Neutral Citation Number: [2010] IEHC 388

THE HIGH COURT

2010 1371 JR

BETWEEN

DENIS O'BRIEN

APPLICANT

AND

THE TRIBUNAL OF INQUIRY INTO PAYMENTS TO MESSRS. CHARLES HAUGHEY AND MICHAEL LOWRY

RESPONDENT

AND

THE HIGH COURT

2010 1367 JR

BETWEEN

DERMOT DESMOND

APPLICANT

AND

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

RESPONDENT

Judgment of Mr. Justice John Hedigan delivered on the 29th day of October, 2010.

1. This is an application by way of judicial review in the first applicant's case, for –

(i) an injunction restraining the respondent from retaining Mr. McDowell, Senior Counsel, as counsel to the Tribunal on grounds of objective bias;

(ii) a declaration that by retaining Mr. McDowell as counsel to it, the Tribunal has displayed objective bias.

The second applicant seeks;

(i) a declaration on the same ground, i.e. bias because of conflicts of interest;

(ii) that Mr. McDowell's retention is in breach of natural justice and fair procedures because of his alleged conflict of interest and/or because he is objectively biased as against the applicant;

(iii) an order of certiorari of the respondent's decision;

(iv) an order of prohibition restraining the respondent from continuing to instruct or retain Mr. McDowell as part of the respondent's legal team or to examine Professor Michael Andersen on behalf of the respondent;

(v) an interlocutory injunction restraining the respondent continuing with the cross-examination of Professor Michael Andersen.

2.

2.1 The grounds upon which the applicants rely are largely identical. They are that the respondent was and is objectively biased in instructing and continuing to retain Mr. McDowell as part of the Tribunal's legal team to examine in his evidence Professor Andersen when Mr. McDowell has to the knowledge of the respondent conflicts of interest which may be summarised as follows;

2.2

(a) Mr. McDowell in his capacity as a member of the Dáil in 1995 commenced questions of the then Minister for Transport, Energy and Communication, Mr. Michael Lowry, concerning the procedures attendant upon the awarding of a licence for Ireland's second mobile telephone service. Seven of his colleagues in the Progressive Democrats Party asked further questions including the then party leader. These questions culminated in one of his colleagues tabling a private members' motion to establish a Tribunal to inquire into payments that might have been received by the Minister from Ben Dunne in relation to his house. This in turn culminated in a speech by Mr. McDowell on the same day in which he trenchantly criticised the Minister, seriously calling his integrity into question. These actions all suggested strongly that Mr. McDowell was a political opponent of Mr. Lowry. The allegations were similar to those raised in regard to the digital phone licence being investigated by the respondent herein. They suggest Mr. McDowell is biased against Mr. Lowry. Any finding against

Mr. Lowry in this regard will result in a negative finding against the first applicant.

(b) In 1995 in Orange Communications Limited, Mr. McDowell acted for Orange in its unsuccessful challenge to the award of the third mobile telephone licence. In the course of this case, he sought to undermine Mr. Andersen's role in that process which was the same as the process in regard to the matters being inquired into herein. He cross-examined him on behalf of Orange.

(c) As Attorney General Mr. McDowell claimed privilege over the advice of Richard Nesbitt, Senior Counsel, in relation to the licence award. It is asserted by the applicant that this disadvantaged him. An objective bystander might conclude that Mr. McDowell's action prevented evidence useful to the first applicant being adduced before the Tribunal. Further, as Attorney General, he was named as a party by two of the defeated competitors for the second mobile licence. The issues involved were similar if not identical to those the Tribunal is investigating. His role in these proceedings might lead to a reasonable apprehension that Mr. McDowell and by extension the Tribunal would seek to protect the interest of the State in the matter currently being investigated.

(d) Mr. McDowell instructed the State team when the State applied for representation in 2002 before the Tribunal. He was therefore a client of one team before the Tribunal and now is acting for the Tribunal. The apprehension is that he and therefore the Tribunal may be biased against non-State parties. Furthermore, in 1999 Mr. McDowell as Attorney General instructed counsel for the public interest to make submissions to the Tribunal on its terms of reference. This made him in fact the client of two teams before the Tribunal both of which are State parties and the same apprehension might arise.

