Neutral Citation Number: [2009] IEHC 470

THE HIGH COURT

JUDICIAL REVIEW

2009 722 JR

BETWEEN/

ANN O'CEALLAIGH

APPLICANT

AND

AN BORD ALTRANAIS AND THE FITNESS TO PRACTISE COMMITTEE OF AN BORD ALTRANAIS

RESPONDENTS

AND

THE CHIEF EXECUTIVE OFFICER OF AN BORD ALTRANAIS

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered the 23rd day of October, 2009.

1. The applicant herein is an independent domiciliary midwife practising in Dublin and registered with An Bord Altranais since 1983.

2. The first named respondent is a statutory body, which was established by s. 6 of the Nurses Act 1985 ('the 1985 Act'). It has the sole responsibility for the maintenance of professional standards in nursing and midwifery.

3. The second named respondent is a committee established by the first named respondent pursuant to s. 13(2) of the Nurses Act 1985, in relation to the Board's fitness to practise functions under Part V of that Act.

4. The notice party is the Chief Executive Officer of An Bord Altranais and was joined as a notice party on the basis that it is the *legitimus contradictor* in respect of the within proceedings.

5. The applicant is seeking the following relief by way of judicial review:-

(a) an order of certiorari quashing the decision of the Fitness to Practise Committee made on 11th June, 2009, that the Chairperson of the Committee hearing the inquiry into the fitness to practise of the applicant is not objectively biased and shall remain on the Fitness to Practise Committee inquiring into allegations of professional misconduct against the applicant.

(b) an order of prohibition prohibiting all members of the Committee who made the aforementioned decision from inquiring into the fitness to practise of the applicant and the allegations of professional misconduct against the applicant.

(c) an order of prohibition prohibiting all members of the Committee who made the aforementioned decision from making any findings or giving any report in relation to the allegations of professional misconduct against the applicant.

(d) an order of prohibition prohibiting the respondents, their servants or agents from requiring the applicant to partake in any further inquiry or hearing conducted by all or any of the members of the Fitness to Practise Committee who made the aforementioned decision.

(e) an order of prohibition prohibiting the Respondent, their servants or agents from requiring the applicant to partake in any further inquiry or hearing involving Ms. Pauline Treanor.

(f) an order of prohibition prohibiting the respondents from carrying out any inquiry in relation to any allegations made against the Applicant save in accordance with the Nurses Act 1985, and the procedures governing the second named respondent.

(g) an order directing expedited pleadings in the within proceedings.

(h) an order directing the early trial of the matter.

(i) such further or other order or relief as this Court shall deem just.

(j) an order for all necessary and/or incidental directions as to the hearing of and determination of these proceedings as this Court shall deem fit.

(k) damages.

(l) costs.

Background

6. By Notice of Inquiry dated 9th September, 2008, the applicant was informed that the Fitness to Practise Committee had received an application from An Bord Altranais for an inquiry into her fitness to practise under Part V of the Nurses Act, 1985. The Notice of Inquiry stated that the Fitness to Practise Committee was of the opinion that there was a *prima facie* case for the holding of an inquiry into her fitness to practise nursing on the grounds of alleged misconduct. The Notice of Inquiry set out nineteen allegations of professional misconduct in relation to the applicant's engagement as a domiciliary midwife to a named patient during the period November, 2006 to 20th April, 2007.

7. The Notice of Inquiry set out the names of witnesses whom it was the intention of the Fitness to Practise Committee to request to be in attendance at the Inquiry for the purposes of giving evidence and the nature of their evidence and the documents intended to be produced. It stated, *inter alia*, that Ms. Fiona Hanrahan, Clinical Midwife Manager III in the Rotunda Hospital, would be one of the witnesses called and that she would give expert midwifery evidence as set out in the report furnished with the Notice of Inquiry.

8. At the Inquiry, the Chief Executive Officer of the Board presented the evidence of the alleged professional misconduct and called witnesses to support the case. Ms Hanrahan was one of the witnesses called in support of the case against the applicant.

