

THE HIGH COURT

Record No. 2012/415 MCA

IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS, 1997 AND 2003

Between/

L. K.

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

THE HEALTH SERVICE EXECUTIVE

Notice Party

Judgment of Ms. Justice Iseult O'Malley delivered the 24th July. 2013**Introduction**

1. This is an appeal under section 42 of the Freedom of Information Act, 1997 (as amended) against the respondent's decision of 25th September, 2012. That decision affirmed an earlier decision of the Health Service Executive (the notice party), refusing the appellant's request for a copy of a report written by a social worker in contemplation of childcare proceedings concerning the appellant's child.

2. The Appellant seeks the following orders:

- i. To quash the decision of the Freedom of Information Commissioner Edmund McDaid on 25th September 2012 ...; and
- ii. An order to hand over a hard copy of the Section 20 report under the Childcare Act, 1991.

Background

3. In early 2009, an application was made to the District Court on behalf of the notice party for a Supervision Order, pursuant to the provisions of the Child Care Act, 1991 in respect of the appellant's child.

4. For the purposes of the proceedings a social worker prepared a report for the District Court setting out, *inter alia*, the concerns and recommendations of the notice party in respect of the child.

5. A copy of the report was furnished to the appellant on 27th May, 2009.

However, on the 26th August, 2009, the learned District Judge directed a member of An Garda Síochána present in the court to remove the report from the appellant's possession. This was done, in court, after a search of the appellant's belongings. It appears that this order was made because of assertions by the solicitor for the notice party that the appellant had confronted her child in respect of the contents of the report and that this had caused the child some distress.

6. The appellant's child is now in care. Understandably, the appellant is very upset by her situation, for which she believes there is no justification. She did not pursue an appeal to the Circuit Court but she has taken unsuccessful judicial review proceedings in respect of the care and custody orders.

7. During the hearing of this appeal, at the suggestion of Senior Counsel for the notice party, I adjourned the case to permit the appellant and the notice party to return to the District Judge and apply for a copy of the report. The court was told that the notice party would, at this stage, support such application.

8. The learned District Judge facilitated the process and heard the application, but acceded to it only to the extent of permitting the appellant to read the report but not to have a copy. She did not consider this to be sufficient for her purposes and the case therefore resumed before this court.

The Freedom of Information Request

9. By letter dated 10th August 2011, the appellant wrote to the HSE making a request, under section 7 of the Freedom of Information Act, 1997, for a copy of the report.

10. By letter dated 7th September, 2011 her request was refused in the following terms:

"I refer to your request under the Freedom of Information Act 1997 & 2003 for copies of

"the Health Service Executive Social Worker- [M.M.], illegally written and containing false statements to the[...] District Court, Section 20 Report under childcare Act 1991..."

As nominated decision maker, I wish to advise that, following consideration of the provisions of the Act, I must refuse

access to the records, (Section 8 (1)(d))

Exemption Used:

Section 22 (1)(b) provides access to a record shall be refused if its disclosure would constitute contempt of court. The Social Work Report prepared for the court, arising out of the HSE's investigation under Section 20 of the Child Care Act, 1991 falls under the exemption.

Court proceedings under the Guardianship of Infants Act and Child Care Act are held in camera and thus, the in camera rule applies. It is a contempt of court for any person to disseminate information derived from proceedings held in camera without prior judicial authority. No such judicial authorization has been brought to my attention. I therefore find the records requested are exempt from release."

11. The appellant then wrote to the office of the Information Commissioner (the respondent) seeking to appeal this decision. She was informed that she should first seek an internal HSE review of the decision. She did this and the original decision was affirmed by the HSE on 24th November, 2011.

