

Neutral Citation no. [2005] NIQB 40

Ref: WEAC5260

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 27/05/2005

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY BERNARD O'CONNOR
AND ANDREW BRODERICK FOR JUDICIAL REVIEW**

WEATHERUP J

The application.

[1] This is an application for Judicial Review of the decision dated 22 September 2004 made by a police disciplinary panel, dismissing an application to stay disciplinary proceedings against the applicants, who are police officers. The basis of this application for Judicial Review concerns the action of the members of the disciplinary panel, between the date of a hearing and the delivery of a decision on a preliminary issue, in obtaining legal advice in relation to the matter from the Head of Legal Services to the Police Service of Northern Ireland. This application raises the issue of apparent bias. Mr O'Donoghue QC and Mr Torrens appeared for the applicants, Mr McMillan BL appeared for the Police Service and Mr Larkin QC and Ms Lyttle BL appeared for the Police Ombudsman.

The background.

[2] The applicants are serving police officers and on 11 March 2001 were involved in an incident in Armagh which resulted in the second applicant firing shots from his police revolver at a motor vehicle. On 18 May 2002 the driver of that motor vehicle was convicted of motoring offences and was sentenced to 3 years imprisonment and disqualified for driving for 15 years. As the discharge of the firearm was neither accidental nor in the course of training the Office of the Police Ombudsman was notified and carried out an investigation. On 26 April 2001 and 13 June 2001 the first and second applicants respectively were each served with forms known as "OMB3"

specifying, in the case of the first applicant, that he had instructed the second applicant to fire his police firearm at the motor vehicle, and in the case of the second applicant that he had fired his police firearm at the motor vehicle.

[3] The Police Service of Northern Ireland (Conduct) Regulations 2000 provide that a report, complaint or allegation against a police officer shall be investigated and a report prepared. This may result in disciplinary charges and a hearing before a disciplinary panel of three officers appointed by the Chief Constable. If sanctions are imposed on the police officer by the disciplinary panel the officer may seek a review before the Chief Constable. On 24 October 2003 the applicants were charged with disciplinary offences. The first applicant was alleged to have abused his authority by permitting the second applicant to use his police firearm to fire on a motor vehicle in circumstances contrary to the Police Service of Northern Ireland Code section 36 paragraph 6. The second applicant was alleged to have disobeyed the lawful written order contained in section 34, paragraph 6, of the Code, by discharging his police firearm at the motor vehicle.

[5] The applicants applied for a stay of the disciplinary proceedings and the application was dealt with as a preliminary matter on 28 May 2004 and 31 August 2004. On those dates the applicants and the Chief Constable were represented by Counsel and skeleton arguments were submitted to the Panel. The application for a stay was based on the delay in the proceedings and relied on a number of legal authorities dealing with delay in criminal proceedings and disciplinary proceedings. The Panel dismissed the application by a written decision issued on 22 September 2004. The Panel concluded that the disciplinary hearing should proceed to hear the evidence before coming to a final decision on the issue of whether the applicants had suffered prejudice as a result of delay.

[6] The Northern Ireland Office has issued "Guidance on Police Unsatisfactory Performance Complaints and Misconduct Procedures." At paragraph 3.57 it is provided that -

"In the event that, whether in the light of skeleton arguments or after hearing oral arguments, the presiding officer decides that he or she needs to obtain legal advice, this advice may be provided in private but should in due course be summarised to the parties concerned at the hearing."

[7] On 22 September 2004, upon delivery of the decision of the Panel dismissing the application for a stay of the disciplinary proceedings, the Chairman of the Panel informed the parties at the hearing that the Panel had sought legal advice from the Head of Legal Services. As appears from the transcript of the proceedings of 22 September 2004 the Chairman of the Panel

obtained oral advice from the Head of Legal Services prior to the date the decision was delivered and then the Chairman met the members of the Panel on 22 September 2004 and they drew up their decision in writing.

The Police Service structures for disciplinary proceedings.

[8] The structures in place are described in the affidavits. Disciplinary proceedings are brought against police officers in the name, and on the authority, of the Chief Constable. Disciplinary proceedings are dealt with by the "Internal Investigation Branch" of the Police Service. There is an Office of Legal Services to the Police Service and the Chief Constable. David Mercier is the Head of Legal Services and he describes the role of his office in disciplinary proceedings as being "merely a formal role and also entails the passing of papers between the relevant parties." IIB is described as responsible for the investigation of disciplinary matters, co-ordination of investigations with the Office of the Police Ombudsman and the presentation of disciplinary matters before disciplinary panels; however IIB makes extensive use of independent Counsel in practice at the Northern Ireland Bar and the difficulty facing IIB is that Counsel are not permitted to take instructions directly from IIB but can only act on instructions from a person on the Roll of Northern Ireland Solicitors; accordingly when IIB wish to instruct Counsel in disciplinary proceedings they forward the case papers to Mr Mercier's office to brief Counsel; when files come to Mr Mercier's office he assigns disciplinary matters to one of three assistant legal advisers who in turns briefs Counsel. Mr Mercier states that in his opinion the assistant legal adviser has no role of any substance in the case.

