Neutral Citation Number: [2009] IEHC 369

THE HIGH COURT

JUDICIAL REVIEW

2007 117 JR

BETWEEN

MICHAEL WALSH

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT delivered by Mr. Justice O'Keeffe on 9th day of June, 2009

1. On 12th February, 2007 the High Court gave the Applicant leave to apply by way of application for judicial review for, *inter alia*:-

> (i) A declaration that the process of reporting adopted and employed by the Respondent and the manner in which the Respondent published on 10th November, 2006, a report prepared by Professor Des O'Neill, following his investigation into the deaths of residents and former residents of Leas Cross Nursing Home, Swords, Co. Dublin ("Leas Cross") which did not consider or take account of written responses submitted by the Applicant to the Respondent on the basis of the Respondent's solicitors' letter of 6th July, 2006 breached the Applicant's right to natural and constitutional justice and/or
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> (ii) A declaration that the Respondent was in breach of the Applicant's right to natural and constitutional justice in having failed to publish the entire of the written response submitted by the Applicant to the Respondent for publication with the report and/or
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> (iii)An order of *certiorari* quashing the Respondent's report and addenda published on 10th November, 2006 to the extent of quashing the criticisms and references to the Applicant contained in the publish report on the grounds that the inclusion of the criticisms and references in the published report to the Applicant failed to take into account the written response submitted by the Applicant to the Respondent and therefore breached the Applicant's right to natural and constitutional justice and/or
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> (iv)An order quashing the Respondent's publication of the report by reason of the Respondent having failed to publish the entire of the written responses submitted by the Applicant for publication with the report and/or
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> (v) An order of mandamus to withdraw the Respondent as published by the Respondent on 10th November for the purposes of having the Respondent redact all criticisms of and references in the report (whether directly or indirectly) to the Applicant.

2. This application arises from a report prepared by Professor Desmond O'Neill, Consultant Geriatrician, Trinity College and the Meath Adelaide Hospitals. He was commissioned by the Respondent in July/August 2005 to carry out an investigation into the deaths of residents and former residents of Leas Cross who died between 2002 and 2005.

3. At the time the Applicant was the Chief Officer of the Health Service Executive, Northern Area. On the establishment of the Northern Area Health Board (NAHB), now known as the Respondent in March 2000, he was appointed Assistant Chief Execution Officer Operations for all service areas in the functional area of the NAHB. In November 2003 he was appointed Deputy Chief Executive and in January 2005 was appointed Chief Officer of the NAHB and held that position until July 2005 when the Respondent in its present constitution took over responsibility for all service areas previously under the remit of the NAHB.

4. In his capacity as Chief Officer, the Applicant claimed he engaged Professor O'Neill to carry out an investigation into matters concerning Leas Cross. In particular, he agreed with Professor O'Neill that for the purpose of addressing the investigation of the deaths of residents and former residents of Leas Cross that he (Professor O'Neill) would examine the medical, prescribing and nursing notes at Leas Cross. Professor O'Neill's terms for reference also included an examination of:-

> *"The hospital records, post mortem summaries, death certificates, notification to the coroner and inquest, correspondence with (various specified bodies) and the Department of Health and Children regarding concerns over Leas Cross Nursing Home Inspection reports and other relevant documents and to:-*
>
> *(a) relate those to national and international data and guidelines on morbidly and mortality in institutional care for older people; and*
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> *(b) to make recommendations as appropriate to the HSE and Department of Health and Children arising from these*

findings."

5. The Applicant retired in October 2005. In his retirement he informed Professor O'Neill that he would make himself available if required to provide information on issues of relevance through his investigation. In February 2006, he was requested by the Respondent to provide observations as a consultant engaged on behalf of the Respondent in relation to the matters the subject of the investigation report and these were submitted in April 2006.

6. On 6th July, 2006, the Respondent by its solicitors sent to the Applicant a draft final report which had been furnished by Professor O'Neill to the Respondent. As the report may have referred directly or indirectly to the Applicant it requested him to make any responses or observations that he may wish, before any conclusions were reached or before taking any further action regarding the report or its recommendations. Such comments were required before 26th July, 2006.

7. The Applicant stated that from reading the extracts of the final draft report furnished to him, it was clear to him that Professor O'Neill had moved beyond the terms of reference and that he had highlighted what he termed "*system failures*" at Health Board level. He said that the final draft went beyond the original brief. He was also concerned that the manner in which the report dealt with and reached conclusions concerning the quality and efficiency of management and structures within the Respondent's remit. He complained about the casual nature of the process which had been employed in the preparation of the final draft report and stated there was no contact made with him by Professor O'Neill. He said that he was in no doubt that the process which facilitated such a report being presented for publication was seriously flawed and that it failed to respect the rights of those parties interested in and affected by the matters and conclusions contained in the report and there was a failure to protect his rights to natural and constitutional justice.

