THE HIGH COURT

[2024] IEHC 541
[2022 No. 1138JR]

BETWEEN:

BRIDGET O'REILLY

APPLICANT

AND

ATLANTIC TROY LIMITED

RESPONDENT

[2022 NO. 1140 JR]

BETWEEN:

DINNY O'NEILL

APPLICANT

AND

ATLANTIC TROY LIMITED

RESPONDENT

JUDGMENT of Mr Justice Barry O'Donnell delivered on the 9th day of September 2024

INTRODUCTION

1. This judgment concerns two related sets of proceedings in which the applicants seek to quash orders made by the Circuit Court dated 18 October 2022, and seek various declarations arising from that hearing. The applicant in the first set of proceedings, Ms O'Reilly, is the mother of the applicant in the second set of proceedings. The respondent company owns and operates the Charleville Park Hotel (*the Hotel*) in Cork.

2. For the reasons set out in this judgment the court has decided that the hearing before the Circuit Court was unfair as a result of excessive intervention by the learned Circuit Judge. As such, the orders made in the Circuit Court will be quashed and the matter will have to be remitted for a fresh hearing before a different judge.

BACKGROUND

3. The issues in the underlying proceedings concern the status of the applicants (a) as recipients of Homeless Assistance Payment (*HAP*) and (b) as members of the Traveller community. In September 2018, the applicants and their family were in need of emergency accommodation. Cork County Council declared the family homeless for the purposes of the Housing Act 1988. The relevant Community Welfare Officer (*CWO*) sought to provide assistance to the family in obtaining emergency accommodation, and in that regard approached the Hotel. The CWO was informed by the Hotel that there was no availability. Ms O'Reilly checked a booking website and saw that accommodation was available. Using her debit card, she made a reservation for herself, her partner and their two children.

4. The applicants attended at the Hotel on the 28 September 2018 with the CWO. The CWO had a cheque for the full amount of a three day stay. The family was refused accommodation on the stated basis that the mandatory Hotel policy was that a credit card should be provided in the name of one of the guests at the time of check-in. Although Ms O'Reilly hds a debit card, she did not have a credit card. Later that day, Ms O'Reilly contacted a solicitor with the Free Legal Aid Centre in Dorset Street, Dublin. The solicitor, Ms Lucey, advised the applicant to return to the Hotel and to

telephone her. Ms Lucey spoke to the receptionist, and she was informed that the Hotel policy was that there had to be a credit card provided at check-in. Ms Lucey offered the use of her own credit card but was told by the Hotel that what was required was a credit card in the name of the person staying in the Hotel. The applicants therefore were unable to use the Hotel and had considerable difficulty accessing alternative accommodation, eventually returning to their existing residence.

5. Following those events, on 8 October 2018, Ms Lucey wrote to the respondent notifying it of a claim of discriminatory treatment pursuant to section 21(2)(a) of the Equal Status Act, 2000 (*ESA 2000*). In response, the managing director of the respondent wrote a letter dated 28 October 2018. In that letter, the respondent asserted and stood over the policy of requiring a credit card and contended that the requirement was a feature in hotels around the world. In addition to that stance, the managing director also made a number of observations which can be summarised as: -

    a. The respondent had no responsibility for the provision of accommodation to homeless persons; and
    b. The Hotel was not "a suitable venue for the accommodation of these families".
    c. If accommodation was provided, the respondent would have to notify its insurers.
    d. The Hotel previously had accommodated "these families" and the "unsuitability of the hotel accommodation was highlighted during the occupation of the hotel by this family. Cork County Council are well aware of the difficulties that arose and will be in a position to clarify the position further to you".

