AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:2020:000044

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

BETWEEN/

Patrick J Kelly

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 O'Donnell delivered the 30th day of March, 2021.

1. I agree with Dunne J. that the decision of the Government to dismiss the appellant must be quashed. However, I arrive at that conclusion for somewhat different reasons. In essence, I would attribute somewhat greater significance to the events surrounding the meeting of the Minister with Mr. Fitzpatrick in October 2004, but less weight to the

participation of the Minister in the Cabinet meeting of September 2009, while still considering that both matters are relevant to the decision. The end point is, however, the same. For the purposes of setting out briefly my reasons, I gratefully adopt the lucid and comprehensive account of both the facts and arguments in this case to be set out in the judgment of Dunne J.

2. This is an unfortunate and difficult case which presents a set of circumstances which are undoubtedly unusual and possibly unique. My view of the correct outcome of the case is significantly influenced by some extraordinary features of the case and I am reluctant, therefore, to decide the case on a principle of wider application.

3. First, it must be said that the investigation of Mr. Kelly's conduct as the Harbour Master of Killybegs was undoubtedly justified. It is clear that a very detailed, meticulous inquiry was carried out, which was made more difficult by the attitude of Mr. Kelly to it. It was unfortunate indeed that the investigation took so long to come to the conclusion, and that the entire procedure was protracted, and that this case, in turn, has taken so long to wend its way to this Court. In doing so, it appears to have accumulated issues rather than undergoing a process of refinement and focus. It is deeply unsatisfactory to be faced now with an issue relating to an investigatory process first commenced in 2004 and relating to issues which occurred a considerable period of time prior to that. If the outcome of this case was that the entire process should be restarted, there must be considerable doubt that it would be possible to carry out an accurate process of inquiry, and it is open to doubt that, even if it were considered that the process initiated in 2004 was less than satisfactory, a further inquiry into the events at Killybegs carried out now, and hampered by the lapse of time, would provide any more satisfactory outcome. It would, however, be very undesirable, from all perspectives, if the saga were to come to an end simply on the basis that it was no longer possible to come to any conclusion on these matters. These difficulties are beyond the power of any order of this Court to cure. The task for this

Court, at this point, is to determine merely whether the decision of the Government to dismiss Mr. Kelly was valid. That task must be approached with a realistic understanding of the imperfections of any process, but if an outcome is invalid, the court must say so. However, disciplinary matters should not be allowed to fester and judicial review is meant to provide a speedy review of lawfulness. If the courts do not have sufficient resources to ensure that judicial review is concluded speedily, the great remedy and guarantee of legality can become an obstacle to the efficient administration it is meant to ensure.

4. For present purposes, some limited salient facts can be extracted from the morass of evidence, and which frame the difficult issue which must be determined in this case. Following an anonymous complaint, a decision was made within the Department of Agriculture, Fisheries and Food ("the Department") on the 6th of October, 2004, to set up a formal inquiry into Mr. Kelly's conduct as the Harbour Master of Killybegs. Mr. Fitzpatrick was appointed to carry out the inquiry, although Mr. Kelly was not informed of the decision at this point. Two days later, a Minister in another department, who was a local TD, communicated with the Assistant Secretary in the Department and expressed strong views about Mr. Kelly. The Assistant Secretary then set up a meeting between the Minister and Mr. Fitzpatrick which took place a week later, on the 15th of October, 2004. At that meeting, the Minister expressed trenchant views about Mr. Kelly, in somewhat pungent terms, as recorded in an unofficial note taken by Mr. Fitzpatrick, which he later stated he did not know was on the file, implying, perhaps, that it was intended that the meeting would be off the record. Mr. Kelly was not informed of the meeting, and the fact is that the Minister's involvement did not come to light in any way until a chronology was produced at an appeal hearing which recorded the fact of ministerial contact with the Assistant Secretary (but not the meeting). In the event, the chronology was objected to by Mr. Kelly's representatives for other reasons, and was withdrawn, but is now relied on as showing that the Minister's involvement was not concealed. Shortly after the meeting,

Mr. Kelly was informed of the commencement of the investigation and was, moreover, suspended from his position.