12. The appellant appealed that decision to the respondent by way of letter dated 2nd January, 2012.

13. By letter dated the 5th July, 2012, the appellant was notified by the respondent's office that the initial view had been formed that the report had been correctly withheld from her. She did not accept this and exercised her right to a formal review by the respondent. This review was undertaken by Mr. Stephen Rafferty, senior investigator in the office. By letter dated the 25th September, 2012, Mr Rafferty communicated to the appellant that

"The senior investigator found that the decision to refuse access to the record concerned was justified under section 22 (1)(b) of the FOI Act and affirmed the decision accordingly"

14. He indicated further that the scope of the review was "concerned solely with the question of whether the HSE was justified in its decision to refuse access to the social worker's report on the basis of section 22(1)(b) of the FOI Act."

15. He sets out his "analysis and findings" as follows:

"Section 22(1)(b)

Section 22(1)(b) of the FOI Act provides that:-

A head shall refuse to grant a request under section 7 if the record concerned-

...(b) is such that the head knows or ought reasonably to have known that its disclosure would constitute contempt of court...

The HSE explained in its original decision that "The Social Work Report prepared for the court.....[arose] out of the HSE's investigation under Section 20 of the Child Care Act..." and that "Court proceedings under the Guardianship of Infants Act and Child Care Act are held in camera and thus, the in camera rule applies".

The In Camera Rule

The in camera rule (i.e. that proceedings be held otherwise than in public) applied to Court proceedings under the Child Care Act 1991. It is a contempt of Court for any person to disseminate information emanating or derived from proceedings held in camera without prior judicial authority. In this case, the report at issue was prepared for child care proceedings under the Child Care Act 1991. For this reason, I accept that the record at issue is covered by the in camera rule. Accordingly, as I am not aware of the existence of any prior judicial authority for the release of the record, I am satisfied that its release to the applicant on foot of her FOI request would constitute contempt of Court and I find therefore, that section 22(1)(b) applies.

Decision

Having carried out a review under section 34(2) of the FOI Act, I find that the HSE's decision to refuse to grant the applicant's request was justified under section 22(1)(b) of the FOI Act."

The relevant provisions of the Child Care Act

16. Section 20 of the Child Care Act, 1991 provides as follows:-

20.-(1) Where, in any proceedings under section 7, 8 or 11 or Part III of the Guardianship of Infants Act, 1964, or in any case to which section 3 (3), 11 (b) or 16 (g) of the judicial Separation and Family Law Reform Act, 1989, relates, or in any other proceedings for the delivery or return of a child, it appears to the court that it may be appropriate for a care order or a supervision order to be made with respect to the child concerned in the proceedings, the court may, of its own motion or on the application of any person, adjourn the proceedings and direct the health board for the area in which the child resides or is for the time being to undertake an investigation of the child's circumstances.

17. Section 29(1) of the Act stipulates that proceedings of this nature must be heard "otherwise than in public"- that is, in camera.

18. Section 27 deals with the procurement of reports by the court and provides that copies are to be provided to the parties in the case.

Relevant provisions of the Freedom of Information Act 1997 (as amended)

19. Section 6 (1) of the Freedom of Information Act provides that:

6.-(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.

(7) Nothing in this section shall be construed as applying the right of access to an exempt record.

20. Section 7 provides for the request to be made, in the first instance, to the head of the public body concerned. Where that is unsuccessful, the applicant may seek a review of the decision by the Information commissioner.

21. Section 22 deals with records that are exempt under the Act and provides that a head of a public body shall refuse disclosure where, *inter alia*, the record

(b) is such that the head knows or ought reasonably to have known that its disclosure would constitute contempt of court...

Section 42-Appeal to the High Court

42.-(1) 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.

Submissions of the Appellant

22. The appellant submits that as a litigant involved in the child care proceedings, she should be furnished with a copy of the report. She relies on s.27 of the Child Care Act in this regard and says that it is superior to the restrictions in the Freedom of Information Act.

23. She also says that she is entitled to a copy of the report under the Freedom of Information Act, as it contains personal information about herself and her child. This, she says, differentiates her position from that of the persons in the cases relied upon by the respondent, which deal with applicants who were third parties.

