THE HIGH COURT

[RECORD NO. 2016 380 MCA]

BETWEEN

MICHAEL GRANGE

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

THE MINISTER FOR FOREIGN AFFAIRS AND TRADE

NOTICE PARTY

JUDGMENT of Ms. Justice O'Regan delivered on the 7th day of March, 2018

Issues

1. By notice of motion bearing date the 29th November, 2016, grounded on an affidavit of the appellant of the same date, the appellant applied to the High Court pursuant to the provisions of s. 24 of the Freedom of Information Act, 2014 to discharge the decision of the respondent of the 4th November, 2016 and further sought a declaration that the respondent erred in law in finding that the appellant's request for information from the third party bearing date the 28th of May, 2016, was frivolous and vexatious under s. 15 of the 2014 Act. In addition, the appellant seeks a declaration that the respondent failed to accord fair procedures and breached natural and constitutional justice and took into account irrelevant matters and/or failed to take into account relevant matters in arriving at its decision.

2. Under s. 24 of the 2014 Act, a party is enabled to appeal to the High Court if affected by a decision of the respondent under s.22, by way of a review on a point of law from such decision. Although there is another basis for such an appeal, same does not arise in the instant appeal.

3. The asserted errors of law on the part of the respondent are set out more fully in the appellant's affidavit of the 29th November, 2016 at para. 95 thereof.

Background

4. The appellant made an application by way of information request of the third party bearing the date 28th May, 2016. This request was refused on the part of the third party by Ms. Kiernan, in a decision of the 27th June, 2016 based upon s. 15(1)(g) of the 2014 Act – under this particular subsection a request for freedom of information may be reused if the request in the opinion of the head, is frivolous or vexatious or forms part of a pattern of manifestly unreasonable requests from the same requestor. By communication of 1st July, 2016, Ms. Kiernan confirmed that the refusal was made on all three grounds under s. 15(1)(g).

5. The appellant sought a review of Ms. Kiernan's decision and by review decision of the 26th July, 2016, by Mr. Ó Caollaí, the initial refusal of information was affirmed on the basis that the request was frivolous and vexatious. On the 26th July, 2016, the appellant made an application to the respondent for a review of Mr. Ó Caollaí's decision, pursuant to s.22 of the 2014 Act.

Deadline for Supplementary Submissions

6. On the 11th October, 2016 the appellant was invited to make further submissions as it was intended that a recommendation of the investigating officer would be made to refuse the application for information requested on the basis that same was frivolous and vexatious. By response of the 12th October, 2016, the appellant indicated that he required the Minister's submissions and a further two week period from receipt of those submissions to make any supplementary submissions of his own. Subsequently, in an email of the 27th October, 2016, the appellant sought an oral hearing - at this time by reason of a prior communication the deadline for the appellant's additional submissions was set as the 4th November, 2016.

7. The appellant has confirmed during the course of this hearing that the failure to have an oral hearing is not the subject matter of his application to the High Court.

8. It is noteworthy that in his email requesting an oral hearing of the 27th October, 2016, he did not indicate that he required a further extension of time from the 4th of November, 2016. Ultimately, the decision now under appeal to the High Court was made by the respondent on the 4th November 2016, although not published to the appellant until on or after the 7th November, 2016. During the course of submissions the appellant suggests that the decision was premature as he had until the close of business on the 4th November 2016 to make his submissions. The appellant did not agitate this point in his initial affidavit of 29th November, 2016; however he did file a supplementary affidavit bearing date the 22nd May, 2017. At para 13 thereof, he states that *inter alia* (by reference to para. 31 of his initial affidavit) on the 27th October, 2016 that he was awaiting a response to his request for an oral hearing and a copy of the third parties submissions with the deadline then being, for his supplementary submissions, the 4th November, 2016, however he states that :-

> "It was my expectation that the respondent would have provided me with a week or two to make submissions after ruling on these two applications. No matter what the outcome was, I would have made a submission."

9. It is noted that the appellant had in fact received an email of the 27th October, 2016 indicating that Ms. Murdiff, investigating officer on behalf of the respondent, was of the view that the appellant had been put on notice of the material issues arising in the department's submissions in line with fair procedure and that he had already lodged comprehensive submissions of his own and any further submissions he wished to make would be given full consideration before a final decision was made.

10. In the body of the decision it is recorded that the respondents' policy document provides that, in general, submissions will not be exchanged, and that the appellant had previously been informed of this on a number of occasions. This statement in the decision has not been challenged.