5. The investigation was meticulous and protracted. In the initial phase, it was carried out by a retired civil servant, Mr. Bolger. It was not assisted by what was described as a blizzard of correspondence from Mr. Kelly. In the end, however, it does not appear that he took issue with the essential facts found by Mr. Fitzpatrick, but rather argued that they did not amount to any breach of discipline. Mr. Fitzpatrick's report was finally delivered and recommended Mr. Kelly's dismissal on a number of grounds. This was the subject of review before the Civil Service Appeal Board. There is no suggestion that the board, chaired by a Senior Counsel, was in any way aware of the ministerial involvement, such as it was, in October 2004. The panel overturned certain recommendations, upheld one other, but recommended a reduced sanction, but also, and critically, upheld a further allegation of misconduct and the recommendation of dismissal. Under s. 5 of the Civil Service Regulation Act 1956 ("the 1956 Act"), the relevant power of dismissal lay with the Government, and at a meeting of the Cabinet on the 30th of September, 2009, the Government decided to accept the recommendation and dismiss Mr. Kelly. It is accepted that the Minister was a member of that Government, and attended the relevant meeting.

6. I agree fully with Dunne J. that there is no question of actual bias in this case. The relevant legal issue is the question of objective bias, which, in turn, must be viewed from the perspective of the well-known resident of the province of administrative law: the reasonable bystander apprised of all relevant facts. This is, however, a more difficult test to apply than to state, since, almost by definition, the views of reasonable people can differ on certain facts. In this context, for example, it might said that the conclusion of the case depends on the view the hypothesised reasonable bystander may have about political decision-making and the workings of public administration in Ireland. In my view, it is important to apply the test in the particular context, and with an appreciation

of how matters are dealt with in a comparatively small country, with a large public administration, a ratio of members of parliament to constituents which is high by international standards, and an electoral system that encourages and rewards local involvement by such representatives.

7. For these reasons, I do not think that any weight should be attached to the fact that the Minister raised concerns with the Department about Mr. Kelly's conduct. If members of the public communicate with their representative about the performance of a public function, or indeed any matter of public concern, it is entirely appropriate for that representative to pass on those concerns to the relevant Department, and if the representative is a Minister, it might also be expected that the concerns would be taken seriously. That, after all, may be why the representations were made to the Minister in the first place.

8. Even taking this approach, however, I do not think that the circumstances of the Minister's involvement in October 2004 should be discounted. A number of features should be noted. The Minister had no direct ministerial responsibility for the Harbour Master. The Assistant Secretary of the Department who was Mr. Fitzpatrick's superior set up a personal meeting between the Minister and Mr. Fitzpatrick, who had just been appointed to carry out an investigation. The unavoidable conclusion is that all the participants considered that the meeting was relevant to Mr. Fitzpatrick's function as investigator. The fact of the meeting is significant. It is, of course, entirely possible that the meeting was thought of as merely a courtesy to a Minister and, if anything, an inconvenience to Mr. Fitzpatrick, but it did bring the Minister into contact with the investigation in a concrete way.

9. While I do not think the standard expected of judges should be too readily applied to officers in government departments, or others, the comparison is a useful starting point as it would be unthinkable that someone outside a piece of litigation, still less a

government minister, would be introduced to a judge for the purposes of expressing trenchant views of the character of one of the litigants. Weight must also be given to the fact that this meeting was between a government minister and a civil servant, whose normal function is to accept direction from ministers. That the Minister's views carried weight in this setting is illustrated by the fact that the meeting was set up at all. It is inconceivable that a member of the public with a complaint to make would have been facilitated in this way and very doubtful that the facility would have been afforded to a member of the Dáil, even if representing the relevant constituency. The fact that no official note was kept of the meeting is also of some significance in this context. It is normal practice for a comprehensive file to be kept by officials, and good practice for a note to be kept of a meeting between a government minister and anyone else when official business is done. Finally, it is necessary to take account of the fact that, shortly following the meeting, Mr. Kelly was informed for the first time of the fact of the investigation, and furthermore suspended from duty. As Charleton J. observes, even viewed with hindsight and through the foreshortening lens of litigation, it is difficult to conclude that these events were unconnected.