24. She asserts that the report is a crucial piece of evidence in order for her to further her appeal of the substantive proceedings to the European Court of Human Rights.

25. She argues that the District Judge had no lawful authority to take her copy from her and that the order made by him was not made in writing. It is submitted that the respondent is empowered to disregard a court order if it is lacking in legality and causes injustice.

Submissions on behalf of the Respondent

26. Mr Kieran BL, on behalf of the respondent, submits that the Information Commissioner is a creature of statute, bound by the terms of the Freedom of Information Act which established his office. The appeal under s. 42 of the Act is on a point of law only. He says that therefore, the appellant must show that the decision made by Mr Rafferty was vitiated by an error of law in relation to the interpretation of that Act.

27. He refers to the provisions of s. 29(1) of the Child Care Act, quoted above, and the principle that

"it is a contempt of court for any person to disseminate information derived from proceedings held in camera without prior judicial authority"

citing Barr J. in *Eastern Health Board v. Fitness to Practice Committee of the Medical Council* [1998] 3 I.R. 399. Reliance is also placed on the judgment of O'Neill J. in the related case of *E.H. v. Information Commissioner* [2001] 2 I.R. 463.

28. The applicant in *E.H.* had previously instituted negligence proceedings against the Minister for Health and the Eastern Health Board. In those proceedings he had sought and obtained discovery of certain documents, subject to an undertaking to the court to preserve the "total confidentiality" of the documents. Later, the applicant was a notice party in *EHB v. Fitness to Practice Committee* (cited above), and again obtained documentation on discovery subject to strict conditions as to confidentiality.

29. In the proceedings before O'Neill J., the applicant had sought from the Information Commissioner disclosure of documents, including some that he had previously obtained in discovery in the two actions mentioned. Disclosure was refused on the basis that it would constitute contempt of court under s. 22(1) (b).

30. Upholding the Commissioner on the issues that are of relevance to this case, O'Neill J. held that

"...the purpose of s.22(1)(b) is to prevent the Act of 1997 operating in such a way as to permit interference in the administration of justice, a function which is reserved by the Constitution solely to the courts established by or under the Constitution. If it were the case that one could under the provisions of the Act of 1997 obtain documents, disclosure of which was prohibited by the ruling of a court or by an undertaking given to a court, I have no doubt that this would amount to a gross and constitutionally impermissible interference in the administration of justice."

31. O'Neill J. went on to hold that to give access to documents under the Freedom of Information Act in such circumstances would have the result of

"robbing an order of a court or an undertaking given to a court of the force and effect which the court intended these to have."

In my views. 22(1)(b) is there to ensure that this does not happen, and it must operate accordingly."

Conclusion

32. This being an appeal on a point of law under s.42, the court is concerned solely with the question whether the respondent correctly interpreted the provisions of the Freedom of Information Act. It is not about the rights and wrongs of the child care

proceedings, or about the propriety of the taking of the copy report, as perceived by the appellant. There is, as a matter of law, authority for the course of action taken by the District Judge but that is not the issue here. Any legitimate grievances about the operation of the court system can only be litigated within the court system, through the normal channels of appeal or judicial review. The Freedom of Information Act is not, as O'Neill J. makes clear, intended to be used in a manner that bypasses the Constitutionally established structures for the administration of justice.

33. In this case, it is clear that the respondent was bound by s. 22(1)(b) to refuse disclosure if he considered that it would constitute contempt of court. The Information Commissioner has no authority to disregard either the statutory provisions relating to the *in camera* nature of the child care proceedings or the court order made in the case. It is no part of his powers to decide that the order was wrong, or that the appellant's right to a copy of the report under s.27 of the Child Care Act should prevail over such an order. Neither the status of the appellant as a party to the District Court proceedings nor the purpose for which she wishes to use the report are relevant to his powers in this respect.

34. Having regard to the *in camera* nature of the District Court proceedings and to the express order of the District Judge in relation to the report, I consider that the respondent was correct in his view and had no option but to refuse disclosure.