OUTER HOUSE, COURT OF SESSION

[2015] CSOH 87

P611/15

OPINION OF LORD WOOLMAN

In the Petition of

(FIRST) THE CONGREGATION OF THE POOR SISTERS OF NAZARETH AND (SECOND) THE DAUGHTERS OF CHARITY OF SAINT VINCENT DE PAUL

Petitioners;

For Judicial Review of a decision of the Scottish Ministers dated 28 May 2015 to appoint Ms Susan O'Brien QC as Chair to the Historical Child Abuse Inquiry in terms of section 4(1) of the Inquiries Act 2005

Act: Duncan QC, Paterson; Simpson & Marwick
Alt: Haldane QC, Ross; Scottish Government Legal Directorate
1 July 2015

Introduction

[1] On 28 May 2015 the Scottish Ministers appointed Ms Susan O'Brien QC to chair an inquiry into historic child abuse in Scotland ("the Inquiry"). She is due to commence her duties on 1 July 2015. The Inquiry will take place in terms of the Inquiries Act 2005 ("the Act").

[2] The petitioners are religious organisations. From the 1950s to the 1970s, they both operated care homes for children in Scotland. Those homes will come under scrutiny in the course of the Inquiry.

[3] In 2007 Ms O'Brien represented two clients in an appeal. They sought damages for alleged abuse from the first petitioner. The claims failed on a preliminary point. The House of Lords held that they were time barred: AS v Poor Sisters of Nazareth 2008 SC (HL) 146. In the course of her career, Ms O'Brien acted for other individuals who alleged that they were the victims of abuse. She also assisted a pressure group that sought to change the law relating to time bar.

[4] Against that background, the petitioners challenge Ms O'Brien's appointment. They seek reduction of the Scottish Ministers' decision dated 28 May. The petitioners rely on the common law principle of apparent bias. They contend that a fair-minded and informed observer would conclude that Ms O'Brien was moving from the role of adviser to adjudicator in the same cause and that by appearing in AS, she had supported the claims of her clients.

[5] The petitioners also contend that the Scottish Ministers were not entitled to appoint Ms O'Brien, because she has a close association with an interested party to the Inquiry, contrary to section 9 (1) of the Act.

[6] Mr Duncan appeared on behalf of the petitioners. He emphasised that they do not impugn the integrity of Ms O'Brien. They accept that she has no actual bias and that as the chair of the Inquiry, she would do her level best to discharge her role fairly, taking into account the positions of all the parties.

[7] On behalf of the Scottish Ministers Ms Haldane submitted that the petitioners had failed to identify any flaw in the decision-making process. She maintained that Ms O'Brien's role in AS was a restricted one. All she did was to act as an advocate at the appellate stage and present her clients' case. That did not compromise her position. Further, she had not moved from the role of adviser to adjudicator because the Inquiry tribunal is not a court. It cannot determine liability. In terms of the Act it can only make recommendations. Accordingly the appointment decision should stand.

[8] Mr Duncan accepted that the two issues of apparent bias and close association stood or fell together. Before turning to them, it is necessary to give a fuller account of the background.
[9] I begin with the facts in AS. The claims arose in this way. A number of children alleged that they had been the subject of abuse while living in homes operated by the petitioners. Many years after the events in question were said to have taken place, they raised actions for damages. They were met with a plea of time bar. In order to test the validity of that defence, the claimants' solicitors took forward two individual cases, which were heard together. Mr Colin McEachran QC acted as senior counsel in each of them. Both at first instance and in the reclaiming motion (appeal), the court upheld the time bar plea.
[10] The claimants decided to mount a further appeal. As Mr McEachran had retired from practice they instructed Ms O'Brien as their new senior counsel. She presented the case to the Judicial Committee of the House of Lords.
[11] In his speech (judgment), Lord Hope of Craighead stated:
"These appeals are concerned only with the issue of time bar. Before I explain why this is so, I ought to mention that the issue should be seen in a wider context. The allegations of child abuse which the appellants make are grave enough in themselves. But your Lordships were told that several hundred other actions have been raised against the same religious order by other persons who lived as children in homes which were run by it. Several hundred more have been raised against other institutions, which ran children's homes during the same period." (para 3)

[12] Section 9(2) of the Act provides that a person must notify the Minister in advance of any matters that could affect her eligibility for appointment. The relevant Minister is the Cabinet Secretary for Education and Lifelong Learning ("the Cabinet Secretary"). She requested disclosure from Ms O'Brien in terms of that provision.
[13] Ms O'Brien replied on 27 May 2015. The material parts of the letter are as follows:
"Dear Minister,

National Historical Child Abuse Inquiry

You have asked me to set out matters which might affect public perception of my impartiality, as you intend to appoint me as Chair of the Historical Child Abuse Inquiry.

