An Chúirt Uachtarach

The Supreme Court

O'Donnell J
McKechnie J
MacMenamin J
Dunne J
Charleton J

Supreme Court appeal number: S:AP:IE:2020:000044
[2020] IESC 000
Court of Appeal record number 2014/745
[2019] IECA 299
High Court record number 2010/319 JR
[2012] IEHC 000

Between

Patrick J Kelly
Applicant/Appellant

- and -

The Minister for Agriculture, Fisheries and Food, The Minister for Finance, The Government of Ireland, Ireland and the Attorney General
Respondents

Judgment of Mr Justice Peter Charleton delivered on Tuesday 30 March 2021

1. The purpose of this judgment is to indicate assent to the reasoning of Dunne J in her dismissal of Patrick Kelly's claim that he was dismissed contrary to fair process from his post as harbourmaster of Killybegs Fishery Harbour Centre, an established civil service post, on 30 September 2009. In the expectation that clear principles may inform future cases, this one having trodden every available sideroad of procedural law, taking up ten days in the High Court and three in the Court of Appeal, it may be that a series of questions and answers might assist. This was, after all, a case about whether a civil servant was dismissed according to fair procedures. The whole point about fair procedures is that they are supposed to be clear and simple steps that ensure fairness. Where the law on fair procedures has become so complex as to command days of analysis, then the law is undermined; it can hardly be expected of civil servants that they negotiate legal minefields in pursuit of this kind of simple task. In reality, the law on fair procedures is both clear and simple in contrast to the inventive submissions on behalf of Mr Kelly. In addition to the enquiry, complaint is also made about the Cabinet decision but Mr Kelly bears the burden of proof and there is no proof of what he alleges.

What are the essential facts?

2. Killybegs in west Donegal has a very large and deep harbour. In consequence, a serious fishing industry has grown up around it together with a large town that belies the origin of its name *na cealla beaga*, in apparent reference to small monastic dwellings from perhaps the 7th century. With the size of the huge modern vessels involved, the local processing industry, visits from foreign ships, and general busyness, the harbour is regulated and Mr Kelly used to be the harbourmaster.

3. The position is an established civil service post and Mr Kelly can only be dismissed by decision of the Government. No public servant is entitled to engage in activities which conflict with the duties assigned to them by the State. The harbour master of Killybegs is on standby on a 24-hour basis. Where large vessels require pilotage into the harbour and in finding an appropriate berth or anchorage, a pilot may be engaged. Like every vocation in life, a pilot may be good or bad and where a harbourmaster is in a position to require one be used, it is not appropriate that a firm in which he holds shares is engaged at his suggestion or that he profit, even potentially, from recommendations or suggestions which carry the weight of the authority which has been conferred on him by a State appointment. Were that to be allowed, an inefficient and even dangerous service could be recommended to, or required of, those needing to purchase that assistance, accidents might follow or the civil servant deciding that vessels should have a pilot might always insist even where it would be completely unnecessary. Thereby, his profits would be maximised or his shareholding value improved where those needing a pilot are pushed in the direction of his company. Any toleration of such a practice would be a strong indication of a corrupt public service in Ireland. That is why public servants are both independent and do not ever profit from their duties outside of their pay and pension entitlements. What was involved here was an affront to the traditions of our public service. This was a harbourmaster, but the underlying corruption would be the same in any branch of public service. There would, for instance, be nothing different to a judge sitting on a patent list and suggesting that an expert assessor was needed to sit with him or her on complex cases and nominating a scientific consultancy firm in which the judge held a shareholding.

4. Patrick Kelly ran a pilotage service, or directed the attention of ships' masters to a pilotage service, North West Marine Services Limited, when pilotage was needed, or was required by him, for incoming or outgoing vessels to Killybegs Harbour. He had been formally warned against engaging in pilotage in 1996 and 1997. In August 2004, the Department was in receipt of an anonymous letter making allegations against Patrick Kelly. It was decided on 6 September 2004 to investigate Patrick Kelly but the process was not speedily initiated. The anonymous author was probably not the only person disturbed by whatever was thought to be going on in Killybegs Harbour. Concerns were also brought to the attention of a Minister in another Department. She visited the relevant Department and expressed her concerns on 14 October 2004. Then, four days later, Patrick Kelly was informed of his suspension from duties and the commencement of the official investigation into his conduct. Two matters are equally improbable: that the Minister and the officials did not discuss the decision of 6 September 2004 and that the officials would simply have left the investigation in abeyance after this visit. Probably, the ministerial visit acted as a spur.