9. The hearing of the Inquiry commenced on 5th May, 2009. The Fitness to Practise Committee is composed of three elected Board members and two appointed Board members. The Chairperson of the Committee is Ms. Pauline Treanor. Ms. Treanor did not state where her place of work was in the course of introducing herself. Mr. Tony O'Connor S.C. was the legal assessor to the Committee.

10. On the first day of the hearing counsel on behalf of the Chief Executive Officer requested that Ms. Fiona Hanrahan be allowed to "sit in on the evidence that is being given." This request was acceded to by the Committee. As a result Ms. Hanrahan was present in the hearing room during all the evidence that was heard by the Committee. Ms Hanrahan's own evidence commenced on Day 3 of the Inquiry, 7th May, 2009. On Day 4 of the Inquiry, 8th May, 2009, counsel for the applicant made an application that the Fitness to Practise Committee discharge itself (in its entirety) from hearing the case on the basis that an apprehension of bias arose as a result of the professional relationship between Ms. Hanrahan and the Chairperson of the Committee, Ms. Pauline Treanor. Ms. Treanor is the Group General Manager of the Rotunda Hospital and Ms. Hanrahan is Assistant Director of Midwifery at that Hospital. The Inquiry Committee directed that legal submissions on this issue be exchanged and conducted a hearing in relation to this matter on 11th June, 2009. It continued to hear Ms. Hanrahan's evidence on 8th May, 2009.

11. At the hearing of the application on 11th June, 2009, the legal assessor to the Committee, Mr. Tony O'Connor S.C., outlined to the parties what his legal advice to the Inquiry Committee was. Mr. O'Connor set out what he considered to be the applicable legal principles. He emphasised Ms. Hanrahan's role as an expert. He did not advise that Ms. Treanor should recuse herself but indicated that the Committee should consider this question. He did advise that he did not consider that there was a basis for the submission that whatever view was taken in relation to Ms. Treanor, the other members of the Inquiry Committee should recuse themselves on the grounds that they were "tainted" by reason of Ms. Treanor's involvement as Chairperson of the Inquiry Committee until Day 4 of the hearing, when the application was made.

12. Mr. O'Connor and Ms. Treanor gave certain details in relation to the relationship between Ms. Treanor and Ms. Hanrahan. Those details were that Ms. Hanrahan was appointed Assistant Director of Midwifery and Nursing at the Rotunda in April, 2009 and that she had worked at the hospital since 2002; Ms. Hanrahan does not report to Ms. Treanor and there is no line management connection between them. It was also stated that they do not participate in regular committee meetings at the hospital; Ms. Treanor never discussed the case with Ms. Hanrahan and Ms. Treanor did not know until the Notice of Inquiry was actually on the Committee's desks at the beginning of the hearing that Ms. Hanrahan would definitely be giving expert evidence at the hearing. Ms. Treanor was appointed as General Manager of the Rotunda Hospital in December, 2008. She had been Director of Nursing and Midwifery from mid-2001 until that time.

13. At all times during the oral submissions on 11th June, and while the summary of the legal advice was provided by the legal assessor, Ms. Treanor was present. The Committee adjourned to make their decision. Ms. Treanor absented herself while the remainder of the Committee determined the issue.

14. The decision taken by the Inquiry Committee was delivered by Ms. Maureen Kington, a member of the Committee. She indicated that the Committee had deliberated in the absence of Ms. Treanor and that the four remaining members were unanimously of the view that having "rigorously applied" the objective bias test, they did not believe that there was a basis for Ms. Treanor to recuse herself.

15. The Inquiry into the applicant's Fitness to Practise was scheduled to recommence on 4th September, 2009. On 6th July, 2009, Mr. Justice Peart granted leave to judicially review the decision of the Fitness to Practise Committee. The Inquiry was stayed pending the outcome of the proceedings.

