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THE HIGH COURT

2008 15 MCA

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

AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 42(1) OF THE AFORESAID ACTS

BETWEEN

MICHAEL KRUSE

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

UNIVERSITY COLLEGE DUBLIN

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Sheehan delivered on the 23rd day of June, 2009

1. In these proceedings, the appellant, Michael Kruse, now a fourth year medical student in UCD, seeks an order pursuant to the provisions of s. 42(1) of the Freedom of Information Act 1997, allowing an appeal from a decision of the respondent dated the 13th December, 2007, on the basis that same is invalidated by errors of law. The said decision of the respondent confirmed a decision of the notice party on the 30th January, 2007, refusing the appellant copies of certain examination documents pertaining to himself, which he had sought pursuant to the Freedom of Information Act 1997.

Background

2. The background to this appeal arises from the appellant's belief that he had performed better than the marks awarded to him in two multiple choice question examinations, which he was obliged to take as a second year medical student in UCD in 2006. He sat these examinations on the 24th October, 2006, and the 3rd November, 2006, and received the results he queried later in November. Following receipt of these results he instructed Hayes Solicitors to act on his behalf, and they duly wrote on the 29th November, 2006, to UCD pursuant to s. 7 of the Freedom of Information Act 1997, as amended by the Freedom of Information (Amendment) Act 2003, for information relevant to the examinations taken by him.

3. This correspondence with UCD led to a request for the following four documents relating to the two examinations.

> 1. (a) Mr. Kruse's question/answer sheet for the examination in Cell Biology taken on the 3rd November, 2006, and entitled "Cell Biology MDSA10030".
>
> (b) Mr. Kruse's computer script for the examination in Cell Biology taken on the 3rd November, 2006.
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> 2. (a) Mr. Kruse's question/answer sheet for the examination in Molecular Basics taken on the 24th October, 2006, and entitled "Molecular Basis BIOC10030".
>
> (b) Mr. Kruse's computer script for the examination in Molecular Basics taken on the 24th October, 2006.

4. As the appellant's question and answer sheet in respect of the 24th October, 2006, examination had been destroyed prior to his formal request to UCD, he subsequently sought, in lieu of the said question and answer script, any standard form question sheet available in relation to that examination.

5. Thus, in his appeal to this Court he sought also, a declaration that he was entitled to a copy of this document as well as copies of the documents referred to above at 1(a) and (b) and 2(b).

6. While the appellant, who represented himself at the time this case came on for hearing, stated that he required copies of the documents to enable him to effectively participate in the examination appeals process, it is relevant to note that s. 8(4) of the Act of 1997, as amended, states:-

> "Subject to the provisions of this Act, in deciding whether to grant or refuse to grant a request under section 7 –
> (a) any reason that the requestor gives for the request, and
>
> (b) any belief or opinion of the head as to what are the reasons of the
>
> requestor for the request, shall be disregarded."

7. In the course of correspondence between the appellant's solicitors, UCD and the respondent, referred to in the replying

affidavit of Desmond O'Neill, investigator with the respondent, UCD explained that the difference between traditional assessments and multiple choice question assessments was that due to the short answer multiple choice format (true/false/unanswered), the script was produced in a computer readable form (computer script) and that it was usual to provide two documents to each candidate taking the assessment - a question and answer sheet and a computer script. Thus the question and answer sheet is a list of statements with a selection of responses (true/false/unanswered) opposite each statement. The candidate chooses the response believed to be the correct answer and fills in "T" for true, "F" for false or "U/A" for unanswered in a box on the corresponding computer script/answer grid for the examination. Thus, the documents sought at 1(a) and 2(a) are a request for the question and answer paper, and those sought at 1(b) and 2(b) are a request for the computer scripts containing Mr. Kruse's answers in true/false/unanswered format.