8. By letter dated 25th August, 2006, the Applicant furnished the Respondent with his response. This is a very detailed document of some 32 pages. It includes an executive summary which is a detailed response to separate findings contained in the report and addressing in specific detail more than 15 matters raised by the report by referring to the particular issue and giving the Applicant's response.

9. The Applicant contended the matters included in the submission of 25th August, 2006 demonstrated that the Respondent in its preparation and finalisation of Professor O'Neill's report failed to have due regard to the principles of natural and constitutional justice in its dealings with the Applicant.

10. On 22nd September, 2006 the Applicant (through his solicitors) wrote to the Respondent requesting that Professor O'Neill's review should not be published without fully reflecting the very detailed submissions made by the Applicant.

11. On 25th September, 2006 a similar letter was written by the Applicant's solicitors requiring an undertaking from the Respondent that it would not publish the report without having regard to the submissions and comments made by the Applicant prior to finalising the report. Unless the undertaking was forthcoming within 24 hours, the letter stated the Applicant would have no alternative but to take whatever action that may be necessary to protect his interests.

12. A similar letter was written on 28th September, 2006 seeking an undertaking not to publish the report on Leas Cross in its then formula without taking into consideration the Applicant's submissions and comments.

13. Further letters were sent on 3rd October and 12th October.

14. On 13th October, 2006 the Respondent wrote to the Applicant stating that Professor O'Neill had indicated that he would not revisit his report but should the Respondent choose to collect and collate post-hoc written submissions and append these as appendices to his unaltered and unedited review as a HSE Report that he would have no objection to this. The letter stated that the Respondent had decided to publish the report with the submissions of all parties appended in full. It was intended to make the complete report public on Friday, 27th October and the letter requested by return any additional points that the Applicant may wish to have included.

15. On 20th October the Respondent wrote a further letter to the Applicant enclosing a copy of the response previously sent by the Applicant to Professor O'Neill. It stated that Professor O'Neill did not refer to named individuals in his report but to employment titles and that with a view to preserving the Applicant's anonymity the response had been redacted to remove the Applicant's name and address. It was stated that if he had included a paragraph containing personal information etc. this had not been removed but that he should be aware that this may lead to his (the Applicants) identification. In addition, the names of any individuals referred to by the Applicant, either in his substantive response or in any appendices had been removed for the purpose of preserving the anonymity of such individuals. Any commentary that he might make in relation to the alleged conduct of identifiable third parties had also been removed. The reason for this was because those individuals had not any sight of the response of the Applicant nor had they an opportunity to address the complaints made by the Applicant which relates specifically to them. If the Applicant wished to make any assertions relating to third parties then he was asked to submit an amended response and insure that the third party is not identifiable. If the Applicant did not wish to submit a further or amended response, the Applicant was requested to confirm that the amended enclosed document is the response that he, the Applicant wished to be appended to the report for the purpose of publication. A reply was sought by the 25th November, 2006.

16. On 25th October the Applicant wrote to the Respondent in response to the letter of 20th October enclosing a further response with a number of important issues which he claimed were highly significant. He said he expected his additional response to be included in the front of his earlier submissions. He also enclosed a draft letter prepared for an Assistant National Director of the Respondent to sign. There was a short letter written by the Applicant to the Respondent on 27th October, 2006.

17. By letter dated 27th October the Respondent informed the Applicant that the publication was not to proceed as indicated on 27th October, 2006 but it was intended to publish the report on 10th November, 2006.

18. On 7th November, 2006 the Applicant through his solicitors wrote to the Respondent's solicitors stating that if the Respondent had any concerns in relation to the publication of any aspect of Mr. Walsh's of the Applicant's submissions contact should be made to the Applicant or his advisers. It also confirmed the documents which the Applicant regarded as his submissions.

19. On the afternoon of 10th November, 2006, the report was published by the Respondent. It was immediately followed by a letter of the same date written on behalf of the Applicant to the Respondent's solicitors. It complained that the full submission prepared by the Applicant was omitted from the review and that it did not include the additional submission made on 25th October or reflect the correspondence of 27th October. It claimed that a unilateral decision was made to exclude the Applicant's detailed submissions from the review which consequently misrepresented the Applicant's views and response. The letter stated that the Applicant was available for discussion and despite his solicitors leaving messages, no contact was made to indicate that the Respondent intended to publish a response that was not complete. It stated that the process had been mismanaged by the Respondent from the outset and that this had placed the Applicant in an invidious position which was avoidable had the Respondent taken the necessary steps to put a proper balanced and appropriate procedure in place. It required a response from the Respondent. There was a further letter of the 15th November sent to the Respondent.

