THE SUPREME COURT

Record No. 339/2004

Denham J.
Fennelly J.
Kearns J.

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT, 1997

BETWEEN

BARNEY SHEEDY

Appellant

and
THE INFORMATION COMMISSIONER

Respondent

and
THE MINISTER FOR EDUCATION and SCIENCE

First Notice Party

and
THE IRISH TIMES LIMITED

Second Notice Party

JUDGMENT of Mr. Justice Fennelly delivered the 30th day of May, 2005.

1. I gratefully adopt the summary of the facts and procedural history of this appeal set out in the judgment of Kearns J. I would add that I fully agree with his proposal that the grounds of appeal based on sections 21 and 26 of the Freedom of Information Act, 1997 (which I will call "the 1997 Act") should be dismissed. I differ only in respect of the treatment of section 32 of that Act, read with section 53 of the Education Act, 1998 ("the 1998 Act").

2. The passing of the Freedom of Information Act constituted a legislative development of major importance. By it, the Oireachtas took a considered and deliberate step which dramatically alters the administrative assumptions and culture of centuries. It replaces the presumption of secrecy with one of openness. It is designed to open up the workings of government and administration to scrutiny. It is not designed simply to satisfy the appetite of the media for stories. It is for the benefit of every citizen. It lets light in to the offices and filing cabinets of our rulers. The principle of free access to publicly held information is part of a world-wide trend. The general assumption is that it originates in the Scandinavian countries. The Treaty of Amsterdam adopted a new Article 255 of the EC Treaty providing that every citizen of the European Union should have access to the documents of the European Parliament, Council and Commission.

3. The long title to the 1997 Act did something which has regrettably become uncommon. It proclaimed its purposes in a long title. This is deserving of full citation. The 1997 Act is stated to be:

> *"AN ACT TO ENABLE MEMBERS OF THE PUBLIC TO OBTAIN ACCESS, TO THE GREATEST EXTENT POSSIBLE CONSISTENT WITH THE PUBLIC INTEREST AND THE RIGHT TO PRIVACY, TO INFORMATION IN THE POSSESSION OF PUBLIC BODIES AND TO ENABLE PERSONS TO HAVE PERSONAL INFORMATION RELATING TO THEM IN THE POSSESSION OF SUCH BODIES CORRECTED AND, ACCORDINGLY, TO PROVIDE FOR A RIGHT OF ACCESS TO RECORDS HELD BY SUCH BODIES, FOR NECESSARY EXCEPTIONS TO THAT RIGHT AND FOR ASSISTANCE TO PERSONS TO ENABLE THEM TO EXERCISE IT, TO PROVIDE FOR THE INDEPENDENT REVIEW BOTH OF DECISIONS OF SUCH BODIES RELATING TO THAT RIGHT AND OF THE OPERATION OF THIS ACT GENERALLY (INCLUDING THE PROCEEDINGS OF SUCH BODIES PURSUANT TO THIS ACT) AND, FOR THOSE PURPOSES, TO PROVIDE FOR THE ESTABLISHMENT OF THE OFFICE OF INFORMATION COMMISSIONER AND TO DEFINE ITS FUNCTIONS, TO PROVIDE FOR THE PUBLICATION BY SUCH BODIES OF CERTAIN INFORMATION ABOUT THEM RELEVANT TO THE PURPOSES OF THIS ACT, TO AMEND THE OFFICIAL SECRETS ACT, 1963, AND TO PROVIDE FOR RELATED MATTERS."*

4. Section 6(1) of the 1997 Act gives effect to the general principle, thus proclaimed, of public access to documents "*to the greatest extent possible consistent with the public interest and the right to privacy"* as follows:

> *"(1) Subject to the provisions of this Act, every person has a right to and shall, on request therefor, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access.*
>
> *(2) It shall be the duty of a public body to give reasonable assistance to a person who is seeking a record under this Act—*
>
> > *(a) in relation to the making of the request under section 7 for access to the record, and*
> >
> > *(b) if the person has a disability, so as to facilitate the exercise by the person of his or her rights under this Act."*

