THE SUPREME COURT

Appeal No: 289/2004

Denham J.
McGuinness J.
Hardiman J.
Geoghegan J.
Fennelly J.
Between/

N. McK.

Appellant/Respondent

and
The Information Commissioner

Respondent/Appellant

Judgment of Denham J. delivered on the 24th day of January 2006.

1. At issue in this case is whether a father, a widower who had been separated from his late wife**,** who was joint guardian of his children, is entitled under the Freedom of Information Act, 1997 to information, in the form of hospital notes, about an illness of his daughter.

2. The Information Commissioner, hereafter referred to as 'the Commissioner', has brought this appeal from the judgment (14th January, 2004) and order (28th January, 2004) of the High Court (Quirke J.).

3. N. McK., the father, the appellant/respondent, hereafter referred to as the requester, had appealed on a point of law to the High Court from the refusal by the Commissioner (on the 12th August, 2002) of his request for access to medical records of his daughter.

4. This case arises within the parameters of the Freedom of Information Act, 1997, hereinafter referred to as the Act of 1997, and it raises fundamental issues on the approach to be taken to an application by a father to access information in medical records of his daughter, a minor, where other guardians object to his accessing such records.

5. The relevant facts were found by the High Court and are not in dispute. I gratefully adopt the findings of the learned High Court Judge. The requester and his late wife D. were married in 1986, and were the parents of two children, a daughter L, born in 1988, and a son R, born in 1990. The requester and his late wife separated in 1992. During the course of family law proceedings in the Circuit Court in 1993 an allegation was made that the requester sexually abused his daughter at the end of 1991. The requester vigorously denied this allegation and in 1994 the Garda Síochána, having investigated the allegations, concluded that there was 'no evidence to warrant a prosecution' against the requester and so informed the relevant Health Board. By order of the Circuit Court in 1993 the requester was granted supervised access to his children. In 1996 the requester and his late wife entered into a separation agreement where both parties undertook to strive towards bringing about unsupervised access by the requester to his children at some future date. However, on 15th November, 1998, the requester's wife died. By agreement in January, 1999 the two children of the marriage went to live with the late Mrs. McK's brother B.J. and his wife M.J.. By order of the Circuit Court in November, 2000 it was agreed that the requester together with B.J. and M.J. would be appointed joint guardians of the two children L and R. The High Court found that L was in a private school and R was in a local National School. Under the arrangements the requester was entitled to supervised access to the children approximately once a month.

6. In January, 2000 L was admitted to a Dublin hospital. M.J. informed the requester. When the requester went to visit his daughter he was advised that she had been admitted for an unspecified viral infection. Being unable to obtain any further information about his daughter's admission, the requester, by letter dated 17 January, 2000, made a request pursuant to s. 7 of the Act of 1997 seeking access to the personal medical records of his daughter.

7. Upon the expiration of the time limited by statute, pursuant to s. 41 of the Act of 1997, a decision refusing to grant the requester's request was deemed to have been made. By an application dated the 18th February, 2000, the requester sought a review of this refusal. Pursuant to s. 41 of the Act of 1997 a decision affirming the refusal was deemed for the purposes of the Act of 1997 to have been made upon the expiration of the requisite time limit. On the 10th March, 2000, the requester applied, pursuant to s. 34 of the Act of 1997, for a review by the Commissioner of the decision which was deemed to have been made by the hospital. By letter dated 14th March, 2000, the Commissioner wrote to the requester agreeing to conduct a review.

8. By letter dated 12th August, 2002, F.B., a Senior Investigator in the Office of the Commissioner, wrote to the respondent and advised him:

> "Having carried out a review under s. 34(2) of the Act of 1997, I hereby affirm the decision of the hospital to refuse access to the records sought in your request of the 17th January, 2000."

9. By Notice of Motion dated the 10th September, 2002, the requester initiated his appeal to the High Court pursuant to the provisions of s. 42 of the Act of 1997.