20. On 2nd February, 2007, the Respondent's solicitors replied to the letter of 10th November. It claimed that the response dated 25th October, 2006 furnished by the Applicant was not provided in accordance with the instructions contained in the letter of 20th October, 2006 and set out five reasons. It included the Applicant disclosing legal advise which was privileged given to him in his capacity as CEO, (which could have potential to prejudice the Respondent in future court cases seeking to remove a Nursing Home from the register), an inaccurate reference to legal advice, the attachment of highly confidential documents of the Respondent and letters to the second response, some of which went into considerable detail in relation to the care provided to specific (and possibly identifiable) patients. Furthermore the appendices to the response were not redacted in compliance with the instructions given in the letter of 20th October, 2006. It stated that Ms. Kinsella, Solicitor (on behalf of the Respondent) contacted Mr. Paul Goff, Solicitor (in the Applicant's solicitor's office) on 8th November to advise him that the information contained in the Applicant's second response (25th October, 2006) was not provided in accordance with the instructions given to him by the Respondent and concerns were raised about the matters raised above in this paragraph (which were not in accordance with the instructions of 20th October, 2006). The letter stated that Mr. Goff rang on 9th November, 2006 advising the Respondent that the Applicant wished the second (and unamended) response to form part of his original response. By the time such communication was received, the publishing process had begun, but in any event, the Respondent would not have been able to publish the second unamended response because of the reasons outlined above. The letter claimed that the due process undertaken by the Respondent was done in an effort to be as fair as possible to all of the person who may have been identifiable in the report. It said that the Applicant was requested to comply with certain instructions given to him by the Respondent in order to enable the Respondent to effect publication. In the event that any of the responses did not comply with those instructions the Respondent was not in a position to be able to publish either (the) whole or part of such response and the Applicant had been made aware of this.

21. A detailed letter was sent by the Applicant's solicitors on 5th February, 2007 outlining the various communications and history leading up to the publication of the report. It stated that because of the serious and public interest nature of the matters, the subject matter of the report, the Applicant notwithstanding his serious reservations about the process and method of publication adopted by the Respondent decided not to challenge the manner in which the report was finalised and published. However, in the period since the publication of the report the Respondent had entirely ignored and failed to correct the very serious injustice caused to the Applicant in publishing the report without ensuring that the full written submissions made by the Applicant were published with the report. The letter, *inter alia*, claimed that because of the serious deficiencies in the process of finalising the report and in the method of publication of the report which resulted in the Applicant's full written submissions not being properly considered, included and published by the Respondent that the Respondent had failed to afford the Applicant basic protection of natural and constitutional justice and in so acting the Respondent has failed to properly vindicate and respect the Applicant's constitutional rights. The Applicant sought undertakings (i) to withdraw the report and the Applicant's submissions from the public domain and redact all criticisms of and references in the report to the Applicant, (ii) to republish the report in its redacted form in accordance with the letter of 7th November, 2006 and (iii) to republish the report of 10th November, 2006 with an acknowledgement it was in breach of the Applicant's rights to natural and constitutional justice together with a formal apology that the Respondent regretted the injury and damage which the manner and method of publication of the report caused to the Applicant's good name and reputation.

Pre-Publication Communications

22. Mr. Paul Goff, a solicitor in the firm of Eugene F. Collins, solicitors to the Applicant, swore an affidavit setting out his recollection of discussion which he had with Ms. Marie Kinsella, solicitor of BCM Hanby Wallace, solicitors for the Respondent. On the 8th November, 2006, he took a phone call from Ms. Kinsella in the absence of Ms. Maura Connolly, solicitor who had been dealing with the matter. He said that when telephoned by Ms. Kinsella on the 8th November, 2006, she stated to him that she was anxious to establish whether or not the Applicant intended to include documents numbered as 1A and 1B in his submission to the Respondent. He said Ms. Kinsella outlined her concerns that they contained confidential legal advice and that the Respondent would find it difficult to publish the report. He subsequently communicated with the Applicant who confirmed to him that his intention was that such documents should be included as part of his submission. He said that he then telephoned Ms. Kinsella at approximately 6.00pm on the 8th November, and confirmed to Ms. Kinsella that the Applicant intended that the documents in question (being the documents numbered as 1A and 1B) should form part of his submission to the Respondent. He said that Ms. Kinsella said that the Applicant would be contacted by Mr. Browne of the Respondent. He said that whilst the Respondent's solicitors had identified certain difficulties which they perceived in this course of action, in that certain information contained in the Applicants submission was considered by them to be confidential and/or privileged, he was not aware of the manner in which the Respondent intended to deal with this issue in the final report. He was not aware that the Respondent intended not to publish the Applicant's submissions in full. He said that he has no recollection of having received any further contact from Ms. Kinsella apart from the publication of the report on the 10th November. He said that he left messages for Ms. Kinsella on the 9th November, 2006, and the 10th November, 2006, and asked her to return his call. As far as he was aware she did not return the calls. He said that had he received a response from Ms. Kinsella or had the Respondent reverted to the Applicant through Mr. Aidan Browne, he would have been in a position to take instructions from the Applicant as to the Respondent's position on the Applicant's submissions of the 25th October.