5. It is likely that on this visit, not then minuted officially but only discovered during litigation through uncovering quite cryptic unofficial notes, the Minister let rip about Mr

Kelly. There were references to matters entirely outside the nature of the harbourmaster's duties and which impacted on his character. That broadside was delivered to Cecil Beamish, the secretary-general of the Department and to Tony Fitzpatrick, the chief personnel officer and the person designated to run the enquiry.

6. With what at worst might be regarded as the personal opinion of the Minister ringing in his ears, Mr Fitzpatrick began an enquiry. He was met by procedural hurdles, lengthy legal correspondence and needed to consult with counsel. So much for fair procedures. His enquiry lasted four years. It should have been simple. The uncertainty of Irish administrative law and the entitlement to raise points as to how enquiries of this simple kind are to be conducted may reasonably be considered, in the light of the relevant papers, to have contributed. The enquiry found that Mr Kelly had run a pilotage service and had profited from it. Mr Kelly had denied that he had profited, while accepting, as the basic facts from the Companies Register were unassailable, that he was involved in running a pilotage service in the very harbour of which he was harbourmaster. His defence was that while he was involved in running a pilotage service, no profit came to him and further that he was acting no differently, he asserted, to the person he replaced and to the person who took up duties after him.

7. While a lot was disputed and the correspondence burgeoned as to fair procedures and the right to turn an enquiry into what would, in effect, have been a criminal trial, one fact could never be disputed: Patrick Kelly is a 1% shareholder in North West Marine Services Limited. Other shareholders are another man and his wife. That company had retained profits of €142,978 in 2003 and of €172,548 in 2004. Those were profits in respect of which the company were entitled to declare a dividend and while nothing may be known as to any internal arrangement or trust as between shareholders, this was an accumulation of wealth on services offered in the very domain where he was master, not in consequence of his own enterprise, but by virtue of a State appointment.

How complex need an internal civil service enquiry be?

8. In the High Court hearing there was much discussion as to when procedures imported from a plenary hearing before the Superior Courts need be imported into what was in effect an employment matter or, looked at another way, an enquiry into what the public service needed to know in order to excise the cancer of corruption. An enquiry is different to a trial. A civil trial involves the judge in usually hearing both sides, unless the case at the close of the plaintiff's case is so weak that it cannot stand. A judicial review may be uncontested but, even so, a judge should only proceed to provide a remedy if the facts as deposed to on affidavit are credible and legally create an entitlement in the court to make an appropriate order. A criminal trial may involve the accused never giving evidence, perhaps contributing only by putting through counsel in cross examination any counter case to witnesses against him or her. In a criminal trial an accused is in a privileged position by law, entitled to put the prosecution on full proof of any case alleged through the simple assertion of a plea of not guilty to the indictment. These procedures, civil or criminal, may be chosen as between employer and employee as part of the contract of employment. That amounts to the voluntary assumption of complex procedures akin to a trial but such procedures are not necessary as a matter of the general law and are likely to be deeply unhelpful. Complex procedures are, firstly, not mandated by law, secondly, are likely to trip up or impede an enquiry and, thirdly add markedly to the time that needs to be taken to complete, as here, what may be an essential investigation to preserve the integrity of public administration.