8. UCD also pointed out that some candidates may fill in their answers initially on the question and answer paper, and then transfer them onto the computer script to enable the automated computation of results. The question and answer paper and the computer script are collected from the candidate at the end of the assessment so that no copies of the questions set and answered can be retained by the candidates. Candidates are informed before taking assessment to be very careful in transferring their answers from the question and answer paper to the computer script, as the latter is the only officially recognised assessment script. The question and answer papers do not form part of the grading process and are destroyed shortly after the assessment.

9. UCD further stated that it was university policy to refuse requests from candidates to retain following assessment, at feedback, under the Freedom of Information Acts 1997-2003, or by any other means, copies of the questions set and answered as part of a multiple choice question assessment. This was because the questions were drawn from a pool of validated questions, the question pool is finite and the questions used in one assessment would be used again in future assessments. A gradual accumulation of questions in the pool by students over a period of time would render it possible to circulate likely questions and correct answers among the student body in advance of future assessments, which would threaten the integrity and future viability of this method of assessment. UCD stated that the 60 questions contained in the multiple choice question assessments under review were drawn from a finite pool of about 250 questions.

10. UCD explained the feedback and appeal mechanisms available to students who wished to have their examination results reviewed, and went on to state that if the university was compelled to release copies of these scripts it would be obliged to depart from established international practice, and would have no option but to review, along with other institutions in the higher education sector, the feasibility of the future use of the multiple choice question format of assessment.

11. In the course of a further replying affidavit on behalf of the notice party, retired university professor, Brian McKenna, described in some detail the formal assessment appeals mechanism that was available to the appellant had he wished to use it. He concluded his affidavit by saying that the appeals process would have provided an adequate and fair opportunity for the appellant to make the complaints that he is now making in these proceedings.

12. UCD responded to the appellant's request for copies of the document by agreeing to allow the appellant to inspect the relevant documentation, but not to have copies of same.

13. The appellant availed of this invitation and met with the module coordinator for examination MDSA10030, who, prior to the meeting had carried out a review of the appellant's answers with a colleague and conceded that the university had erred in respect of one answer and that a second answer was ambiguous. This resulted in an improvement of 1.25% in the appellant's result, but did not affect the grade that he had obtained. The appellant maintained in his grounding affidavit that he had identified at least six errors.

14. With regard to examination script BIOC10030, the appellant was given access to his computer script, to the list of questions, and to the master answer sheet, on the 29th March, 2007. UCD maintained that the appellant had not been disadvantaged as he had all the documents necessary to enable him to verify the correctness of his assessment.

15. Following these inspections the appellant requested UCD to review its earlier decision. This was refused and on the 18th June, 2007, the appellant applied to the respondent for a review of the university's decision.

16. Finally, on the 13th December, 2007, Fintan Butler, senior investigator with the respondent's office, issued a final decision pursuant to an examination of the records provided by the university and the submissions of the university and the appellant. His decision upheld UCD's response to the appellant's request for documentation and is the subject of this appeal.

17. The appellant seeks to impugn the decision of the respondent on three grounds.

1. He contends that there was no reasonable evidential basis on which the respondent could have concluded under s. 21(1) of the Act of 1997, as amended, that the release to him of his examination scripts would prejudice the effectiveness of the examinations conducted by UCD.

2. He contends that there was no evidence to support the findings of the respondent to the effect that the public interest arguments in favour of not releasing the records outweighed those favouring release.

Under this heading, certain aspects of the respondent's conclusions which led to her decision on the public interest question were queried by the appellant in his affidavit at para. 16, and I quote:-

> "In her decision the respondent envisaged that a student could query the correctness of a presumed answer for the purposes of an appeal without having received a copy of the scripts in question. I say and believe this is unreasonable. However, the respondent indicated…that the Appeals Committee would not be expected, as a matter or course, to verify the correctness of the presumed answers in the context of an appeal but would only do so where an appellant presented a compelling reason for so doing. I say and believe that it would not be reasonably possible for a student to present a compelling case to the Appeals Committee if that student does not have a copy of the questions and the presumed answers which he or she wishes to contend are correct."