23. In her affidavit Ms. Kinsella, solicitor in the Respondent's legal advisers BCM Hanby Wallace, referred to the submission sent by the Applicant dated the 25th October, 2006, which was sent to the Respondent. She received a letter from the Applicant's solicitors dated the 7th November, 2006. She said that when she considered the Applicant's response of the 25th October, 2006, it was clear that the purported submission was at odds with the facility afforded to him by the letter of the 20th October, 2006. Firstly, she said the Applicant had printed his name on the document which was inconsistent with the fact that his name had been removed from his initial submission. The Applicant also disclosed confidential legal

advice given to him during the course of his employment with the Respondent. Crucially she said the Applicant's purported submission of the 25th October, 2006, disclosed information likely to lead to the identities of a deceased resident of Leas Cross and/or members of the deceased's family. The appendixes included a draft letter prepared by the Applicant on behalf of another member of staff of the Respondent without the person's permission. This letter included potentially defamatory material in relation to a third party and disclosed the identities of third parties. Appended to the draft letter were numerous letters obtained by the Applicant during the course of his employment with the Respondent for which permission had not been given for publication, and which also disclosed the identities of third parties. She stated that she phoned Mr. Goff having received the Applicant's solicitor's letter dated the 7th November, 2006. She said that she told Mr. Goff that it was unclear whether the purported submission of the 25th October, 2006, was intended to be a submission and she outlined the difficulties which she had observed which are stated above. She accepted that Mr. Goff did not concede the issues raised by her. She noted Mr. Goff stated that he obtained instructions from the Applicant and then contacted her at 6.00pm on the evening of the 8th November, 2006, for the purpose of telling her that the Applicant required his submission of the 25th October, 2006, to be appended in any published report. She said she left her office at 16.55 on the 8th November, 2006 and her recollection was that she received a voicemail message from Mr. Goff on the morning of the 9th November, 2006, in which he communicated that the Applicant intended his submission of the 25th October, to be appended to the published report. She did not contact Mr. Goff again as she had made her position quite clear in relation to the publication of the submission in their telephone call of the 8th November, 2006.

24. A further replying affidavit was sworn by Mr. Goff in which he exhibited some contemporaneous handwritten notes of the conversation with Ms. Kinsella of the 8th November, 2006. He agreed that Ms. Kinsella explained that there were perceived difficulties with the content of the Applicant's submission, but he did not recall her stating that the submission would not be published. He claims that he spoke to Ms. Kinsella at 6.55pm on a mobile phone stating that his client wished his entire submission to be included in the published document. He said it was during this conversation that he was informed that Mr. Aidan Browne (of the Respondent) would be in contact with the Applicant. (Ms. Kinsella in her earlier affidavit said she had no memory of telling Mr. Goff that she would ask Mr. Browne to contact the Applicant and she had no instructions that such contact would occur).

25. In the light of the discrepancies in the recollection of Ms. Kinsella and Mr. Goff, each of the solicitors was cross-examined on their respective affidavits.

26. In cross-examination Mr. Goff said he was not familiar with the documents referred to as 1A and 1B and he had not read them. His recollection was that Ms. Kinsella's concern was that the documents comprised legal privilege (of the Respondent). There was more than one concern raised by her but he could not recall same. He was aware the publication of the report was due to take place on the 10th November. He accepted that when he attempted to contact Ms. Kinsella on the evening of the 8th November, he did not speak to her but left a message on her voicemail. He confirmed that he left a message on the voicemail that it was Mr. Walsh's position that he intended all the documents (submitted on the 25th October) to be included in the Applicant's submission that was to be published. His recollection was that Ms. Kinsella did not tell him during the conversation on the 8th November, that the documents as submitted by the Applicant on the 25th October would not be published.