As far as I am aware, I do not have any direct interest in the matters to which the Inquiry relates, nor to my knowledge, do I have a close association with any persons who may be interested parties. I have had a long career at the Scottish Bar, representing thousands of clients, so it is difficult to recall all of the matters which might be relevant, and it is important to record that I have seen none of the evidence which has been gathered to date. All I can do is to take the Inquiry Terms of Reference as my starting point, particularly the definition of 'In Care'.

I have at various times acted for the UK government (largely prior to 1999), and in particular, I acted for the Home Secretary in numerous immigration cases, some of which may have involved migrant children. Equally, I have often sued the UK government on behalf of clients, and once in my personal capacity. I have represented many Scottish Local Authorities and their predecessors, and sued on behalf of clients. I have been instructed by the Scottish Ministers, and sued them on behalf of clients. I acted for the defence in a brief career in the criminal courts when I was young, and I once acted as an ad hoc Advocate Depute more than a decade ago. I have visited Young Offenders Institutions and Prisons, as a solicitor, as an Advocate, and as a part-time sheriff. I have acted for the insurers of a residential children's care home, and for various educational institutions, in cases which did not involve child abuse. I cannot recall acting for private boarding schools or List D schools. On the other side, I have often acted for victims of physical and sexual abuse, both in cases which relate to a long time ago, and occasionally in claims which relate to the past decade, in civil claims where they sought compensation. Some of those Pursuers were suing religious groups. I have acted for victims, who tried to challenge the existing law of Time Bar, taking a test case to the House of Lords on the issue, and I assisted a legal pressure group which unsuccessfully attempted to persuade the Scottish Law Commission to change that law. I cannot recall acting for or against any Healthcare establishments which provided long-term care for

children. I have sometimes been instructed by the Central Legal Office to represent Health Boards and NHS Trusts, and I have often acted for people suing them, and suing doctors or midwives, in medical negligence cases. I have acted for many clients who have pursued Human Rights challenges to legislation and rules, mostly in contexts unrelated to the subject matter of the Inquiry, but including a case for a child who sought to be released from detention when she was in care.

…

I have about 20 years of judicial experience in four tribunals and courts, and I have been trained to put out of my mind knowledge and prejudice which might have an impact on the case I am hearing. I believe you can have confidence that my training and experience will minimise any risk of compromise to the Inquiry."

The Scottish Government web-site
[14] The Scottish Government's web-site has a page dedicated to the Inquiry. It contains hyper-links to Ms O'Brien's letter, together with three further documents that provide important background information.

(i) The terms of reference of the Inquiry
[15] The Inquiry's terms of reference are as follows:
"The overall aim and purpose of this Inquiry is to raise public awareness of the abuse of children in care, particularly during the period covered by the Inquiry. It will provide an opportunity for public acknowledgement of the suffering of those children and a forum for validation of their experience and testimony. The Inquiry will do this by fulfilling its Terms of Reference, which are set out below.

To investigate the nature and extent of abuse of children whilst in care in Scotland, during the relevant time frame.

To consider the extent to which institutions and bodies with legal responsibility for the care of children failed in their duty to protect children in care in Scotland (or children whose care was arranged in Scotland) from abuse, and in particular to identify any systemic failures in fulfilling that duty.

To create a national public record and commentary on abuse of children in care in Scotland during the relevant time frame.

To examine how abuse affected and still affects these victims in the long term, and how in turn it affects their families.

The Inquiry is to cover that period which is within living memory of any person who suffered such abuse, up until such date as the Chair may determine, and in any event not beyond 17 December 2014.

To consider the extent to which failures by state or non-state institutions (including the courts) to protect children in care in Scotland from abuse have been addressed by changes to practice, policy or legislation, up until such date as the chair may determine.