10. In my view, a reasonable bystander who was neither unduly cynical nor prone to conspiracy theories would certainly note, and be troubled by, these events. In other circumstances, these factors in themselves might be decisive. However, the reasonable bystander must be expected to be not just fair, but robust and aware that a standard for objective bias that is met if even a suspicion can be voiced could result in a near-impossible test which could be too easily invoked by disappointed parties who cannot point to any weakness in the individual decision. It is easy to say that the system benefits if the most demanding standards are required, since this will exclude even unrealistic suspicions about the process, but such a test assumes that the benefit of avoiding any hint of suspicion in the mind of even the most committed cynic is costless, when in fact such

a test exacts a very heavy price in decisions set aside and outcomes delayed. Indeed, if a reasonable bystander had an interest in the classics, he or she might be aware that the test that Caesar's wife must be above suspicion, often used to justify demanding of officials, adjudicators and judges that they not only perform their functions correctly, but do so in a way which cannot be criticised by even the most suspicious person (see, in this regard, the famous comment of Bowen L.J. in *Leeson v. The General Medical Council* (1889) L.R. 43 Ch. D 385), was first announced to allow Caesar to justify divorcing his wife, Pompeia, an event that did not seem to trouble him, since it left him free in due course to marry a third wife. Pompeia's views are not known. It would be more impressive if the standard of behaviour was one demanded of oneself rather than used as a vehicle to criticise and undermine the decisions of others. This, or any other case, should not be approached on the basis that if a suspicion can be stated, particularly in a world of fevered social media commentary, a decision must inevitably be set aside.

11. In this case, a reasonable bystander would know that the matters raised by the Minister did not form any part of the Mr. Fitzpatrick's investigation, that the investigation itself was meticulous, that the facts were not in dispute, and that Mr. Fitzpatrick's recommendation as to the penalty was open to review. There was, furthermore, an extensive appellate process before a body that had no knowledge of the Minister's involvement, and which produced the relevant recommendation for dismissal. Furthermore, the fact that the structure required that, before an established civil servant was dismissed, it was necessary for the Government to decide to accept a recommendation to that effect, provided another layer to the process tending to insulate it from the events of five years earlier. If there was nothing more in the case, and a Cabinet that knew nothing of the background had accepted the recommendation of dismissal, then I think a reasonable bystander would consider that, while the events of 2004 were

troubling, the suggestion that a dismissal in 2009 was the product of, or in some sense procured by, a ministerial intervention five years earlier was implausible.

12. I do not consider, however, that these matters could be excluded on the legal ground that any alleged bias had to be extraneous to the process, and that, since the investigation had already formally commenced with Mr. Fitzpatrick's appointment on the 6th of October, 2004, the ministerial involvement was, therefore, part of the investigation and not extraneous to it. First, this argument involves the acknowledgement that the correspondence and meeting were indeed part of the investigative process, which makes more noteworthy the absence of an official record of the meeting, and the absence of any notification to Mr. Kelly, at any stage during that investigation, of the fact of the meeting, or its contents. More fundamentally, this, in my view, is an over-reading of the decision of this Court in *Orange Ltd v. Director of Telecommunications (No. 2)* [2000] 4 I.R. 159.

13. In that case, the applicant sought to challenge a decision of the respondent to award a mobile phone licence, and sought to establish that the marking system adopted contained a number of errors. The High Court, however, held that the decision could not be reviewed on the grounds of individual errors, but rather required something more substantial: namely, a serious or significant error or series of such errors. It was accepted, however, that bias would be a ground of challenge. The applicant then sought to argue that what it contended was a series of erroneous decisions on individual marks adverse to the applicant was itself evidence of objective bias. The High Court upheld that argument, but the Supreme Court reversed the decision. This, then, was the context in which members of this Court made observations about the nature of bias. It was observed that you could not infer bias from the nature of the decision itself. If applied to this case, it would mean that Mr. Kelly could not be permitted to impugn the decision as bias by merely arguing that Mr. Fitzpatrick had been wrong about some one or more aspects of the investigation. Otherwise, the law would give credence to the complaint so readily made that, since the

decision was adverse to me, the decision-maker must have been biased. Bias must be extraneous to the correctness of the decision sought to be impugned. But this reasoning does not, in my view, go the distance of contending that bias must also be extraneous to the process leading to the decision.

