Neutral Citation Number: [2008] IEHC 279

THE HIGH COURT

2006 No. 12 MCA

**IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 1997,
AS AMENDED
AND
IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 42 (1) OF THAT ACT**

BETWEEN

THE MINISTER FOR EDUCATION AND SCIENCE

APPELLANT

**AND
THE INFORMATION COMMISSIONER**

RESPONDENT

Judgment of Mr. Justice Brian McGovern delivered on the 31st day of July, 2008

1. In these proceedings, the Minister appeals against the decision of the Information Commissioner (hereinafter referred to as "the Commissioner") that a document known as Record No. 32 is not an "exempt record" within the meaning of the Freedom of Information Act 1997, and her construction of s. 19 (1) (a) and s. 19 (1) (c) thereof. The applicant submits that the respondent erred in law in concluding that Record No. 32 is not an "exempt record".

2. The legislation provides that where a decision is made to refuse a request under the Act, this can be reviewed by the Commissioner, pursuant to s. 34 of the Act. The Act provides that a decision to refuse to grant a request,

> ". . . shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified." See s. 34 (12) (b) of the 1997 Act.

3. Section 42 (1) of the Act, provides that a:

> " . . . party to a review under s. 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."

There are procedures in the Act which allow for the hearing to be *in camera* so as to avoid disclosure to the public of the documents until the matter has been decided. In this case the Court made such a ruling in view of the nature of the document being considered.

4. This case concerns "Record No. 32" which is a Draft Memorandum for Government, prepared in July 2001, which was not, in fact, submitted by the Minister to Government. Because the Memorandum was not sent to Government, the Commissioner took the view that s. 19 (1) (a) of the Act, did not apply to it. She also held that Record No. 32 was not "a record of the Government" so that s. 19 (1) (b) did not apply. In giving her reasons for her decision, the Commissioner also stated that she:

> "…considered whether the Memorandum, as prepared, contains information (including advice in the form of a proposal and recommendation in his name) for a member of the Government, (the Minister) for use by him in such a way as would bring Record No. 32 within the scope of the exemption provided by s. 19 (1) (c) . . ."

Given that the Minister decided not to proceed on the basis of what had been prepared in the form of this record, he did not use the information (including advice) prepared for him, primarily for the purpose of the transaction of any business of the Government at a meeting of the Government. For that reason, she decided that Record No. 32 did not fall within section 19 (1) (c).

5. I propose to deal with s. 19 (1) (c) first. This provides that a head of a public body, as defined in the Act, shall refuse to grant a request under s. 7, if the record concerned:-

> "(c) Contains information (including advice) for a member of the Government, the Attorney General, a Minister of State, the Secretary to the Government, or the Assistant Secretary to the Government, for use by him or her, primarily for the purpose of the transaction of any business of the Government at a meeting of the Government".

6. The Commissioner complains that the applicant made no argument to her, based on s. 19 (1) (c), but confined his arguments to s. 19 (1) (a). This, indeed, appears to be the case. Accordingly, the Commissioner argues that the applicant should not be permitted to make submissions in his appeal against her decision, based on section 19 (1) (c).

7. The court should be slow to admit a new argument not advanced before the Commissioner. In the area of criminal law, the Court of Criminal Appeal has repeatedly stated that it will be reluctant to entertain arguments on appeal which were not made at the original trial. In *William James Murray v. the Trustees and the Administrators of the Irish Airlines (General Employees) Superannuation Scheme* [2007] 2 I.L.R.M. 196, Kelly J. refused to allow additional evidence where the parties seeking to adduce the evidence made submissions to the Pensions Ombudsman on two occasions and never sought to introduce that evidence which was available. Although the case concerns evidence and not legal arguments or submissions, it is of some general relevance to the Commissioner's argument. In *South Western Area Health Board .v. Information Commissioner* [2005] 2 I.R. 527, the issue of whether or not the High Court could entertain a point on appeal that was not raised before the Commissioner during the course of review was the subject of comment. Smyth J. said:

> "… it would be wholly unsatisfactory that a decision on appeal should be made without the matter having first been raised before the Commissioner.

In my judgment the Commissioner was correct in his submissions that it was undesirable that as a matter of policy that a party in the position of the appellant would not advance all relevant arguments to the Commissioner in the first instance."