10. The relevant statute law is as follows. The requester has a right of appeal on a point of law from the decision of the Commissioner, pursuant to s. 42 (1) of the Act of 1997, which provides:

> "A party to a review under section 34 or any other person affected by the decision of the Commissioner forming such a review may appeal to the High Court on a point of law from the decisions."

Section 28(1) precludes personal information in the following terms:

> "Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if, in the opinion of the head, access to the record concerned would involve the disclosure of personal information . . . "

However, s. 28(6) of the Act of 1997 provides for exceptions:

> "Notwithstanding subsection (1), the Minister may provide by regulations for the grant of a request under section 7 where:-
>
> (a) The individual to whom the record concerned relates belongs to a class specified in the regulations and the requester concerned is the parent or guardian of the individual . . . "

The Freedom of Information Act, 1997 (Section 28(6) Regulations, 1999 (S.I. 47 of 1999) (hereinafter referred to as the Regulations) provide at Regulation 3 (1) as follows:

> "Notwithstanding s. 28 (1), a request under section 7 in relation to a record access to which involves the disclosure of personal information . . . shall, subject to other provisions of the Freedom of Information Act, 1997, be granted where:
>
> (a) the requester is a parent or guardian of the individual to whom the record concerned relates and that individual belongs to one of the following classes of individual:
>
> (i) individuals who, on the date of the request, have not attained full age (within the meaning of the Age of Majority Act, 1985 (No. 2 of 1985)), or
>
> . . .
>
> being individuals specified in clauses (i) and (ii) access to whose records would, in the opinion of the head having regard to all the circumstances and to any guidelines drawn up and published by the Minister, be in their best interests, or . . . "

11. It was agreed by the parties that a total of 26 of the records to which the requester seeks access comprise "joint personal information" which is confined to material relating to the requester's daughter and himself and it is those records which are the subject of the appeal.

12. The Commissioner published a written decision, dated 12th August 2002, which stated:-

> "The Regulation provides that a request for records relating to personal information about a minor may be granted where the requester is the minor's parent or guardian and where, having regard to all the circumstances, to release the records to the parent/guardian would be in the minor's best interests."

It continued:

> ". . . As you are the father and joint guardian of L, it is clear that you satisfy the first of the two requirements set out above. Accordingly, the question to be addressed is whether release to you of material containing personal information relating solely to L, or relating jointly to L and to yourself, would be in L's best interests.
>
> In the ordinary course of events, and in general terms, one might accept that it is likely to be in the best interests of a minor that a parent/guardian will have access to the minor's medical records. However, in the ordinary course of events, the parents/guardians are likely to be in agreement on the matter. As you know, both in contacts with this office and with the hospital, Mr. and Mrs. J (joint guardians and custodians of L) have opposed the release of these records. Following the recent and regrettable death of her husband, I understand that Mrs. J remains firmly opposed to these records being released to you. Furthermore, it is the view of the hospital that the records should not be released to you. In any situation in which there is disagreement between parents/guardians regarding the release of records relating to a minor, the Commissioner has taken the view that release would only be directed where there is tangible evidence that such release would actually serve the best interests of the minor.
>
> I note you make the case that, as the father of L and as a person holding joint guardianship and custody in relation to her, you hold certain rights in relation to decision-making regarding her health and general welfare. You maintain that release of the records to you may assist in the making of such decisions regarding L and would therefore be in her best interests. I accept that in certain instances access by parents or guardians to medical records in relation to children may offer substantial assistance to them in making decisions in relation to the seeking of medical treatment of their children or consenting to such treatment. Having regard to the contents of the records in this case, I consider that their release would not offer substantial assistance to you in relation to the making of decisions to seek medical treatment or to consent to medical treatment, for L in the future. Further I note that, where appropriate such records could be made available to medical personnel treating L in the future. On balance, I find that you have not presented evidence that release of L's medical records to you would actually serve her best interests.
>
> In the absence of evidence showing that disclosure would actually be in L's best interests, the requirement to protect her privacy remains strong. While it has not been proven that release of the records would be to the detriment of your daughter, neither am I satisfied that release of the information would be to her benefit or serve her best interests. I do not see any significant benefit accruing, or likely to accrue, to your daughter by granting you access to these records. I am not satisfied that the requirements of S.I. 47 of 1999 are met in this case and I find, therefore, that you do not have the right of access to these records pursuant to its provisions."