(e) The first applicant made political donations to all the main political parties including the Progressive Democrats. This might lead an observer to consider that Mr. McDowell's involvement with the Tribunal might call into question the decision of the Tribunal if it validates the award of the second mobile licence.

(f) Mr. McDowell in 2005 as Minister for Justice was collectively responsible for the decision of the Government to refuse Professor Andersen an indemnity he had sought from the State in relation to his evidence. This delayed his giving evidence that might have greatly shortened the life of the Tribunal.

2.3 It is argued that because of these conflicts which Mr. McDowell has, the respondent by instructing him, has taken upon himself those same conflicts so that a situation of objective bias now infects the respondent and thus gives rise to a reasonable apprehension that he will not receive a fair hearing or a fair adjudication.

3. The threshold for granting leave to seek judicial review is, as has been agreed by all parties and is well established in law, a low one. The applicants have merely to establish that they have an arguable case in order to obtain leave and proceed to a substantive hearing. It is a low threshold but it is a threshold. It is only if they succeed in crossing this threshold that an interlocutory injunction may issue. The application for leave is normally made ex parte. In this case I heard the preliminary application on Wednesday, the 27th October, 2010. It seemed to me then that it was appropriate I give leave to the applicants to serve short notice of motion on the respondent to enable him to make submissions to the Court in this matter. I have therefore had the benefit of submissions from Mr. O'Callaghan, Senior Counsel, for the first applicant, from Mr. Shipsey, Senior Counsel, for the second applicant and from Mr. Murray, Senior Counsel, for the respondent.

4. Objective bias

The test for establishing whether such a bias exists as to deprive a party of their right to a fair hearing is now well established. In *Dublin Well Woman Centre Limited and Others v. Ireland* [1995] ILRM 408, the applicants were seeking a declaration that they could disseminate abortion information. One of the defendants in the proceedings, the Society for the Protection of the Unborn Child (SPUC), applied to Carroll J. to discharge herself from hearing the case in the High Court as she had served as Chairwoman of the second Commission on the Status of Women, which had made submissions on this issue. Carroll J. refused to discharge herself on the basis that she was satisfied that she was not biased in the matter. On appeal to the Supreme Court the Court held that Carroll J. had not applied the correct test and should have examined the issue of objective bias. The issue to be determined was whether a person in the position of SPUC, being a reasonable person, would apprehend that his chances of a fair and independent hearing of the question at issue did not exist by virtue of the previous non-judicial position, statements and actions of the High Court Judge. Denham J. stated that once a possible perception of bias had been raised reasonably on the grounds of the pre-existing position or actions, it would be contrary to constitutional justice to proceed with the trial. In *Kenny v. Trinity College Dublin* [2007] IESC 42, the plaintiff brought a motion to the Supreme Court in 2007 seeking to set aside a previous order given by the Court in 2003. The case related to the development of student accommodation by Trinity College Dublin (TCD). TCD had, in those previous proceedings, successfully appealed to the Supreme Court. In 2006 the plaintiff became aware of the fact that Murray J. who had been one of the Supreme Court Judges, who had heard the appeal, was a brother of one of the partners in Murray O'Laoire, the architects who had designed the Trinity Hall development. Fennelly J., writing the sole judgment on behalf of the Supreme Court, allowed the appeal on the grounds of objective bias. He stated:

> *"Denham J. described the test authoritatively in her judgment in Bula Ltd. v. Tara Mines Ltd. and Ors. At page 441 she is reported as saying:*
>
> > *'… it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test – it invokes the apprehension of the reasonable person.'*
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> *The hypothetical reasonable person is an independent observer who is not over-sensitive, and who has knowledge of the facts. He would know both those which tended in favour and against the possible apprehension of a risk of bias."*

I gratefully accept that statement of principle.

5. The application herein is most unusual. It has been stated by Mr. Murray that there is in fact no precedent anywhere for an application such as this one. It seems to me the central question for the Court to address in applying the principles of objective bias herein is what is the nature of the relationship that Mr. McDowell has with the Tribunal in his present role. I can readily accept that Tribunal counsel are in a somewhat different role to that of counsel in a normal civil or criminal court role. They participate in the investigative process for the Tribunal. They interview witnesses. However, it is to the facts of this case I must look in order to determine if the principles of objective bias can apply. It goes without saying that save for the most exceptional cases, rules of objective bias cannot apply to barristers. By the very nature of their role in the legal system, they are partisan. They also operate

under the so-called "taxi cab rule" which means they must, save for very limited cases, act for whoever comes along. Thus counsel may appear for the Director of Public Prosecutions on one day in prosecuting a case and on the other side the following day acting for the defence. In this very nature of their work lies the inherent possibility of all manner of conflictual situations very few of which would require a barrister to refuse to act.

