Neutral Citation No. [2013] NIQB 133 | *Ref:* **TRE9106**

Judgment: approved by the Court for handing down | *Delivered:* **20/12/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

PS's Application [2013] NIQB 133

IN THE MATTER OF AN APPLICATION BY PSFOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE FOSTERING APPEAL PANEL OF THE SOUTH EASTERN HEALTH & SOCIAL CARE TRUST

TREACY J

Introduction

[1] The applicants in this judicial review challenge a decision of the Fostering Appeal Panel of the South Eastern Health and Social Care Trust ("the Appeal Panel") which upheld the decision of a Fostering Panel ("the Panel") terminating the approval of the applicants as foster carers and that the decision of the Trust was reached in breach of the rules of natural justice. The membership of the Appeal Panel was comprised of the same membership as the Fostering Panel.

Background

[2] The applicants became approved foster carers in 2000 and remained so for over a decade. During that time they provided foster placements to over twenty children. The last such placement, of two boys, lasted for twenty months before the boys were removed from the applicants' foster care on 27 May 2011.

[3] A note of a Trust strategy meeting on 21 April 2011 indicates that it was agreed that given concerns including those set out in an Employer's Reference, the boys should be moved to an alternative placement.

[4] An Employer's Reference dated 15 April 2011 is the subject of defamation proceedings instituted by PS.

[5] An application for leave to apply for judicial review of the decision to remove the boys contends that PS was not properly informed of the allegations, or given a proper opportunity to respond to them in advance of the decision to remove the boys being taken or confirmed. That application stands adjourned generally, as a Fostering Panel that met on 25 June 2012 decided to terminate the approval of the applicants as foster carers.

[6] The applicants appealed the decision of 25th June.

[7] The Appeal Panel convened on 28 September 2012, and upheld the decision by letter dated 2 October 2012. It is this decision which is impugned in these proceedings.

Order 53 Statement

[8] The applicants seek an order of certiorari quashing the decision of the Fostering Appeal Panel to refuse the applicants' appeal and an order that the matter be re-considered and determined according to law.

[9] The grounds on which the above was relief was sought included:

> "(a) The manner in which the impugned decision was reached was in breach of the rules of natural justice in that:
>
> - The Fostering Appeal Panel comprised the same membership as the Fostering Panel whose decision was appealed against, and as such offended the rule against bias (*nemo judex in causa sua);* and
>
> - The receipt by the Fostering Appeal Panel of information relied upon in the refusal of the applicants' appeal, in the absence of the applicants and without affording them a right to know of and respond to that information, was in breach of the right to a fair hearing (*audi alteram partem).*"

[10] In support of the first ground of challenge arising from the common membership of the two panels Mr Sayers referred the court to the following statement of principle in Wade & Forsyth's Administrative Law (10th Edition, 2009) at p372 :

> "[I]n administrative law natural justice is a well-defined concept which comprises two fundamental rules of fair procedure: that a man may not be a judge in his own cause; and that a man's defence must always be fairly heard. In course of law and in statutory tribunals it can be taken for granted that these rules must be observed. But so universal are they, so 'natural', that they are not confined to judicial power. They apply equally to administrative power …".

[11] As to the rule against bias Mr Sayers referred to the summary of the rule in Wade at p380:

> "A judge is disqualified from determining any case in which he may be, or may fairly be suspected to be, biased".

[12] The applicant contended that the rule requires application of the test whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased [see Re Medicaments and Related Classes of Goods (No.2) [2001] 1 WLR 700 per Lord Phillips at para 85 adopted by Lord Hope in Porter v Magill [2001] UKHL 67 at para 103 and Lord Bingham in Lawal v Northern Spirit Ltd [2003] UKHL 35.]

[13] In the present case he said this test falls to be applied in light of the respondent's acceptance that:

> "[I]t is correct that the membership of the Fostering Appeal Panel was comprised of the same membership as the Fostering Panel".

[14] The applicant submitted that the present state of the law on bias should preclude the 'particularly clear class of irregularity' referred to by Wade & Forsyth:

> "… where a person sits with an appellate body to hear an appeal against a decision of his own …" (p397).