6. Thereafter each member of the family (Ms O'Reilly, her partner, and their two children) issued complaint forms to the Workplace Relations Commission (the *WRC*). At that point the complaints were that the applicants were discriminated against as HAP

recipients. The complaints later were expanded to include claims of discrimination on the basis that the applicants were members of the Traveller community. That enlargement was triggered, according to the evidence of Ms Lucey, by the contents of documents that were submitted by the respondents as part of the WRC process. The documents in question referred, inter alia, to a previous experience of the Hotel when it was stated they provided emergency accommodation at the request of Cork County Council to two families, comprising ten persons. That was a reference to families who were members of the Traveller community, and it was contended that the families caused approximately €12,000 damage to the Hotel.

7. At a hearing before the WRC on 25 January 2022, the Adjudication Officer (*AO*) permitted the application to amend or enlarge the claim to include the Traveller discrimination grounds. The AO's decision was dated the 16 February 2022. The decision summarised the evidence and the various legal submissions that were made by the parties. The AO found that the applicants had established facts from which it may be presumed that prohibited conduct had occurred. Hence, pursuant to section 38A of the ESA 2000, he deemed that the onus shifted to the respondent to prove that there was no infringement of the principle of equal treatment.

8. As set out in the decision, at the hearing the general manager of the Hotel accepted that the credit card policy was somewhat flexible, and the Hotel had a discretion to accommodate in the absence of a credit card. The AO found that the respondent had a "*strong pre-determined position*" not to allow persons on HAP to be accommodated in the Hotel. The AO found that the respondent had not rebutted the prima facie case that it discriminated on the basis of the applicants being recipients of HAP and also on the

basis of their membership of the Traveller community. In that latter regard, the AO noted the respondent's evidence of its previous experience with members of the Traveller community; however, he also noted that other than membership of the Traveller community there was no evidence that the other families were connected to the applicants.

9. The Adjudication Officer directed the respondent to pay the complainants compensation and to revise its credit card policy so that it did not infringe its obligations under the ESA 2000. The respondent appealed that decision to the Circuit Court.

THE HEARING IN THE CIRCUIT COURT

10. As provided for in Order 57A of the Circuit Court Rules, the appeal proceeded by way of an originating notice of motion, and the following documents were to be filed with the application:
    a. A certified copy of the Decision;
    b. Certified copies of all pleadings, documents and particulars provided by either party at the first instance hearing;
    c. Any other relevant documentation.

11. The hearing before the Circuit Court occurred on the 18 October 2022. As required by O.57A, r.6, the appeal was heard on oral evidence. At the hearing each party was represented by junior counsel and solicitor, and the respondents (the applicants herein) made short written legal submissions, which emphasised, inter alia, the provisions of section 38 of the ESA 2000 concerning the shifting burden of proof.

12. The parties to these proceedings exhibited the transcript of the Circuit Court hearing. At the hearing the Circuit Court heard evidence from Ms O'Reilly, from her partner, and from Mr McDonagh, the managing director of the respondent. I will refer in more detail to the manner in which the hearing was conducted below. Ultimately, the Circuit Court gave an ex-tempore judgment at the conclusion of the hearing. The Court allowed the appeal, vacated the order made by the Adjudication Officer, and made no order as to costs.

13. Following the orders being made in the Circuit Court, the applicants in fact commenced two separate sets of proceedings: first, by an originating notice of motion dated 23 November 2022, the applicants commenced an appeal on a point of law pursuant to section 28(3) of the Equal Status Act, 2000; and second, on 3 July 2023, they were granted leave to apply for judicial review on foot of an ex parte application originally made in January 2023. While leave was granted in applications for judicial review brought by each of the four family members, the court directed that only one adult case and one minor case should proceed for hearing; and those are the cases before this court.

14. Arising from the fact that two separate forms of proceedings were initiated following the Circuit Court decision, there is a preliminary issue to be determined as to whether the court should entertain the judicial review proceedings.