5. This is the first appeal under the Act to come before this Court, the Oireachtas having repealed the bar on such appeals contained in section 42(8) of the 1997 Act. (see section 27 of the Freedom of Information (Amendment) Act, 2003.) Prior to now, therefore, all judgments on the operation of the Act have been given in the High Court. McKechnie J made a number of statements of general importance, with which I fully agree, in *John Deely v. The Information Commissioner* [2001] 3 I.R. 439 at 442

> *"As can thus be seen the clear intention is that, subject to certain specific and defined exceptions, the rights so conferred on members of the public and their exercise should be as extensive as possible, this viewed, in the context of and in a way to positively further the aims, principles and policies underpinning this statute, subject and subject only to necessary restrictions.*
>
> *It is on any view, a piece of legislation independent in existence, forceful in its aim and liberal in outlook and philosophy."*

6. In addition, the learned judge made the following observations about the scope and limitations of an appeal taken to the High Court pursuant to section 42(1) of the Act. He said at page 452:

"It was submitted…… that findings made by the respondent [the Commissioner] *on questions of primary fact should not be reviewed by this court as part of the appeal process under s. 42 of the Act. There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-*

(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;

(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;

(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;

(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision……"

7. In my view, the learned judge was correct to say that these propositions were based on established principles. He cited well-known authority in support of them: *Mara v. Hummingbird Ltd.* [1982] 2 I.L.R.M. 421, *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 and *Premier Periclase v. Commissioner of Valuation* (Unreported, High Court, Kelly J., 24th June, 1999). I believe that these principles are applicable to this appeal. It is important to bear in mind, firstly, that the appeal comes before this court through the mechanism and procedures of the 1997 Act and not otherwise and, secondly, that the Court is concerned with an appeal on a point of law.

8. In the present case, the initial request made by the Irish Times for access to all school reports of Primary School Inspectors went through all the statutory stages. There was, presumably, a two-stage refusal of access by the Minister under sections 7 and 14 of the Act, although the relevant decisions are not before the Court. One of a number of grounds of the refusal advanced by the Minister was based on section 53 of the 1998 Act. I am not concerned with any of the other grounds, since I am in agreement with Kearns J that the appeal should be dismissed insofar as it relates to any matter other than section 53.

9. As is clear from the judgment of Kearns J, the Commissioner, having been asked to review the Minister's refusal of access to the relevant records pursuant to section 34 of the Act, rejected that ground of refusal. It is interesting to note that another ground originally advanced was, pursuant section 10(1)(c) of the Act, *"that the examination and retrieval of the records sought would cause a substantial and unreasonable interference with or disruption of the other work of the public body concerned."* It does not appear, therefore, that the Minister contested the jurisdiction of the Information Commissioner or the propriety of the making of the request by invoking the procedures under the Act. He advanced a number of grounds of refusal recognised by the 1997 Act. He accepted the request made by the Irish Times and dealt with it under sections 7 and 14. He then asked the Commissioner to review the decision in accordance with his powers and using the procedure provided by section 34 of the Act.

10. Section 42(1) of the Act provides:

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

11. It is no longer contested that the Appellant is a *"person affected."* The Minister has not, however, appealed.

12. A principal submission made by Mr Gerard Hogan, Senior Counsel, on behalf of the Appellant was that, by section 53 of the 1998 Act, the Oireachtas had decided to disapply the 1997 Act, that section 53 was a "stand-alone" section and should not be interpreted by reference to the 1997 Act. Mr Hogan argued that the 1997 Act was an ordinary piece of legislation, and that its legislative character or value was no different from any other Act of the Oireachtas. It had no constitutional or quasi-constitutional status. For the purposes of statutory interpretation and, in particular for the purposes of being affected by subsequent legislation, it should be treated like any other Act of the Oireachtas. Thus, it was a particularly important part, perhaps even the essence of Mr Hogan's submission that the Court should not interpret section 53 of the 1998 Act by reference to or by importing into it the general principles underlying the 1997 Act. He criticised the Commissioner for failing to give effect to the "*fundamental principle*" of section 53.

13. The written submissions of the Commissioner say, on the other hand, that the relevant question, in the context of an application for a review before the Commissioner or on appeal before the High Court in a freedom-of-information context is whether a particular statutory non-disclosure provision applies *by reference to section 32.* It is submitted that there is a harmonious co-existence between statutory non-disclosure provisions in other legislation and those contained in the 1997 Act.