5.2 In his evidence before the Court, Stewart Brady, solicitor to the Sole Member of the Tribunal, avers that due to serious allegations made by Professor Andersen against both the Tribunal and Tribunal counsel, the respondent decided it would be advisable to engage independent counsel for the examination of Professor Andersen. He did so because, as he put it, the cross-examination of him could be disrupted. It seems on its face a very reasonable decision to have made in the unfortunate situation that had arisen between Professor Andersen and the Tribunal. Mr. Brady states that Mr. McDowell has been briefed for this examination and for no other purpose. His brief is to pursue the particular lines of inquiry required by the respondent and remains subject to the overall direction of the respondent. Further, in his letter to the second applicant's solicitors dated the 27th October, 2010 and opened to the Court, Mr. Brady stated that the respondent would make the following statement that morning:

> *"To my ex tempore ruling of yesterday, I wish only to add the following:-*
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> *Mr. Michael McDowell is not part of the deliberative process of this Tribunal. Because of the circumstances that arose in relation to hearing the evidence of Mr. Michael Andersen, Mr. McDowell has been retained to conduct Mr. Andersen's examination as an experienced and senior barrister. Whilst he will obviously exercise his professional skills as to the manner and sequence in which that examination is conducted, he will nonetheless act on the instructions of the Tribunal, and will, on the completion of Mr. Andersen's evidence, cease to have any further involvement in the remaining work of the Tribunal."*

5.3 It is clear on this evidence before the Court that Mr. McDowell is in quite a different role to that of counsel working full-time for the Tribunal. He appears clearly to have been engaged as counsel independent of the Tribunal for reasons set out above. Indeed it is his very independence that the respondent is relying upon to obviate any problems that might arise between Professor Andersen and Tribunal counsel. I accept the respondent's statement that Mr. McDowell will have no deliberative role.

6. The decision of the Court

6.1 I find the proposition that any objective bias of counsel, even Tribunal counsel, might as it has been put, infect the Sole Member charged with the adjudicative function, a novel and somewhat improbable one. I do not however need to consider that because, on the evidence before the Court, Mr. McDowell is clearly not a part of the Tribunal team. He is independent counsel engaged specifically because of his independence from the Tribunal.

6.2 It may well be that Mr. McDowell in his previous roles, both political and legal, has had a substantial legal or political interest in the matters being investigated by the respondent. He has clearly had much to say on the topic. He clearly knows a great deal about it. It may well be that therein lies the reason he was briefed. However, the rules relating to objective bias in my view, save for the most exceptional cases do not apply to counsel – see *Geveran Trading Co. Ltd. v. Skjevesland* [2003] 1 WLR, where Arden L.J. in the Court of Appeal for England and Wales stated at paragraph 48;

> *"… an advocate for instance, has no duty not to be partisan. The judge, on the other hand, must be independent and free from any actual or apparent bias."*

Earlier in this same judgment, consideration was given at paragraph 39 as to what might constitute exceptional cases where an advocate might be restrained from acting – see *RV Smith (Winston)* [1975] 61 Criminal Appeal Reports 128, where a pupil barrister met the accused, discussed his case with him and then subsequently appeared sitting behind prosecution counsel at the accused's trial. Likewise in *R. v. Batt* [1996] Criminal Law Reports 910 where the Court of Appeal for England and Wales observed it was undesirable for cohabiting counsel to appear on opposite sides in a contested criminal case.

6.3 It is clear from these cases that it is only in the most exceptional of circumstances of a very particular kind that counsel may be excluded under the rules relating to objective bias. Nothing of that nature in my view arises here. In the result, it appears to me that the very ground upon which the applicants bring their case has no basis in law in this country. It is not in my view an arguable case and therefore I refuse leave to seek judicial review.