11. On this point, therefore, I am satisfied that the appellant had not in fact sought an extension of time, was aware of the deadline for his submission being the 4th November, 2016, was effectively advised by Ms. Murdiff that he would not be receiving the third party submissions and indeed in a subsequent email of the 27th October, 2016 indicated that in the absence of a positive response from the respondent he fully reserved his position. The foregoing does no support any realistic understanding on the part of the appellant that the deadline for submissions would be extended beyond the 4th November, 2016, or that he had any expectation that the deadline would be extended or that in fact he would have made further submissions in the absence of being furnished with the third party submissions or in the absence of being afforded an oral hearing.

Premature decision
12. I am further satisfied that the fact that the decision of the respondent is dated the 4th November, 2016 but was not published until, on or after the 7th November, 2016, is not a breach of fair procedure nor did any prejudice arise as against the appellant. Furthermore, as aforesaid, the appellant has not agitated this point in his initial notice of motion or grounding affidavit.

Relevant or irrelevant documents
13. The essential difference as between the appellant, in conducting this appeal, and the respondent and notice party is that the appellant urges the court to look at the information request of the 28th of May, 2016 on an effective stand-alone basis whereas the respondent and third party urge that this request for information has to be seen in the context of dealings as between the appellant and the third party including, in particular all such dealings since 2013, when the appellant was unsuccessful in securing a position on the third party's roster of members from whom parties would be nominated as election observers for a particular mission, together with the emails of the appellant to the third party respectively dated the 10th May, 2016 and the 12th June, 2016. In the events the respondent and indeed the third party, when the third party was making its decisions, both had regard to the history of events from 2013 and the respondent had regard to the email of the 12th June, 2016, aforesaid, in arriving at the decision.

14. The appellant urges that such broad overview of the information request of the appellant of 28th of May, 2016 is in fact impermissible under the 2014 Act by reason of :-

> (a) Section 13(4) thereof which provides that subject to this act in deciding whether to grant or refuse a freedom of information request, any reason that the requestor gives for the request, or any belief or opinion of the head as to what the reasons of the requestor is thought to be, that reason should be disregarded,

And

> (b) The wording of s. 15(1)(g) in commencing with the words: - "The request is …."

15. In the circumstances the appellant argues that on the basis of s.13(4) the motivation or reason of the requestor is of no consequence and should be disregarded in considering s.15(1)(g) and the wording of s. 15(1)(g) also confines the respondent in its decision making process, to review the information request in isolation.

16. On the other hand, the respondent and the Minister suggest that such an interpretation of the legislation is not in accordance with either the wording of section 13(4) when it says "subject to this Act" and therefore not intended to override other provisions of the Act, or, jurisprudence.

17. In particular, reference is made to the decision of O'Malley J. of the 7th October, 2014, in *Kelly v. Information Commissioner* [2014] IEHC 479 where at para. 100 thereof, it is stated :-

> "In this case, I consider that the respondent did not err either in her assessment of the legal test to be applied or in its application to the facts. In the first instance, she was entitled to take into account the context in which the applications were made - the long-running and unsuccessful pursuit of the appellant's grievances dating from 2002. She then set out, carefully and with specificity, why she had come to the conclusion that the appellant was using the FOI process to further prosecute his grievances and that this constituted an abuse of the FOI process."

18. The respondent also refers to the comment of Noonan J in *Fingleton v Central Bank of Irelan*d [2016] IEHC 1 to the effect that context is everything (see para 72 of that judgment).

19. In the circumstances, therefore, and in particular given the fact that :-

> (a) the appellant did not counter the jurisprudence aforesaid save to tender his view of the implications of s. 13(4) and s. 15(1)(g),
>
> (b) the appellant does not feel constrained to attribute any particular meaning to the phrase "subject to this Act" save that it need not be considered in otherwise applying s.13(4) to s.15(1)(g) to the effect that s.15(1)(g) is motive blind

I am satisfied that the respondent did not err at law in taking into account other matters in addition the request of the 28th of May, 2016 in arriving at the respondents' decision and for the purposes of this judgment I adopted the views expressed in para. 100, aforesaid, of the judgement in *Kelly* to the effect that if the instant appellant was using the FOI process to further prosecute his grievances this constituted an abuse of the FOI process.

Vexatious and/or frivolous
20. I am satisfied that, notwithstanding the appellants' arguments to the contrary, an abuse of the FOI process to prosecute a personal grievance can legitimately be classified as vexatious in accordance with the jurisprudence of Birmingham J. in *Nowak v. Data Protection Commissioner* [2012] IEHC 449, quoted in *Fox v. McDonald* [2017] IECA 189, a judgment of the Court of Appeal of the 20th June, 2017, at para. 20 thereof where Irvine J. describes the word frivolous as usually deployed to describe proceedings which the court feels compelled to terminate because their continued existence cannot be justified having regard to the relevant circumstances which Irvine J. felt was consistent with Birmingham J.'s view in Nowak, aforesaid, as proceedings clearly destined to cause irrevocable damage to a defendant.