14. On this issue, I am satisfied that the Commissioner is plainly correct. The dispute as to disclosure of the inspectors' reports comes before this Court exclusively as an appeal pursuant to and employing the machinery of the 1997 Act. If the Minister had exercised his right to appeal and claimed, as the Appellant effectively does, that the Freedom of Information Act does not apply, I believe he would have been met with the effective answer that he could not employ the machinery of the Act to argue that the Commissioner had no jurisdiction under the Act to grant access to documents covered by section 53. The Appellant is clearly in the same position. I cannot understand how the Commissioner can be criticised for considering the application of section 53 of the 1998 Act in the light of the principles underlying the 1997 Act. Such criticism is misconceived. It is the 1997 Act which gives jurisdiction to the Commissioner. By the same token, this Court, in entertaining an appeal pursuant to the 1997 Act, must consider it in that context.

15. It is true that the Commissioner appears to have addressed the matter as if disclosure of the records mentioned in section 53 of the 1998 Act was *"prohibited"* by that section. It may be that this is a simple error of transposition, though the Commissioner, in his decision, expressly attributes this submission to the Minister. Whatever its source, the approach is clearly erroneous. The applicable provision is section 32(1)(b) of the 1997 Act, which I cite below. Under that provision, refusal to disclose is discretionary. Equally, section 53 of the 1998 Act is expressed in permissive terms: *"Notwithstanding any other enactment the Minister…may refuse access to any information which would enable……"* Mr Hogan appeared to accept that section 53 is the sort of enactment which is *capable* of coming within section 32. Nonetheless, he argued, based on the introductory phrase (*"notwithstanding any other enactment"*) that the 1997 Act was, in effect "disapplied" by section 53.

16. The appropriate course for the Appellant or the Minister to have taken to support that contention would have been to apply to the High Court by way of judicial review of the decision of the Commissioner. I do not believe that the machinery of appeal to the High Court and by extension to this Court can validly be used to challenge the very basis of the jurisdiction of the Commissioner and the applicability of the 1997 Act. For that reason alone, therefore, I believe that this argument of the Appellant is misconceived. This is an appeal pursuant to the Freedom of Information Act. I would dismiss the appeal.

17. However, in deference to the extensive arguments that have been heard by the Court, and to remove any doubt, I will express my opinion on the argument that section 53 of the 1998 Act in some manner disapplied the 1997 Act. I do not believe that the Oireachtas can have intended such a result. Furthermore, it is neither sensible nor necessary, in order to give effect to the intent of section 53, to attribute any such intention to the Oireachtas.

18. For all the reasons already given, the 1997 Act was a piece of legislation of major significance. It was also intended, except for those restrictions and limitations contained within it, to have universal application, meaning that it extends to every class of record held by any public body listed in the First Schedule to the Act. Nonetheless, within its own terms, it recognised that there could be legislative provision (past or future) either prohibiting disclosure or permitting non-disclosure on a discretionary basis. It included a specific statutory mechanism to accommodate such legislation. Section 32 reads:

> *"1) A head shall refuse to grant a request under section 7 if—*
>
> *(a) the disclosure of the record concerned is prohibited by any enactment (other than a provision specified in column (3) of the Third Schedule of an enactment specified in that Schedule), or*
>
> *(b) the non-disclosure of the record is authorised by any such enactment in certain circumstances and the case is one in which the head would, pursuant to the enactment, refuse to disclose the record."*

19. Section 2 defines an enactment as meaning a statute or an instrument made under a power conferred by a statute. Clearly, the term is wide enough to include both past and future enactments. Thus, to the extent that section 53 of the 1998 Act permits non-disclosure it is perfectly compatible with the 1997 Act.

