

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2022] IEHC 85  
[2021 No. 641 JR]**

**BETWEEN**

**BRIDGET DELANEY**

**APPLICANT**

**AND**

**THE PERSONAL INJURIES ASSESSMENT BOARD, THE JUDICIAL COUNCIL,  
IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Charles Meenan delivered on the 17<sup>th</sup> day of February, 2022**

**Introduction**

1. An independent judiciary, as is provided for in Article 35.2 of the 1937 Constitution, is essential for the protection of the basic freedoms which we enjoy in our society. This is often brought forcefully home when we see the consequences for those who live in, or deal with, countries where the judiciary enjoys no such independence. At the same time, the judiciary has to evolve and develop in a way that is consistent with the Constitution. It is in this context that we have to consider the provisions of the Judicial Council Act 2019 (“the Act of 2019”).

2. The Act of 2019 creates a Judicial Council which is required by law to adopt guidelines concerning judicial conduct and ethics, guidelines for sentencing and guidelines for personal injuries. This must happen within the provisions of the Constitution that provide for the separation of powers, the enactment of laws and the independence of the judiciary. The instant and other proceedings maintain that the adoption of Personal Injury Guidelines by the Judicial

Council, on 6 March 2021, was in breach of these constitutional provisions. More particularly, the instant proceedings maintain that the guidelines on personal injuries that were adopted by the Judicial Council were *ultra vires* the provisions of the Act of 2019.

3. The Statement of Grounds, delivered by the applicant in July, 2021, seeks certain reliefs against the Judicial Council: -

“(vi) A Declaration that the second named Respondent [the Judicial Council] acted *ultra vires* in adopting the Personal Injury Guidelines on the 6<sup>th</sup> day of March, 2021”.

There are many other reliefs sought by the applicant, but I believe this is the relief that is central to the application herein.

4. The grounds upon which this relief is being sought against the Judicial Council were somewhat limited in the Statement of Grounds that was delivered. However, by a pending Notice of Motion, the applicant wishes to amend the Statement of Grounds by setting out further and better particulars of these grounds. This motion has not been determined by the Court, but the proposed additional grounds were opened to the Court in the course of this application.

### **Application for recusal**

5. The applicant before the Court seeks the following reliefs: -

“1. An Order assigning a Judge of the High Court to hear any interlocutory applications herein and to preside over the substantive hearing of the within proceedings other than:

- (i) A Judge of the High Court who was up to and including the 6<sup>th</sup> March 2021 a member of the Personal Injuries Guidelines Committee, a member of the Board of the Judicial Council or a member of the Judicial Council attending and voting (including voting by proxy) on the Personal Injury Guidelines on the 6<sup>th</sup> March 2021 (all within the meaning of the Judicial Council Act 2019);

(ii) A Judge of the High Court in his or her capacity as a member of the Judicial Council who was consulted about whether these proceedings should be opposed and/or in what manner they should be opposed, or as to whether the proposed amendment to the Statement of Grounds notified to the Respondent by way of correspondence of the 17<sup>th</sup> December 2021 be objected to, or whether discovery should be agreed to or refused or who took part as a member of the Board or the Council in any such decision-making process;”

6. As I am the Judge hearing this motion for recusal, I informed the parties as to my personal position. I am a member of the Judicial Council, as provided for in the Act of 2019. I am not a member of the Personal Injuries Guidelines Committee, nor a member of the Board of the Judicial Council. As a member of the Judicial Council, I was not consulted nor my advice or views sought concerning these or any other proceedings involving the Judicial Council.

7. I am one of three elected members of the Judicial Conduct Committee.

8. As a member of the Judicial Council, I attended and voted at the meeting of 6 March 2021 which adopted the Personal Injuries Guidelines complained of. It is in this respect that my recusal is being sought.

9. The first named respondent (PIAB) and the second named respondent (the Judicial Council) took a neutral stance on the within application. The third and fourth named respondents (Ireland and the Attorney General) opposed the application.

### **Principles to be applied**

10. There are a number of authorities which set out the principles to be applied on an application for a judge to recuse himself or herself. In *Goode Concrete v. CRH Plc* [2015] 3 I.R. 493, Denham C.J. considered a number of earlier authorities: -

“(18) In *Bula Ltd v. Tara Mines Ltd (No. 6)* [2000] 4 I.R. 412 at p. 441 I stated:—

‘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’.