3. He contends that the respondent erred in accepting that the provisions of s. 21 of the Act of 1997, as amended, could be invoked as a basis for refusing access in a particular form.

18. The scope and limitations of an appeal to the High Court from a decision of the Information Commissioner on a point of law under s. 42(1) of the Acts were set out by McKechnie J. in *Deely v. The Information Commissioner* [2001] 3 I.R. 439, and approved by Fennelly J. in *Sheedy v. The Information Commissioner & Ors* [2005] 2 I.R. 272 at pp. 276 – 277:-

"This is the first appeal under the Act of 1997 to come before this Court, the Oireachtas having repealed the bar on such appeals contained in s. 42(8) of the Act of 1997 by s. 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 *Deely v. 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.'

In addition, McKechnie J. made the following observations about the scope and limitations of an appeal taken to the High Court pursuant to s. 42(1) of the Act. He said at p. 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 restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confirmed 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 some 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…'

The 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] 1 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 Act of 1997 and not otherwise and, secondly, that the court is concerned with an appeal on a point of law."

19. In this case the first two grounds of appeal relate to the interpretation of s. 21(1) and (2) of the Act of 1997. Section 21(1) provides that:-

"A head may refuse to grant a request under section 7 if access to the record

concerned could, in the opinion of the head, reasonably be expected to –

(a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of a public body or the procedures or methods employed for the conduct thereof,

(b) have a significant, adverse effect on the performance by the public body of any of its functions relating to management (including industrial relations and management of its staff), or

(c) disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be, carried on by or on behalf of the Government or a public body."

Section 21(2) provides that:-

"Subsection (1) shall not apply in relation to a case in which in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under section 7 concerned."

20. The standard of proof required to establish that harm could reasonably be expected to occur was considered by the Supreme Court in *Sheedy v. Information Commissioner* [2005] 2 I.R. 272.

21. In that case, in describing his approach to the claim for exemption under s. 21 of the Act of 1997, the then Commissioner stated as follows:-

> "In arriving at a decision to claim a s. 21 exemption, a decision-maker must, firstly, identify the potential harm to the functions covered by the exemption that might arise from disclosure and, having identified that harm, consider the reasonableness of any expectation that the harm will occur. The test of whether the expectation is reasonable is not concerned with the question of probabilities or possibilities. It is concerned simply with whether or not the decision maker's expectation is reasonable. In the case of a claimant under s. 21(1)(b) the establishment of 'significant adverse effect' requires stronger evidence of damage than the 'prejudice' standard of s. 21(1)(a). When invoking s. 21(1)(b), the public body must make an assessment of the degree of importance or significance attaching to the adverse effects claimed. Not only must the harm be reasonably expected but it must also be expected that the harm will be of a more significant nature than that required under s. 21(1)(a)."

22. The Supreme Court in *Sheedy* endorsed the Commissioner's approach. In the present case the respondent expressly adopted the said test and noted that the university had argued that the release of the records in question would increase the risk of undeserving candidates gaining prior access to correct answers through the dissemination of the question pool prior to their sitting the examinations. This, according to the university, would undermine its ability to examine the factual knowledge of candidates in a vocational degree programme such as medicine. The respondent, therefore, formed the view that the university had identified the potential harm to the functions covered by the exemption that might arise from the disclosure and further, that it had shown that the expectation of such harm occurring was a reasonable expectation.

23. I hold that the respondent had sufficient evidence before her on which she could conclude that the university had identified a potential harm to its functions, and to enable her to be satisfied as to the reasonableness of the expectation that the said harm could occur. Accordingly, I reject the first ground of the appeal.