Submissions of the Applicant

16. Counsel for the applicant, Mr. Frank Callanan S.C., submitted that the main issue in the proceedings was the relationship of the Chairperson of the Inquiry Committee and the expert witness, which gave rise to a reasonable apprehension of objective bias. He accepted that the complaint could not simply be made on the grounds that Ms. Treanor and Ms. Hanrahan were employed at the same hospital: something more than that was required. Mr. Callanan submitted that there was a structural relationship of significance between Ms. Treanor and Ms. Hanrahan, describing it as an active hierarchical relationship. Ms. Hanrahan occupied Ms. Treanor's former position and was at only two removes from her in the hierarchical relationship. Regular communication and significant ongoing interaction in the course of their employment could be assumed. In effect, Ms. Treanor would view Ms. Hanrahan as one of "her" midwives in receiving her evidence. Mr. Callanan submitted there was a lamentable paucity of disclosure concerning the relationship, despite the legal assessor's advice that Ms. Treanor make disclosure in this regard.

17. Mr. Callanan submitted that in assessing the relationship, the court should take into consideration the facts outlined in the decision of this Court in *Kudelska v. An Bord Altranais* (Unreported, High Court, 10th February, 2009). It was clear from that judgment that Ms. Treanor had commissioned a formal assessment of Ms. Kudelska (a midwife at the Rotunda Hospital in respect of whom issues of competency had arisen) which had been carried out by Ms. Hanrahan. Both Ms. Treanor and Ms. Hanrahan had given direct evidence to the Fitness to Practise Committee inquiring into Ms. Kudelska's conduct. Mr. Callanan also pointed to the statement of the legal assessor that Ms. Treanor had not "definitely" known until the Inquiry commenced that Ms. Hanrahan would appear as an expert witness. It could be inferred from this that Ms. Treanor knew it was likely that Ms. Hanrahan would give expert evidence in an inquiry of this kind.

18. Mr. Callanan further submitted that the process by which the Inquiry Committee determined that Ms. Treanor should not be recused on the basis of objective bias was manifestly flawed. Ms. Treanor had absented herself from that decision of the Committee. This absence was not based upon the advice of the legal assessor or of counsel for the Chief Executive Officer. By Ms. Treanor doing so, the remaining four Committee members made a decision without the correct quorum of members and without the correct ratio of appointed to elected members making the decision, in breach of s.13(6) of the Nurses Act 1985. Mr. Callanan contended that Ms. Treanor had made limited disclosure of her relationship with Ms. Hanrahan, despite the advice of the Committee's legal assessor. She had detailed the relationship to the Committee in private and these details had been recounted by the legal assessor at the hearing on 11th June. He submitted that the court should take into account in a broad sense the process on which the Committee's decision on the application was reached.

19. Mr. Callanan argued that if a finding of objective bias was made in respect of Ms. Treanor, the entire Committee should be discharged. This would be the natural consequence of such a finding. The entire Inquiry would be tainted by Ms. Treanor's involvement in four days of the hearing and there was a risk that the original injustice would linger if the entire Committee were not discharged.

20. In the course of his submissions on behalf of the applicant, Mr. Callanan relied in particular on the following authorities: *Dublin Well Woman Centre Ltd. v. Ireland* [1995] 1 I.L.R.M. 408; *O'Reilly v. Cassidy (No. 2)* [1995] 1 I.L.R.M. 311; *Bula Ltd v. Tara Mines Ltd (No. 6)* [2000] 4 I.R. 412; *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40 and *Prendiville v. Medical Council* [2008] 3 I.R. 122.

Submissions of the Notice Party (*legitimus contradictor*)

21. Counsel for the Notice Party, Mr. Eoin McCullough SC, submitted that this was not a case where a strong argument could be made for the reasonable apprehension of objective bias. While there was a connection in terms of their employment between Ms. Treanor and Ms. Hanrahan, this connection did not meet the threshold set out in the applicable caselaw concerning relationships of this kind. Mr. McCullough submitted that a professional relationship must be sufficiently close and would have to be related to the subject matter of the proceedings in order to create a reasonable perception of bias. There must be a cogent and rational link between the contested associations and its capacity to influence the decision-making body.

