THE HIGH COURT

[2020] IEHC 558

[2019 289 M.C.A.]

IN THE MATTER OF SECTION 64 OF THE FINANCIAL SERVICES AND PENSION OMBUDSMAN ACT, 2017 AND
IN THE MATTER OF A DETERMINATION OF THE FINANCIAL SERVICES AND PENSION OMBUDSMAN MADE ON 14TH AUGUST, 2019 BEARING REFERENCE NUMBER 16/91486

BETWEEN

JOHN O'CONNELL

APPELLENT

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 20th October, 2020

1. The applicant who represents himself applies for my recusal to hear this appeal. He submits that unrelated proceedings in which I delivered judgment on the 12 April 2018 *O'Connell v. Building and Allied Trades Union & Ors* [2018] IEHC 815, cause him an apprehension that I have made a personality judgment adverse to him during the course of those proceedings and in the judgment which I delivered. He did not cite any authority for his submission that I should rely on his own subjective apprehension that I would be unable to hear this appeal independent of that alleged personality judgment.

2. This application before the court was listed for hearing last July and was not reached. It was allocated with priority for today's non-jury judicial review list. Meenan J. who currently manages that list informed the parties earlier this morning (according to Mr. O'Connell and Mr. Kieran, counsel for the respondent) that he would leave it to me to determine the recusal application while indicating that no other judge is available to hear the application today.

3. Mr. O'Connell outlined the nature of his substantive application by way of appeal before the court. It is a statutory appeal from a determination by the respondent concerning a grievance or complaint by Mr. O'Connell relating to mortgage protection policies.

4. Mr. Kieran without contradiction from Mr. O'Connell submits that this is a statutory appeal which does not involve any credibility assessment by the judge hearing the appeal.

5. I cannot determine the extent of the substantive application at this stage. Although I have some recollection of the proceedings in which I delivered judgment on the 12 April 2018, I can assure Mr. O'Connell and the respondent that I do not have a view about Mr. O'Connell's personality. He pursued proceedings issued in 2002 and was successful in an appeal to the extent that the proceedings were remitted to the High Court for assessment of damages relating to the breach of his constitutional rights. That judgment of the Court of Appeal was in *O'Connell v. Building and Allied Trade Union & Ors*. 2016 IECA 338. He then represented himself before the me in 2018 and I awarded him €15,000 for general damages. Mr. O'Connell has indicated to this court that he has appealed some part of that judgment or something relating to that judgment. No further details of that appeal have been given to me at this stage.

6. The last sentence of para. 15 of the judgment delivered on the 12 April 2018 is brought to my attention particularly in this regard:

> "To this end, the plaintiff has failed to satisfy this court as to his specific net loss and the court remains curious if not sceptical, about the claim for 2001 in particular, given the unemployment assistance of nearly €15,000 with some €24,000 in earnings from PAYE and self-employment block-laying services identified in the notice of assessment for the year ending 5 April 2001"

Mr. O'Connell's refers today to an interaction with me during the trial concerning his working with a possibility of claiming social welfare at the same time and he puts that forward as the principal basis of this recusal application.

7. Mr. Kieran cites the Supreme Court judgment in *Bula v. Tara Mines Ltd No. 6* [2000] 4 I.R. 412 which I have had the opportunity of reading since rising before delivering this ex tempore judgment. At p. 441 of that judgment the Supreme Court adopted the reasoning of the Constitutional Court of South Africa and the High Court of Australia and I quote:

> "That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it ... Although statements of the principle commonly speak of 'suspicion of bias', we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meaning."

Later Denham J. on that same page stated:

> "The submissions in relation to the test to be applied roved worldwide. However, there is no need to go further than this jurisdiction where 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."

8. In the judgment of this court in *Wallace v. Beggan* [2017] 2 I.R. 318 I determined a similar but not identical application to this made by Mr. O'Connell today. In that case I had determined an issue in separate litigation which Mr. Beggan's solicitor submitted would cause me not to have an open mind insofar as an objective observer might conclude. It may be helpful for me to quote paras. 8 and 14 from that judgment in particular.

> " Using the words of the Court of Appeal in *Commissioner of An Garda Síochána. v. Penfield Enterprises Limited* [2016] IECA 141 (unreported Court of Appeal 11th May, 2016) at para. 59 and those of Denham C.J. in *Goode Concrete v. CRH* [2015]

IESC 70 [2015] 3 I.R. 493 at para. 54 p. 520 I ask whether a reasonable, objective and informed person would think that regardless of my declaration pursuant to Art. 34.6.1 of the Constitution to administer justice without fear or favour, I could provide an impartial hearing free of pre-judgment, hostility or prejudice to the defendants or their arguments.

14. The following often cited paragraphs from the judgment of the High Court of Australia in *Ebner v. Official Trustee* [2000] HCA 63 2000 205 CLR 337 at p. 348 are most useful and are applicable in this application:-

'[19] Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.

[20] This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.

[21] It is not possible to state in a categorical form the circumstances in which a judge, although personally convinced that he or she is not disqualified, may properly be inclined to sit. Circumstances vary and may include such factors as the stage at which an objection is raised, the practical possibility of arranging for another judge to arrange to hear the case and the public or constitutional role of the court before which the proceedings are being conducted. These problems usually arise in a context in which a judge has no particular personal desire to hear a case. If a judge were anxious to sit in a particular case, and took pains to arrange that he or she would do so, questions of actual bias may arise.'

Conclusion

9. The apprehension put forward by Mr. O'Connell could be held by any litigant but it is the objective observer who is not unduly sensitive and is in possession of all relevant facts in the circumstances that applies. Given my declaration on appointment, the fact that I can assure Mr. O'Connell that I do not maintain a personality determination adverse to him, the fact that this is the second listing of this appeal, no other judge is available today to hear this appeal, that litigants should not be given an opportunity to forum shop on account of subjective apprehension and the assurance from counsel for the respondent

that no issue of credibility will arise for determination in these proceedings, I refuse the application of Mr. O'Connell to recuse myself from hearing this appeal.