If no submission was made by the Minister to the Commissioner that the records were exempt, pursuant to s. 19 (1) (c), it is difficult to see why the Minister should be permitted to make such an argument in this appeal, unless it could be shown that there was some public policy or constitutional issue to be protected. If the matter can be dealt with by reference to s. 19 (1) (a), which was raised both before the Commissioner and on this appeal, then this would seem to be the proper way of disposing of the matter.

8. For the reasons which I will set out below, I am satisfied that this matter can be dealt with on the basis of s. 19 (1) (a) and I

propose dealing with it on that basis.

9. Section 19 (1) (a) states:

> "(1) A head shall refuse to grant a request under section 7 if the record concerned -
>
> > (a) has been, or is proposed to be, submitted to the Government for their consideration by a Minister of the Government or the Attorney General, and was created for that purpose . . ."

10. The Commissioner, in her decision, stated:

> "Record No. 32 is a Draft Memorandum for Government, prepared in July 2001, which was not submitted by the Minister to the Government. I am satisfied, from the content that this is not a preliminary or other draft of 'Final' memoranda for Government, which was sent later. Indeed, it is clear from the record, that the material and recommendations in this Memorandum were never submitted to the Government for consideration. Therefore, I do not believe that section 19 (1) (a) can apply to it . . ."

11. The appellant says that this decision is flawed in two respects:

> (i) It appears to determine the issue on the basis that the Memorandum was not sent and therefore does not qualify for exemption. The Commissioner failed to consider the alternative ground, namely, whether it was proposed to be submitted to Government.
>
> (ii) The reference to "Final Memoranda" is perplexing and irrelevant because this is not a criterion under the section of the Act.

12. Record 114, is a Memorandum for Government from the Minister, dated 31st May, 2002. This was for the purpose of putting before Cabinet the agreement with religious congregation on their contribution to the Residential Institutions Redress Scheme. It appears that this matter was put before Cabinet. The Commissioner, therefore, found the Memorandum for Government to be exempt under section 19 (1) (a).

13. In Case No. 03622 - *Deputy Fergus O'Dowd v. Department of the Environment, Heritage and Local Government*, a member of the Oireachtas requested records relating to drafts of the National Spatial Strategy. The Department refused the request under s. 19. The records at issue included Government Memoranda and other submissions, records that contributed to drafts which were submitted to the Government, records of the Government, briefing material, notes of a discussion at a Government meeting, records relating to the Inter-Departmental Steering Committee, and records of communication between members of the Government. In the decision, the Commissioner accepted that, while not all of the Memoranda for Government were actually submitted to the Government, all of the documents were at least proposed to be submitted to the Government and were created for that purpose. She therefore found the Memoranda for Government to be exempt under s. 19 (1) (a).

In Case No. 99450 - *Mr. X. and the Department of Justice, Equality and Law Reform*, the Commissioner accepted that the Drafts of a Memorandum for Government satisfied the provisions of s. 19 (1) (a), which also provides that a "record" includes a preliminary or other draft of the whole or part of the material contained in the record. In that decision, it is stated:

> "More significantly, the Commissioner found that the draft and final version of the Minister for Finance's observations on the Draft Memorandum, also met the provisions of section 19 (1) (a). In doing so, the Commissioner attached a considerable importance to the facts that these were the Minister's views, or at least a draft of what the Minister's views would possibly be."

14. I accept the jurisprudence concerning the 1997 Act, which is set out in the cases of *Sheedy v. Information Commissioner* [2005] 2 I.R. 270, and *McKay v. Information Commissioner* [2006] 2 I.R. 260. In the Sheedy case, reference was made to the High Court decisions of *The Minister for Agriculture and Food v. Information Commissioner* [2000] 1 I.R. 309, and *Deely v. Information Commissioner* [2001] 3 I.R. 439. These decisions establish that the Act provides that it was the intention of the Oireachtas that it is only in exceptional cases that members of the public should be deprived of access to information in the possession of public bodies. It is clear that the legislation operates on the basis that a decision to refuse to grant a request is to be presumed by the Commissioner not to have been justified.