22. Mr. McCullough pointed out that the pool of Irish midwives with experience of homebirth was small and consequently, it was highly likely that expert witnesses and professional nurses sitting at inquiries would be familiar with each other. Moreover, Ms. Hanrahan was acting in her capacity as an independent expert. There was no real community of interest between her and Ms. Treanor in respect of the Inquiry. Nor did their relationship have any connection with the facts of the Inquiry. Ms. Treanor was an experienced member of the Fitness to Practise Committee and had been a member of An Bord Altranais since 2002. There was no cogent reason to believe that she would necessarily prefer the evidence of Ms. Hanrahan because they worked in the same hospital. The Court should also have regard to the procedural safeguards present. Ms. Treanor was one of five decision-makers. The Committee also had the assistance of senior counsel acting as legal assessor.

23. Mr. McCullough submitted that Ms. Treanor had acted correctly in recusing herself from the determination of the Committee regarding the allegation of objective bias. He further contended that the applicant had the material before her at the outset of the inquiry to raise an objection on the grounds of a reasonable apprehension of objective bias pertaining to Ms. Treanor. She had delayed in making the application to the Committee.

24. With regard to the question of whether the entire Committee should be discharged, Mr. McCullough rejected the assertion that Ms. Treanor's presence as Chairwoman had tainted the Inquiry. The Committee was composed of five members. More fundamentally, this was not a case where a decision had been made by the quasi-judicial authority on the ultimate issues arising.

25. Mr. McCullough rejected the applicant's assertion that there was a procedural infirmity in the manner in which the contested decision was taken. The proportionality requirement in section 13(6) of the Nurses Act 1985 regarding the composition of the Fitness to Practise Committee applies only to the Committee in its entirety, and not to a division of the Committee sitting to hear an inquiry. Consequently, nothing in the 1985 Act precludes a modification of the quorum required for inquiries, and nothing in the Act would preclude the Inquiry Committee from pursuing the Inquiry in the absence of Ms. Pauline Treanor, if required.

26. In the course of his submissions, Mr. McCullough relied upon the decision of the UK Court of Appeal in *Locabail (UK) Ltd. v Bayfield Properties Ltd.* [2000] 1 Q.B. 45. He also relied upon the following authorities: *Kenny v Trinity College Dublin* [2007] I.E.S.C. 42; *Bula Ltd v Tara Mines Ltd* [2004] I.R. 412; *Gillies v Secretary of State for Work and Pensions* [2006] 1 All E.R. 731 and *Radio Limerick One v Independent Radio and Television* [1997] 2 I.R. 291. Mr. McCullough also cited the academic text De Smith on *Judicial Review* (6th ed.) para. 1045-1050.

The Applicable Law

27. The essential element in this case is to determine whether the relationship between Ms. Treanor and Ms. Hanrahan was, in all the circumstances, such as to give rise to a reasonable perception of objective bias on the part of Ms. Treanor. The law relating to bias is a cornerstone of the principles of natural justice in this jurisdiction, intended to afford a party protection where a decision maker is actually biased (subjective bias) and even to provide a safeguard where a

reasonable observer would apprehend that there may be bias (objective bias). It is with the latter strand that we are concerned here. The concept of objective bias was succinctly explained by Lord Denning M.R. in *Metropolitan Properties Co. (FGC) Ltd v Lannon* [1969] Q.B. 577 at 599, in a passage cited with approval by Denham J. in *Dublin Wellwoman Centre v Ireland* [1995] 1 I.L.R.M. 408:

> *"In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand …. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough …. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'."*