21. In these circumstances, I am satisfied that the respondent properly came to the view that the request of the 28th of May, 2016 was to further the appellant's personal grievance and it was within jurisdiction of the respondent to classify such a request as being vexatious so that the request might be refused.

Extent of Review under s. 24

22. In assessing the manner in which this court should pursuant to s. 24 of the 2014 Act, review the decision of the 4th November, 2016 I note a very helpful discussion on the point by Noonan J. in *McKillen v. Information Commissioner* [2016] IEHC 27 which commences at para. 52 thereof, where the jurisprudence indicates that where a court is considering only a point of law, it cannot set aside findings of primary fact unless there is no evidence to support such findings and it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw. However if the decision making body took an erroneuos view of the law or if the decision flies in the face of fundamental reason and common sense, then the decision might be set aside. As Noonan J. stated at para. 56: -

> "Accordingly, a decision of the respondent will not be interfered with unless it is either based on no evidence or flies in the face of fundamental reason and common sense. It is thus immaterial if the court would have arrived at a different decision based on the same evidence. Inferences will not be set aside unless they are such that no reasonable decision maker could have drawn them."

23. In the appellant's email of the 10th May, 2016 which predated his information request by some eighteen days, it was noted that the appellant had been refused his application to be paid a grant in respect of observing an overseas election. He then set out the history of previously being on the relevant roster. He failed to be included on the 2013 roster because of lack of language ability; he suggests he was unfairly deselected from the roster and that he does not accept the premise that the grant is conditional on being a member of the same roster. He submitted that as a volunteer election observer he had a much greater expectation to be paid the grant than some others and he invited reflection as to how he had been treated. In his email of the 12th June, 2016, some 15 days after the instant FOI request, he is critical of the third party as being in denial and rejecting criticism. He thereafter complains of his ongoing exclusion from the selection process of election observers. He indicates that it is his intention to pursue a resolution of both non-payment of the grant and ongoing exclusion by using various fora, and ultimately if necessary by litigation. He indicates that the European Commission has indicated they would accept a complaint on the matter and he includes the following significant statement: -

> "Does DFAT have any objection to me escalating the matter in such a fashion or does it finally wish to make any alternative proposals for friendly resolution of my legitimate grievances in this case. From the very start this is how I wanted the matter resolved but DFAT never reciprocated such efforts at resolution."

24. In the third paragraph of the impugned decision under the heading of "Conclusion", it is stated: -

> "I am satisfied that the applicant's request to the Department was directly related to his ongoing grievance relating to his exclusion from the roster…it seems to me that submitting FOI requests has become an integral part of the applicant's strategy in pursuing this matter with the Department. Having considered the nature of the current application against the background of the applicant's ongoing prolonged interaction with the Department, I find that the purpose of his request is directed at an objective unrelated to the right of access to records, that is, it is being used tactically for the purpose of pursuing the dispute. In the circumstances, it is my view that a pattern of conduct exists relating to the use of FOI which suggests an abuse of the FOI process with no regard for the burden which the pursuit of his grievance has placed on the Department. Accordingly, I am satisfied that the Department was justified in deciding to refuse the request at issue on the ground that it is vexatious".

25. The above conclusion was reached following a consideration of the aforesaid email of the appellant of the 12th June, 2016 and I am satisfied that the inference drawn in the quoted conclusion above could not possibly be set aside as representing a decision that no reasonable decision maker could have come to. The decision maker reviewed the request of the 28th May, 2016, as aforesaid, in the context in which the application was made.

26. I am satisfied that the respondent decision maker had regard to the context of s. 15(1)(g) as a whole which is in accordance with the jurisprudence stated by Noonan J. at para. 72 of his judgment in *Fingleton v. Central Bank* [2016] IEHC 1 where he stated the provisions of the section as a whole must be examined to determine the context and later states:-

"context is everything".

The Minister's Submissions

27. The appellant complains that fair procedure was not applied in that he was deprived of sight of the Minister's submissions to the respondent prior to the respondent making the decision. In response the respondent refers to the decision of Quirke J. in *The National Maternity Hospital v. The Information Commissioner* [2007] 3 IR 643 where a similar complaint was made *vis-à-vis* submissions. At para. 121, Quirke J. stated :-

> "I know of no principle of natural law or justice which confers upon parties who make submissions to a decision making body the right to respond to the submissions made by every other party who participates in the process. The review undertaken by the Commissioner was a statutory process which expressly envisaged and permitted the adoption of informal procedures."