15. When one looks at Record No. 32, it is clear that it is a "Memorandum for Government" dated July 2001, prepared by the Minister for Education and Science, and it is for the purpose of discussing at Cabinet the contribution of congregations to the Redress Scheme for victims of institutional child abuse. It is accepted by both parties to the appeal that this was never sent.

16. The Commissioner held that the Department was entitled to refuse access to Record No. 114, which is a Memorandum for Government, dated 31st May, 2002, from the Minister for Education and Science. This was for the purpose of discussing at Cabinet an agreement with religious congregations on their contribution to the Residential Institutions Redress Scheme. It is alleged by the appellant that there is an inconsistency in the decision of the Commissioner to refuse access to Record No. 114, but at the same time, allow access to Record No. 32. It is also alleged that the decision of the Commissioner on Record No. 32 is inconsistent with the decisions made in the *O'Dowd* case and *Mr. X* case.

17. Although the appellant says there is no ambiguity in s. 19, it is argued that if there is an ambiguity, the court should give a purposive interpretation to the section. It seems to me that this is correct. The appellant argues that the Commissioner misconstrued the word "or" in s. 19 (1) (a), and failed to read the clauses "has been" and "is proposed to be" in a disjunctive manner. She construed the sub-section in a manner that limited the exemption to documents actually submitted to Government. If one reads the clauses "has been" and "is proposed to be" in a disjunctive manner, and in the light of the objects of the Act, it is argued that the document was clearly proposed to be submitted to Government and was "created for that purpose". The appellant argues that it is irrelevant that the document was not, in fact, submitted to Cabinet.

18. Looking at Record No. 32, it is clear that it contains reference to negotiations between the Government and religious institutions on a scheme of contribution to the Residential Institutions Redress Scheme. Record No. 114, deals with the same subject matter, except that events had moved on to the point where an agreement had now been reached and this was to be formally put to Cabinet. Within Record No. 32, the Minister expresses views and discusses the likely result of rejection of the proposal by Government. In my view, this was the type of matter that was intended to be captured by s. 19 of the Act, and in particular, section

19 (1) (a).

19. I am quite satisfied that the evidence establishes that the Memorandum was, at the time of its preparation, prepared and created for the purpose of submitting it to Government. In the circumstances, it is, in my view, captured by s. 19 (1) (a) of the Act. This would rebut any presumption arising by virtue of section 34. Furthermore, if a record comes within the ambit of s. 19, the "head" is required to refuse a request made under section 7. If a document containing the Minister's advice to Government on an issue such as this, can be disclosed merely because it was not ultimately submitted to Cabinet, it would, in my view, totally undermine the position of the Minister concerned, and would have serious implications for Government. A Minister must be entitled to commit his views and recommendations to a document intended to be submitted to Government, without those views subsequently getting into the public domain, merely because the matter was not submitted due to the manner in which circumstances evolved. In *Attorney General v. Hamilton* [1993] 2 I.R. 250 Finlay C.J. referred to Articles 28.4.1 and 28.4.2 of the Constitution observing that these Articles "impose upon members of the Government separate though clearly related obligations and these are:

> (1) They must meet as a collective authority.
>
> (2) They must act as a collective authority.
>
> (3) They must be collectively responsible for all the Departments of State and not merely the one which each of them administers.
>
> (4) They have as a Government a responsibility to Dáil Éireann." (ibid 266)

He went on to state that:

> "That these obligations involve some obvious, necessary, consequential duties:

The first of those relevant to the issues arising in this appeal is the necessity for full, free and frank discussions between the members of the Government prior to the making of decisions, something which would appear to be an inevitable adjunct to the obligation to meet collectively and to act collectively. The obligation to act collectively must, of necessity, involve the making of a single decision on any issue, whether it is arrived at unanimously or by a majority. The obligation to accept collective responsibility for decisions and, presumably, for acts of Government, involves, as a necessity, the non-disclosure of different or dissenting views held by the members of the Government prior to the making of decisions."

Section 19 of the 1997 Act (as amended) can most readily be understood in the context of that decision.

20. I am satisfied that, on the basis of this particular case, the original refusal to grant the request under s.7 of the Act was correct. Accordingly, I hold that the Commissioner erred in law in the manner in which she interpreted s. 19 (1) (a) of the Act, and applied it to Record No. 32.