28. The circumstances which may give rise to objective bias are not closed. It is generally recognised that certain relationships, family, social or business, may raise an apprehension of bias but the precise nature of the relationship and its connection with the case under consideration must be examined. It is not the mere fact of the relationship itself that will raise a valid objection of objective bias, a point which was rightly conceded by counsel for the applicant in this case. In this regard, the judgment of Mr. Justice Flood in *O'Reilly v Cassidy* [1995] I.L.R.M. 311 at 321 is instructive, where the learned judge stated:-

> *"Counsel for the applicant in this Court has anchored his case to the proposition that the mere fact of the judge's daughter being briefed before him is sufficient to give rise to the possibility of a reasonable man considering that bias could follow. Stated in that bold and rigid fashion, I would reject his submission. To accept it would, in my opinion, be to derogate the oath made and subscribed to by every judge on appointment pursuant to Article 34.5.1 of the Constitution to a totally empty formula. In my opinion, there must exist in addition to a mere relationship, some element or factor which could (not would) give rise to a fear in the mind of a reasonable man that in the circumstances the relationship between counsel and judge could affect the outcome of the case…*
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> *…the Court must look at all of the circumstances of the proceedings in question. In my opinion, in the circumstances prevailing in the court on 21 March, the complaint by the applicant's counsel as to the relationship between counsel and the judge got so inextricably entangled with other factors that there was a real possibility that the end product could give rise to a fear in a reasonable person that the outcome of the proceedings could be affected, in an indeterminate way, by (inter alia) the relationship between the judge and counsel. In the last analysis the overriding principle is that justice must be manifestly seen to be done."*

29. In *Locabail (UK) Ltd. v Bayfield Properties Ltd.* [2000] Q.B. 451, the English Court of Appeal commented on the factors which may give rise to bias although the court emphasised that "*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*." Lord Bingham C.J., delivering the judgment of the court, stated as follows:-

> *"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 extracurricular utterances (whether in textbooks, 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. By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of the individual could be significant in the decision of the case; or if in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; or if, for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him."*

30. Though the test of objective bias is expressed differently in the English jurisprudence, requiring real danger of bias, I agree with the conclusions of the learned judge quoted above. The first set of characteristics identified as highly unlikely to raise objective bias correspond in large part with the classic grounds of anti-discrimination legislation. A judge's objectivity could not normally be impugned on the basis of innate characteristics such as gender and age. Counsel for the respondent placed considerable weight on the statement in *Locabail* that employment history or background could not normally be a sound basis for an objection of objective bias. This statement is correct but should not be taken out of context. It is true that the employment background or history of the adjudicator cannot of itself normally raise a suspicion of objective bias, but there may be additional factors (such as those set out in the latter part of the passage above) which arise from an employment relationship and which might validly ground a reasonable apprehension of bias.

31. This requirement of an additional element or factor in respect of the impugned relationship is supported by the decision of the Supreme Court in *Bula Ltd. v Tara Mines (No. 6)* [2000] I.R. 412. There, objective bias was alleged in proceedings before the Supreme Court where two of the three justices had acted as legal advisers to some of the

respondents many years before, though not in relation to the issues arising in the proceedings. Denham J. rejected the principle that a judge should be disqualified from hearing a case simply because he had acted for a party previously. Instead, the issue was whether the circumstances in which he had acted for the party would raise a reasonable apprehension of bias. She stated:-