9. While this particular process is argued by Mr Kelly to have been unfair, it involved a saga of four years of investigation by the chief personnel officer of the relevant Department of State, an appeal process spread over three days, ten days of argument in the High Court and two in the Court of Appeal. At once, it must be commented that a civil or criminal trial model is inappropriate to employment or internal civil service investigations. What is at issue is whether something was done wrong, in terms of neglect or active misbehaviour, by an employee. An employee is not an accused in a criminal trial. A public servant or other employee has no entitlement, unless granted by contract, which is unlikely, to remain silent in the face of a situation where his or her position or duties would reasonably call for an explanation to be given. Since an employee owes a duty of care and fidelity to his or her employer, there is a duty of cooperation and truth-telling in relation to the subject in issue. There is no right to silence, no right to sit back and say: "prove your case for I will say nothing, presumed as I am to be innocent." Unless a contract otherwise specifies, an employment enquiry is not an offshoot of court procedures. Instead, it involves the employer investigating what has happened or what has been neglected, with the cooperation of the employee, gathering information and then putting that information to the employee so that he or she knows what neglect or misbehaviour of theirs is in question. The employee will then put his or her case and the employer will consider if a reasoned view of the situation, having considered the material and the answer, shows misconduct or neglect and if there should be a sanction up to one of dismissal; *Connolly v McConnell* [1983] IR 172, *McKelvey v Iarnród Éireann* [2019] IESC 79. Fairness of procedure is guaranteed by a simple standard. That standard, and the straightforward procedure which it requires, was explained by Clarke J in *Atlantean v Minister for Communications and Natural Resources* [2007] IEHC 233, following the decision of Barrington J in *Mooney v An Post* [1998] 4 IR 288 at 298. There, Clarke J described the floor of rights as beginning with "the minimum" that a person so affected "is entitled to" which is some notice of what might be described as "the charge against him" and while cross-examination or a public hearing do not come into the question necessarily, that person must "be given an opportunity to answer it and make submissions." An enquiry demands fair notice and a chance to comment. It does not, as in the elaborate arguments deployed on behalf of Mr Kelly, require more than that. Apart from his rights, there are other entitlements in play: chief among them is the duty of the public service to conduct enquiries as are necessary for good administration.

10. In the general workplace, many employment contracts incorporate the straightforward Industrial Relations Act 1990 code of practice on grievance and disciplinary procedures, as set out in SI 146 of 2000, while for some forms of employment there may be elaborate procedures leading to dismissal, whereby the employee becomes effectively an accused in a criminal trial and a case is presented with witnesses, with a right to have lawyers and to cross-examine. That extraordinary scenario is not applicable to civil servants generally. In any event, while the minutiae of the civil service dismissal and grievance procedure was examined at length in the High Court and Court of Appeal, this further appeal concerns only the issue of an allegedly biased investigation.

11. In *Shatter v Guerin* [2019] IESC 9, O'Donnell J stressed in his judgment that the nature of the enquiry undertaken determined what procedures, if any, were necessary. As a matter of prudence, being thorough and receiving materials or submissions in similar format, oral or written, from each side is appropriate. Going further and turning an internal enquiry into an imitation of a court case is not:

> 57 I conclude, therefore, that a person charged with conducting a preliminary inquiry with a view to making recommendations as to the establishment of a more formal inquiry, which itself will be conducted in accordance with fair procedures, is not required to afford such procedures, whether by way of legal representation, submission, cross-examination, or some process of submitting a draft report to interested parties and receiving comments thereon before delivery. This is not to say that it is not a counsel of prudence to take steps to engage with all interested parties as fully as possible before making any conclusion in relation to them, not least with a view to strengthening any factual findings. A failure to do so may undermine the cogency and persuasiveness of the report as a matter of fact. But it is not the case that, before concluding such a report, in the normal course, the person charged with making such a preliminary inquiry is obliged as a matter of law to observe certain procedural steps, whether by way of permitting submission, representation, cross-examination, hearing or otherwise, before coming to that conclusion. If this is so because of the nature of the report, and having regard to the legal nature of the task undertaken, then it cannot subsequently become necessary because of the events which occurred in the political arena thereafter.
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> 58 However, it must be recognised that this outcome depends in part on an analysis of the nature of the task the respondent was asked to undertake. As already observed, there was no pre-existing clarity in either statute or administrative practice which showed that the legal nature of that task was clearly established and understood. It is easy for the terms of reference to blur the legal distinctions, and invite, or at least encourage, findings which are essentially final in nature, without the full range of fair procedures that should be necessary before a final conclusion is published to the world with the authority of the State. Furthermore, the task of identifying those issues which are not in dispute assumes a clear dividing line between issues which are contested and those which are not, which may more obvious in theory than in reality. It is important that it is understood that the final, public reporting of adverse conclusions requires that fair procedures are accorded to the person the subject matter of the report. In some cases, that may have to be addressed at a preliminary stage. However, where it is clear that the preliminary recommendation is to do no more than recommend the establishing of a commission of investigation, then that process does not require any particular procedures in advance of such a recommendation. This, as I understand it, is also the view taken by Charleton J.