27. Ms. Kinsella stated that the Applicant's letter of the 25th October was sent to her by email by the Respondent on the 26th October. She said that she rang Ms. Connolly on the 7th November, to seek confirmation of whether all the documents submitted on the 25th October, together with appendixes were submitted for the purpose of publication. At that stage she had received the letter of the 7th November and reviewed all the documents with two colleagues. She said that persons who made a submission in response to the letter of the 20th October were expected to comply with those instructions. She accepted that the letter of the 20th October, did not mention privileged legal advice should not be contained in the documents submitted but as the Applicant was being advised legally she assumed he would be advised in relation to this matter. The instructions required the misconduct of identifiable third parties to be removed. The draft letter submitted by the Applicant for Mr. O'Brien to sign contained a reference to the misconduct of a third party and that was not removed. She said in relation to the appendixes attached to the submission of the 25th October, such documents were owned by the Respondent and it was for the Respondent to refuse to grant permission for their publication which the Respondent did. She confirmed that she specifically told Mr. Goff on the 8th November that the Applicant's submissions in the form submitted would not be published by the Respondent. She said she told Mr. Goff that the submission of the 25th October did not comply with the instructions given in the letter of the 20th October. She said she went through her objections to the documents submitted by the Applicant. She said that the documents contained privileged legal advices of the Respondent, the appendices included a draft letter which had not been approved by the person who was to be the author of the letter, the documents contained potentially defamatory material and that the documents included confidential documents owned by the Respondent that identified third parties and identified patients. She stated that if these documents were being submitted for publication that they would not be published.

28. She subsequently received the message on the 9th November from Mr. Goff that the entirety of the document was to be published as instructed by the Applicant. She had already conveyed to Mr. Goff (on the 8th November) that if all the documents were being tendered for publication, such documents would not and could not be published. The publishing process commenced on the 9th November. She conveyed to the Respondent the Applicant's position in relation to what he wished to have published. She said that it would have been possible for minor redactions to have been incorporated prior to publication, but not substantial ones. In relation to the draft letter to be signed by another party, her objections to its publication was that the author had not approved the contents of the letter, it also identified third parties, referred to patients and their relatives and also, contained potentially defamatory material in relation to a doctor in Beaumont Hospital.

Applicant's Submissions

29. Mr. Mark Sanfey S.C. on behalf of the Applicant submitted that the Respondent had adopted procedures and pursued a method of publication of Professor O'Neill's report which was contrary to and in breach of the Applicant's right to natural and constitutional justice. He submitted that the Respondent failed to ensure that before the conclusions or recommendations were finalised and made in Professors O'Neill's report it would have due regard to and take account of the responses and submissions of the Applicant. He relied on *McCormack v. An Garda Síochána Complaints Board* [1997] 2 I.R. 489 at p. 499 which held it was established that the constitutional presumption that a statute enacted by the Oireachtas intended that proceedings, procedures, discretions and adjudications permitted, provided for or prescribed at Acts of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. He submitted that whilst the present report was not conducted under statute the same structures apply to the instant report. He referred to *Duffy v. Commissioner of An Garda Síochána* (Unreported, High Court, 10th July, 1998).

30. He also referred to *Tierney v. An Post* (Unreported, High Court, McCracken J., 7th July, 1998). In that case McCracken J. at p. 17 adopted with approval the general principles set out by Barron J., in *Flanagan v. University College Dublin* [1989] I.L.R.M. 469 at p. 475, where he said:-

> *"Once a lay tribunal is required to act judicially the procedures to be adopted by it must be reasonable having regard to this requirement and to the consequences of the person concerned in the event of an adverse decision. Accordingly, procedures which might afford a sufficient protection to the person concerned in one case, and so acceptable might not be acceptable in a more serious case. In the present, the principles of natural justice involved relate to the requirement that the person involved should be made aware of the complaint against them and should have an opportunity both to prepare and to present their defence. Matters to be considered are the form in which the complaint should be made, the time to be allowed to the person concerned to prepare a defence, and the nature of the hearing at which that defence may be presented."*

McCracken J. at p. 18 stated in commenting on *Tierney*:-

> *"It is quite clear from this passage and indeed from other authorities that there is no fixed standard of natural justice which lays down that specific matters must be complied with. The protection to be afforded to a person whose conduct is being investigated will vary according to the circumstances."*

31. He submitted the fact that Professor O'Neill refused to alter his draft report to take account of and have regard to the written responses and observations of interested parties did not entitle the Respondent to depart from and ignore the other requirements of natural and constitutional justice.

32. He submitted that the Respondent accepted the position adopted by Professor O'Neill, instead of ensuring compliance with the Applicant's entitlements to natural and constitutional justice and that the Respondent's conduct of the process was such as to entitle the Applicant to declaratory orders and orders of certiorari and mandamus as sought by the Applicant.

