Neutral Citation Number: [2007] IEHC 152

THE HIGH COURT

[2002 No. 55 MCA]

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 1997 AND

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 42(1) OF THAT ACT

BETWEEN

JOHN O'GRADY

APPELLANT

AND
THE INFORMATION COMMISSIONER

RESPONDENT

AND
THE MINISTER FOR EDUCATION AND SCIENCE

NOTICE PARTY

Judgment of Mr. Justice Barry White delivered on the 30th day of March 2007

This is an Appeal brought by the Appellant, a litigant in person, pursuant to the provision s. 24(1) of The Freedom of Information Act 1997 (hereinafter referred to as "The Act"), in respect of a decision made on the 9th day of January 2002, by the Respondent, whereby the Respondent directed the Department of Education and Science (hereinafter referred to as "the Department") to release certain records held by the Department to the Appellant, but upheld the Department's decision not to release other records to the Appellant, being records which were not held by the Department itself, but rather were independently held by the four separate Religious Orders who respectively ran St. Michael's Industrial School for Junior Boys, Cappoquin, Co. Waterford, St. Joseph's Industrial School for Senior Boys, Ferryhouse, Clonmel, Co. Tipperary, St. Francis Xavier's Industrial School for Girls and Junior Boys, Ballaghdereen, Co. Roscommon, and St. Joseph's Reformatory School for Girls, Limerick.

In broad terms, this Appeal involves a narrow issue which emerges from the following facts:-

> (1) The Appellant and his sister (now deceased) were detained during their respective childhoods in the above said four schools. The Appellant in the former two, and his sister in the latter two. The said schools were not run by the Department, but were run by Religious, and were certified by the Minister for Education and Science under the provision of The Children's Act 1908.
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> (2) The Appellant sought from the Department access affectively to all records that might exist in relation to both his own, and his late sister's periods of detention in the said schools.

The Department granted the Appellant's request in addition to its own records, but refused the request in relation to records not held by the Department.

The Department did however suggest to the Appellant that he apply directly to the Religious Orders for their respective records.

Whist the Appellant endeavoured, with mixed success, to obtain the relevant records from the several Religious Orders, he additionally sought from the Respondent a Review of the decision taken by the Department.

In his application to the Respondent, the Appellant maintained that the Department's relationship with the relevant Religious Orders amounted to a contract for services, and that, accordingly, having regard to the provisions of s. 6(9) of The Act, the Department ought to have required the Religious Orders to furnish all relevant records to the Department for the purposes of dealing with his request.

In his decision, the Respondent found that no contract for services existed between the relevant schools and the Department, and that, accordingly, the Department was not obliged when dealing with the Appellant's requests for access, to take account of records which might be held by the Religious Orders concerned.

For the purposes of assisting the Appellant in the presentation of his Appeal, the Respondent's solicitors wrote to the Appellant by letter dated 12th April 2002, setting out what the Respondent understood to be:-

> (a) The reliefs the Appellant was seeking from this Honourable Court;
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> (b) The points of law upon which the Appellant was appealing to this Court under s. 42(1) of the Act;
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> (c) The grounds the Appellant would be relying upon in raising this point/these points of law; and
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> (d) The factual assertions and documentation by the Appellant would be seeking to rely upon in support of the Appeal;

and this Appeal was presented and argued in reliance in the matters set out in the said letter. The relevant matters set out therein are as follows:-

> The Reliefs sought:
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> 1. An order discharging the decision of the Respondent made on 9th January 2002 in case number 99036 whereby the Commissioner decided that the Appellant was not entitled to access to certain records held by the Religious Order who operate or operated the following industrial schools on the ground that no contract for services within the meaning of s. 6(9) of The Act existed or exists between the Religious Orders and the Department:
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> St. Michaels's School, Cappoquin;
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> St. Joseph's School, Ferryhouse, Clonmel;
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> St. Francis Xavier School, Ballaghdereen, Co. Roscommon;

2. A declaration that the said decision is wrong in point of law.

3. A declaration that there existed and/or exists a contract for services between the Department and the Religious Orders.

