Neutral Citation Number: [2006] IEHC 33

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 1299 JR]

BETWEEN

D.D.

APPLICANT

AND
DISTRICT JUDGE CONAL GIBBONS

RESPONDENT

AND
HEALTH SERVICE EXECUTIVE

NOTICE PARTY

Judgment of the Honourable Mr. Justice Quirke delivered the 10th day of February 2006
By order of the High Court (Abbott J.) dated 5th December, 2005, the applicant was given leave to seek certain relief by way of judicial review including an order of *certiorari* quashing a decision of the respondent made on the 23rd September, 2005, whereby the respondent refused to discharge himself from hearing an application made by the notice party.

The application was to have the applicant's daughter D.D. taken into the care of the notice party. It was made pursuant to the provisions of the Child Care Act, 1991 (hereafter the Act of 1991).

Leave was also granted to seek additional declaratory and other reliefs including an order prohibiting the respondent from continuing to hear the notice party's application.

Grounds
Although relief was granted on a number of jurisdictional and other grounds the applicant's claim is fundamentally based upon the contention that, by refusing to disqualify himself from hearing the proceedings, the respondent created an apprehension in the minds of the applicant that he would not adjudicate impartially upon the issue which he was required to determine (and in which the applicant had a vital interest).

It is argued on behalf of the applicant that, on the facts, her apprehension was a reasonable, objective and informed apprehension which would be shared by any reasonable person in similar circumstances.

Defence
The respondent, as is customary, did not participate in these proceedings.

The notice party, in general terms, denied that the applicant is entitled to the relief sought or to any relief against the respondent.

In summary, Ms. Ring S.C. on behalf of the notice party contended that the (largely) undisputed facts could not and did not give rise to an apprehension in the mind of a reasonable, fair and objective person that the respondent would not adjudicate fairly and impartially upon the issue which he was required to determine.

Although it was initially argued that the applicant had failed to make her application "promptly" pursuant to the provisions of O. 84 r. 21(1) of the Rules of the Superior Courts that contention was not pressed on behalf of the notice party.

For the avoidance of doubt I am satisfied, on the evidence, that there was no undue delay on the part of the applicant in applying for leave to seek the relief sought.

Facts
1. The applicant is a K. national. She is the mother of two children; D., (now aged seven years), whose father is deceased, and D., (now aged three years), whose father is the applicant's husband.

2. In September, 2002, the applicant and her husband separated. On 14th October, 2003, they were awarded joint custody of D. pursuant to the provisions of the Guardianship of Infants Act, 1964 (hereafter the Act of 1964). It was ordered that the applicant was to have weekend access to D. who was to reside with his father.

3. By order of the 13th October, 2004, the respondent, on the application of D.'s father varied the applicant's access to D. to provide that the applicant should have access "*…on two days per week- supervised by the Health Board on days to be agreed by the Health Board 2 - 4 pm.*"

The applicant was not professionally represented. She appeared on her own behalf during all of the guardianship proceedings which related to D.

4. On 4th October, 2004, an interim emergency care order in respect of D. was granted by the District Court to the notice party. It was extended on a number of occasions and remains extant.

5. On 23rd May, 2005, an application on behalf of the notice party for a full care order in respect of D. was made to the respondent.

On the same day a report was provided to the respondent pursuant to s. 20 of the Act of 1991. It arose out of the guardianship proceedings. It concerned the care, custody of, and access to D. by and between his parents.

The respondent stated that he would hear the application by the notice party for a full care order in respect of D. first and then consider the report arising out of the guardianship proceedings which had been provided pursuant to the provisions of s. 20 of the Act of 1991.

No objection was made on behalf of the applicant to the suggested sequence for dealing with the proceedings or to the respondent dealing with both sets of proceedings. The respondent did not read the report under s. 20 of the Act of 1991 in respect of D.

6. On 25th May, 2005, which was the second day of the hearing, the applicant's legal adviser requested the respondent to disqualify

himself from hearing the case on the ground that in the earlier guardianship proceedings he had made orders in respect of the applicant's access to D.