[9] Detective Chief Inspector McKeown is assigned to the IIB. She sets out on affidavit that in the present case there was an investigation by the Office of the Police Ombudsman and a misconduct file recommending formal charges was submitted by the Office of the Police Ombudsman to the IIB. IIB drafted charges which were agreed by the Office of the Police Ombudsman; as IIB are not able to instruct Counsel directly IIB forwarded the case papers to the Office of Legal Services to instruct Counsel. DCI McKeown describes the role of the assistant legal adviser as being confined mainly to administration; primarily the assistant legal adviser passes communications between IIB and Counsel; the assistant legal advisor does not attend disciplinary hearings and has no input into decisions; decisions as to amendment of charges, evidence or how to proceed are made by the supervising member of the IIB.

[10] The Chairman of the Panel describes the process in relation to the obtaining of legal advice in the present case. After the hearing on 31 August 2004 the panel members reviewed the various submissions made by the parties and unanimously concluded that the applicants' contentions should be rejected and that the matter should proceed to full hearing; further the Panel concluded that the question of prejudice should be left open so that the

applicants would be permitted to present any evidence they saw fit as to prejudice caused by delay; the members of the Panel were not totally confident in their understanding of the legal authorities that had been opened during the hearing and it was agreed that the Chairman would approach Mr Mercier to seek advice on the interpretation of the case law; on 3 September 2004 the Chairman met Mr Mercier for approximately 15 minutes; there had been an earlier occasion when the Chairman had consulted with Mr Mercier in relation to a very similar case and had discussed the legal authorities; on 3 September 2004 the Chairman had drawn up an outline of the unanimous decision of the Panel and this was discussed with Mr Mercier and advice sought on whether the Panel had misdirected itself as to the applicable law; the Chairman received no indication that the Panel had misdirected itself as to the law.

Apparent bias.

[11] The applicants allege apparent bias. It is contended that the disciplinary panel should not seek legal advice from the Head of Legal Services, as legal adviser to the Chief Constable. Disciplinary proceedings are undertaken against police officers on behalf of the Chief Constable. In the course of the hearing Mr O'Donoghue QC added two further aspects of the complaint of apparent bias. The Regulations provide for a review by the Chief Constable of decisions of a disciplinary panel. The applicants contend that in respect of any legal advice required by the Chief Constable for the purposes of such a review the Chief Constable will be expected to consult Mr Mercier as legal adviser. Further the applicants contend that even if the Chief Constable is a "nominal" complainant in disciplinary proceedings, which the applicants do not accept, the IIB as the part of the organisation processing the complaint may have occasion to seek legal advice from the Office of Legal Services or from Counsel through the Office. In those circumstances the applicants contend that members of the Office of Legal Services should not give legal advice to disciplinary panels. The applicants were given leave to rely on the further aspects of the complaint of apparent bias and leave was granted for the respondent to file a further affidavit to address the further aspects.

[12] The test to be applied in relation to apparent bias has been redefined by the House of Lords in Porter v Magill [2002] 1 All ER 465. Having considered the test formulated by the House of Lords in R v Gough [1993] 2 All ER 724, and the more objective approach taken in Scotland and some Commonwealth countries and in the Strasbourg jurisprudence, Lord Hope suggested what he described as a modest adjustment of the test in R v Gough. Accordingly the Court must first ascertain all the circumstances that have a bearing on the suggestion that the decision maker was biased. It must then ask whether those circumstances would lead a fair-minded and informed

observer to conclude that there was a real possibility that the Tribunal was biased. As stated by Lord Hope in Porter v Magill at paragraph 103 -

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.”

[13] The parties referred to two earlier cases. First of all, the applicants relied on R v Sussex Justices ex parte McCarthy [1924] 1 KB 256 where the applicant was convicted by magistrates on a charge of dangerous driving after a collision with another vehicle. The magistrates’ clerk was a solicitor in the firm acting for the other driver in civil proceedings against the applicant arising out of the collision. The clerk retired with the magistrates but they did not consult him and he did not refer to the case. The conviction was quashed by a Divisional Court. In his judgment Lord Hewart CJ made his famous remark that -

“.....it is not merely of some importance but is a fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

In quashing the conviction Lord Hewitt said of the clerk, “His two-fold position was a manifest contradiction.”