4. Such further or other order as to the Court might seem meet.

Points of law the Appellant is raising and the grounds therefore:

1. The Respondent erred in law in the construction and/or application of s. 6(9) of the Act and, in particular in the interpretation of the expression "contract for services" as that expression is used in the said section and, in consequence, wrongly found that no contract for services existed between the Department and the Religious Orders.

2. The Respondent in interpreting the expression "contract for services" as used in s. 6(9) of the Act, should have had regard to the following factors and/or factual assertions:

A contract is defined as an agreement between two or more parties in which an offer is made and accepted, and each party benefits.

A "contract for services" may be formal or informal, written, oral, express or implied.

The Appellant and his sister were committed to the industrial schools by order of a court and the request of the Department

The Religious Orders provided a service for the Department and received payment form the Department and from the council of the relevant area and so benefited financially.

The Religious Orders received money from the Appellant's mother pursuant to a Court Order.

The Department and the Religious Orders benefited.

The Department and the Religious Orders each agreed to the conditions which abided by the Courts, otherwise the Courts would have been legally wrong in their decisions.

1. Furthermore, The Appellant may wish to rely on the documentation furnished under cover of his letters of 2nd February and 8th April 2002, which documents were not previously furnished to the Respondent. The Appellant now wish to rely on this documentation as evidence tending to support of his view that a contract for services existed between the Department and the Religious Orders and that, therefore any records held by these Religious Orders and falling under the ambit of his request should have been released to you on the grounds that s. 6(9) of the Act applies.

The Act contains a general entitlement on the part of members of the public to gain access to records held by the public bodies referred to in the First Schedule to the Act and in Regulations made under the Act. The Department is a scheduled body.

Section 6(1) of the Act provides for the general statutory right of access afforded to persons by the Act. This section provides as follows:

"subject to the provisions of this act, very person has a right to and shall, on request therefore, 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."

Section 2(5) of the act provides that references to records "held" by a public body are to be taken including references to records under the control of such a body.

Section 6(9) of the Act provides a further gloss on the extent of the records that are to be taken into account by a public body when considering a request for access. It provides:-

"A record in the possession of a person who is, or was, providing a service for a public body under a contact for services shall, if and in so far as it relates to the service, be deemed for the purposes of this Act to be held by the body, and there shall be deemed to be included in the contract a provision that the person shall, if so requested by the body for the purposes of this Act, give the record to the body for retention by it for such period as is reasonable in the particular circumstances."

Section 34 of the Act, provides, *inter alia*, for a review by the Respondent for a decision in relation to records. It further provides that the Respondent may, following the review, affirm or vary the decision or annul the decision and, if appropriate, make such decision in relation to the matter concerned as it considers proper in accordance with the Act.

Finally, s.42 of the Act provides for an appeal to be brought to the High Court on a point of law against a decision of the Respondent. Section 42(1) states as follows:

"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."

It is clear form the wording of s. 42(1) that any appeal is limited to an appeal on a point of Law. In *Deely v. The Information Commissioner* [2001] 3 I.R. 439 McKechnie J. at 452 states

"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: see for example *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).

Having regard to the fact that this appeal is limited in scope and is not a hearing "De Novo", I am satisfied that I must consider matters solely in the light of the material available to the Respondent and not in the light of the broadened material presented before me.