To consider whether further changes in practice, policy or legislation are necessary in order to protect children in care in Scotland from such abuse in future.

Within 4 years (or such other period as Ministers may provide) of the date of its establishment, to report to the Scottish Ministers on the above matters, and to make recommendations. ”

The Minister’s Statement
[16] The Cabinet Secretary made a statement to the Scottish Parliament on 28 May 2015 that includes the following passages:

“I expect the inquiry to take a human-rights-based approach, to be inquisitorial rather than adversarial and to enable people with little experience of legal processes to engage with it. Crucially, the inquiry will examine the on-going effects of abuse on survivors and their families in order to improve our understanding of the issues they face and help us to improve support for them now and in future.

Taking all that into account, the inquiry needs a chair who can rise to those challenges while gaining and maintaining the confidence of survivors. I am pleased to announce that Susan O’Brien QC will chair the inquiry. Ms O’Brien is an experienced advocate in civil litigation, including on issues pertinent to the inquiry, and has a knowledge of and expertise in human rights.” (p 36)

“… many of those who were abused in care as children called for the right to seek reparation. That would involve removing the time bar that requires a civil case for compensation to be brought to court within the three-year limitation period. At the heart of the issue is the reality of childhood abuse. It can take decades for a survivor to have the strength to challenge their abuser in court.

Having listened to survivors and examined the legal position carefully, I can announce that this Scottish Government intends to lift the three-year time bar on civil action in cases of historical childhood abuse since September 1964.” (p 37)

[17] In response to a question from Iain Gray MSP following her statement, the Cabinet Secretary said:

“In the 1980s, Ms O’Brien was also on the steering committee that set up the Scottish Child Law Centre. I am confident that we have struck the right balance with someone who has the necessary legal skills and experience and who also, crucially, understands first and foremost the needs of survivors.” (p 38)

“What’s an Inquiry”
[18] The third document is dated 9 June 2015 and provides general guidance to members of the public about the Inquiry. It states:

“An inquiry is not designed to rule on anyone’s civil or criminal liability and has no power to do this. It may be that liability can be inferred from facts that come out of the inquiry, or from recommendations it makes.”

[19] It also states that “it is crucial that the inquiry has due regard for the human rights of all groups involved” including current or former staff in institutions and continues:

“… with everyone’s human rights as a priority, we propose that the inquiry is about establishing the truth rather than attributing blame.”

Does Ms O’Brien have a close association with an interested party?

[20] Mr Duncan first considered the common law challenge. That appears to me to be the wrong starting point. Primacy must be given to the legislation. Accordingly, I begin with Section 9 (1) of the Act, which is headed “Requirement of impartiality”:

“The Minister must not appoint a person as a member of the inquiry panel if it appears to the Minister that the person has—

…

(b) a close association with an interested party,

unless, despite the person's … association, his appointment could not reasonably be regarded as affecting the impartiality of the inquiry panel.”

[21] The Act does not define "close association". Plainly it could include a professional connection: Public Inquiries ed. Beer (2011) para 3.49. The nature of the connection must be examined with care. In many instances an advocate could not be seen to have a close association with his client. For example, he may only have had a fleeting involvement in the case, or accepted the instructions under “the cab rank rule” despite holding personal views entirely at odds with those of his client. In others, however, the advocate may be identified with the cause he is espousing. Someone who only acted for one client might be classified as having a close association with him.

[22] Assistance is provided by the Court of Appeal decision in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451. The opinion of the court (comprising Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C) states:

“25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on … previous receipt of instructions to act for or against any party… if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal.” (480A-H)

[23] That captures the exercise that must be undertaken. I therefore pose two questions. First, is there some feature of Ms O’Brien’s involvement in AS that takes it away from the ordinary receipt of instructions? I conclude that the answer is No. She only acted for the claimants at a very late

stage to argue a point of law. I do not accept Mr Duncan's submission that she "supported" the written pleadings, in the sense that she was seen to personally endorse their veracity. She was not responsible for drafting the summons. She simply advanced her clients' case to the court. If carrying out that task involves being identified with the cause, every advocate would have a myriad of close associations. In Ms O'Brien's case, that might amount to thousands.