Having heard from both parties the respondent expressed disappointment that the application to disqualify himself had not been made before the commencement of the hearing. He adjourned the matter and on 28th July, 2005, having read and considered written submissions submitted on behalf of the applicant and on behalf of the notice party he refused the applicant's request. His reasons for refusal (as outlined in Counsel's note of his decision) included the following:

> *"…the reason for making the application on the second day is unexplained. No objection was made to the first day of hearing evidence. Witnesses had been examined and cross-examined…Many judges have dealt with this case for example Judge Collins and Judge Watkins. This is the nature of the judicial system. This is as it must be. …where a judge has heard an application for an emergency care order or an interim care order does that mean that he would be debarred from any future hearing of the case? … Judges can guard against being prejudiced.…I note that the orders that were made were not appealed by the respondent…even though they were described by her as adverse to her interests. ..I had no involvement in any extra judicial matter concerning this case... I cannot see how a reasonable person could consider I am biased. The respondent must show actual or objective bias. The thrust of the application is based on objectives bias. She has failed to meet the tests outlined in the case law… it cannot easily give up obligations and duties placed on the court…I feel it is convenient to hear the issue in relation to D. (s. 20) also. There is not much logic in hearing it separately."*

He referred to the relevant authorities and to the principles which should be applied when an application is made to a judge to discharge himself/herself on grounds of objective bias.

Decision
Certain circumstances may arise where it is appropriate for a judge to disqualify himself or herself from a particular case. There are many reasons why this may be the case. The judge may have an interest (real or perceived), in the outcome of the proceedings. He or she may be friendly or acquainted with a litigant or a witness who is to testify in the proceedings.

Such factors will not necessarily give rise to an inference or presumption of bias on the part of the judge but they could however give rise to a perception or apprehension of bias in the minds of reasonable persons.

The principles to be applied where an application is made to a judge to disqualify himself/herself on grounds of objective bias have been identified by Lord Hewart C.J. *in R. v. Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256 (at p. 259) in the following terms:

> *"..A long line of cases shows that it is not merely of some important but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not promptly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."*

Those principles have been applied by the courts within this and other jurisdictions in a succession of cases, notably *Bula Limited v. Tara Mines Limited* (No. 6) [2000] 4 I.R. 412, *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419, and *Dublin Well Woman Centre Limited v. Ireland* [1995] 1 I.L.R.M. 408.

In the latter case the Supreme Court (Denham J.) observed at (p. 421):

> *"The test is objective; not whether the learned High Court Judge considered she was or was not biased; nor whether the appellant considered the judge was or was not biased; but whether a person in the position of the appellant in this case, a reasonable person, should apprehend that his chance of a fair and independent hearing by reason of the actions of the learned High Court Judge in her capacity as Chairwoman of the condition on the status of women would lend a completely fair and independent hearing of the issues which arise. The apprehension of the appellant is what has to be considered."*

In Bula the Supreme Court, (Denham J.) confirmed and clarified the test. She said (at p. 449):-

> *"A judge has a duty to sit and hear a case. However, in certain circumstances it is appropriate that he or she disqualify himself or herself from a particular case. The test is not whether that judge believes he or she would be impartial. Nor is it whether the judge or judges on a motion to set aside such a judgment believes the judge was or would be impartial. Nor is it whether the parties consider the judge impartial. The test is objective. This has been analysed by the Constitutional Court of South Africa: President of the Republic of South Africa v. South African Rugby Football Union [1999] (4) S.A. 147 at para 48;*
>
> > *'... the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial'."*

It is unnecessary to state that a risk of actual bias requires a judge to disqualify himself/herself whether requested to do so or otherwise. It is unnecessary also to state that every person coming before the courts should receive a fair, unbiased and impartial hearing and adjudication.

The issue for determination by this court is whether, on the facts of this case, an objective and informed person in the position occupied by the applicant might reasonably apprehend that the respondent has not and will not bring an impartial mind to bear on the adjudication on the application made by the notice party for a full care order in respect of D.

The issue for determination before the respondent concerns the future care and custody of the applicant's daughter, D. He has, on a former occasion, restricted her right of access to her other child, D., by requiring that her access to D. must be supervised by the notice party.