33. Reference was made to the case of *Kirrane v. The Finlay Tribunal (Irish Times, 3rd March, 1998)* where there was an account of an agreed court order being made in relation to the Finlay report on hepatitis C blood. The consent order was made in that case quashing part of the report of the tribunal which concluded that the Applicant bore some responsibility for failing to act in a certain way. He submitted that the failure by the Respondent to publish the Applicants' written responses of the 25th October, 2006, was a departure by the Respondent from compliance with the principles of natural and constitutional justice in refusing or failing to ensure that Professor O'Neill's report, in its conclusions and recommendations and prior to its publication, had due and proper regard to the written submissions furnished by the Applicant. It was absolutely incumbent upon the Respondent in the interests of basic fairness to ensure that Professor O'Neill's report would not be published without the inclusion of the Applicant's written response as an appendix to the report. Alternatively, if the Respondent had difficulties with the Applicant's written response, it was submitted that the interest of basic fairness requires the Respondent to delay the publication of Professor O'Neill's report until such time as agreement was reached as to the final version of the Applicant's written response for publication as an appendix to the report, when published.

34. The Applicant submitted that the question as to the appropriateness of the relief of *certiorari* should be viewed at the date in which the proceedings were commenced – 8th February, 2007 (notwithstanding the fact the report had been published on the 10th November, 2006, and was accessible on the website to the extent a person had a PC).

35. He relied on the decision *Khan v. Health Service Executive* (Unreported, High Court, McMahon J., 11th July, 2008) at p. 16 where he stated:-

> *"What does fair procedures mean? At the very minimum it means that the person at whom a charge is levelled has proper notice of the charge, that he has proper opportunity to take legal advice and to prepare for hearing, that no one is to be a judge in their own cause…"*

36. He submitted that the first time there was a denial of the principles of natural justice was on the 13th October, 2006, when the Applicant was informed that the Rules of *audi alteram partem* would not be expected of Professor O'Neill. He submitted that what was offered by the Respondent was a makeshift solution. He submitted that having been told of the concerns of the Respondent in relation to the publication of the Applicant's submission, that the Applicant was not given an opportunity to address them on the 8th November, and the publication process commenced the following day.

37. He complained of the delay between the 25th October and the 8th November when the Applicant was informed that there were concerns about his submission. He said that it was the time limit adopted by the Respondent for publication that denied the Applicant his opportunity to have his submissions appended to the report.

38. In relation to the period of delay by the Applicant in commencing this application, it was submitted that in the circumstances in which the Respondent proceeded to publish the report of Professor O'Neill on the 10th November, 2006, without advance notice to the Applicant and in circumstances where the Applicant subsequent to the publication of the report wrote to the Respondent's solicitors outlining the Applicant's concerns about what had occurred, and the Respondent's solicitors not having replied to the Applicant's solicitor letter until the 2nd February, 2007, there was no objective basis for the Respondent's contending that the Applicant was guilty of delay in moving to apply for leave to commence judicial review proceedings on the 12th February, 2007.

Respondent's Submissions

39. Mr. Peter Finlay, S.C. on behalf of the Respondent maintained that the Applicant was not entitled to bring this application because he has failed to bring it within the timeframe provided for in O. 84, r. 21 of the Rules of the Superior Courts. In particular, the Respondent relied on the failure to bring the application promptly. He relied on the decision of *De Roiste v. The Minster for Defence and Others* [2001] 1 I.R. 190. He further relied on the decision in *the State (at the prosecution of Gerald H. Cussen) v. Joseph Brennan* [1981] I.R. 181. This case considered the failure of an Applicant to act "promptly".

40. It was also claimed that because of his delay in instigating this application that the Applicant acquiesced in the matters complained of and he permitted the Respondent to believe as it did, that the Applicant did not intend to make the claim.

41. The Respondent denied this was a report commissioned by the Applicant who gave the terms of reference. It was not a commission of inquiry set up on a statutory basis that was being conducted by Professor O'Neill. The Applicant was one of seventeen persons who were written to and invited to make responses to the relevant parts of Professor Walsh's report.

42. Counsel submitted that the only legal principle at issue is whether the requirements of justice had been satisfied by taking into consideration the material sent by the Applicant on the 25th October. He submitted that the principle of law relevant to the Respondent was that it had an obligation to receive the material, to consider it and form a view. After that once it communicated that view, there was no further obligation on it. The Respondent is not obliged at the insistence of the Applicant to carry on an open ended dialogue up to the date of publication. The Applicant must have been in no doubt as to the difficulties he was causing the Respondent if it was to publish the matters requested by the Applicant (the facts of which I have referred to earlier in this judgement, as being identified by Ms. Kinsella in her affidavit of 20th July (paragraph 5) and in her evidence to the court). He submitted that this was not a report into the Applicant nor did it level charges at him.

