right falls to be considered as per *Meadows v Minister for Justice* [2010] IESC 3. Taking the first two issues i.e. limiting the nature of the cross examination; here the right pursued is to cross examine a witness who not only is not an accuser but who has given evidence favourable to the position contended for by the applicant. The right involved here is such as I think can only arise in certain limited circumstances. I do not believe it possible to set out exhaustively what those circumstances might be but I do believe they must be clear and compelling in order to constrain the High Court to intervene in what must ordinarily be within the discretion of a Tribunal i.e. its procedures in controlling the taking of evidence before it.

6.6 In this case it is agreed the evidence given by Professor Andersen was favourable to the applicant. In my view no compelling or even satisfactory answer was given to the Courts question as to what it was hoped to obtain by questioning him further about bias on the part of the Tribunal lawyers. He had already stated he thought they were biased and had explained in some detail what he meant by that. The most that could have been hoped for was that he would repeat what he had already said but perhaps in stronger terms, that he could perhaps gild the lily. Without even taking account of the inherent risk involved in advocates, however skilled, attempting to gild the lily, this speculative opportunity allegedly missed must surely be a right of the most limited nature if indeed it exists at all. For the same reasons it is also highly speculative as to the extent to which the limitations which were imposed on cross examination could prejudice the reputation of the applicant.

7. Against this is to be balanced the concerns expressed by the Sole Member that to allow this area of evidence to be pursued in cross examination would, in the interests of fairness, require him to hear evidence from the Tribunals own lawyers as per the rule in *audi alteram partem*. Their good name and reputation was after all being called into question. This in turn would place him in the position of being a judge in his own cause. These interlinked problems would surely give rise to grave questions concerning the Sole Members impartiality. In short there are at the very least strong grounds for the Sole Member to have taken the course he did. Balancing these very real and serious problems for the Tribunal against the very speculative and therefore limited right of the applicant, it seems to me that the Sole Member made a decision that was eminently reasonable and grounded firmly on relevant evidence. That alone, on reasonableness grounds, must put the decision to limit the cross examination of Professor Andersen beyond the reach of Judicial Review. Even were I to accept that the application is not based on grounds of irrationality but on the choice by the Sole Member of a procedure that was unfair to the applicant, the same considerations apply. The procedures followed were in all the circumstances of the case fair and reasonable taking account the difficulties with which the Sole Member was faced.

8. As to the decision of the Sole Member to limit the time to cross examine, I think similar consideration apply but even more strongly so. It is manifestly clear from the evidence that the presence of Professor Andersen to give evidence had been obtained only after extraordinary difficulty. Limited time was available. His future availability, were his evidence incomplete, was highly doubtful and at best would delay the Tribunal delivering its final report by up to a year. The decision to limit the applicant to five hours which in fact was extended to six hours was it seems to me a balancing of rights that was eminently reasonable in the circumstances of this case and consistent with fair procedures.

9. For the above reasons the orders sought are refused.