12. The analysis in the other judgments are to the same effect. The judgments in that case require that, before an adverse view is taken, minimal procedures be adopted. These are no more than attempting reasonably to assemble what may be the relevant facts, including from public servants involved. Where those facts are adverse to a person, here Mr Kelly, fair procedures simply require putting them to him in terms of any relevant written materials and asking for and receiving his response. Reasonable times for this may be allowed, but matters cannot be allowed to drag. The country must be properly administered. On receipt of that response, the person conducting the enquiry will make a decision as to what has happened. Even though that decision be adverse to an individual, the decision will stand. In *Shatter v Guerin,* comments are also made as to more complex forms of statutory enquiry where there are two models. One is based on interviewing witnesses, either privately or publicly, but only through direct questions on behalf of the commission or other tribunal, and gathering materials and interviewing any supposed wrongdoers. A draft report is prepared and any materials supporting any findings of

wrongdoing is given to the thought-to-be wrongdoers, giving them reasonable time to comment. The comments are then considered and a public report is issued. The other model is that of a public tribunal of enquiry, with those who may reasonably be thought to be capable of being severely criticised represented and participating by cross-examination and submission. That participation is sufficient and no draft report is first issued for comment by thought-to-be miscreants. The report simply comes out. But that takes an enormous amount of time, as between gathering materials, distributing all that is relevant, making an opening statement, doing public hearings and drafting an accurate report. It might be commented in this regard that, as in a court case, a witness's evidence may be rejected, even in trenchant terms, but that would give no right to be represented. Rather, it is findings of public wrong, as in corruption, that give those potentially involved the entitlement to be represented. Even there, the draft report and individual enquiry model suffice on the current state of the law. Thus, there may be two types of public enquiry. This was a private enquiry within the public service. Those procedures for statutory enquiries, a commission or a tribunal have no place in an internal public service or employment enquiry, unless these are adopted by contract or by civil service regulation. Here, there was an appeal grafted on to the basic procedure and that becomes important for other reasons.

What is bias and why does it undermine an enquiry?

13. Where a decisionmaker is biased, that precludes any real consideration being given to objective fact. Thereby, relevant factors may be overlooked or hidden or ignored, irrelevant factors may assume importance, what leads nowhere may be made to arrive at a pre-ordained destination and mere makeweights can be turned into primary exhibits as to the confirmation of the decisionmaker's prejudice. Absence of bias is the pivotal point of any fair appraisal of truth. Since truth is the object of every judicial exercise, truth being the indispensable foundation of any fair appraisal of what result is just, where a judge or decisionmaker is uninterested in the truth and has decided an outcome in advance, what may look like a search for facts becomes a tendentious exercise in self-confirmation and even that may be no more than the affirmation of blind opinionatedness based on hatred of others or of individuals. But it is rare in a judicial review to prove that a judge or an enquirer has set out to get a result and to do that with a determination to achieve a pre-ordained outcome no matter what.

14. Rather, the large bulk of cases are about the judge or decisionmaker being conflicted by having an interest in the outcome, some personal or financial tie, according to the standards of reasonable and well-informed people. A judge or decisionmaker should not have an interest in the outcome of a case. If that is so, then there may float around a suspicion based on rational grounds that the decision may have tilted in one direction because of a factor tying the decisionmaker or judge to that specific outcome. This undermines confidence in public administration and it draws systems of justice towards, or even into, the acid bath of public mistrust. An example as old as that of the trial of Saint Jeanne d'Arc may illustrate this. She was condemned to be burnt alive by English forces in France following a supposed enquiry into heresy, the result of which would favour the invading army; Castor, Joan of Arc (London, 2015). A later enquiry overturned the result and rehabilitated her. By then she had suffered horrible indignities leading to a torturous death.

What is the test for bias?

15. It is not bias, as such, but that bias might from the circumstances be apprehended, that is the test. The current edition of Hogan and Morgan, *Administrative Law in Ireland* (Dublin 2019), cannot definitively state the test but, at 14-65, sets out that, as between an applicant seeking to overturn a decision having to prove a real likelihood of bias or merely that there is a reasonable suspicion of bias, that the tide has turned very strongly in favour of the latter. This test, reasonable apprehension of bias or reasonable suspicion of bias, is used by McKechnie J in the unanimous decision of this Court in *Reid v Industrial Development Authority* [2015] IESC 82 at [52]:

> The test for this class of objection is now well established: in short, it is the reasonable suspicion or the reasonable apprehension test: whilst the latter description has been preferred in Bula Limited v. Tara Mines Limited (No.6) [2004] I.R. 412 ("Bula (No.6)"), both terms continue to be used interchangeably. No longer is there any real suggestion that the once alternative approach, namely a real likelihood of bias, should be considered. The test now to be applied is centrally rooted on the necessity of establishing and maintaining the confidence of the public in the integrity of public administration generally. Thus, the prism through which the issue must be considered is that of a reasonable observer's perception of what happened: therefore as has been said on numerous occasions what the parties, the witnesses or even us judges think, is not decisive. It is what the reasonable person's view is, albeit a person well informed of the essential background and particular circumstances, of the individual case.