20. Having enacted in such clear terms legislation of purportedly universal application providing for public access to all state documents, the Oireachtas is, according to the Appellant, to be deemed, within a year, and without any express reference to the 1997 Act, to have intended to remove a poorly defined category of information contained in publicly held records entirely from the purview of the Act and to submit it's disclosure exclusively to the unfettered discretion of the Minister. One consequence of that approach would inevitably be that any discretionary decision of the Minister would be reviewable, if at all, only on grounds of irrationality (see *The State (Keegan) v. The Stardust Victims' Compensation Tribunal* [1986 I.R. 642]). Effectively, that would involve a move from the presumption in favour of disclosure written into the 1997 Act to an even stronger contrary presumption. It is stronger, firstly, because, a person seeking disclosure of records possibly within the scope of section 53 does not have any prima facie right of access to them. Outside the framework of the Freedom of Information Act, it is difficult to se how any citizen (or any member of the media in the capacity of citizen) would have the standing to require the Minister to justify refusal of access. Secondly, it is stronger because any decision by the Minister not to disclose would be virtually beyond review.

21. But the problems created by this approach do not end there. As is disclosed by the argument in the present case, there is wide room for legitimate debate as to whether any particular documents do or do not come within the scope of section 53. The Appellant accepts that the inspectors' reports do not come within paragraphs (i) or (ii) of section 53. He says that they come, and then only in part, within the general description: *"information which would enable the compilation of information (that is not otherwise available to the general public) in relation to the comparative performance of schools in respect of the academic achievement of students enrolled therein…"* Clearly, any judgment on this issue is highly subjective.

22. What if the Commissioner considers that certain documents do not come within the scope of section 53? That would give him jurisdiction under the 1997 Act. But the Minister might consider that the same records are covered by the section. As already stated his opinion on that issue would be virtually unreviewable? At least the 1997 Act provides a considered and detailed machinery for determining such an issue. The Minister would be in a position to challenge any decision of the Commissioner by appealing on a point of law to the High Court. However, if the Minister simply refuses access, there is no available machinery for resolution of the conflict.

23. I believe that the result postulated is redolent of conflict and cannot have been intended. I believe that the more reasonable intention to attribute to the Oireachtas is that requests for access to information the kind mentioned in section 53 could be made, but that the applicable machinery is that provided in the 1997 Act. Section 53 lays down no procedure or criteria at all.

24. In answer to an invitation from the Court to address it on the principles applicable to situations of conflict between legislative provisions, Mr Hogan cited the judgment of Henchy J, on behalf of this Court, in *McLoughlin v Minister for Public Service* [1985] I.R. 631. There was a conflict between two provisions for the Garda Síochána Compensation legislation, one requiring a pension or allowance to be taken "into consideration" and the other stating that it should not be "taken into account." Henchy J at page 655 noted " *a want of congruity between the two provisions..."* in which event he thought that the provision representing *"the later thinking of the Oireachtas should prevail……"* The point to note is that the "incongruity" seemed unavoidable. By implication, I believe he would have preferred a solution which made the provisions compatible, as is possible here. Mr Hogan also drew attention to the maxim *generalia specialibus non derogant,* referring to a passage from the Earl of Selborne quoted by Henchy J in *DPP v Grey* [1986] I.R. 317 at 327. The passage is from *The Vera Cruz* (1884) 10 App. Cas. 59 at p.68 and reads as follows:

> *"Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any intention of a particular intention to do so."*

25. Henchy J was alone in considering this maxim relevant to resolution of the issue before the Court. Nonetheless, the principle offers useful guidance and, if applicable to the relationship between section 53 of the 1998 Act and the 1997 Act, it suggests that the court should not regard the later Act of 1998 as affecting the earlier one of 1997. Such rules are, in any event, intended as useful guides to ascertaining the intention of the Oireachtas. The matter is discussed as follows in Bennion on *Statutory Interpretation* [Butterworths

LexisNexis 4th Ed .London 2002]:

> *"It may be that, while a state of facts falls within the literal meaning of a wide provision, there is in an earlier act a specific provision intended to cover that state of facts in greater detail. Where the effect of the two enactments is not precisely the same, and the earlier one is not expressly repealed, it is presumed that Parliament intended it to continue to apply……"*

26. Clearly, the problem is to identify what is general and what is specific. Is the subject-matter here the class of documents or is it the provision regarding disclosure? The class of information mentioned in section 53 is necessarily narrower than the universality of records covered by the 1997 Act. On the other hand, section 53 lays down only the most general rule regarding the Minister's power to refuse disclosure, but providing no machinery for requests or who can make them. The 1997 Act, on the other hand, contains detailed and specific provision regarding that subject. Thus considered, section 53 is the general provision and the 1997 Act is more specific. This view tends to resolution of the jurisdictional conflicts I have postulated, by reconciling the two provisions rather than placing them in conflict.