> *"In Ireland the test is objective. The test is the view of the reasonable person who would have a reasonable knowledge of a barrister's work and so the link or links alleged need to be more than simply that the judge as barrister had acted for one of the parties in an action.*
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> *Indeed, it was quite rightly accepted by the applicants that the mere fact that a judge when a practising barrister acted for a party is not a bar to him or her acting as a judge in a subsequent case where that party is a party to the litigation. The test for the court is more than a prior relationship of legal adviser and client. In Re Polites; Ex parte Hoyts Corporation Pty. Ltd. [1991] 173 C.L.R. 78 at pp. 87 and 88 it was held that prior relationship of legal adviser and client does not generally disqualify the former adviser on becoming a member of a court from sitting in proceedings. The High Court of Australia, Brennan, Gaudron and McHugh JJ. held:-*
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> > 'A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter) from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. A fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate. If the erstwhile legal adviser were to sit in a proceeding in which the quality of his or her legal advice is in issue, there would be reasonable grounds for apprehending that he or she might not bring an impartial and unprejudiced mind to the resolution of the issue. Much depends on the nature of his or her relationship with the client, the ambit of the advice given and the issues falling for determination.'
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> *I am satisfied that this is a correct analysis of the situation and the approach to be taken in analysing the issue. The link must be cogent and rational. I agree with the analysis of Merkel J. in Aussie Airlines Pty. Ltd v. Australian Airlines Pty. Ltd. (1996) 135 A.L.R. 753 where he stated:-*
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> > 'In my view, as with the cases considering personal, family and financial interests, the decision in the cases dealing with professional association between adjudicator and litigant demonstrate that the courts do not take a hypothetical or unrealistic view of an association relied upon in a disqualification application. In particular they appear to accept that the reasonable bystander would expect that members of the judiciary will have had extensive professional associations with clients but that something more than the mere fact of association is required before concluding that the adjudicator might be influenced in his or her resolution of the particular case by reason of the association. Although the test is one of appearance it is an appearance that requires a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case. In the absence of such a link it is difficult to see how the test for disqualification as stated in Livesey can be satisfied.'
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> *If a judge has acted for or against a person previously as a legal adviser or advocate that alone is insufficient to disqualify him or her from acting as a judge in a case in which that person is a party, there must be an additional factor or factors. The circumstances must be considered to see if they establish a cogent and rational link so as to give rise to the reasonable apprehension test. The link must be relevant."*

32. This decision of the Supreme Court makes it clear that aside from the mere fact of the relationship, there must be an additional element to the association which has the potential to affect the adjudicator's impartiality in the case, having regard to the nature of the relationship and the issues to be determined in the case. While the bulk of the authorities are concerned with relationships between an adjudicator and a party appearing before him, the circumstances where objective bias may arise are not confined to this precise situation.

33. In this jurisdiction, the Supreme Court has held in *Kenny v Trinity College Dublin* [2008] 2 I.R. 40 that a relationship between adjudicator and witness may, in certain circumstances, give rise to objective bias. There, the plaintiff claimed objective bias where one of the judges hearing his application was a brother of an architect in a firm of architects which was responsible for the design and execution of the development which was the subject matter of the proceedings. That firm of architects was alleged to have participated in the concealment of material from the court. Two factors operated to distance the judge's brother from the facts of the case. Firstly, he had had no involvement with the development, being based in Limerick not Dublin. Secondly, the firm of architects were not parties but a member of the firm, operating out of Dublin and having charge of the project, was a witness in the proceedings. The Supreme Court did, however, uphold the claim of objective bias. Fennelly J. set out its reasons for doing so in the following passage:-

> *"An important aspect of this case is the substance and character of the allegations being made by the plaintiff in these proceedings. He alleges that the first defendant engaged in deliberate misleading of the High Court with the result that the court made an incorrect decision. The affidavits exchanged in the High Court show that the plaintiff alleges that the firm of architects were implicated in this action by the first defendant.*
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> *In his judgment in Orange Ltd. v Director of Telecoms (No. 2) [2000] 4 I.R. 159, Barron J. approved a lengthy passage from the judgment of the Court of Appeal in England (consisting of Lord Bingham C.J., Lord Woolf M.R. and Sir Richard Scott V.C.) in Locabail (UK) Ltd. v Bayfield Properties Ltd. [2000] 1 Q.B. 451, which contains the following relevant statement at p.480:-*
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> > '…a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case…'

I infer from that passage that the test of objective bias does not necessarily require that the relationship of which complaint is made is between the adjudicator and a party in the case. A witness will suffice. The question is whether a reasonable observer might have a reasonable apprehension that a judge, hearing such allegations being made against the firm of architects in which his brother was a member, although that brother was not in any way directly involved in the subject matter of the litigation, might find it difficult to maintain complete objectivity and impartiality. Could such an observer be concerned that the allegations were of a nature to cast doubt on the integrity of at least one member of the firm and that a judge should not adjudicate on such a dispute? Applying the most favourable interpretation of the facts from the plaintiff's point of view, and bearing in mind that the courts should be especially careful where considering one of its own judgments, I believe that the test of objective bias should be held, in all the circumstances, to be satisfied."