[14] The second case was relied on by the respondents. In R v Camborne Justices ex parte Pearce [1955] 1 QB 41 the applicant was convicted of an offence under the Food and Drugs Act after charges were brought by the County Council. The clerk was a member of the County Council, though not of the relevant public health committee and he retired with the magistrates. The Divisional Court dismissed the application to quash the conviction, holding that in the circumstances there was no real likelihood of bias on the part of the magistrates’ clerk.

[15] These two earlier cases of McCarthy and Pearce were discussed in R v Gough. The former was described by Lord Goff as leading to a tendency for courts to invoke a test requiring no more than a suspicion of bias and the latter as rejecting such an approach and relying on the approach of real likelihood of bias (page 664A-C). Applying the modern test for apparent bias set out in Porter v Magill the outcome of the two earlier cases could be expected to be the same today.

[16] The issue of bias was further considered by the House of Lord in Lawal v Northern Spirit Limited [2004] 1 All ER 187. The claimant alleged racial discrimination and his complaint to an employment tribunal was

dismissed. At the appeal before the Employment Appeal Tribunal the Senior Counsel instructed by the employer had previously sat as a Recorder with one of the lay members of the Tribunal. The House of Lords held that the previous practice whereby part-time Judges in the Employment Appeal Tribunal might appear as Counsel before a Tribunal, having previously sat with one or more lay members of the bench hearing the appeal, should be discontinued.

[17] Referring to the modified approach to apparent bias outlined by the House of Lords in Porter v Magill Lord Steyn stated, at paragraph 14, that –

“The small but important shift approved in Porter’s case has at its core the need for ‘the confidence which much be inspired by the courts in a democratic society’

Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach.”

It was stated, at paragraph 21, that the principle to be applied was whether a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased. At paragraph 22 Lord Steyn stated –

“What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago. The informed observer of today can perhaps ‘be expected to be aware of the legal tradition and culture of this jurisdiction.’... But he may not be wholly uncritical of this culture.”

The Court concluded that the practice in issue tended to undermine public confidence in the system.

The objective observer.

[18] The modern approach to apparent bias reflects the need for public confidence that must be inspired in courts and tribunals, and for present purposes that includes the police disciplinary system. Public confidence will not be inspired by any public perception of the real possibility of bias in the

system. The assessment is made on an objective basis. The standard of intervention requires a real possibility. The prospect will apply to circumstances that may include unconscious bias. Where an adviser holds different positions within a system that may create the perception of conflicting roles. The objective observer would note the existence of the legal office advising the Police Service and the Chief Constable on the general range of legal issues that may affect their functions. In relation to disciplinary proceedings the objective observer would note that such proceedings are undertaken formally on behalf of the Police Service and the Chief Constable, and that in itself would not lead to any adverse conclusion by the objective observer. Further, the legal office processes the disciplinary files and Counsel may be instructed to prosecute the disciplinary charge. There is a division of responsibility in the legal office in that the head of the legal office allocates all disciplinary cases to an assistant. The assistant makes no substantial contribution to the process and does not attend Counsel at the disciplinary hearing. Again the involvement of the legal office is a formality brought about by the legal culture concerning instructions to Counsel and those arrangements would in themselves not lead to any adverse conclusion by the informed observer.

[19] However there are further circumstances that the informed objective observer must consider where there would be the appearance of a manifest contradiction or conflict of interest and a corresponding perception of the real possibility of bias.

First of all the head of the legal office may advise the disciplinary panel. The objective observer would note the appearance of a manifest contradiction or conflict of interest within the legal office where the head allocates the case, the assistant processes the case on behalf of the prosecutor and the head advises the adjudicator in the disciplinary proceedings. At this stage the involvement of the legal office ceases to be a formality. The legal office formally processing the charges is also advising the decision makers. The appearance of a manifest contradiction or a conflict of interest would hardly be diminished in the mind of the objective observer by the head of the legal office having no substantive role other than advising the panel. The objective observer would recognise that the legal office will be seen to have a role, albeit formal, in the prosecution as well as a potentially substantive role in the adjudication. There must be a public perception of a real possibility of bias on the part of the Panel in these circumstances.

Secondly, the Chief Constable has power to review the decision of the panel. The role of the legal office in relation to the Chief Constable upon a review has not been stated. However the further affidavit filed on behalf of the respondent by Mr Mercier indicates that he provides day to day legal advice on matters of concern to the Chief Constable and the assistant legal advisers may also have occasion to advise the Chief Constable on the entirety

of the role of the Chief Constable. The objective observer would be entitled to assume that, if legal advice were required on such a review, the Chief Constable would receive that legal advice from the legal office. There is the appearance of a manifest contradiction or a conflict of interest between the role of the legal office in advising the Panel and also advising the Chief Constable upon a review. This must reflect upon the public perception of the Panel when the structures for obtaining legal advice operate in such circumstances. There must be a public perception of a real possibility of bias on the part of the Panel in these circumstances.

