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Judgment: approved by the Court for handing down | *Delivered:* **31/05/2006**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY
DAVID ANDREW GLASGOW FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of the decision of a Police Disciplinary Panel of 20 June 2005. By that decision the Panel refused to recuse itself from a consideration of disciplinary charges brought against the applicant after legal advice had been obtained by the Panel from the Police Service legal adviser.

[2] This application was made further to the judgment in O'Connor and Brodericks Application [2005] NIQB 40. By that judgment it was held that the system for obtaining legal advice operated by Police Disciplinary Panels involved apparent bias. At paragraph 18 of the judgment it was stated -

> "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 which may include unconscious bias. Where an adviser holds different positions within a system that may create the perception of conflicting roles."

[3] There were stated to be three respects in which the system gave the appearance of bias.

First, the head of the legal office may advise the Disciplinary Panel, and the objective observer would note the appearance of a conflict of interest

where the head of the legal office allocates the disciplinary case to an assistant, the assistant processes the case on behalf of the prosecutor and the head of the legal office then advises the Disciplinary Panel.

Second, the Chief Constable has power to review the decisions of the Panel, and the objective observer would note the appearance of a conflict of interest between the role of the legal office in advising the Panel and then advising the Chief Constable upon a review of the Panel's decision.

Third, the Internal Investigation Branch acts on behalf of the Police Service and the Chief Constable in the prosecution of disciplinary charges. The legal office advises the IIB in relation to the investigation of disciplinary matters. There was the appearance of a conflict of interest between the legal office advising the IIB on the disciplinary matters, the legal office instructing Counsel to advise the IIB in relation to the prosecution, and the legal office advising the Disciplinary Panel on the hearing and the Chief Constable on a review.

[4] The events giving rise to the disciplinary charges in the present case occurred on 19 April 2000 when the applicant was on duty with Constable Hanna attending the scene of a domestic violence incident in Glengormley. At the scene Constable Hanna was attacked and while the applicant went to the police vehicle to call for help a gunshot was discharged. On return to the house the applicant found that Constable Hanna had sustained a head wound and a man on the premises had been shot. As a result of the incident the applicant received formal notification for disciplinary purposes on 22 May 2000, namely disobedience of an order in that he failed to carry a truncheon or a notebook, neglect of duty, in that he failed to take appropriate action to prevent an assault on a lady present at the scene and neglect of duty in that he failed to assist the man who had been shot.

[5] On 17 October 2002 three disciplinary charges were served on the applicant and on 21 October 2003 a disciplinary hearing was convened. At that hearing a preliminary point was taken in relation to the application to disciplinary proceedings of the fair trial provisions under Article 6 of the European Convention. In particular, the applicant proposed to rely on the reasonable time requirement provided by Article 6. The issue on the preliminary point concerned the application of Article 6 to police disciplinary proceedings. The Panel ruled that Article 6 did not apply to disciplinary proceedings.

[6] Assistant Chief Constable McCausland chaired the Panel and by his affidavit he states that having heard the application in relation to Article 6 and in order to reassure itself, the Panel, which was comprised of non-lawyers, spoke to the Police Service legal adviser, Mr Mercier, in order to ensure that the conclusion that the Panel had formed was not legally flawed.

Mr Mercier confirmed the Panel's understanding of the law on the issue and with that reassurance the Panel announced its decision to the parties. In the course of doing so on 21 October 2003 ACC McCausland also advised the parties that the Panel had sought legal advice from the Police Service legal adviser.

[7] On 8 January 2004 the applicant made an application for leave to apply for judicial review. That application essentially relied on two grounds (1) whether or not Article 6 applied to the disciplinary proceedings so that the reasonable time requirement could be called in aid in relation to the charges and (2) at paragraph (m) of the Order 53 Statement, that the Disciplinary Panel failed to act fairly and reasonably and in accordance with the rules of natural justice in reaching its decision, in that the Panel, in the absence of the applicant and his legal advisers, consulted with and sought the advice of the police legal adviser before delivering its ruling on the application of Article 6 to the disciplinary hearing.

[8] At the hearing of the judicial review before Morgan J the applicant proceeded on the first ground in relation to the application of Article 6, but did not proceed with the second ground in relation to the involvement of the force legal adviser. On 1 June 2004 Morgan J gave judgment and dismissed the application for judicial review on the basis that Article 6 did not apply to police disciplinary proceedings.