43. He contrasted this case to the *Kirrane* case arising out of the Finlay inquiry. In the *Kirrane* case a particular passage was excised from the report, whereas in the present case an order of *mandamus* was being sought to compel the Respondent some considerable time later to insert additional material into a report.

44. He referred to the decision in *the State (Williams) v. The Army Pensions Board and the Minister for Defence* [1983] I.L.R.M. 331, and *De Roiste v. The Judge Advocate General & Ors* [2005] I.E.H.C. 273. He relied on those cases as illustrations of conventional standards applicable to fair procedures and natural justice. Factually, he submitted these cases were very different from the present case.

45. He submitted that there was no legal obligation on the Respondent to publish material at the insistence of a particular party where the Respondent had serious difficulties in doing so. It was also compromising the rights of other persons. The Applicant's rights cannot be placed above the rights of others and to the extent that the law required them to be accommodated, he submitted that the rights of the Applicant were accommodated. He submitted that if the Applicant had difficulties with the publication of the report, he, the Applicant could have published his own material and appendixes on the internet provided he accepted the legal consequences of so doing.

46. He submitted that having regard to the decision in *Grey v. Byrne* the court was entitled in its discretion to refuse an order of *certiorari* in a case where it was clear that the Applicant can derive no benefit from it. In the present case the Applicant would derive no benefit he submitted from such an order.

Decision

47. The first matter I have to consider is whether or not this application for judicial review was commenced promptly within the meaning of O. 84, r. 21 of the Rules of the Superior Courts. Order 84, rule 21(1) provides as follows:-

> *"An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds when the application first arose, or six months where the relief sought is certiorari, unless the court considers that there is good reason for extending the period within which the application shall be made."*

48. In my opinion the event the subject matter of this application which triggers off time limits for the purposes of the Rules was the publication of the report on the 10th November, 2007.

49. In his letter of 10th November, 2006 the Applicant complained that by the publishing of an incomplete and incorrect response that the Respondent had misrepresented his position and compounded his reservations about the process adopted. It was not until 5th February, 2007 that a further letter was sent on behalf of the Applicant to the Respondent (with the exception of a letter of 15th November, 2006). This is to be contrasted with the many letters that were written on behalf of the Applicant in the period of September – October 2006 prior to publication. This letter of 5th February also dealt with a reply to the Respondent's solicitor's letter of 2nd February, 2007 which was in response to the letter of 10th November, 2006 and a letter of 15th November, 2006 sent to the Respondent.

50. The Applicant's letter claimed that because of the serious deficiencies in the process of finalising the report and in the method of publication of the report, which resulted in the Applicant's full written submissions not been properly considered, included and published by the Respondent that the Respondent had failed to afford the Applicant the basic protection of natural and constitutional justice and had failed to properly vindicate and respect the Applicant's constitutional rights. Three undertakings were sought from the Respondent in relation to the withdrawal of the report from the public domain, the redaction of all criticisms and references in the report to the Applicant, the republication of the report with the Applicant's full and complete written submissions as identified in paras. 2 and 3 of his letter of 7th November, 2006 and an acknowledgment to be published that the process adopted and method of publication of the report were in breach of the Applicant's right to natural and constitutional justice together with a formal apology. I have also regard to what was stated in this letter, namely that because of the serious and public interest nature of the matters the subject of the report, the Applicant notwithstanding his serious reservations about the process and method of publication adopted by the Respondent decided not to challenge the manner in which the report was finalised and published. I do not know on what date or for what reason he changed his mind. No development of any materiality is recorded as having occurred following publication.

51. It is significant that these undertakings were sought for the first time almost three months after the publication of the report on 10th November, 2007. The Applicant gives no explanation as to the time lapse other than that he was expecting a reply to the letter of 10th November. It must have been evident to the Applicant and his advisors within a couple of weeks of sending the letter of 10th November that no reply was forthcoming. Indeed no reply was sought in the meantime by the Applicant.

52. Having regard to the nature of the undertakings that were sought in the letter of 5th February and the fact that this concerned the publication of a document that was readily available and considering the extensive nature of the relief that was being sought by the Applicant, the Applicant did not act promptly in applying for leave for judicial review. Whilst it is true that the rule provides for a period of three months or six months were the relief sought is *certiorari*, the overriding requirement is to make the application promptly. This in my opinion is the type of case which should be initiated promptly.

53. I therefore hold that the application was not made promptly. Furthermore, no good reason for extending the period in which the application could be made has been advanced. It is not sufficient to say that a response was expected to the letter of 10th November.

54. In case I am incorrect in this conclusion I will proceed to the judgment in relation to the merits of the application.