28. Taking into account:-

> (a) The fact that submissions cannot be classified as evidence.
>
> (b) The adjudicative process as a whole (see the judgement of Haughton J, in *Martin v Data Protection Commissioner* [2016] IEHC 479 at para 75 et seq where he distinguishes various different statutory adjudicative processes).
>
> (c) The discretion afforded to the commissioner in or about the procedures to be adopted under s.45 (6) of the 2014 Act.
>
> (d) The decision of Quirke J. aforesaid.
>
> (e) The respondent's policy document and prior advice on the point afforded to the appellant.

I am satisfied that the non-furnishing of the third party submissions, prior to the decision on the 4th November, 2016, did not in fact breach any constitutional right of the appellant or breach fair procedure.

Other Inquiries
29. The appellant argues that data protection requests or parliamentary questions (PQs) or other freedom of information requests cannot amount to a standard of vexatious.

30. The appellant further argues that the respondent was wrong to attribute to the Minister a suggestion that PQs were raised on behalf of the appellant (such assertion is not in fact made in the submissions of the third party), which the respondent mentioned in it's decision of the 4th November, 2016 and this, therefore, is an error of fact.

31. The respondent and third party counter that:-

> (a) It is clear from an email of the appellant of the 9th August, 2013 that he had some connection to the raising of certain PQs;
>
> (b) The reason why the third party made reference to PQs in the submissions was because of the involvement of the appellant with respect thereof (see the email aforesaid of the 9th August, 2013);
>
> (c) The respondent was legitimately and within jurisdiction taking into account the evidence including as aforesaid the interchange between the appellant and the Minister since 2013 when the appellant did not achieve membership of the new roster including the email the 9th August 2013 in which he acknowledges PQs were raised on his behalf.

32. I am satisfied that the respondent was entitled to have regard to the context in which the request of the 28/5/2016 was raised including the PQs and other inquiries and no prejudice occurs to the appellant or indeed error arises by the respondent attributing an involvement between the appellant and certain PQs.

Training Course
33. The appellant complains that the third party erroneously stated that the appellant applied to partake in a training course for which he was not eligible and he complains he had no opportunity to address this erroneous complaint – in the appellant's initial affidavit his complaint was to the effect he did not have an opportunity to deal with this complaint, however in the course of submissions before this court, the respondent referred to an email of Ms. Murdiff of the 14th October, 2016, being a date prior to the decision of the 4th November, 2016, in which the issue is in fact addressed to the appellant and therefore it is clear that he did have an opportunity prior to the decision to address this matter. The appellant then altered his argument to this court to the position that although he knew about the erroneous assertion on the part of the third party, nevertheless he was not afforded time to address same in submissions. I reject this argument as he is was in possession of Ms. Murdiff's email since the 14th October, 2016 and therefore had ample time, three weeks, in which to address the matter.

34. The appellant relies on the Supreme Court judgment in *The State (Lynch) v. Cooney* [1982] IR 337, and the judgment of Noonan J. in *The West Cork Bar Association v. The Courts Service,* [2016] IEHC 388 to support the proposition that where there is a manifest error of fact or irrelevant matters have been taken into account a decision must be quashed.

35. I am not satisfied that irrelevant matters as suggested by the appellant were taken into account as the matters which were taken into account were for the purposes of establishing context (see para's 13-19 herein).

36. Further, I accept the distinguishing features which arose in *The West Cork Bar Association* over that prevailing in the instant matter, namely that there was no express limit of the scope of the review of the facts and the parties agreed that there was an error. In this regard, the respondent also references the judgment of Cross J. in *Westwood Club v. Information Commissioner & Anor*. [2015] 1 IR 489 as to the requirement that the relevant error would be material.

Miscellaneous
37. A further asserted error identified by the appellant is the statement in the impugned decision to the effect that Mr. Julian Claire clarified certain issues raised by the appellant in a meeting between them (a fact denied by the appellant).

38. Reference to the content of the meeting with Mr. Julian Claire was not sufficiently material or fundamental to the decision to warrant interference with the decision by this court having regard to the jurisprudence as to the scope of the hearing before the High Court (see above) and having regard to the relevant passage at page 103 in International *Fishing Vessels Ltd v. Minister for Marine (No. 2)* [1991] 2 IR 93 where McCarthy J stated:-

> "If, however, there are valid reasons for his decision based upon matters of which he has notified the applicants and given them ample opportunity to make representations, the fact that there are other reasons of which he has not given them notice, does not, in my view, invalidate his decisions."