Thirdly, the IIB acts on behalf of the Police Service and the Chief Constable in the prosecution of disciplinary charges. Mr Mercier's further affidavit indicates that he or an assistant legal adviser would provide general legal advice to the IIB, including the investigation of disciplinary matters, but not on the bringing of disciplinary charges. The objective observer would also be entitled to assume that Counsel instructed by the assistant solicitor in the legal office would advise the IIB. There would be an appearance of a manifest contradiction or a conflict of interest between the legal office advising the IIB on the investigation of disciplinary matters and instructing Counsel to advise the IIB in relation to the prosecution, and the legal office advising the disciplinary panel and the legal office advising the Chief Constable on review. There must be a public perception of a real possibility of bias on the part of the Panel in these circumstances.

[20] To apply the words of Lord Steyn in Lawal v Northern Spirit the indispensable requirement of public confidence in the administration of justice requires higher standards today that was the case even a decade or two ago. While the informed observer today can perhaps be expected to be aware of the legal traditions and culture of this jurisdiction he may not be wholly uncritical of this culture. The present practice in relation to legal advice in relation to the prosecution, hearing and review of police disciplinary charges tends to undermine public confidence in the system.

[21] It is contended by the respondent that if the legal advice offered to the Panel was correct then there was no error and no detriment to the applicants. However apparent bias does not depend upon proof of prejudice but is concerned with perception. The respondent contends that examples could be offered where in particular circumstances legal advice from the Head of Legal Services to the Panel would not be the occasion for the objective observer to conclude that there was a real possibility of bias. In the present case the legal advice involved an oral briefing on the legal authorities, and given the overall circumstances in which that legal advice is offered, as outlined above, could not be other than the occasion for the objective observer to conclude that there was a real possibility of bias. It should be emphasised that there is no suggestion of actual bias on the part of the Panel or the Chief Constable or the legal advisers.

Satellite litigation.

[22] The Police Ombudsman is a Notice Party to this application for Judicial Review and objects to the Judicial Review proceedings being permitted to interrupt the disciplinary proceedings. This objection is made on the basis that the application for Judicial Review represents satellite litigation that has the effect of interfering with the disciplinary proceedings against the applicants. In R v Chief Constable of the Merseyside Police ex parte Merrill [1989] 1 WLR 1077 a police officer subject to disciplinary charges applied for Judicial Review of a decision of the Chief Constable that a notice of disciplinary charges had been served as soon as was reasonably possible after the conclusion of criminal proceedings and rejecting an abuse of process application. The Court of Appeal stated that it had been a mistake to treat the issue about the notice as a preliminary point and to adjourn the disciplinary hearing to enable an application to be made for leave to apply for Judicial Review and to grant leave to apply for Judicial Review. Lord Donaldson stated at p.1088 –

“There can be cases in which the evidence is so substantial that it is sensible to give separate consideration to a preliminary objection based upon Regulation 7, but these must be very rare and I do not think that this was such a case. It must be even rarer to have a situation in which judicial review should even be considered before a Chief Constable has reached a final decision on the complaint, if indeed one can be imagined. Normally, the time for judicial review would not arise, if at all, before the appeal tribunal had given its decision.”

[23] In R v Director of Public Prosecutions ex parte Kebilene [2000] 2 AC 326 the House of Lords held that a decision of the DPP to consent to a prosecution was not amenable to Judicial Review in the absence of dishonesty, mala fides or an exceptional circumstance. Lord Steyn concluded by stating –

“While the passing of the [Human Rights Act 1998] marked a great advance for our criminal justice system it is in my view vitally important that, as far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be

permitted in our criminal justice system. In my view the Divisional Court should have dismissed the respondents' application."

[24] Both cases cited above recognise that only in exceptional circumstances will it be appropriate for Judicial Review proceedings to take place in the course of criminal proceedings and that all issues should be dealt with in the proceedings whether at trial or on appeal. Similarly in disciplinary proceedings the issues that arise should be dealt with in the proceedings, whether at the initial hearing or on review or on appeal where permitted, and normally Judicial Review would only be appropriate at the conclusion of those disciplinary proceedings. The issue of apparent bias that arises in the present proceedings goes to the very essence of the system for the conduct of disciplinary proceedings. A longstanding practice is under challenge and the conduct of all disciplinary proceedings may be affected. The present case of apparent bias is not merely case specific but affects the whole system of adjudication. The above circumstances are exceptional and the Court should intervene at this preliminary stage of the disciplinary proceedings. Accordingly the decision of the disciplinary panel will be quashed and the matter reconsidered by a new panel that will operate in accordance with arrangements that do not give rise to apparent bias.