It is probable that the applicant is genuinely fearful that the respondent will decide to place D. in the care of the notice party. That is not altogether unsurprising. It is probable also that her fear is based, at least in part, upon the fact that the respondent, on an earlier occasion, restricted her access to D. by requiring that her access to him must be supervised by the notice party.

However, the applicant's fear of an unfavourable decision from the respondent is not evidence of the presence of objective bias of the kind required before a judge should properly accede to an application of the kind made in these proceedings.

The respondent was not entitled to accede to the application unless he was satisfied on the balance of probabilities that an objective and informed person, occupying the applicant's position would reasonably apprehend that the respondent would not bring an impartial mind to the adjudication of the case.

The respondent made an *ad interim* decision on the 13th October, 2004, in respect of the applicant's access to her son D. That decision required the variation of an earlier order regulating the applicant's access to D. It was not appealed by the applicant. Further applications may, in the future be made to the respondent, or to another judge of the District Court for further variations of or for the final determination of issues concerning the applicant's access to and custody of D.

On 4th October, 2004, an interim emergency care order in respect of the applicant's daughter D. was granted to the notice party by a judge of the District Court. It was extended on a number of occasions by successive judges of the District Court. Such extensions are not unusual. The applicant enjoyed the benefit of professional representation in respect of those applications.

On the 23rd May, 2005, an application on behalf of the notice party was made to the respondent seeking a full care order in respect of D.

The respondent decided to hear the care application in respect of D. first and thereafter to hear and consider a guardianship application concerning the custody of and access to D. arising out of a report provided to the respondent pursuant to the provisions of s. 20 of the Act of 1991. He commenced hearing the care proceedings.

The applicant's legal representatives did not object to the suggested sequence of events. On behalf of the applicant they actively participated in the care proceedings until the second day thereof.

On the second day of the hearing the applicant's legal representative requested the respondent to disqualify himself from hearing any further evidence and from determining the issue before him. The reason advanced was the fact that the respondent had, in the earlier guardianship proceedings, restricted the applicant's access to D. by requiring that he be supervised by the notice party.

It was indicated that this fact had only came to the attention of the applicant's legal representatives on the second day of the hearing.

Having listened carefully to the request the respondent sought submissions from the parties in respect of the application and adjourned the proceedings for that purpose. At a subsequent hearing the respondent considered written and oral submissions from the parties and declined to disqualify himself. He gave full and detailed reasons for his decision.

I am satisfied that the reasons which he gave and the principles which he applied in arriving at his decision were the correct reasons and the correct principles.

He correctly identified the duty of a judge to sit and to hear every case assigned to him/her unless there are cogent reasons why it would be inappropriate to do so.

He pointed out that no explanation had been offered for the fact that the request that he should discharge himself had not been made until the second day of the hearing. Whilst not necessarily determinative, that was a relevant consideration to the decision which he had to make.

He pointed to the distinction between *ad interim* applications and decisions and orders which are final and have permanent effect. He explained that judges of all jurisdictions hear and determine *ad interim* applications and then proceed to make final determinations and orders concerning the same issues and the same parties. He spoke of the special jurisdiction of the courts in relation to the care of children and the provision for ongoing review of issues such as custody and access to children.

He stated correctly that judges cannot recuse themselves on the sole ground that a party to proceedings has appeared before them on other occasions. The same litigants come before the same courts, (and before the same judges), repeatedly. That is particularly the case in family matters and in criminal matters. It happens very frequently in the District Court.

Judges are required to bring detachment and impartiality to the performance of their judicial duties and functions. They have taken an oath to do so. The respondent directly referred to that fact.

There is no reason why an objective informed person should doubt the commitment of a judicial office holder to honour his or her oath of office and to perform judicial functions in a fair, independent, and impartial manner.

The sole reason advanced to sustain a claim for refusal on grounds of objective bias in this case was the fact that the respondent had made an earlier decision which involved the applicant and the notice party. Objective bias is alleged on the ground that the decision, (made on an ad interim basis), was perceived by the applicant to have been unfavourable to her interests.

I am not satisfied that an informed, objective person, occupying the applicant's position could reasonably apprehend judicial bias in those circumstances. The respondent was accordingly correct not to disqualify himself from hearing the case.

It follows that the relief sought on behalf of the applicant is refused.