13. On appeal by the requester the High Court found in his favour, stating:

"In the instant case I am satisfied that by enacting s. 28(6) of the 1997 Act the Legislature was, *inter alia,* legislating in the interests of vindicating and defending the rights of children. Accordingly, the provisions of the Act fall to be interpreted in the light of the provisions of the Constitution generally and of Articles 41 and 42 in particular.

Although a complaint has in the past been made about the [requester], it remains unsubstantiated and the [requester] comes before this Court enjoying the presumption of innocence which is enjoyed by every citizen of the State. The evidence indicates that he is concerned with the welfare of both of his children and avails of his rights of access to them in a conscientious fashion.

No suggestion has been made of any failure of duty on the part of the [requester] of the kind contemplated by Article 42.5 of the Constitution.

Accordingly the [requester], as a parent, joint guardian and joint custodian of the child concerned enjoys the parental primacy identified by Hardiman J. in *North Western Health Board v. H.W.* [2001] 3 I.R. 622 and the presumption that he has the welfare of his child at heart in the absence of evidence to the contrary.

The presumption is of course rebuttable, but there is no suggestion of rebuttal in this case.

Reluctance by another family member to agree to access does not, in the absence of any supporting evidence, amount to rebuttal sufficient to displace the presumption referred to.

t follows from the foregoing that I am satisfied that in reaching the decision made in this case the [Commissioner] has misconstrued the provisions of s. 28 (6) of the Act of 1997 and Regulation 3 (1) of the 1999 Regulations by failing to recognise that the decisions of the parent of minors are presumed to be in the best interests of that minor in the absence of evidence to the contrary. The [requester] should not have been required to discharge an onus of the type identified by the [Commissioner] and the test applied by the [Commissioner] in so doing was incorrect in the circumstances.

It follows from all of the foregoing that the [requester's] appeal is allowed and that he is entitled to the relief which he seeks."

14.

The Commissioner has appealed against that finding, filing twenty one grounds of appeal. In essence, on behalf of the Commissioner, it was submitted that the essential issues revolve around the proper approach to be adopted under the Act of 1997 and the Regulations where one parent of a minor seeks access to medical records of that minor in circumstances where other guardians object to such access. The Commissioner reached his decision on foot of a test stipulated in regulations made under the Act of 1997, it was submitted, regarding such access being in the minor's 'best interests'. It was interpreted as requiring that the parent should establish that his access to the records was indeed in the minor's best interests. The High Court held that this was an incorrect approach, and that where a parent in these circumstances sought access to such records there was a presumption that access was in the child's best interests and the High Court directed that the requester be given access to the minor's records. The Commissioner submitted that both in relation to the test applied by the High Court and the decision that the records should be provided to the requester (rather than remitting the matter to the Commissioner for reconsideration), the High Court erred.

On behalf of the requester it was submitted that the provisions of s. 28 (6) of the Act of 1997 and the Regulations of 1999 fall to be construed in light of Article 41 and Article 42 of the Constitution. The requester had sought the information so as to assist him to look after his daughter's welfare and to make decisions in her interest. It was submitted that this is precisely the kind of parental decision-making which is protected by Article 41 and that it is presumed that the parent is in the best position to make a judgment. It was submitted that the 'tangible evidence' test applied by the Commissioner effectively reverses the onus of proof and that any such interpretation of section 28 (6) would be at variance with this Constitutional presumption. It was submitted that the Commissioner had erred in law.