34. It is clear from this case that the threshold for objective bias can be met where the relationship concerned is between adjudicator and witness. However, I would infer from this judgment that the threshold is necessarily higher than where the impugned relationship is between adjudicator and party, at least where the witness does not have a stake in the outcome of the proceedings. In *Kenny*, the judge's brother may be said to have had a stake, albeit a limited one, in proceedings where the decision might have adverse implications for the good name and reputation of the firm of architects of which he was part. This is a factor which distinguishes that authority from the present case. One of the leading academic authorities in this field, De Smith on Judicial Review, (6th ed.) para. 1045-1050, states:- "*It is unlikely that proceedings could be successfully impugned (on the professional relationship ground) unless the community of interest between the judge and party…was directly related to the subject matter of the proceedings.*" I find De Smith's analysis most helpful and I take the view that this criterion applies with equal, if not greater, force where the relationship is between adjudicator and witness.

35. I turn now to the circumstances where objective bias may be said to arise. It is axiomatic that the test in Ireland is whether a reasonable person in the position of the plaintiff would reasonably apprehend bias on the part of the adjudicator. This test was succinctly stated by Denham J. in *Bula Ltd. v Tara Mines (No. 6)* [2000] 4 I.R. 412, at 441, in the following terms:-

"…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."

36. What then are the attributes of the reasonable person? In this regard, I return to the decision of the Court of Appeal in *Locabail (UK) Ltd. v Bayfield Properties Ltd.* [2000] Q.B. 451, at 477, where Lord Bingham C.J. stated:-

"Provided that the court, personifying the reasonable man, takes an approach which is based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well informed member of the public, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done."

37. Having reviewed the leading authorities in this jurisdiction and others on the question of objective bias, I would consider the following principles are applicable in determining the presence of objective bias:

(1) Objective bias is shown where a reasonable, well informed observer would reasonably apprehend that the plaintiff would not receive a fair and impartial hearing because of the risk of bias on the part of the judge.

(2) A relationship between the judge and a party, or a witness to the proceedings, or another member of public involved with a case, be it personal, social or professional, is not sufficient of itself to prove objective bias. It must be shown that the circumstances of that relationship and its connection with the proceedings are such that it has the capacity to influence the mind of the decision-maker.

(3) The impugned relationship between the judge and the party, witness or other relevant person, must normally display a community of interest between them which is directly related to the subject matter of the proceedings for objective bias to arise. This link must be cogent and rational.

(4) Where the impugned relationship concerns a witness or other person, not a party, who does not have a stake in the outcome in the proceedings, the threshold to establish objective bias will necessarily be higher.

38. Whilst being alert to the possibility of appearing objectively biased, judges (or members of a tribunal) should be slow to recuse themselves from cases which come before them in the ordinary operation of the list. As Denham J. stated in *Bula Ltd v Tara Mines Ltd (No. 6)* [2000] 4 I.R. 412, at 442:- "*If a judge considers that there may be a reasonable apprehension of bias, in accordance with convention, he or she would not sit. However, a judge has a duty to sit and determine cases.*"

The Court's Decision

39. I turn now to the application of the law as stated to the facts of the present case. It is clear that there is a relationship between the Chairperson of the Inquiry, Ms. Treanor, and the independent expert witness, Ms. Hanrahn. Both are employed at the same hospital. That of itself is not of course sufficient. I must determine if there is some element or factor in respect of that relationship, in the context of the Inquiry, which would give rise to a reasonable apprehension that the outcome of the Inquiry could be affected.