THE CLAIMS MADE

15. The applicants' pleaded case, as set out in the Statements of Grounds dated 22 December 2022, can be summarised as claims that the learned Circuit Court Judge acted

in breach of natural and constitutional justice and/or the order was unreasonable for the following reasons: -

a. There was no explanation of the legal basis of the Circuit Court orders and there was a failure to provide sufficient reasons for the orders made.
b. That the Circuit Court had acted *ultra vires* in:
    i. imposing a burden of proof which is not provided for in the ESA 2000 and not applying the burden of proof which shifts to the respondent once prima facie discrimination is proven;
    ii. departing from Order 57A of the Circuit Court Rules in failing to have regard to relevant documents; and
    iii. finding that the minor applicants could not experience discrimination by virtue of their age.
c. That the Circuit Court failed to act in accordance with fair procedures and natural justice in, inter alia:
    i. failing/refusing to have regard to the material before it;
    ii. being over interventionist; and
    iii. giving rise to a reasonable apprehension of bias.

16. The respondent delivered an extensive Statement of Opposition on the 19 October 2023. The is a preliminary objection to the application for judicial review on the basis that the applicants had already taken steps to avail of an alternative remedy – the statutory appeal. Without prejudice to that argument, the respondent denied that the applicants were entitled to a remedy in judicial review. Fundamentally, the respondent asserted that the hearing in the Circuit Court was a de novo hearing and therefore the applicants were obliged to run and prove their case in a fresh hearing and, in that regard, they

failed to establish the facts necessary to prove their case at the hearing. The respondent contends that there was no breach of fair procedures and the hearing before the Circuit Court was fair and comprehensive.

17. In the first instance it is necessary to engage with the alternative remedies issue as this potentially could operate as a discretionary bar to relief.

THE ALTERNATIVE REMEDIES ISSUE

Factual issues

18. The factual backdrop to this issue is somewhat convoluted, and made confusing by the fact that not all aspects of that issue were addressed in affidavit evidence. Ms Lucey addressed the statutory appeal in her grounding affidavit, which was dated 21 December 2022. In summary, Ms Lucey explained that the applicants were advised by senior counsel that the default position was that there should be a statutory appeal; however the advice was that, in this case, judicial review was a more appropriate route to deal with the issues that had been identified. Nevertheless, because of the difference between the time limits for statutory appeals and applications for judicial review, it was deemed prudent to initiate a statutory appeal. Those appeals, in fact, were issued out of time on the 28 November 2022. The delay was explained by reference to the fact that the Circuit Court orders were not received until 9 November 2022 and there, apparently, were difficulties filing the originating notice of motion in the Central Office.

19. When the statutory appeal was first listed, the court was informed that there was a need to seek an extension of time, and that an application for judicial review was likely to be

made. The affidavit noted that the High Court (Meenan J) directed that a motion for the extension of time be brought returnable to 30 January 2023 and that the court should be informed if an application for judicial review was brought. As the initial affidavits were sworn on the 21 December 2022 the narrative paused at that point.

20. It is clear from the Order granting leave to apply for judicial review on the 3 July 2023 that the initial ex parte application had been made on the 16 January 2023 – within the time limit then applicable for the commencement of such proceedings.

21. From the perspective of the applicants, it appears that one reason for the gap between the initial ex parte application and the granting of leave was that the applicants sought to take up the Digital Audio Recording (*DAR*) transcript from the hearing. That transcript was exhibited in a further affidavit of Ms Lucey dated the 5 May 2023. An affidavit was sworn on behalf of the respondent by its solicitor, Mr Kelly, on the 19 October 2023. Mr Kelly sets a detailed response to the applicant's substantive contentions and referred extensively to the transcript of the hearing in the Circuit Court. In relation to the statutory appeals, Mr Kelly asserts that the judicial review proceedings appear to have been brought solely because the time for a statutory appeal had expired. He expressed the view that the applicants could not pursue two remedies arising from the same matter.

22. In her replying affidavit sworn on the 22 November 2023, Ms Lucey reiterates that the advice given to the applicants was that judicial review was the more appropriate remedy to pursue considering the nature of the applicants' complaints about the hearing in the Circuit Court. It appears from that affidavit that some delays were encountered in

progressing matters due to the difficulties in taking up the DAR from the Circuit Court hearing.