14. In any event, the bias alleged here *is* extraneous to the investigation and the decision. What is alleged is that a reasonable bystander might perceive that the conclusions to which Mr. Fitzpatrick came on the facts were influenced not by the merits themselves or the facts established, but rather by the desire (extraneous to the proper investigatory process) to satisfy the Minister. Accordingly, I do not think that the concerns arising from the meeting of October 2004 can be discounted on this basis. However, as set out above, I consider that the reasonable bystander appraised of the exhaustive process in this case would consider that the events in 2004 were unusual and unsatisfactory, but would probably conclude, perhaps after some anxious reflection, that it would be implausible to suggest that when, after an investigation lasting years, Mr. Fitzpatrick produced a report, which was not challenged as to its factual findings by Mr. Kelly, on foot of which it was recommended that Mr. Kelly be dismissed, a conclusion carefully reviewed by the appeal panel and only partially upheld, that the recommendation which went to Government and was accepted was not merely a product of the investigation which had produced the report, but was somehow influenced by a single meeting nearly 5 years earlier.

15. However, this is not the end of the matter. The Minister, who had met Mr. Fitzpatrick and expressed such trenchant views about Mr. Kelly was a member of the Cabinet which met to decide upon the recommendation of dismissal. This is the decisive factor which leads Dunne J. (with whom McKechnie J. agrees) to conclude that this decision must be quashed. In doing so, Dunne J. relies, in part, on the observations of McKechnie J. in *Reid v. Industrial Development Agency* [2015] IESC 82, [2015] 4 I.R. 494 ("*Reid v. IDA*"), to the effect that the test for bias:-

> "remains the same right throughout the ambit of public administration: given that the underlying purpose of the test is confidence in the objectivity of all such persons and bodies, it would be invidious if the standard should differ as between one entity and another".

On this basis, it was considered that the Court of Appeal was wrong to conclude that the jurisprudence in relation to bias on the part of a judge could be applied *simpliciter* to all other deciding bodies having any decision-making function.

16. I agree that the same rule of bias applies to all decision-makers and is derived from the fundamental rule of *nemo iudex in causa sua*, but, in my view, the application of the rule must take account of the different functions being performed, the legal circumstances of the decision being made, and the legal characteristics of the decision-maker. There is no doubt that if the Government coming to make a decision to dismiss an established civil servant pursuant to its powers under s. 5 of the Civil Service Regulation Act 1956 can be treated as indistinguishable from a judge performing a judicial function, then the involvement of a person making the decision who previously expressed strong views and communicated them to the principal investigator would invalidate the decision. In the context of judicial decision-making, this is established by the famous case of *R v. Sussex Justices (ex parte McCarthy)* [1924] 1 K.B. 256.

17. In that case, a driver was subject to a summary prosecution in respect of an accident. The justices' acting clerk was also a solicitor in a firm which had commenced civil proceedings against the accused arising out of the accident. The clerk retired with the justices when they came to make their decision, in which they convicted the accused. The decision was quashed, notwithstanding sworn evidence from the justices that they did not consult the acting clerk, and the clerk, in turn, abstained from referring to the case. This is why, if the analogy with a judge holds true, I would not, with respect, be able to agree with the conclusion of Charleton J. that the provisions of Article 28.4.3° in relation to

Cabinet confidentiality preclude a decision on this aspect of the case. It was not for the applicant to establish what was or was not discussed at the Cabinet meeting, or who took part in the discussions. Furthermore, even evidence emanating from the Cabinet meeting pursuant to Article 28.4.3° to the effect that the Minister did not take part in the discussions on Mr. Kelly's dismissal would not be an answer if, following *R v. Sussex Justices (ex parte McCarthy)*, the participation of the Minister gave rise to an appearance of impropriety.

18. While I recognise the attraction of a single clear-cut rule which, moreover, could be said to maintain the highest standards of behaviour in decision-making, I am reluctant to accept such a far-reaching rule on the basis of a general observation made in the course of the decision in *Reid v. IDA*, on an aspect of the case which was, in any event, subsidiary to the main issue decided in that case, and would prefer to decide this case on a more narrow basis.