16. Similarly, in England, it is not necessary to prove bias was present or to show the probability of bias, but rather a real danger of bias. Thus the test in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 is whether a "fair-minded and informed observer, having considered, the facts, would conclude that there was a real possibility of bias", Lord Hope at [103]. This observer is not a litigant and is not paranoid or subject to conspiracy fantasies but rather has objectivity and has diligently self-educated as to the facts of the case and background; see *de Smith's Judicial Review* (8th edition, 2018, London) 10-018. As has been observed, this paragon is an ideal being and capable of fine judgment; in a context where such diverse decisions as between a daughter appearing to plead a case in front of her father who is the judge or the judge who subscribes to a magazine of questionable views, will always form a right judgment. Clearly, the gravamen of objective bias is not that the decisionmaker or investigator formed a pre-judgment, and then tendentiously acted upon it by twisting facts to suit what was already decided, but rather that a person of commonsense and reason and in full possession of the relevant background and the facts of the case would reasonably suspect bias may have influenced the process. Importantly, that is to be judged not as and of the moment when the source of bias is supposed to have crept in, but at the endpoint of the completion of the process. That reasonable person of commonsense would know that, whereas opinion may be powerful, facts speak louder and that while a point of view or a representation may offer a reason to investigate, what an investigation uncovers can fairly be judged in the cold light of reality. The appearance of bias may be left in the wake of serious and determined efforts to deploy investigative resources towards uncovering truth. A reasonable person would dismiss some apparent cases on enquiry and that is because of the nature of such a person. As Lord Hope explained in *Helow v Secretary of State for the Home Department* [2008] UKHL 62 [1-3]:

> The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the

> reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.
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> The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
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> Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

17. This reasonable person would be neither complacent nor unduly sensitive or suspicious and is required by the case law to be particularly well-informed and in possession of quite extensive knowledge. Thus, reasonable suspicion requires actual circumstances whereupon a reasonable individual would find grounds for suspecting that bias had entered the equation. But, that conclusion would not be leapt at; the reasonable individual would take no superficial view but sift through what could be known and then apply the test. In the context of a tie of finance as between the outcome of a decision and the person making the decision, the conclusion is easily reached because there is but one fact and that is a fact which tends to move human nature towards self-interest. In the context of a complex enquiry, then the reasonable person is little or nothing removed from the judge enquiring into a judicial review application: what was it that was alleged to be operative as a biasing factor, would it operate in these circumstances, did it continue to operate, and what does the way the enquiry was gone about and the facts sifted tell us as to whether any initial suspicion should remain? The reasonable bystander in contract implying terms on the basis that it is obvious becomes, in judicial review, the reasonable person with a full knowledge of the facts and, since the time when objective bias is to be judged to be present or not is at the end of the process, has morphed into the fair-minded judge analysing the entirety of what has happened. Thus, the reasonable person with an appraisal of the facts relevant to alleged objective bias has become the judicial review judge. The whole of the process is assessed as and of the end point.

When does the reasonable person condemn a decision?

18. No reasonable person would condemn a thorough enquiry simply because the decisionmaker was at the receiving end of a blast of prejudice. Were that so, no judge could ever sit and consider fairly the facts of a notorious murder case, where the media had pointed towards a prime suspect (taking into account an all judge court such as the Special Criminal Court). Nor could there be judges as fact-finders dealing with a case that excites heady public excitement, for instance, an alleged fraud on the public purse where a supposed whistleblower had dominated the airwaves or time in Dáil Éireann with a lurid but unquestioned tale. A reasonable person does not live isolated from public discourse or mass supposition or the hurried and unthinking creation of heroic figures. A reasonable person knows these may turn out to have clay feet. The decisionmaker is not to be adjudicated as labouring under subconscious bias in consequence of hearing received opinion or to be condemned for pre-judgment as of the moment that the fruits of mass wisdom are served up perhaps as a television program or even as mass public assumption. That can happen.