23. At the substantive hearing of these proceedings, further detail was provided by counsel for each side. It seems clear that the applicants persisted in seeking to progress the statutory appeals and made an application to extend time for those appeals. Ultimately, on 29 March 2023, the High Court made what amounted to an unless type of order: if leave was granted in the judicial review proceedings, then the statutory appeals would be struck out. The High Court also made an award of some costs in favour on the respondents in the statutory appeals. Thereafter, the applicants sought to move an application for leave to apply for judicial review.

Legal principles

24. The respondent highlighted that the usual course to be taken where a party was dissatisfied with the outcome of an appeal in the Circuit Court from a decision of the WRC was an appeal on a point of law as provided for in section 28 of the ESA 2000. Here, that option was exercised by the applicants. The respondents argued that the statutory appeals were capable of addressing the complaints that the applicants had about the Circuit Court appeal, and that in reality the decision to pursue judicial review was motivated by the fact that the statutory appeals were out of time. It should however be noted that that, in fact, the initial application for leave to apply for judicial review was opened ex parte in January 2023, before the issues around the High Court application for an extension of time in the statutory appeals had been resolved.

25. In terms of legal principles, the respondent relied on the decisions of Barron J. in *McGoldrick v. An Bord Pleanála* [1997] 1 IR 497 and the decision of the Supreme Court (Geoghegan J.) in *Buckley v. Kirby* [2001] 2 ILRM 395, which affirmed the decision in *The State (Roche) v. Delap* [1980] IR 170.

26. In *McGoldrick v. An Bord Pleanála*, Barron J., in considering the question of where judicial review lies where an alternative remedy exists held:-

> *"It is not just a question whether an alternative remedy exists or whether the Applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness, provided, of course, that the Applicant has not gone too far down one road to be estopped from changing his or her mind."* [emphasis added]

27. The above passage has been cited and approved by the Supreme Court in *Buckley v. Kirby*, *Stefan v. Minister for Justice* [2001] 4 IR 2023and *O'Donnell v. Tipperary South Riding County Council* [2005] IESC 18.

28. In *G v. DPP* [1994] 1 IR 374, Finlay C.J. held that where there is an alternative remedy it requires to be established, *"that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."*

29. The applicants placed emphasis on *EMI v. Data Protection Commissioner* [2013] 2 IR 669, where Clarke J. (as he then was) opined on the question as to when a party would

be justified in not pursuing a statutory appeal and rather pursues a judicial review and cited the case of *The State (Abenglen Properties) v. Corporation of Dublin* [1984] IR 381 (O'Higgins C.J. at p. 393):-

> *"The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."* [emphasis added]

30. Clarke J. went on to cite and highlight the key passages of the then recent judgment of Hogan J. in *Koczan v. Financial Services Ombudsman* [2010] IEHC 407, with Clarke J. noting:

"…The default position is that a party should pursue a statutory appeal rather an initiate judicial review proceedings….as pointed out by Hogan J. in Koczan v. Financial Services Ombudsman [2010] IEHC 407…that is must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned.

[42] However, there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review. The set of such circumstances is not necessarily closed. However, the principal areas of exception have been identified. In some cases an appeal will not permit the person aggrieved to adequately ventilate the basis of their complaint against the initial decision…that may be so because of constitutional difficulties or other circumstances where the body to whom the statutory appeal lies would not have jurisdiction to deal with all issues. Likewise, there may be cases where, in all the circumstances, the allegation of the aggrieved party is that they were deprived of the reality of a proper consideration of the issues such that confining them to an appeal would be in truth depriving them of their entitlement to two hearings."