[9] Thereafter the matter came back before the Panel and evidence was heard on 21 and 23 March 2005. The judgment in O'Connor and Brodericks Application was delivered on 27 May 2005. The hearing of the disciplinary proceedings in the present case then resumed on 20 June 2005 and on that occasion Counsel for the applicant made an application that the Panel should recuse itself from hearing the matter on the basis of apparent bias and in reliance upon the judgment in O'Connor and Brodericks Application. The Panel rejected the application. ACC McCausland states in his affidavit that at no time after the Panel's ruling of 21 October 2003 had it sought any legal or other advice from the Police Service legal adviser. Instead legal advice on the application made on 20 June 2005 had been obtained from the Crown Solicitor's Office, which is independent of the Police Service.

[10] This application for judicial review challenges the decision of the Panel of 20 June 2005, by which the Panel refused to recuse itself after taking advice from the Police Service legal adviser in October 2003 in relation to the application of Article 6 to disciplinary proceedings. The Order 53 statement sets out the grounds of challenge. First, that the Panel's decision was unfair, secondly, that it was procedurally improper, and thirdly that the circumstances gave rise to apparent bias. All the grounds really focus on one aspect, namely that in reaching its decision the Panel had taken advice from the Police Service legal adviser.

[11] The respondent in answer to the complaint of apparent bias relies on the doctrine waiver. It is contended by the respondent that the applicant, with knowledge that advice had been received from the Police Service legal adviser, proceeded with the first application for judicial review and then with the evidence in the disciplinary proceedings without reliance on apparent bias.

[12] To invoke waiver it is necessary to establish, as appears from the judgment of Lord Bingham in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 1 All ER at paragraph 15 that -:

> "It is however clear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not."

[13] The party alleged to have waived the apparent bias should have full knowledge. I consider that in order to constitute full knowledge there must be appropriate disclosure of the grounds upon which the complaint of bias might be made. Such disclosure made to the legal advisers may be sufficient if they have knowledge of the relevant circumstances as well as the applicant. Further, it is necessary that any objection be timely. In other words, once the applicant has full knowledge, he or she must not "wait and see". Secondly, such acts as would constitute waiver must be clear and unequivocal. There must be an obvious and freely given election made not to proceed with the challenge on the ground of bias. Thirdly, there is the matter of the Court refusing to accept a waiver of bias in the public interest, where some greater public concern arises.

[14] In Locabail (above) a Judge had been a member of a law firm that had a connection with proceedings that he was hearing. He had no personal involvement, but his former firm had an involvement and he disclosed that information. Initially no objection was taken. At paragraphs 68 and 69 it stated that it was not open to the applicant to wait and see how her claim in the litigation turned out before pursuing her complaint of bias. It was contended that not enough information had been disclosed to the applicant to put her on her election. The court disagreed. It said that the essentials of the conflict of interest case that were relied on were known. It was stated that the applicant "wanted to have the best of both worlds. The law will not allow her to do so."

[15] R v Secretary of State for the Home Department ex parte Al Fayed [2001] concerned an application for a British passport. The Home Secretary was reported as having stated in advance that such a passport would not be granted to the applicant. The application was then made to the Home Secretary to decide whether a passport should be granted. The fact that he

was reported as having made this statement was known to the representatives of the applicant and the issue was whether proceeding with the application and not objecting to the Home Secretary dealing the matter amounted to a waiver of the apparent bias. The Court of Appeal was satisfied that there had been a waiver of any apparent bias. Kennedy LJ at paragraph 85 cited Henchy J in Corrigan v Irish Land Commission [1977] IR 317 at 326— "The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways."

[16] Kennedy LJ accepted that there may be cases of actual bias being shown which in the public interest the courts will say cannot be waived. Referring to New Zealand cases he stated that tentatively he would be prepared to accept the view of the New Zealand Court of Appeal as accurately representing the law but that in that case there was on any view no display of blatant bias likely to undermine public confidence in the justice system(paragraph86).