15. Decision

15.1 As a matter of Constitutional and family law a parent has rights and duties. In general a parent would expect to be given and would be given medical information about his or her child. It would only be in exceptional circumstances that medical information about a child would not be given to a parent/guardian. As it is so quintessentially a matter arising in family law it may be that it is a matter more appropriately considered in a Family Law Court. However, this matter proceeded under the Act of 1997 procedures.

15.2 Unfortunately there has been a considerable delay since the request of the requester. In January, 2000 the requester sought the information. The review by a Senior Investigator was communicated to the requester by letter dated 12th August, 2002. The High Court gave its decision in January, 2004. This decision is given in January, 2006.

The elapse of time has a special relevance where a minor child is involved.

L was born in 1988. The hospital stay in issue was in January, 2000. At that time she was still a minor. Six years later she is in her 18th year, she was born on the 30th May 1988. This alters the circumstances, as her wishes are now most relevant.

The delay is not the fault of the requester, and it is most unfortunate. However, the effects of the delay cannot be ignored in view of the necessity to balance the changed circumstances, including the attitude of L.

15.3 I would affirm the decision of the High Court as to the approach taken by the Commissioner. The Commissioner erred in determining that release of the medical information would only be directed where there is tangible evidence that such release would actually serve the best interests of the minor.

The Act of 1997 and the Regulations fall to be interpreted in accordance with the Constitution. A parent, the requester, has rights and duties in relation to a child. It is presumed that his or her actions are in accordance with the best interests of the child. This presumption while not absolute is fundamental. The Commissioner took an incorrect approach in requiring tangible evidence of the parent rather than applying the presumption that a parent was acting in the child's interests. The 'tangible evidence' test of the Commissioner reversed the onus of proof.

The relationship between parent and child has a special status in Ireland. Under the Constitution the family is the primary and

fundamental unit group in our society: Article 41.1°. The State has guaranteed to protect the family in its constitution and authority: Article 41.1.2°. The State encompasses the judicial branch of government which has a consequent duty to protect the family and its authority. While the family unit has its rights, so too each member of the unit has rights. Thus while the parents have duties and rights in relation to a child, and a child has rights to parental care, the child also has personal rights which the State is required to vindicate if the parent fails in his or her duty.

A parent's rights and duties include the care of a child who is ill. As a consequence a parent is entitled to information about the medical care a child is receiving so that he or she may make appropriate decisions for the child, as his or her guardian. The presumption is that a parent is entitled to access such information. That position is not absolute. The circumstances may be such that the presumption may be rebutted. But the primary position is that the presumption exists. Consequently, the approach of the Commissioner was in error when he required 'tangible evidence' that the release of such information would serve the best interests of the minor. The obverse is the correct approach. The presumption is that the release of such medical information would best serve the interests of the minor. However, evidence may be produced that it would not serve her interests, and, in considering the circumstances, her welfare is paramount. That issue did not arise in this case because of the erroneous approach of the Commissioner.

The Commissioner should have approached the request by acknowledging that a parent is presumed to be entitled to access the information. However, the Commissioner may then proceed to consider any evidence which exists addressing the issue that it would not be in the minor's best interests that the parent should be furnished with such information.

It is a regrettable factor of this case that there has been a considerable elapse of time since the requester sought this information in 2000. In view of the time which has elapsed in this matter, and the circumstances of the case, especially the age of the minor [nearly 18 years of age], whose views now are very relevant, I would remit this matter to the Commissioner to enable the matter to be reconsidered in accordance with the correct test and the circumstances of the case.

However, I would stress that it is unfortunate that the incorrect test was applied to the requester's application and that his rights as a parent and guardian were viewed so erroneously by the Commissioner, with the consequent effect which has occurred.

16. Conclusions

I would affirm the decision of the High Court, and dismiss the appeal of the Commissioner, as to the interpretation of the Act of 1997. However, in view of the age of the minor [who will achieve her majority in a few months], I would remit the matter to the Commissioner for review in accordance with the correct test and in light of all of the circumstances.