31. Hogan J. in *Koczan* detailed categories of cases were the legal argument raised is more properly canvassed by way of judicial review rather than by statutory appeal stating at para. 19:-

"…As indicated in Square Capital … an argument directed towards a total lack of subject matter jurisdiction is one such case. Judicial review might also be

appropriate where the complaint relates to the integrity or basic fairness of the decision making process, so that in justice the decision-maker ought to be afforded an adequate opportunity of defending his or her position in judicial review proceedings which admit of the possibility of cross-examination and oral evidence. There may well be other cases - such as, e.g., those touching on the constitutionality of legislation or the validity of statutory instruments – where the legal issues cannot properly be raised by way of appeal". [emphasis added]

Analysis

32. There is no doubt that, where appropriate, pursuing an available statutory appeal should be the default option. It can also be noted that among the criteria for succeeding in a statutory appeal there is scope to incorporate issues that can arise in judicial review proceedings, such as a significant failure to comply with the requirements of fair procedures or natural or constitutional justice. However, I am satisfied that in this case there are very significant issues in relation to the fairness of the procedure before the Circuit Court, which is a matter clearly appropriate to judicial review proceedings. By reference to the observations by Hogan J in *Koczan*, these are issues that go to the integrity and basic fairness of the proceedings in the Circuit Court. Moreover, having regard to the overall justice of the situation, if the court was to refuse to grant relief in this case on the basis of the statutory appeals it would result in the applicants being deprived of any substantive hearing on the important issues that they have raised.

33. Ultimately, I consider that the confusion over which remedy to pursue – which must be solely attributed to the applicants – is not a sufficient justification to exercise my discretion to refuse relief in these proceedings. Nevertheless, it was clearly

unsatisfactory for the applicants in effect to seek to ride two horses at the same time. It is more unsatisfactory that having made an ex parte application for leave to apply for judicial review in time, they continued to pursue the application for an extension of time in the statutory appeals. However, any prejudice to the respondents caused by that ambivalence was resolved by a partial costs order made by the High Court when the statutory appeals issue was resolved. There is a need for litigants to make a clear and unequivocal decision as to the remedy that they wish to pursue at an early stage in order to avoid wasted expense and the unnecessary use of scarce court time.

THE SUBSTANTIVE CLAIMS

34. As set out above, the applicants have set out multiple bases on which they claim the decision of the Circuit Court should be set aside. As I will explain, I have come to the conclusion that viewed objectively there was an unfortunate failure to provide fair procedures in terms of the actual conduct of the hearing. Accordingly, it will be necessary to quash the decision of the Circuit Court and remit the matter for a fresh hearing before a different judge. That being so, it does not seem necessary or appropriate to address the other complaints. However, that is not to say that the applicants should treat this judgment as in any sense endorsing their views about those other matters. It is well established that the fact that an applicant disagrees with an outcome does not make it amenable to judicial review. There will have to be a fresh hearing of the appeal from the WRC, and it will be a matter for the judge hearing that appeal to deal with the evidence and legal arguments in an appropriate manner.

35. The court has had the opportunity to consider the transcript of the hearing before the Circuit Court, and the parties made detailed submissions by reference to that transcript. As noted above the respondent's position was that the hearing was fair, and that the applicants' arguments are not borne out by an objective reading of the transcript. Unfortunately, I disagree with that position. One must have some sympathy with the position of a respondent whose success in an appeal will be set at nought for reasons outside their control, and who will have to face the additional costs of a fresh hearing. Nevertheless, I consider that the respondent should have been alive to the very real prospect in this case that a court would consider that the appeal hearing was flawed with the result that an early concession would have avoided these proceedings continuing to a full hearing over a number of days.

The fair procedures arguments

36. The applicants advance a variety of bases for contending that the hearing before the Circuit Court was unfair. These amount to a combination of a claim that objectively there was an apprehension of bias and a claim that the overall conduct of the hearing was rendered unfair by what can be generally viewed as excessive intervention in the hearing. In particular it was asserted that the learned Judge prevented the applicants' counsel from referring to the WRC determination, and in general impeded the running of the case in a fair manner.