(19) In *Kenny v. Trinity College Dublin* [2007] IESC 42, [2008] 2 I.R. 40 Fennelly J. stated at p. 45 that the test had been described authoritatively in *Bula Ltd v. Tara Mines Ltd (No. 6)* [2000] 4 I.R. 412, in the words quoted above.”

11. In *Goode Concrete Plc* Denham C.J. also cited the following passage from the judgment of Fennelly J. in *O’Callaghan v. Mahon* [2008] 2 I.R. 514: -

“(551) ...

(a) objective bias is established, if a reasonable and fair minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision maker will not be fair and impartial;

(b) the apprehensions of the actual affected party are not relevant;

(c) objective bias may not be inferred from legal or other errors made within the decision making process; it is necessary to show the existence of something external to that process;

(d) objective bias may be established by showing that the decision maker has made statements which, if applied to the case at issue, would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses.”

Having referred to the above passage, Denham C.J. stated: -

“(23) Thus, the above are illustrations of the description of the test to be applied in situations where there is perceived objective bias, and also illustrations of the application of the test.”

**12.** As is provided for in Article 34.6.1° of the Constitution, every person appointed a judge under the Constitution shall make and subscribe the declaration set out therein. As Irvine J. (as she then was) stated in *Commissioner of an Garda Síochána v. Penfield Enterprises Ltd* [2016] IECA 141: -

“34. The starting point for the court’s consideration on this appeal is the right and indeed the duty of judges to hear and determine all such cases or legal issues as may come before them for adjudication, unless there are substantial reasons why they should not do so. It is relevant in this regard that judges, at the time of their appointment, make a declaration pursuant to Article 34.6.1 of the Constitution to administer justice ‘without fear or favour.’ They have made a public declaration to uphold the Constitution and the law. This necessarily includes a solemn promise to uphold the impartial administration of justice and to provide, for all who come before them, a fair and just hearing.”

**13.** In *Bula Ltd v. Tara Mines Ltd (No. 6)* [2000] 4 I.R. 412, McGuinness J. stated at p. 518: -

“In applying the test of a person’s reasonable apprehension of bias to the facts of this case, the following factors ought also to be taken into account.

1. The importance of the judicial oath; ...”

**14.** On 4 February 2022, the Judicial Council adopted guidelines concerning judicial conduct and ethics. These guidelines effectively reflect the various decided legal authorities.

### **Application of principles**

15. The starting point is to identify what are the relevant facts possessed by the “*reasonable and fair-minded objective observer*”. Mr. Feichín McDonagh SC, on behalf of the applicant, submitted that such an observer would reasonably apprehend that a judge who took part in the Judicial Council vote of 6 March 2021 would not be fair and impartial in determining whether or not the Personal Injury Guidelines were *ultra vires* the Act of 2019. The observer could reach this conclusion as such a judge had access to documentation, heard submissions from his/her judicial colleagues and may have reached a conclusion as to the lawfulness, or otherwise, of the guidelines.

16. In considering this submission, it is necessary, as was submitted by Mr. Eoin McCullough SC on behalf of Ireland and the Attorney General, to look at the provisions of the Act of 2019 under which the Personal Injury Guidelines were adopted. He submitted that a reasonable and fair-minded observer would have knowledge of the provisions of the Act and that the Act enjoys the presumption of constitutionality.

17. Section 8 of the Act of 2019 provides that every member of the judiciary is a member of the Judicial Council, and only ceases to be a member on retirement. Thus, the Judicial Council is not a voluntary organisation where judges are free to join or leave as they see fit. This fact distinguishes the instant case from *R.v. Bow Street Magistrate, Ex p. Pinochet* [2000] 1 A.C. 119. In that case, the applicant, a former head of State of Chile on a visit to London, was arrested under warrants initially issued by a Spanish Court. The Divisional Court quashed the warrants on the ground, *inter alia*, that as a former head of state he was immune from arrest and extradition proceedings in the United Kingdom. The matter was appealed to the House of Lords. Before the main hearing Amnesty International, the Human Rights body which had campaigned against the applicant, obtained leave to intervene in the appeal and was represented by counsel in the proceedings. The appeal was allowed by a majority of 3:2. Subsequently, the

applicant’s advisers discovered that one of the Judges who had been part of the majority was, although not a member of Amnesty International, an unpaid director and chairman of AIC Ltd, a charity which was wholly controlled by Amnesty International. The House of Lords granted a petition by the applicant to set aside its previous decision on the ground of apparent bias on the part of the Judge in question. Lord Browne-Wilkinson stated at p.135: -

