Neutral Citation No. [2015] NIQB 1

Ref: **TRE9494**

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

Delivered: **08/01/2015**

2011 No 137064/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR65's Application [2015] NIQB 1

IN THE MATTER OF AN APPLICATION BY JR65
FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT AND MINISTER FOR HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

TREACY J

INTRODUCTION

[1] Before this court the applicant seeks leave to adduce further evidence in support of the apparent bias ground of challenge. Whether further evidence is admitted or not this court is now required to rule on whether the impugned decision is infected by apparent bias.

[2] The background to the present application, as set out in the applicant's written submissions, is that the applicant originally initiated an application to adduce such additional evidence in the context of the pending appeal and cross-appeal, which is listed before the Court of Appeal. These appellate proceedings are listed for hearing before the Court of Appeal, commencing Monday 19 January 2015, for 4 days. When the matter was reviewed before the Court of Appeal on 2 October 2014, the Court of Appeal resolved that the apparent bias element of the appeal should be remitted for determination by the High Court (on the basis that the Court had previously decided that it was not necessary to reach any conclusion on the ground of apparent bias by virtue of the other findings in the case; but that, because this issue is included as a ground of appeal in the (applicant) respondent's notice of cross-appeal before that Court, it was desirable to have the first instance judge's view on the matter). In such circumstances, the Court of Appeal resolved that the

corresponding additional evidence application should therefore be determined by this Court, in the first instance, when hearing the apparent bias ground again.

[3] The applicant seeks leave to adduce the following fresh evidence:

(a) Comments made by the (respondent) appellant Minister (Mr Edwin Poots MLA) to the Northern Ireland Assembly ("the Assembly") on 5 November 2013, following judgment being delivered in this matter by this Court on 11 October 2013; and

(b) A BBC news article dated 25 September 2001 entitled "*Gay blood donor comments furore*", reporting comments made by Mr Edwin Poots MLA in his capacity as the Democratic Unionist Party MLA for Lagan Valley.

FACTUAL BACKGROUND

[4] The factual background to the application to adduce further evidence is set out in the affidavit and exhibits of Mr Brian Moss, solicitor for the (applicant) respondent, sworn on 5 September 2014, for the application before the Court of Appeal.

Comments made to the Assembly

[5] In the context of a debate before the Assembly on 5 November 2013, in respect of a motion noting the ruling of the High Court and calling on the Minister to *inter alia* lift the lifetime ban on blood donations from men who have had sex with men (MSM), the Minister was asked to respond to a number of questions, which included a question as to whether the Minister would appeal against the decision of the lower Court. The Minister commented as follows:

> "The question is this: will I appeal it? I am very reluctant to appeal it. Number one, it gives the larger parties in the Executive considerably more power. Number two, it refers a lot of governance back to the national Parliament and, as a unionist, should I be that concerned about that? Number three, do I believe that I would get fairness in the Court of Appeal or would there be a circling of the wagons? I am concerned that that may not be the case.
>
> People have made suggestions about my own moral views and so forth, and, although there has been no bias found — because there is no bias to find — it is interesting to see that just last week in England Sir James Munby outlined that secularism rules in courts now and there is no place for religious beliefs. He had to be rebuked by the

former Archbishop of Canterbury George Carey who said that we are now living in:

'An age when all faiths are equal - except Christianity'.

When I was at the Department of the Environment, I was asked a question by a BBC journalist as to whether I was fit to be a Minister and a Christian. What a shameful, despicable question, particularly when there are people in this Government who have engaged in terrorism and have been convicted of terrorist activities. It is alright for them to be in Government, but, if you embrace Christian values, you should not be there. That was the substance of the question.

4.45 pm

There is a continual battering of Christian principles, and I have to say this: shame on the courts, for going down the route of constantly attacking Christian principles, Christian ethics and Christian morals, on which this society was based and which have given us a very good foundation. It is a shame that George Carey had to respond in the way that he did to a judge in GB who made such a statement. It appears that our judges are rushing headlong in behind them.

Therefore, I am not sure that I would get a fair hearing ..."
(applicant's emphasis)

[6] The applicant submitted that it is clear that the Minister interpreted the judgment of this Court as part of an assault on Christian principles, ethics and morals, and the Minister considered that he was not sure that he would get a fair hearing on appeal because of what he perceived to be judicial antipathy towards Christian principles.

[7] It was contended by the applicant that the Minister's reasoning in this debate only makes sense if and to the extent that he viewed his impugned decision as being consistent with, or an expression of, his Christian beliefs and morals, notwithstanding his stance in these proceedings that the decision was made purely on health grounds.

2001 News Article

[8] Following the judgment of this court, and corresponding reports in the news media, the applicant's solicitor Mr Moss avers that his attention was drawn to an internet "link" to a much earlier BBC news story entitled "*Gay blood donor comments furore*", from 2001, which reported comments that the (respondent) appellant Minister had made at that time, in his capacity as the elected representative for Lagan Valley, regarding issues relevant to these proceedings. The applicant submitted that the gist of the article suggests that the Minister displayed a predetermined view of the issues which later came before him for decision in his capacity as Northern Ireland Minister for Health, Social Services and Public Safety.