[17] R(Agnello) v London Borough of Hounslow [2003] EWHC 3112 (Admin) concerned planning approval for alterations to a market in London. The applicants were aware of the involvement of certain fellow traders in the decision-making in relation to the opening of the new market. The issue was whether the applicants had sufficient knowledge for the purposes of a claim of apparent bias on the part of the fellow traders. It was found that the applicants did not have full knowledge because it was relevant for them to know the extent to which the fellow traders were involved in the decisions as to who should be allowed to be a trader in the new market. Silber J concluded that the applicant "was in ignorance of the fact that its competitors on the Relocation Committee could and would make statements about it, which it would not have the opportunity to comment on or to rebut". An additional and an important reason why the waiver claim failed was that there was no "clear and unequivocal" waiver (paragraph 89).

[18] Turning to the facts of the present case it is necessary, first of all, to establish whether or not the applicant had full knowledge. There was disclosure of the relevant facts to the applicant on 21 October 2003 that there had been contact between the Panel and the Police Service legal adviser. This enabled the applicant to formulate a complaint about the involvement of the Police Service legal adviser in the Order 53 statement lodged in the first judicial review on 5 January 2004. The applicant elected not to proceed with that ground and so it did not form part of the judgment of Morgan J on 1 June 2004. The evidence in the disciplinary proceedings was then heard on 21 and 23 March 2005. The judgment in O'Connor and Brodericks Application was given on 27 May 2005. The application that the Panel recuse itself on the ground of apparent bias was made on 20 June 2005.

[19] The applicant contends that he was not fully informed in relation to the true character of the arrangements in the legal office until 27 May 2005. The evidence about the structures to which objection is taken in the judgment in O'Connor and Brodericks Application did not come to the attention of the applicant or his legal representatives until the judgment was delivered. What constitutes full knowledge? Full knowledge means sufficient information being available to an applicant or his legal advisers to enable him to appreciate that an objection on the ground of bias could be made. It is not for the decision-maker to undertake enquiries in order to complete his knowledge of the facts, as appears from paragraph 26 of the decision of Locabail where it was found that the judge with the potential conflict of interest was not bound to make further enquiries in relation to the involvement of his firm in the legal proceedings in question. Similarly, in a situation such as the present, it would not have been for the members of the Panel to begin to examine the structures in relation to the giving of legal advice in order to disclose fuller facts to the applicant. The Panel were only obliged to disclose to the applicant such relevant facts as were within their knowledge. That is what the Panel did on 21 October 2003 when it disclosed that they had sought advice from the Police Service legal adviser. At that point the applicant had sufficient facts to raise the issue of apparent bias, and indeed the applicant did so in drafting the first application for judicial review.

[20] Further facts emerged in the course of the judicial review, which is almost inevitably the case on any application for judicial review when a respondent replies. Such further facts may strengthen an applicant's case, as occurred in O'Connor and Brodericks Application. However that does not alter the position that the applicant had received sufficient information to enable him to determine whether to raise the objection. Not only did the applicant have sufficient information, but he actually did raise the objection and for reasons that are not clear he elected not to proceed. It may be that he was advised at the time that it was not a strong point and he preferred to rely on his alternative point under Article 6. The reason does not change the position. He was sufficiently well informed to be able to make a decision with full knowledge of the relevant facts.

[21] Having established full knowledge it is necessary, secondly, to establish that the waiver is clear and unequivocal. That condition is satisfied. The applicant clearly and unequivocally removed from his judicial review challenge any reliance upon the complaint concerning the involvement of the Police Service legal adviser. Not only that, but he then proceeded to have the evidence heard in the disciplinary proceedings before taking up with the Panel the issue of bias. There has been waiver by the applicant of any complaint of apparent bias.

[22] While acknowledging that there may be cases where public confidence in a criminal justice system or a disciplinary system might not be maintained

if the Court were to accede to the contention that there had been waiver of bias, so that in such cases the Court would not accept a plea of waiver in the public interest, this is not such a case. The advice received from the Police Service legal adviser concerned a preliminary point about the application of Article 6 to police disciplinary proceedings. Thereafter, when the Panel began to hear the substance of the charges against the applicant, it did not obtain legal advice from the Police Service legal adviser but from the Crown Solicitors Office. There is no public interest that requires the Court to disregard the waiver of apparent bias by the applicant.

[23] In all the circumstances I dismiss the application for judicial review.