37. Before considering the case law and transcript, it is important to note that every judge is entitled to ensure that hearings, within the limits of overall fairness, are conducted

properly and efficiently. A judge, inter alia, is fully entitled to ask questions for the purposes of clarifying issues and also to intervene for the purposes of ensuring that the hearing is conducted within proper parameters for the pleaded issues. The court does not underestimate the need for judges in the Circuit Court to be able to move through their often very arduous lists efficiently and for the benefit of all the various parties that come to court for their hearings.

38. The complaints about the hearing in the Circuit Court can be summarised as including claims that the learned Judge excessively interrupted the applicants' counsel, repeatedly intervened to direct the respondent's case, and a complaint that the Judge used derogatory language towards Ms O'Reilly and used an unacceptable term to describe members of the Traveller community.

(i) The Judge's use of language

39. In that latter regard the learned Judge at one point used the term "*itinerant*" and commented on Ms O'Reilly's appearance with statements such as "*you [the first-named applicant] come across as a very respectable lady"* and, "*the claimant and her partner, who came across as highly respectable individuals…And the claimant who is very literate and well presented, articulate lady…".*

40. Counsel for the respondent submitted that the applicants' reliance on the use of the word "*itinerant*" to ground their claim of bias was overstated. It was submitted that the use of the word was confined to a limited exchange between the Judge and counsel for the applicant and that no further issue was raised by counsel for the applicant. The respondent also contested, with regards to the comments about Ms O'Reilly's

appearance, that the statements, either on their own or read with any other part of the transcript, could support any contention of bias. It was submitted that the fact that an allegation of bias must be raised at the material time was '*fundamental*', as stated by Finlay C.J. in *O'Reilly v. Cassidy* [1995] WJSC 1425.

41. In *O'Reilly*, the context surrounding the comment by Finlay C.J. was to do with the applicant raising an objection to the fact that the daughter of the Circuit Court judge sitting on that case appeared on behalf of the State and on behalf of the Garda objection, with Finlay C.J. noting, *"[a]n objection to that fact was taken on behalf of the Applicant and that is fundamental in my view. If no objection is taken to any relationship between an advocate and a judge there could be no conceivable impropriety in the judge continuing to hear the case."*

42. The general test to be applied in determining whether there is objective bias was enunciated by the Supreme Court in *O'Callaghan v. Mahon* [2008] 2 IR 514 as being "*whether a reasonable person, with full knowledge of the circumstances, would consider that there are external factors which would cause the decision maker to make a particular decision, or would inhibit him from making a decision impartially, as would give rise to a reasonable apprehension of bias*."

43. The Supreme Court went on to detail the established principles to be applied in objective bias cases:-

> *(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 to one party or his witnesses. [emphasis added]

32. Clearly, in this case the language used by the learned Judge was inappropriate and derogatory, even if that was not the intention. The language should not have been used. However, the question is whether the language used is sufficient to ground a finding of bias. In light of the authorities cited above, the court is not persuaded that the language used – particularly when viewed in light of the hearing as a whole – can lead to a finding that there was pre-judgment, or a partiality motivated by a pre-existing bias which contaminated the hearing. That is not to say that this court considered the reaction of the applicants or their representatives as oversensitive. It is fundamental that every person who brings a case before the courts at any level is entitled to expect an impartial hearing uncontaminated by pre-existing views or bias, and the use of derogatory or pejorative language – whether intended or inadvertent – carries a real risk that that expectation will be undermined.

(ii) Interventions

44. Here, the applicants argue that the Circuit Court acted contrary to fair procedures and natural justice by (a) preventing the cross-examination of the respondent's only witness in relation to its defence and notice of appeal, (b) that the Circuit Court judge went so

far as to give evidence on the acceptability of cheques as security notwithstanding that no such evidence was provided on behalf of the respondent and (c) that the interventions of the Circuit Judge went well beyond the mere seeking of clarifications.