55. The first matter I should resolve is the conflict between the account of Mr. Goff and Ms. Kinsella in relation to the events of 8th – 9th November. I have already set out in considerable detail what was stated by each of them on affidavit and a summary of the evidence given by them. I accept the version of events as stated by Ms. Kinsella in her affidavit and in her evidence to the court. In particular I accept that she identified each of the matters (outlined above) which she says caused difficulties for the Respondent to accept in relation to the submission of 25th October from the Applicant. These matters became apparent from her review of the documents submitted by the Applicant which she carried out on 7th November. I am also satisfied that she so informed Mr. Goff in relation to each of these matters and that she explained how this information was not in accordance with the direction that had been given. I am also satisfied that she said to Mr. Goff that if the Applicant did not accept this that the Respondent would not publish the Applicant's submission in the form, it had been submitted. Mr. Goff communicated this information in a phone call to the Applicant whose response was an insistence of the matters set out in the submission being published in accordance with his letter of 7th November. His response was communicated by voicemail by Mr. Goff and the message was received by Ms. Kinsella on 9th November. Having regard to her earlier discussion with Mr. Goff in which she had set out the Respondent's position she concluded that there was no further point in reverting to Mr. Goff as his clients response had been communicated to her.

56. Mr. Goff gave his evidence as best he could. Whilst he had some earlier involvement in relation to the matter at an earlier date, he was not familiar with the most recent developments as he was dealing with the matter in the absence of Ms. Kinsella. I am not satisfied that his recollection was that Ms. Kinsella told him that the Applicant would be contacted by Mr. Brown is correct. This was challenged by Ms. Kinsella.

57. Separate to the above conclusions, it is clear that from 6th July, 2006 until 13th October, 2006 that the Applicant was engaging with Professor O'Neill in relation to the finalisation of his report. The events set out in the letter of 13th October, 2006 which indicated that Professor O'Neill was not going to revisit his report (having received submissions from different parties including the Applicant) were outside the control of the Respondent. It requested any additional points that the Applicant may wish to have included in the report to be submitted. The manner in which the Respondent decided to deal with the publication of the report by the inclusion of submissions from all parties as set out in the letter of 13th October, 2006 did not constitute a denial to the Applicant of his rights to constitutional and natural justice. Furthermore, the Applicant accepted this procedure and participated in this process.

58. Furthermore, the directions which were given by the Respondent in the letter of 20th October, 2006 and the manner in which the earlier submission of the Applicant and others had been dealt with were in my opinion, consistent with fair procedures being adopted whilst respecting the rights of persons including that of the Applicant. Again the Applicant engaged with this process in his letter of 25th October, 2006. He stated, *inter alia*, that it was important that the investigation into Leas Cross was brought to an early conclusion in the context of the public interest overall. On 27th October, 2006 the Applicant was informed that the date for publication had been changed to 10th November, 2006.

59. The letter of 7th November, 2006 from the Applicant's solicitors confirmed what he regarded was the submission which he required to be published.

60. I have above set out my conclusions in relation to what transpired following receipt of the letter of 25th October by the Respondent's solicitors. It is apparent from the conclusions that I have reached that notwithstanding the known publication date of 10th November, the Applicant was insistent that his submission as described in letter of 7th November should be included in the report, notwithstanding the express reservations that the Respondent had under a number of headings communicated by Mr. Goff. In these circumstances where the Applicant's solicitors (Mr. Goff) had been told there would not be publication as set out in the letter of 7th November, it is my conclusion that the refusal of the Respondent to publish the submissions requested by the Applicant did not amount to a denial of fair procedures or constitutional or natural justice to the Applicant.

61. Having regard to the Applicant's attitude, there was no further point in having dialogue with him. He did not have a right to hold up publication of the report indefinitely.

62. I have already referred to the submission of the Applicant that if the Respondent had difficulties with the Applicant's written response, the interest of basic fairness required that the Respondent delayed the publication of Professor O'Neill's report until such time as agreement was reached as to the final version of the Applicant's written response for publication as an appendix to the report when published. In other words, there would be no publication until agreement was reached between the Applicant and the Respondent. Such an attitude is manifestly unreasonable and amounts to exercising a veto on what is or is not contained in the appendix to be furnished by the Applicant to the report. No case has been made out in the pleadings affidavits or in the submissions that any of the objections which the Respondent had to the Applicant's reservations (as articulated by Ms. Kinsella and again set out in the Respondent's letter of 2nd February, 2007) were unreasonable, incorrect, unsustainable or without foundation.

63. Whilst there had been many allegations of a breach by the Respondent of the Applicant's rights to natural and constitutional justice, it has never been particularised as to how or in what manner the failure to publish each of the matters (which the Applicant insisted upon being published) constituted a breach of the Applicant's rights.

64. In my judgment, the Applicant has failed to make a case for judicial review.