“—The substance of the matter is that A.I., A.I.L. and A.I.C.L. are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart C.J.’s famous dictum is to be observed: it is ‘of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.’ (see *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259)”

**18.** In the *Pinochet* case, Lord Hoffman was a director of Amnesty International Charity Ltd by choice, presumably, because he supported the aims and objectives of Amnesty International, whereas a Judge is a member of the Judicial Council by Statute.

**19.** Section 7 of the Act of 2019 sets out the functions of the Judicial Council: -

“7. (1) The functions of the Council shall be to promote and maintain—

— — — — —

- (e) respect for the independence of the judiciary, and
- (f) public confidence in the judiciary and the administration of justice.

(2) Without prejudice to the generality of *subsection (1)*, the Council shall—

— — — — —

- (g) adopt—

(i) draft personal injuries guidelines prepared and submitted by the Personal Injuries Guidelines Committee to the Board under *section 18 (2)(a)* with the modifications (if any) made by the Board under *section 11 (1)(d)*, or  
(ii) any draft amendments to personal injuries guidelines prepared and submitted by that Committee to the Board under *section 18 (2)(b)* with the modifications (if any) made by the Board under *section 11 (1)(d)*,

as soon as practicable, and in any event not later than 12 months, after such submission and publish the personal injuries guidelines and amendments in such manner as it considers appropriate as soon as practicable following such adoption,”

The Judicial Council is under a statutory obligation to adopt draft Personal Injuries Guidelines within a specific time. It is also clear that the adoption of the Personal Injury Guidelines is “*without prejudice*” to the functions of the Judicial Council, which are, *inter alia*, to promote and maintain “*respect for the independence of the judiciary*” and “*public confidence in the judiciary and the administration of justice*”.

**20.** Any judge who attended and voted at the meeting of 6 March 2021 was clearly doing so under the provisions of the Act of 2019, an Act which enjoys the presumption of constitutionality. Section 93 provides: -

“93. Nothing in this Act shall be construed as operating to interfere with—

(a) the performance by the courts of their functions, or

(b) the exercise by a judge of his or her judicial functions.”

**21.** In my view, this statutory provision leads to two conclusions. Firstly, the adoption of the Personal Injury Guidelines was not a pronouncement on their legality. That is a function of the Courts. Secondly, and possibly more importantly, whatever views or opinions a judge may



have had in voting for or against the guidelines, such do not interfere with “*his or her judicial functions*”. Judicial functions include being able to fairly and impartially make a decision on the issues raised in these proceedings, as would be expected by a reasonable and fair-minded objective observer.

**22.** I am satisfied that in seeking the recusal of a judge who attended and/or voted at the meeting of 6 March 2021, the applicant has failed to meet the test required. I am of the view that a reasonable and fair-minded objective observer would have knowledge of the following: -

- (i) Every judge makes the declaration provided for in Article 34.6.1 of the Constitution and is fully cognisant of its importance;
- (ii) The Act of 2019 enjoys the presumption of constitutionality;
- (iii) Judges, like everybody else, are obliged to follow the law;
- (iv) Every judge is, by law, a member of the Judicial Council;
- (v) The Judicial Council is under a statutory obligation to adopt, in a specific timeframe, Personal Injury Guidelines;
- (vi) The adoption of Personal Injury Guidelines by the Judicial Council was not, expressly or impliedly, a decision on their legality as that is a matter for the Courts;
- (vii) As is provided for in the Act of 2019, whatever opinions or reasons a judge may have had in voting for or against the Personal Injury Guidelines such did not operate to interfere with his or her duty to be fair and impartial in hearing and determining the applicant’s application.

### **Conclusion**

**23.** By reason of the foregoing, I refuse the reliefs sought by the applicant.