45. The respondent asserts that the onus firstly lay on the applicants to establish a prima facie case of discrimination, and that the questions put by the trial judge "*were for the purposes of seeking clarity on how it was being submitted that the prima facie case had been met*". The respondent also contends that no objection was raised during the Circuit Court hearing regarding the interventionist behaviour, or allegations of bias, on the part of the trial judge.

46. Both the applicants and the respondents rely on the case of *Donnelly v. Timber Factors Limited* [1991] 1 IR 533 to support their contentions regarding judicial intervention. In *Donnelly*, the court stated:-

> *"The role of the Judge of trial in maintaining an even balance will require that on occasion he must intervene in the questioning of witnesses with questions of his own – the purpose being to clarify the unclear, to complete the incomplete to elaborate the inadequate and to truncate the long-winded. It is not to embellish, to emphasize or, save rarely, to criticize. That is the function of counsel. The casual by-stander on seeing and hearing repeated judicial intervention may well conclude that issues in the case or the case itself are being decided before the evidence and the submissions are complete: if the casual by-stander may do so how much more the interested party, the litigant. This division of role between judge and advocate was always important in civil trials by jury;*

it is more important now that claims for damages for personal injuries are no longer tried by juries." [emphasis added]

47. *DPP v. McGuinness* [1978] IR 189, as highlighted by Faherty J. in *O'Connor v. Judge O'Donoghue* [2017] IEHC 830, is the leading Irish case on judicial interruption. In *McGuinness*, during the course of the trial in respect of a charge of rape, the trial judge interrupted the complaint numerous times to make inquiries and remarks. On appeal, it was held that the interventions of the trial judge had caused the trial to be unsatisfactory and a retrial was ordered. The Court of Criminal Appeal opined that the number of questions and interventions by the trial judge made *it impossible for the defence to conduct an effective cross-examination and could have caused the jury to believe he formed a definite opinion as to the credibility of the complainant*.

48. *O'Connor v. Judge O'Donoghue* seems to me to be a more apposite analogy to the current case. There, having considered both criminal and civil case law on judicial intervention, Faherty J. noted the English case of *Jones v. National Coal Board* [1957] 2 QB 55 which set out the function of a judge in a civil dispute:-

"The judge must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth

...

So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties...

So also it is for the advocates, each in turn, to examine the witnesses, and not for the judge to take it on himself lest by doing so he appear to favour one side or the other…

And it is for the advocate to state his case as fairly and as strongly as he can without undue interruption, lest the sequence of his argument be lost…The judge's part in all of this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and to keep the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned symbol." [emphasis added]

49. Faherty J. noted at para. 94 when addressing the fact that while the trial judge's interventions were "*actuated by the best of motives*", *"[t]he difficulty is that however worthy the learned trial judge's intentions were, it is a well established rule of the system of justice under which the courts operate that judicial interventions should be as infrequent as possible, in particular, when a witness is under cross-examination. As pointed out in Jones v. National Coal Board, 'the very gist of cross examination lies in*

the unbroken sequences of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness of qualifications of the evidence which he has given in chief." [emphasis added]

50. The transcript of the hearing in this case is of enormous assistance in understanding the concerns expressed by the applicants. The hearing commenced at 3.45pm, presumably at the end of what could be expected to have been a busy day of hearings. The hearing itself, including the announcement of the judgment, lasted until 5.45 pm. A number of themes or patterns of concern emerge from a consideration of the transcript, however for the purposes of this decision it seems to the court that the extent of the interventions by the learned Judge were such that it is impossible to conclude that the hearing was fair. The level of intervention was excessive and went far beyond any need to clarify points or to keep the case on track. The learned Judge excessively intervened in the examination and cross examination of witnesses to the point that he gave the appearance of having entered the fray to a substantial extent.