19. The starting point is the then-relevant provisions of s. 5 of the 1956 Act, which provides that:- "[e]very established civil servant shall hold office at the will and pleasure of the Government". This would appear to provide a very broad and unfettered discretion to the Government. However, it is now clear that fair procedures must be complied with before a decision is made removing an established civil servant from office. This is the obligation which gave rise to the elaborate procedure followed by Mr. Bolger, and then Mr. Fitzpatrick, and leading, in turn, to the appeal before the Appeal Board. The point has been reached by the combination of the Civil Service disciplinary procedures and the provisions of the 1956 Act that the decision of the Government, while undoubtedly a decision having decisive legal effect, is not in any way an appeal or review of the process that has gone before. It is, rather, a broad decision taken in the light of broad considerations of public policy on the one hand, and perhaps very particular personal considerations relating to Mr. Kelly on the other, but is not in any way a judicial

determination on the facts or a review of legality. It is a process to which it is expected the members of the Government will bring political experience. Had the 1956 Act wished that the final decision in relation to the holding of office by an established civil servant should be made by a judicial body, then it would have provided that confirmation of any dismissal would be a function of the High Court. However, for obvious reasons, the 1956 Act identifies the Government as the body who will make such a decision, and, in my view, certain consequences flow from that legislative choice.

20. The Government of Ireland is established pursuant to Article 28 of the Constitution and is charged with executing the executive power of the State. By Article 28.4.2°, it is obliged to meet and act collectively and the confidentiality of its discussions are protected pursuant to Article 28.4.3°. The Government cannot be required to act and discharge its duties in the same way as judges perform their functions under Article 34 of the Constitution. To take only one example, the expression of views on a matter of public controversy may disqualify a judge from deciding a case which touches on that matter: *Dublin Wellwoman Centre v. Ireland* [1995] I.L.R.M. 408. By contrast, the possession, and prior expression of strong views on matters of public controversy, and the making of decisions on them, might be said to be a positive qualification for members of the Government. Furthermore, it is in the nature of government in a representative democracy that members of the Government who are also members of parliament will be open to the views of their constituents and others. In my view, it is to be expected, for example, where an issue was to come before the Government in respect of the office of an established civil servant, that Ministers might receive representations from the civil servant concerned, and others interested, and conceivably some other citizens in favour of dismissal. This recourse is in sharp contrast to the position of a judge who can only decide a case by reference to the material submitted during the case and lobbying of the judge is absolutely forbidden. To take another example, it is one of the oldest and most established

rules in respect of judicial decision-making that the holding of a pecuniary or other interest in the subject matter of the decision will disqualify a judge from hearing it: *Dimes v. Grand Junction Canal Proprietors* (1852) 3 H.L. Cas 759. However, in respect of holders of public office, a different rule is prescribed. Under s. 14 of the Ethics in Public Office Act 1995, the Minister is normally obliged to make a statement of any material interest in an issue to be decided by the Government, but is then entitled to perform the function of participating in the decision. Recusal is not required: instead, disclosure and participation is contemplated. This is probably consistent with the fact that elected representatives are elected to participate in decisions. I would be slow, therefore, to conclude that knowledge or expression of views which might properly lead a judge to recuse him or herself from a case would disqualify a member of the cabinet from participating in a decision, or invalidate any decision in which he or she participated.

21. In this case, however, the Minister was also an active participant in the investigation, made a complaint in relation to it, was present at the outset of it, was one of the first people to meet the investigator and expressed strong views to the investigator, and then participated in the final decision. Even allowing for the fact that the statutory procedure contemplates a mixture of quasi-judicial investigation in accordance with fair procedures, and a broader political function being performed by the Government, I consider that the reasonable bystander would not, at a minimum, be able to be confident that the procedure was not affected by the twin involvements of the Minister as a complainant/informant at the outset of the process, and as a decision-maker at its conclusion. In the unusual circumstances of this case, I consider that a reasonable bystander would have a reasonable apprehension that the process which should have involved an inquiry (and appellate review) in accordance with fair procedures, and a governmental decision, was affected by the ministerial involvement at each stage. It follows that I agree that, in the particular and unusual circumstances of this case, the decision to dismiss Mr. Kelly should be

quashed. I would hear counsel on the appropriate course which follows from this Court's conclusion. Since this judgment is being delivered electronically, I should, however, express a preliminary view that, following the approach I have taken, it would be permissible to remit the matter to the Government to permit it to make a decision on the report, in the light of the factual matters set out in the judgment of Dunne J.