[15] Mr Sayers emphasised that this is not a case in which it is alleged that a panel is infected by the presence of a single person with previous involvement in a decision: the panel that took the impugned decision was simply re-convened to determine an appeal against that decision. Such a process he submitted does not merit description as an appeal.

[16] However, in Hamlet v General Municipal Boilermakers and Allied Trades Union [1987] 1 WLR 449 Harman J held that there was no rule of natural justice that a member of a body who had sat at first instance might not properly hear the matter on appeal [see p455 letter B-H and the line of authority referred to therein]. The present case is concerned with administrative not judicial decision makers. However, even in the case of judicial decision makers prior consideration of a case does not, by itself, disqualify a judge from considering the matter at a later stage [see para 8.92 of Judicial Review Principles and Procedure by Auburn, Moffett and Sharland]. Whether the task of the panel was truly an appeal or more likely in the nature of a review its common membership did not offend the rules of natural justice.

[17] As the respondent's deponent explained there is nothing sinister in the common membership. Ms Walsh, Assistant Principal Social Worker, deposes that it was "entirely appropriate" to have the same membership as this was a panel that had been convened to allow the applicants to discuss their grounds of appeal against their deregistration as foster carers, to allow them to raise before the panel any new information or evidence based on their grounds of appeal and to allow social work staff to meet with the panel to clarify any issues raised by the applicants. The various Statutory Rules and Regulations relating to fostering are silent as to any appeal or review process – see Reg 7 of the Foster Placement (Children Regulations) (NI) 1996 No 467. The procedure followed derives from the guidance referred to below. I accept the point made by Mr Toner QC that the process is not in substance an appeal to an independent panel but rather one of review by a reconvened Foster Panel.

[18] For the above reasons I dismiss the first ground of challenge.

[19] As to the second ground of challenge I was referred to page 426 of Wade that proper hearing must always include a 'fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view'.

[20] Relying on this Mr Sayers submitted that it is plain that what occurred before the Appeal Panel on 28 September 2012 was destined to give rise to unfairness.

[21] It was submitted that the termination of the applicants' approval as foster carers is the revocation of a licence held for over a decade. Mr Sayers cited De Smith's Judicial Review (6th edition, 2007), referring to the presumption that a person whose licence may be revoked should have notice and an opportunity to be heard and paragraph 7-019 that:

> "The presumption should be especially strong where revocation causes deprivation of livelihood or serious pecuniary loss, or carries an implication of misconduct".

Being akin to a revocation rather than a simple refusal, it was submitted furthermore that it was a decision with a particular effect upon the applicants' reputations as well as depriving the applicants of an established ability to generate income by important, difficult and worthwhile work. It was argued the Appeal Panel adopted a procedure structured to deprive the applicants of knowledge of what was said by social work staff in response to the questions of the Appeal Panel.

Discussion

[22] The procedure followed by the Trust is set out in Section 17.12 of the Fostering Services Policy and Procedures for Looked After Children Vol 2. The procedure first saw the applicants attend before the decision maker. They were given the opportunity to discuss their grounds for appealing and to raise any new information or evidence based on the grounds of appeal. On conclusion of their submissions they left with an indication that the Appeal Panel would contact them in writing. Social work staff then met with the Panel to clarify any issues raised by the applicants. Three questions had been agreed by the panel to clarify points raised by the appeal. These questions had been agreed by the panel following the presentation by the applicants. The first question to which the applicant takes great exception is that Ms Walsh [assistant principal Social Worker] was asked "aside from the information already taken into consideration by the panel previously is there any historical evidence in relation to [the applicants] capacity to work in collaboration with Social Services." This question and the response [in the applicants' absence] elicited material said to be relevant to the second reason for refusing the appeal namely 'concerns still remain about PS's collaboration and working together with the Trust". The explanation for the genesis of this question is set out in Ms Walsh's affidavit. The question did produce a response which elicited adverse information relevant to the appeal. This is recorded in the minutes at page 7 [page 36 of the trial bundle]. That was not provided to the applicants for consideration, correction or clarification before a decision in the matter was reached. It seems to me that as a matter of procedural fairness the applicants ought to have been alerted to the provision of this information and given an opportunity to respond. They were not and on that basis the decision must be quashed.