51. The learned Judge was informed that there were four claimants but expressed a preference to hear from just one witness "to short circuit matters". When Ms O'Reilly was called, it is apparent that the judge initiated and effectively took over her examination in chief. Of the first 63 questions asked, only 6 questions were asked by Ms O'Reilly's counsel. At that point, despite having conducted the bulk of the questioning – and therefore deciding on the course of inquiry – the learned Judge expressed considerable scepticism that the burden of proof had been discharged. Counsel for Ms O'Reilly endeavoured to explain how she understood the burden of

proof under Equal Status Act claims, attempted to refer to the filed papers, and made a short submission explaining Ms O'Reilly's case.

52. The learned Judge continued to interrupt counsel and made observations suggesting that he had not heard evidence that Ms O'Reilly felt discriminated against, despite the fact that he had conducted the preponderance of questioning to that point, and then moved to interrogating the submissions. The learned Judge also effectively ignored the point that counsel was attempting to make to the effect that the Traveller discrimination element in the case emerged as a result of papers filed by the respondent with the WRC. It would be fair to say that the learned Judge either did not grasp the potential significance of the documents filed by the respondent as part of the WRC process - which squarely introduced the issue of the Hotel's previous experience accommodating Traveller families unconnected to the applicants before the Court - and instead seemed very focused on the question of whether Ms O'Reilly sensed Traveller discrimination at the point when she presented to the Hotel. The learned Judge then intervened to express a view that it was not possible for Ms O'Reilly to "go on two horses. She can't say, I am discriminated upon because I am homeless, and then say with the same breath, because I am a traveller."

53. When counsel for the respondent was cross examining Ms O'Reilly the transcript records that approximately 127 questions were asked. Of those 127 questions, approximately 68 questions were put by the learned Judge. The transcript makes clear that the learned judge repeatedly interrupted the re-examination of Ms O'Reilly by her counsel. Similarly, when Ms O'Reilly's partner gave evidence, the learned Judge conducted the bulk of the questioning, thereby directing the evidence towards the issues that he wished to consider.

54. The evidence for the respondent was given by the manging director of the respondent, Mr McDonagh. Strikingly, all of the questions in his examination in chief were asked by the learned Judge, and most were leading questions directed towards explaining and justifying the position adopted by the Hotel. The learned Judge again continually interrupted Mr McDonagh's cross examination by counsel for Ms O'Reilly.

55. In all the circumstances it was clear to this court that even if the learned Judge was focused on endeavouring to hear and conclude the WRC appeal expeditiously the objective impression of the hearing was that it was unfair. That finding in and of itself is sufficient to warrant the court quashing the orders made by the Circuit Court and remitting the matter for a fresh hearing before a different judge.

SUMMARY

56. In summary, although the applicants have sought to impugn the decision in the Circuit Court on a large number of grounds, it is possible to address matters by reference to the narrower issue of unfairness. The court is satisfied that the proceedings in the Circuit Court were rendered unfair by the excessive interventions of the learned Judge. That unfairness is such that the decision and orders must be set aside.

57. In the premises, the court will grant an order of certiorari quashing the decision and orders of the Circuit Court made on the 18 October 2022, and will make a further order that the appeal from the WRC should be remitted to the Circuit Court to be dealt with by a different judge.

58. As this judgment is being delivered electronically, I should note my provisional view on costs. Having succeeded in quashing the decision impugned in these proceedings the applicant (Ms O'Reilly) should be entitled to the costs of her proceedings as against the respondent.

59. Four sets of judicial review proceedings were initiated and only two proceeded to hearing, hence it would seem to follow that the decisions in each appeal before the Circuit Court should be quashed and remitted in a similar way to the orders involving Ms O'Reilly. Nevertheless, because there was in effect only one hearing before this court, it seems that the justice of the case is met by awarding Ms O'Reilly the costs of her action to include any reserved costs, and by awarding the applicants in the other cases the costs of and associated with the initial individual applications for leave to apply for judicial review, with all costs to be adjudicated in default of agreement.

60. I will list the matter before me to address the question of final orders at 10.30 on 10 October 2024, and will hear argument if the parties wish to contend for any different forms of final orders.