I am satisfied that no evidence in the decision of the respondent has been identified to suggest that this conversation with Mr. Julian Claire, formed a fundamental or material aspect of the decision making process so as to vitiate the decision.

Further given the oblique and minimal reference to Mr. Julian Claire in the decision (to the effect that at a meeting payment of the grant was adequately dealt with), such reference was not sufficiently material or fundamental to warrant interference by this court with the impugned decision having regard to the relevant jurisprudence referred to herein.

39. The appellant complains in submissions that the decision of the respondent of the 4th November, 2016 does not demonstrate any awareness of the issues which the respondent should have had regard to in an assessment of the request of the 28th May, 2016, or indeed the various provisions of the 2014 Act. In response the respondent states that this complaint cannot be properly before this court as it was not raised in the notice of motion or affidavit of the appellant. I accept the respondent's submission in this regard.

40. Insofar as the appellant suggests that the respondent did not provide any adequate explanation for its decision, I am satisfied that there is no merit in such argument as it is clear from the decision as a whole and in particular the conclusion element thereof, as to the basis for the respondent arriving at its decision. The decision clearly discloses the essential rationale on foot of which the decision is taken and therefore is in compliance with the judgment in *EMI Records (Ireland) Ltd & Ors. v. Data Protection Commissioner* [2014] 1 ILRM 225.

41. The appellant takes exception to a description of the appellant attending Sri Lanka as an unofficial election observer. In this regard, the appellant suggests that this connotes criminal activity on the part of the appellant, however as was pointed out in submissions on the part of the respondent, the appellant has not pointed to any particular statutory provision which suggests such

criminal activity and reference to independently attending the Sri Lanka election process is equally referable to independently of the third party.

42. Additional complaints of the appellant are as follows: -

> (a) The appellant asserts that if the information that he was seeking in his request of the 28th of May, 2016 was already made available to him, he should have been refused the request under s. 15(1)(i) of the 2014 Act rather than subsection (1)(g).

In this regard, it is noted that subsection (1) (i) relates to a requested record already released, whereas in the current circumstances, the respondent asserts that the appellant was on notice by virtue of information furnished in the information leaflet in respect of the roster and grant arrangements being the document mentioned at p. 377 of the booklet comprising Exhibit FK 3 of the replying affidavit of Frances Kiernan. Because therefore, there was no prior release of such records, as anticipated by s. 15(1)(i); further on the basis that this issue was not raised in either the notice of motion or grounding affidavit, and that the entire tenor of the appellants' argument assumes no overlap between the various subsections within subsection (1) without any basis as to why there should be read into s.15(1) that the subsections therein are mutually exclusive I am satisfied that this is not a meritorious argument on the part of the appellant.

> (b) The appellant argues that the respondent did not comply with its guidelines published in August 2015 on s. 15(1)(g), in particular the list identified at p. 7 thereof.

It is noteworthy that such list is identified as being non-exhaustive and identifies matters which may (permissive) be considered. In addition, the respondent indicates that in fact the items were considered, for example in p. 5 of the decision it is noted that the appellant made eleven prior FOI requests in respect of the roster and made six applications in 2014 and 2015 to be nominated as an election observer, notwithstanding he was not on the roster. At p. 7 of the decision the respondent argues that the respondent identifies that the appellant had a tactical purpose and the nature and scope of the request was also considered. The appellant acknowledges consideration of Item #3 and insofar as Item #4 is concerned, the respondent refers to p. 7 of the impugned decision where it is noted that since 2013, the appellant has pursued all available avenues. Therefore, I am satisfied that this argument on the part of the appellant cannot succeed

> (c) The appellant argues that there is no basis for the respondent to assume reasonable behaviour on the part of a requestor.

Such a stated assumption was neither material nor fundamental to the decision and therefore cannot amount to a valid basis to have same discharged.

> (d) On page 5/6 of the decision the respondent sets out 14 items identified by the third party comprising a pattern of conduct which the third party alleged to be vexatious on the part of the appellant. The appellant complains that if individually reviewed none of such items amount to vexatious and the respondent failed to attach weight to such items on an individual basis, in addition to other complaints already dealt with herein.

It is clear that the third party was referring to the cumulative effect of such items to identify context.

In view of the conclusion in the decision and matters herein under the heading 'extent of review under s.24' the appellants' complaints in this regard do not amount to sufficient grounds to support the relief claimed.

Conclusion

43. For the reasons set out above, I am not satisfied that in accordance with s. 24 of the 2014 Act, the appellant has demonstrated an error at law sufficient to vitiate the decision of the 4th November, 2016 and in the circumstances, the relief claimed in the notice of motion of the 19th November, 2016 is refused.