[9] It was common case at the hearing that the Ladd v Marshall strict test for admission of fresh evidence *on appeal* does not apply where, as here, the High Court was dealing with the issue at first instance. The parties were agreed that the **test** to be applied in determining whether to admit the further evidence was relevance and fairness. No suggestion was raised by the respondent that it would be unfair to admit it. Accordingly the sole question on this aspect of the case was the relevance of the further evidence.

[10] As to the 2001 article the sole point raised against its admission was that as the article appeared 10 years prior to the impugned decision it was not relevant given the passage of time. In the context of this case I consider that the passage of time goes to weight rather than to relevance and I propose to admit it.

[11] As to the 2013 Assembly remarks the respondent argued that as these post-dated the decision they "… cannot, on any view, be relevant to a consideration of whether, at the time of taking the decision, the Minister was apparently biased." This argument is unsustainable. The parties are agreed that the test for apparent bias is that laid down in Porter v Magill [2002] 2 AC 357 namely "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". But that question must be answered by reference to the facts known to the court at the time it is determining the question of apparent bias. The court must first ascertain all the circumstances which have a bearing on the suggestion of apparent bias. It then must ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility of bias - see Lord Hope at para [102]-[103] of Porter v Magill and Weatherup J at para 18 of Re Cullen [2005] NIQB 9. In my view the Minister's Assembly remarks are unquestionably circumstances which have a bearing on the determination of this issue and it would be wrong for the court to shut out consideration of these remarks. Accordingly I admit this further evidence.

Apparent bias

[12] Taking into account all the matters which it is said have a bearing on the suggestion of apparent bias I consider that these circumstances would lead a fair-

minded and informed observer to conclude that there was a real possibility that Minister Poots was biased. The circumstances include the following:

(i) the finding of the court that the decision of the Minister was irrational. This finding gives rise to the real possibility of some "undisclosed agenda" as Mr Scoffield QC characterised it or of the decision being infected by extraneous considerations;

(ii) the fact that the Minister's decision was against the advice of his senior officials and without any consultation with the Assembly Health Committee or other interested parties. The Minister had a submission recommending the removal of the lifetime ban but he nonetheless as counsel put it "quickly, without consultation and against the advice of his officials" acted against this advice. Whilst he is entitled to reject the advice and recommendations of his officials he can only do so on rational grounds;

(iii) the Minister denied that he had made a decision in his reply to the pre-action correspondence and maintained this stance at the leave hearing. This was plainly wrong. The Minister had made a decision and he knew he had made a decision. This is clear from the contents of various documents including internal emails and notes from the Departmental files which I have summarised at paras 43-47 of my earlier judgement [see also paras 123-125]. For example in one email from the Ministers Special Advisor reference is made to the "**Minister's decision to keep the ban ...**" In a note from the Department's file it is recorded that "… the Minister advised that … he **had decided** to keep the lifetime ban …" The Minister's very troubling lack of candour and his attempt to conceal the fact that he had made a decision are plainly circumstances that are material to whether a fair-minded and informed observer would conclude that there was a real possibility of bias;

(iv) the fact that politicians and others expressed their concern that the Minister had acted out of prejudice. This included the deputy leader of the UUP and health spokesman John McAllister who said "… I feel the Minister has been disingenuous and has based his decision on deep-rooted personal prejudice" [see Trial Bundle 1 p227]. See also Mr McAllister's comments, those of the Chair of the Stormont Health Committee and John O'Doherty of the Rainbow project reported in the BBC News NI on 22 September 20011 at p169 of TB 1.

(v) the Minister's 2013 Assembly comments. These I have already set out above. From these comments the Minister purported to interpret this court's judgment as an assault on Christian principles and morals. The Minister's case has always been that the impugned decision was taken on purely health grounds. Thus Christian principles and morals

formed no part of the legal case justifying the impugned decision. Nor accordingly did such considerations form any part of the court's judgment which was directed solely to the lawfulness of the impugned decision and, inter alia, an analysis of the sole ground put forward by the Minister to justify it. If, as the Minister claimed, his "decision" (as I held it to be) was based solely on health grounds his reasoning in the debate can only mean that *he* regarded his impugned decision as an *expression* of his Christian beliefs and morals. Simply put if his decision was based on purely health grounds why would he be making these comments. *If* health was, as the Minister claimed, the sole basis underpinning the impugned decision, no question of any assault on Christian principles or morals could conceivably arise. Such a criticism could only make *any* sense if the Minister regarded his challenged decision as a manifestation or expression of his religious beliefs;

(vi) the Minister's previous opposition to gay rights legislation and the 2001 News article.

[13] For the above reasons I conclude that the test for apparent bias has been met and that the impugned decision is infected with apparent bias.