40. Evidence was put to the Court that the professional relationship between Ms. Treanor and Ms. Hanrahan is not particularly close. Ms. Treanor is not Ms. Hanrahan's line manager and they do not participate in regular committee meetings together. Moreover, Ms. Hanrahan is not a party to the proceedings but is an independent expert witness. She

does not have a stake in the outcome of the proceedings, nor does the hospital where she and Ms. Treanor are employed. She appears in her capacity as expert to present her personal view on the allegations of professional misconduct made against the Applicant. No community of interest is apparent between Ms. Treanor and Ms. Hanrahan in determining whether these allegations are proven.

41. A further relevant factor is that Ms. Hanrahan is one of a very small pool of experts in domiciliary midwifery. In a country such as Ireland, the likelihood of some degree of familiarity between expert witnesses and professional nurses sitting as members of an inquiry is very high, if not inevitable. I must also have regard to the fact that Ms. Treanor is an experienced member of the Fitness to Practise Committee, having been a member of An Bord Altranais since 2002. There is no cogent reason for believing that, because she worked in the same hospital as Ms. Hanrahan, she would necessarily prefer her evidence over the evidence of other expert witnesses whom Ms. O'Ceallaigh proposes to call. In this regard, I am guided by the decision of the House of Lords in *Gillies v Secretary of State for Work and Pensions* [2006] 1 All E.R. 731. There, the applicant had applied for a disability living allowance to a disability appeals tribunal. The medically qualified member of the three person tribunal was a doctor who had been providing reports to the benefits agency in disability allowance cases as an examining medical practitioner (EMP). The tribunal was required to consider medical evidence which included a report from an EMP. The House of Lords held that objective bias was not shown. Lord Hope stated, at 739, that:-

> *"The weakness of the argument that [bias] was a real possibility is exposed as soon as the task that [the decision-maker] was performing as an EMP is compared with the task which she was performing on the tribunal. In each of these two roles she was being called upon to exercise an independent professional judgment, drawing upon her medical knowledge and her experience. The fair-minded observer would understand that there is a crucial difference between approaching the issues which the tribunal had to decide with a predisposition in favour of the views of the EMP, and drawing upon her medical knowledge and experience when testing those views against the other evidence. He would appreciate, looking at the matter objectively, that her knowledge and experience could cut both ways as she would be just as well placed to spot weaknesses in those reports as to spot their strengths. He would have no reason to think, in the absence of any other facts indicating the contrary, that she would not apply her medical knowledge and experience in just the same impartial way when she was sitting as a tribunal member as she would when she was acting as an EMP."*

42. I consider the facts of the case to be broadly analogous to the present case and this reasoning can be similarly applied to Ms. Treanor. No evidence was been given which illustrates an additional element in her relationship with Ms. Hanrahan which could affect her impartiality as an adjudicator. Nothing untoward is shown by their prior professional relations in fitness to practise proceedings as outlined in *Kudelska v An Bord Altranais* (Unreported, High Court, 10th February 2009) and relied upon by counsel for the applicant. There is nothing to indicate that Ms. Treanor would be in any way predisposed to the evidence of Ms. Hanrahan. Furthermore, it is in the interests of a fair and proper inquiry that it should be chaired by a professional nurse with extensive knowledge of midwifery and that expert evidence should be tendered by another professional nurse with special expertise in domiciliary midwifery.

Conclusion

43. In the circumstances, I find that the applicant has failed to show any reasonable apprehension of objective bias by reason of the relationship between Ms. Treanor and Ms. Hanrahan. It is consequently unnecessary for me to determine any of the other issues canvassed at hearing. However, I would observe that Ms. Treanor was in my view correct to recuse herself from the decision of the Fitness to Practise Committee concerning the allegation of bias against her. This course of action was in accordance with fair procedures and natural justice.

44. For the reasons outlined above, I must refuse the relief sought by the Applicant.