24. At p. 6 of her decision the respondent stated to the appellant:-

> "I consider the following public interest factors favour release of the records in this case.
>
> 1. The public interest in individuals being able to exercise their rights under the FOI Act in order to enhance their understanding of the reasons for courses of action taken by a public body.
>
> 2. The public interest in members of the public knowing how a public body performs its functions, and
>
> 3. The public interest in increasing the openness and transparency of the examination and grading process in UCD.
>
> The following public interest factors which favour withholding the records must also be taken into account:-
>
> 1. The public interest in ensuring that public bodies are facilitated in performing their functions.
>
> 2. The public interest in ensuring that examinations conducted by public education institutions are fair to all of the candidates and that some candidates are not allowed an unfair advantage, and
>
> 3. The public interest in maintaining academic standards in education.
>
> I note in particular your contention that the presumed correct answers which are programmed into the system for the automated marking of MCQ examinations may not in fact be the correct answers. You argue, in effect, that the possibility of incorrect presumed answers which go undetected represents a greater threat to the integrity of the examination process than does the release to your client of his scripts. In support of this contention you point to the fact that on review of your client's scripts, UCD found that one question had been assigned an incorrect answer, and that another question was so worded as to make the correct answer a matter of interpretation. I take this to be an argument that release of the scripts will serve the public interest in ensuring the integrity of the examinations process.
>
> While I accept that there is a strong public interest in ensuring the integrity of the examination process, it seems to me that this public interest can be served in a way which does not impact negatively on the examinations process as would be the case were the scripts to be released to your client. According to UCD it would not have been necessary for your client to have possession of the scripts in order to avail of the appeals system provided by the Assessment Appeals Committee. I take it that it is open to a student appealing an examination result based on MCQ to query the correctness of the presumed answers, and that in order to do so it is not necessary for the student to have received a copy of the scripts in question. I am not saying that, as a matter of course, the Assessment Appeals Committee would be expected to engage in an exercise whereby it would verify the correctness of the presumed answers; but if an appellant presented a compelling reason for so doing then I take it that it would be open to the Assessment Appeals Committee to inquire into the correctness of the presumed answers. Ultimately, it does seem reasonable to assume that UCD is itself interested in assuring the quality and efficacy of its own examination system. The fact that UCD recognised and dealt with one error as well as with another potential error in the MDSA10030 examination, supports the view that UCD is anxious to ensure the integrity of its examination system.
>
> On balance I consider that the public interest arguments in favour of not releasing the records outweigh those favouring release and I find accordingly."

25. Bearing in mind the approach that this Court must take in light of the Supreme Court decision in *Sheedy v. Information Commissioner* [2005] 2 I.R. 272, I am satisfied that the respondent was entitled to conclude that the appellant could query a presumed answer for the purposes of an appeal without having received a copy of the scripts in question. I am equally satisfied that the respondent was entitled to reject the appellant's assertion that it would not be reasonably possible for a student to present a compelling case to the Appeals Committee without having copies of the question and answer sheet and the computer script.

26. Finally, an examination of the respondent's decision in this matter discloses that she had ample evidence enabling her to conclude that the public interest arguments in favour of not releasing the records outweighed those favouring release. The appellant, therefore, fails in respect of his second ground of appeal.

27. The appellant's third ground of appeal was based on the premise that the request was not a request which the university refused, but a request for access in a particular form which the university refused.

28. In the course of his submissions, the appellant stated at para. 17 of his affidavit:-

> "At all times UCD sought to justify its refusal to grant me access in a particular form by reference to the provisions of s. 21 of the Acts. However, s. 21 of the Act does not provide any basis on which a refusal for a request in a particular form may be made. Section 21 does allow the head of a public body to refuse access to a record, but not access to a record in a particular form. Accordingly, once a decision is made to grant access it is not open to a head of a public body to restrict the form of access by invoking the provisions of s. 21 of the Acts. Section 12(2) of the Acts makes it clear that once the head of a public body grants a request under s. 7, the access to the record must be given in the form requested subject to certain exceptions."

29. It is clear that s. 12 offers the head a range of forms or manner in which access may be granted, including a reasonable opportunity to inspect the record. I regard the fact that neither the university nor the respondent made specific reference to s. 12 as relevant to this appeal, and I accept the respondent's submission that this ground of appeal is misconceived. Accordingly, I also refuse the appeal on this ground and, therefore, refuse the relief sought.