27. It is plain that section 53 of the 1998 Act deals with the same subject-matter as the 1997 Act, namely the disclosure of information. To that extent, the two enactments are *in pari materia.* There are strong intuitive reasons favouring a harmonious interpretation of the two provisions. The introductory words, "*notwithstanding any other enactment*," are general, not specific. The Oireachtas must be presumed to be aware of the existing state of the law at the time it enacts legislation. If it had intended to remove the documents mentioned in section 53 from the purview of the 1997 Act, as distinct from enacting a provision of the type specially provided for in section 32 of the latter, I believe it would have clearly said so. I also believe that the maxim *generalia specialibus non derogant* provides support for the continued effectiveness and applicability of the 1997 Act.

28. Accordingly, I am of the opinion that, even if the matter were procedurally regularly before this court, for example by way of judicial review, that it would be correct to hold that the Oireachtas did not intend, in enacting section 53 of the 1998 Act to amend the 1997 Act. A more commonsense and realistic interpretation is that it intended to adopt legislation which, subject to operation of the procedures of the 1997 Act, would enable the Minister to refuse disclosure of records.

29. Finally, it is necessary to consider the effect of section 53 in the light of the conclusion I have reached, namely that it is a provision of the type provided for in section 32(1) allowing for discretionary refusal. The reasons for the decision of the Commissioner are fully set out in the judgment of Kearns J and I do not wish unnecessarily to repeat them. The crucial passage in the Decision is as follows:

> *"I acknowledge that an analysis of the reports in question could give rise to comparisons being drawn between overall views of the schools. However, such comparisons would be highly subjective and I do not believe that any empirical league table of schools, even one based on overall impressions, could be compiled. In any event, I do not believe that such information would breach the provisions of section 53 of the Education Act. Having examined the contents of the reports and having regard to the provisions of section 34 (12) of the FOI Act, I am not satisfied that access to the reports would breach the provisions of section 53 of the Education Act. Therefore I find that access to the reports is not exempt under section 32 (1)(a) of the FOI Act"*

30. It is important to observe, in the first instance, that this is a conclusion of fact. The Commissioner expressed his view that the information contained in the reports, to adapt the relevant words of section 53, "*would* [not] *enable the compilation of information ……in relation to the comparative performance of schools in respect of the academic achievement of students enrolled therein…"*

31. Mr Hogan conceded that the *Tuarisc Scoil* does not enable compilation of information of the type mentioned in sub-paragraphs *(i)* or *(ii).* He argues that the *"academic achievement of students"* has broader scope or meaning. He refers to some laudatory comments on one page of the report: regarding English that "*pupils' written work is of a very high standard in terms of the range of topics covered, presentation and standard of spelling*;" regarding mathematics, that "*written work is of an impressive standard, inclusive of the range of assignments and neatness and accuracy of presentation*."

32. The Commissioner nonetheless concluded that he did "*not believe that any empirical league table of schools, even one based on overall impressions, could be compiled."* He also remarked on the subjective quality of the observations. Bearing in mind the statutory presumption in favour of disclosure, to which the Commissioner drew attention, and the fact that his conclusion is one of fact, I do not believe that the Appellant has established any mistake of law. Bearing in mind that this Court is considering an appeal on a point of law, I believe that paragraph *(b)* of the principles summarised by McKechnie J, cited above is applicable, namely that the Court "*ought not to set aside inferences drawn from…… facts unless such inferences were ones which no reasonable decision making body could draw."* The vehicle of appeal on a point of law cannot have been intended to involve the High Court or, *a fortiori*, this Court in detailed review of the Commissioners conclusions of fact. I do not think the conclusion of the Commissioner that the inspectors' reports did not come within section 53 was unreasonable at all and it certainly was not unreasonable to the standard required to enable this Court to disagree with him in the context of an appeal on a point of law.

33. I would dismiss the appeal.