19. Here, part of the tacit argument is that the Minister is a powerful figure, albeit in another Department from the decisionmaker, and that an outcome was therefore desired. It is possible to argue that case but the height of that argument is only that such an outcome was desired by her. That is not the same as the reasonable appearance of bias. Political figures come and go, the permanent government of our country is always there, working for the public good and upholding standards of good administration pursuant to codes of conduct by which they are bound.

20. On the question of it being wrong in law to rush to judgment on the basis of the mere fact of the enquirer, Mr Fitzpatrick, hearing the opinion of a political figure, it is instructive to quote *de Smith*, 10-018, footnotes omitted:

> While it had previously been held that the fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, it has also been held that the facts known to the fair-minded and informed observer are not limited to those in the public domain. In addition, it has been held that the court must look at all the circumstances as they appear from the material before it, not just at the facts known as to the objectors or available to the hypothetical observer at the time of the decision; what is required is an examination of all the relevant facts. In other words, the position is to be judged at the time the matter comes before the court. In a similar vein, the courts will have regard to admissible evidence about what actually happened in the course of the deliberations of the tribunal against which apparent bias is alleged, and it has been observed that it is important to consider "all of the facts when considering whether apparent bias is established". Overall, the courts will not readily make assumptions from the facts that indicate bias, and have been keen to emphasise that "[t]he test is not one of 'any possibility' but of a 'real' possibility of bias" and that each case turns on an intense focus on the essential facts of the case.

21. Where circumstances have in the past indicated that the decisionmaker had a strong position as to where an enquiry ought to end up or what should the result be, it must be shown in order to demonstrate bias that such a closed mind was there as of the time of the decision; *de Smith* 10-065.

Whose mind must be closed?

22. It thus follows that while there might be evidence of the Minister over the other Department having a view, there is no evidence that Mr Fitzpatrick did anything other than listen to a strong emotional view from a person who had no power, as of that stage, save of urging on an enquiry. There is nothing to suggest she ordered the enquiry towards any particular end or proposed any outcome. Why would Mr Fitzpatrick be influenced by a political figure?

23. Drawing on the wealth of case law from Hogan and Morgan and from de Smith, nothing comparable emerges. Another person's opinion is not imputed to a decisionmaker, the decision maker's context, ties and relationships are what are considered by the well-informed and rational bystander. Material interest of the decision maker is important; *The People (AG) v Singer* (1963) [1975] IR 408; *Goode Concrete v CRH plc* [2015] 2 ILRM 289. Or holding positions on a deciding authority and being one of the experts advising; *Reid v IDA* [2015] 4 IR 494. Personal animosity may show bias, as in judging someone whom the judge has recently had a physical showdown with; *R v Handley* (1921) 61 DLR 656. Or having anti-alcohol views of an extreme kind when adjudicating on licences; *Ex parte Robinson* (1912) 76 JP 233. Or expressing supposedly funny but troublingly unsettling views about the ethnicity of a party; *El-Farargy v El-Farargy* [2007] EWCA Civ 1149.

24. Many cases of bias turn on a continuing situation: the judge has shares, or the decision-maker is the offspring of the person wronged, or the person making the complaint is also acting as judge. What is less obvious, and what is not represented to this point in the decided cases, is a single instance of a representation. That is not important because then there is no ongoing entanglement through which objective justice may find no escape but rather a potentially passing feeling that may dissipate as facts displace emotion. There is no parallel case to this one. The submissions on behalf of Mr Kelly assume that the Minister and her views are to be equated with Mr Kelly, but for this there is not the slightest evidence. The closest parallel in the decided cases is *Helow v Secretary of State for the Home Department*. There, the decision maker was the member of an association which expressed through its publication strong views on matters related to Israel and the Palestinian question. For some views expressed by this magazine, it was said, a person such as the judge who was on effectively the steering committee, ought to resign or make a public disavowal, for others the views are just views, part of the range of opinions, extreme or stupid or worth immediately dismissing from mind, or interesting or carrying perhaps some sense. Just because one is of a particular religion or national identification and is part of an association with a magazine that expresses strong views does not mean identification with those views, much less an apparent bias disqualifying a member of the association from dealing with asylum cases.

What do other parallel situations indicate?