In considering the issue, and in arriving at his decision thereon the Respondent in his letter of the 9th January 2002, sets out his reasons at pp. 7 and 8 wherein he states:-

> "The key question arising here is whether, as you contend, s. 6(9) of the FOI Act should apply to any relevant records which may still be held by the religious orders. For s. 6(9) to apply, it is necessary to establish that the relationship between the Department and the schools was based upon a contract for services. Unfortunately there is not, to my knowledge, any single, comprehensive definition as to what constitutes a 'contract for services'. Murdoch's Irish Legal Companion refers to it as a 'contract with an independent contractor' and notes that there are no 'hard and fast rules' on the matter; each case 'has to be considered on its own facts in the light of the broad guidelines provide by case law'. What is clear is that a contract for services is a very specific type of contract. There are certain requirements which must be satisfied for a contract to exist. Murdoch summarises these as follows:-
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> > 'In general, for a contract to be valid and legally enforceable, there must be:-
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> > (1) an offer and unqualified acceptance;
> >
> > (2) an intention to create legal relations;
> >
> > (3) consensus *ad litem*;
> >
> > (4) legality of purpose;
> >
> > (5) contractual capacity of the parties;
> >
> > (6) possibility of performance;
> >
> > (7) sufficient certainty of terms
> >
> > (8) valuable consideration.'
>
> In your submissions you make very clear your belief that the industrial schools were the agents of the State. However it is one thing to accept that the schools were, in a broad sense, the agents of the State; it is quite a different thing to establish that this agency role was founded on a legal relationship whose terms gave rise, not just to a contract, but to a very specific from of contract, i.e. a contract for services. I note that you have not made any specific arguments in support of your contention that such a contract exists or existed. The Department, for its part, expressly refutes the contention that such a contract for services exists or existed. According to the Department, its role in relation to industrial schools was primarily a regulatory one, involving certification and inspection as well as the payment of capitation grants in respect of the children admitted to the schools.
>
> It appears to me that neither of the first two requirements for a contract, as outlined above in the extract from Murdoch, are likely to have applied. The relationship between the Department and the industrial schools was determined in statue (see below) rather than on the basis of an agreement between the parties. Accordingly, it would seem to me that the Department was not free to make any offer to the schools in the sense that it could decide not to avail of the services of the schools should the offer be rejected. Neither, it seems to me, could the Department have had the intention to create legal relations with the schools given that the nature of those relations was already established by statute.
>
> The industrial schools themselves are/were statutory entities provided for a time in the Children Act 1908. It is relevant to bear in mind that at least in the context of the present case, the decision to commit a child to such a school was taken by the courts and not by the Department. Once a child was committed to a certified school, and provided the school was within its approved quota, the Department was obliged in law to pay the appropriate capitation grant in respect of that child. In a context in which the Department's funding of the child's placement was required by law (s. 73 of the Children Act 1908) it is difficult to envisage that the Department's relationship with the school was based on a contract for services. It may be that the relationship was quasi-contractual in the sense that it arose by operation of law and irrespective of the intention of the parties. However, as I understand it, such a quasi-contractual relationship would not equate with a contract for services.
>
> Given my view that two at least of the requirements for a contract were not met, I find that no contract for services exists or existed between the industrial schools and the Department. Having regard to the institutions concerned in this case and in the light of the arguments presented, I am satisfied that my finding is warranted. Arising from this finding I take the view that, in dealing with your FOI requests, the Department was not obliged to take account of the relevant records which may be held by the religious orders which operate or operated, the schools in question."

The primary facts herein are not in dispute. However, what is in dispute are the inferences, (based on his interpretation of the

documentation before him), drawn by the Respondent, namely that contracts for services did not exist between the individual Religious Orders and the Department.

On balance I find that the Respondent did not err in the inferences which he drew herein, and that he did not err in law in concluding that no contract for services existed herein. Clearly the schools came within the provisions of the Children's Act 1908, and the Children's Act 1941.

Section 44(1) of the 1908 Act, provided *inter alia*:-

> "The expressions 'certified school' means a reformatory or industrial shall which is certified in accordance with the provisions of this Part of this Act."

