

DECISION OF THE SOLE MEMBER – 28TH SEPTEMBER 1999

I sat today in public following upon the decision of the President of the High Court in the matter of the Judicial Review application of the Irish Times Ltd, and ors (Applicants) and the Tribunal (Respondents) of yesterday and pursuant to my order of the 24th of September, 1999.

I heard the evidence of Dr John Curran – medical practitioner regarding the medical status of his patient Joseph Murphy Senior following upon the legal representatives of Mr Murphy indicating to the Tribunal that consideration to his evidence should be given prior to any decision being made as to how the evidence of Joseph MS would be taken.

Dr. Curran's evidence was to the following effect "he has insulin dependent diabetes, cerebral atrophy and established vascular disease and more recently congestive cardiac failure. His current medical status is that he has a very fragile cardio-vascular system he has been recently hospitalised with cardiac failure and required medical resuscitation and had he not been admitted to hospital he would have succumbed and died of heart failure.

He easily becomes short of breath with any increase in heart rate or anxiety and this puts his cardio-vascular system at serious risk.

On the 13th of September 1999 JMS attended at Dr Curran's surgery. Dr Curran found him short of breath sweaty and extremely anxious. He assessed a serious risk of cardio-vascular incident.

In reply to a question of the affect of giving evidence before the Tribunal at which there were members of the press and public present Dr Curran said "it would be unwise to put himself at such risk... I think he is at a very real and serious riskof cardiac failure." ..with a likely hood that it probably would be a terminal event if he was not resuscitated in adequate time.

Dr Curran stated that in his opinion JM's main focus and anxiety that would produce the symptoms was having an open and public form of the Tribunal.

I am mindful of the Terms of the decision of the learned President of the High Court of today's date, that section 2(a) of the Act of 1921 does not afford a statutory ground to exclude the public in general and the press from the proceedings of the Tribunal based on concern of the health of a witness.

The judgment expressly confirms the entitlement of a Tribunal to appoint a Commissioner to take evidence where it is appropriate to do so. This is contained in section 1(c) of the Tribunals of Inquiry Evidence Act 1921.

I have carefully considered the testimony of Dr Curran. In the light of this evidence which I accept I believe it would expose the Witness Joseph Murphy Senior to an unnecessary risk of death if I were to proceed to take the evidence in public.

I am driven to the conclusion that in order to fulfil my mandate to obtain the evidence of this relevant witness that a Commissioner should be appointed to take this evidence.

Accordingly I propose tomorrow at 11am to make an order appointing myself as Commissioner to take the evidence of JMS under the provisions of section 1 (c) of the Act of 1921 and to proceed to do so.

I note from the order of the High Court in the proceedings to review my Order of the 24th instant that the parties have liberty to apply to the High Court in respect of the issues raised therein.

It is my intention as I have indicated to make a fresh Order tomorrow morning appointing the said Commission.

The proceedings before the Commissioner will be conducted in a manner equivalent and analogous to the procedure set fourth for such a commission in the High Court as provided in Order 39 of the Rules of the Superior Courts – it follows that the deposition will be taken in private.

The statement of the evidence harvested by the Commissioner will remain in escrow until it is submitted to the Tribunal upon its return to Dublin following conclusion of the Commission.

Mr Justice Feergus M. Flood