25. The closest that can be drawn as a parallel is the fairness and impartiality required by decisionmakers under Article 6 of the European Convention on Human Rights. Pre-trial publicity may well influence jurors or jurors may well have conducted Internet searches about matters or people in the sphere of public interest, but all that can be done is to ask those who cannot fairly judge a case to tell the judge that prior to being sworn and jurors are warned off browsing on any matter related to a trial. This is different to improper communications between a prosecutor and a juror. In the context of public discourse and a case, the test applied is whether the risk of prejudice is so grave that no direction by a

trial judge, however careful, could reasonably be expected to remove it. Such a decision is not to be jumped to. All the circumstances must be considered. In *R (Mahfouz) v General Medical Council* [2004] EWCA Civ 233 it was decided that prejudicial material must be judged in the context of the proceedings as a whole; and see *Byrne v DPP* [2010] IEHC 322.

26. There is no evidence of initial, or much less any continuing, influence over Mr Fitzpatrick. For all that any reasonable person might know, he might have regarded the Minister as sounding forth with fury but signifying little. Here, the proof of the dish is the careful embarkation on and sifting of facts. In the more serious field of confession statements an abundance of authority backs up the proposition that something, in any event, which might have had an immediate effect on a prisoner towards unlawfully inducing an admission, can dissipate over time; *The People (DPP) v Pringle* (1981) 2 Frewen 57, *The People (DPP) v McCann* [1998] 4 IR 397, *The People (DPP) v Doyle* [2018] 1 IR 1 and in particular the judgment of O'Donnell J where the ultimate test comes down not to the mechanical application of rules but basic fairness. Fairness and scrupulousness in turning over and finding real fact is what is not lacking here.

Does the appeal matter?

27. There was a right of appeal. The findings of fact were not appealed despite the fact that they could have been. If the findings were arrived at unreasonably or in consequence of bias, then under the Civil Service Code, Mr Kelly could have challenged the result. Those findings were of him running a pilotage service in conflict with his public duties and of profiting from that corruption. Instead, he challenged the penalty only. These cases are not on a parallel with *McNamee v Revenue Commissioners* [2016] IESC 33 where there is a lack of the ordinary fair procedures in collecting tax but where there may be an appeal with a hearing, admittedly on a reversed burden of proof, with a right to make submissions; and see the cases cited therein. Nonetheless, the appeal and the lack of protest as to the facts as found would weigh in the mind of the independent and informed person.

The Minister at the Cabinet

28. Dunne J has to be correct in her assertion that the cabinet is bound by the Constitution: *Garvey v Ireland* [1981] 1 IR 75. The same Minister with the memorably strong and colourful views pre-enquiry sat in Government when the enquiry and appeal was over. As an established public servant, only the Government could dismiss Mr Kelly. Under Article 28 of the Constitution, governmental authority is collective. There is no evidence as to whether or not that Minister voted, no evidence as to political lobbying received by other members of the Government for or against any decision, which is common in a democracy, and no position in law whereby the collective nature of the Government's decision could be undermined by the views of one member. In any event, the recommendation of the appellate board was for dismissal and the decision one taken at the highest level after proper procedure leading to it. The documents appended to the draft decision for Government indicate the sense of the recommendation to dismiss. As Article 28.1 declares: "The Government shall be responsible to Dáil Éireann." It is unnecessary for the purposes of this case to delineate any bright lines as between governmental and judicial authority. What can be said from *Garvey v Ireland* in addition to the basic proposition that all branches of government operate under the authority of the people as defined in the Constitution, is that dismissal of an office holder without a basic procedure of putting what is apparently wrong to a person and hearing his point of view is not correct. Article 28.1.2° provides: "The Government shall meet and act as a collective authority, and shall

be collectively responsible for the Departments of State administered by the members of the Government." Under the next clause, if it was desired to try to make a case as to participation in a decision, and no comment is here made on the possibility of that ever having any traction, one member having expressed a view four years earlier, a proper procedure is available under Article 28.1.3° thus:

> The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter –
>
> i in the interests of the administration of justice by a Court, or
>
> ii by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance.

29. Since there is no such evidence and since the outcome of any possible argument is beyond the scope of this appeal, there is no case. As to the view of Dunne J on the applicability of the principle of not being a judge in one's own cause to cabinet discussions after a proper procedure and only one recommendation being on the table, in the absence of evidence, no view need here be expressed.

Result

30. In the result, the appeal from the Court of Appeal should be dismissed and the order of the High Court affirmed dismissing Mr Kelly's application to overturn the procedure leading to his dismissal on the grounds of apparent bias.