Section 45 provides:-

> "(1) The secretary of State may upon the application of the managers of any reformatory or industrial school direct the chief inspector of reformatory and industrial schools herein-after mentioned to examine into the condition and regulations of the school and it fitness for the reception of youthful offenders or children to be sent there under this Part of the this Act, and to report to him thereon.
>
> (2) The Secretary of State, if satisfied with the report of the inspector, may certify that the school is fit for the reception of youthful offenders or children to be sent there in pursuance of this Part of the Act."

Section 3 of the 1941 provides:

> "(1) The Minister may make regulations for the conduct of certified schools and, in particular and without prejudice to the generality of the foregoing, such regulations may make provision in relation to the education and training to be given to persons detained in such schools and the safeguarding of the health of such persons.
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> (2) Regulations under this section may be so framed as to apply in respect of all or one or more certified schools or of any class or classes of certified schools.
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> (3) Where the Minister has made regulations under this section, he shall send by post a copy thereof to the managers of the certified school or of each certified school in relation to which such regulations apply.
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> (4) It shall be the duty of the managers of the certified school or of each certified school in relation to which regulations made under this section apply to comply with such regulations and to make such variations (if any) in the rules under section 54 of the Principal Act for the time being in force in relation to such school as may be necessary to bring the said rules into conformity with such regulations."

And Section 4 provides:-

> "(1) The Minister may make regulations prescribing the remuneration of officers of certified schools or of any class or classes of such officers.
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> (2) Where the Minister has made regulations under this section, he shall send by post a copy thereof to the managers of every certified school.
>
> (3) It shall be the duty of the managers of every certified school to comply with any regulations made under this section."

Section 21 provides:

> "(1) The Minister, with the consent of the Minister for Finance and the Minister for Local Government and Public Health, may make regulations prescribing the payments to be made by local authorities to the managers of certified schools for the maintenance of such children and youthful offenders as such local authorities are liable under section 74 of the Principal Act to maintain.
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> (2) Regulations under this section may prescribe different rates of payment in respect of different certified schools or different classes of certified schools and may prescribe such rates by reference to fixed amounts or by reference to maximum and minimum amounts.
>
> (3) Where any regulations under this section are for the time being in force, it shall be the duty of every local authority to comply with such regulations and such duty shall lie on such local authority notwithstanding anything contained in any contract made (whether before or after the commencement of this section) by them under paragraph (a) of sub-section (8) of section 74 of the Principal Act and every such contract shall accordingly be deemed to be void to the extent (if any) to which it is inconsistent with such regulations.
>
> (4) Every sum payable by a local authority in accordance with regulations under this section to the managers of a certified school shall, in default of payment, be recoverable as a simple contract debt in any court of competent jurisdiction.
>
> (5) Every regulation made under this section shall be laid before each House of the Oireachtas as soon as may be after it is made, and, if a resolution annulling such regulation is passed by either such House within the next twenty-one days on which such House has sat after such regulation is laid before it, such regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder."

Thus it is clear that the Department had a sizeable statutory regulatory role or function (1) in respect to the health, welfare, education and training of children detained in such schools, and (2) in regard to the manner in which such schools were funded. This statutory role arose in my view necessarily and as a direct consequence of Parliament having legislated for the committal of children to such schools.

Undoubtedly, the Religious Orders by providing such schools were providing a service to the State, and, in return, they were being

remunerated for this service. The provision of a service and the receipt of payment in respect thereof, are elements to be found in a contract of service. However, it must be borne in mind that the level of remuneration was determined solely by the Department and imposed upon the management of the school who were statutorily obliged to accept the Department's determination without the right of negotiation.

It must also be borne in mind that the source of the funding was not the Department alone, but also the Local authority who could be, and indeed were mandated to make payments to the management of the schools.

I consider these to be significant features to be taken into consideration when determining the relationship between the Department and the management of schools, and I consider these elements, together with the other statutory regulatory features conferred upon the Department to be inconsistent with a contract for services.

Accordingly I dismiss this Appeal.