[24] Second, is there a real ground for doubt? Again I answer that question No. Ms O'Brien's narrative of her career discloses that she had a wide-ranging practice covering many areas of the law. She represented pursuers and defenders. In particular, she acted both for and against the government. She could not be identified with only one side. In addition, she has extensive judicial experience and swore the judicial oath as long ago as 1995.

[25] The fact that she assisted a pressure group to change the law on time bar appears to me to weigh lightly in the scales. The petitioners do not contend that she actively or publicly campaigned for a change. In any event, there is widespread support for the proposal that the three year time limit should be altered. The Cabinet Secretary stated that the Ministers intend to introduce legislation in this regard.

[26] Having regard to the whole circumstances, I hold that Ms O'Brien does not have a close association with an interested party to the Inquiry.

[27] In arriving at that conclusion, I note that the phrase "if it appears to the Minister" in section 9(1) indicates the high test that the petitioners must surmount. They must establish that no reasonable minister could have made the decision in question. In my view they have failed to do so.

The Common Law Test

[28] The common law jurisprudence provides guidance on the relevant factors to take into account in relation to section 9(1), and acts as a cross check. In Porter v Magill [2002] 2 AC 357 at para 103 Lord Hope stated:

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased."

[29] That statement echoes an earlier one made by Hewart CJ in R v Sussex Justices (ex parte McCarthy) [1924] 1 KB 256, which the petitioners say is the closest case on the facts. There the police prosecuted M for dangerous driving following a collision with A. The acting clerk to the justices that convicted M was a member of the firm of solicitors which acted for A. In quashing the conviction, Lord Hewart stated (at p 259) that the question was whether the clerk:

"was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done, but upon what might appear to be done."

[30] A number of more recent cases have considered the question of apparent bias: Davidson v Scottish Ministers (No.2) 2005 1 SC (HL) 7; Gillies v Secretary of State for Work and Pensions, [2006] 1 WLR 781; Prince Jefri Bolkiah v Brunei [2007] UKPC 62; and Belize Bank v AG Belize & Ors [2011] UKPC 36. From them, I draw the following key propositions:

Each case is intensively fact sensitive.

The threshold for establishing a case of apparent bias is a high one.
The fair-minded and informed observer takes a balanced approach.
He expects that (a) the decision-maker will not be chosen to suit one party; and (b) any doubt will be based on objective grounds.

[31] Kirby J outlined the knowledge and approach of the fair-minded and informed observer in his well-known judgment in Johnson v Johnson 2000 CLR 201:
"The attributes of the fictitious bystander to whom courts defer have … been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality." (para 53)

[32] That petitioners contend that in this case the fair-minded and informed observer would note the following points:
The Inquiry will consider whether and to what extent individuals were abused in institutions such as Nazareth House.
Its over-arching aim is to "validate" the allegations of abuse.
Ms O'Brien will have to determine the veracity of allegations made by her former clients against the first petitioner and its staff.
She supported her clients' claims by inviting the House of Lords to send their cases to proof.
Prior to the appointment of a chairman, the Scottish Ministers consulted extensively with victims' groups to ensure that Ms O'Brien's appointment would be acceptable.
[33] In my view that list is flawed and incomplete. It is flawed because for the reasons given above, I hold that the fair-minded and informed observer would be aware that the Inquiry will not determine liability and that Ms O'Brien did not support her clients' claims. Further there is no basis to make the assumption about the consultation process. Ms Haldane informed me that the Scottish Ministers did not consult with victims' groups about Ms O'Brien's suitability for appointment.
[34] The list is incomplete, because it leaves out of account a variety of matters that would also be within the knowledge of the fair-minded and informed observer. He would have access to all the Inquiry documents on the Scottish Government website. He would note that it was "about establishing the truth rather than attributing blame" and that everyone's human rights would be respected.
[35] If he wished to find out about the role of an advocate, he could access the Faculty of Advocates Code of Conduct, which is also available online. He would take into account that Ms O'Brien had a very broad based career, including some experience of child abuse, but also involving some 20 years of judicial experience. He would note that she represented pursuers and defenders and that her role in AS was a very limited one.
[36] In my view, the fair-minded and informed observer would not conclude that there is a real possibility that the tribunal was biased. I therefore hold that the common law challenge based on apparent bias also fails.