NMcK v the Information Commissioner

This judgement was given by the High Court on an appeal against the Commissioner's decision in Case Number 000128 - Mr X and the Adelaide & Meath Hospital. The judgement has been **appealed to the Supreme Court** by the Office of the Information Commissioner.

THE HIGH COURT

[2002 No. 85 MCA]

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

N McK

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

JUDGMENT of Mr. Justice Quirke delivered the 14th day of January, 2004.

This is an appeal by the appellant N McK pursuant to s. 42 (1) of the Freedom of Information Act, 1997 on a point of law from the decision of the respondent delivered by letter dated the 12th August, 2002, whereby the respondent affirmed the decision of a Dublin hospital to refuse the appellant access to certain written records relating to his daughter, L McK, arising out of her admission to that hospital in January, 2000.

RELEVANT FACTS

The applicant and his late wife D were married in 1986, and were the parents of two children, a daughter L who was born in 1988, and a son R who was born in 1990.

Differences between the appellant and his wife resulted in a separation in 1992 and Circuit Court Family Law proceedings in June, 1993 during the course of which an allegation was made that the appellant had sexually abused his daughter at the end of 1991. The appellant vigorously denied

and still denies this allegation and in January, 1994 the Gardaí, having investigated the allegations concluded that there was "no evidence to warrant a prosecution" against the appellant and so informed the North Eastern Health Board.

By Order of the Circuit Court made some time in 1993 the appellant was granted supervised access to his children and in 1996 the appellant and his late wife entered into a separation agreement whereby both parties undertook to strive towards bringing about unsupervised access by the appellant to his children at some future date.

Sadly, on the 15th November, 1998, the appellant's wife died and by agreement, in January, 1999, the two children of the marriage went to live with the late Mrs. McK's brother, B J who lived with his wife M J in Dublin. By Order of the Circuit Court made in November, 2000, it was agreed, inter alia that the appellant, together with B J and M J, would be appointed as joint guardian of the two children L McK and R McK and L now attends a private school, whilst R attends the local national school.

The appellant is entitled to supervised access to the children, approximately once each month.

In January, 2000, L McK was admitted to a Dublin hospital and M J (with whom the appellant has a somewhat strained relationship) advised the appellant of her admission. When the appellant went to visit his daughter he was advised that she had been admitted for an unspecified viral infection.

Having been unable to obtain further information about his daughter's admission, the appellant, by letter dated the 17th January, 2000, made a request pursuant to s. 7 of the Freedom of Information Act, 1997 (hereafter called the 1997 Act) requesting access to the personal records inter alia of his daughter L.

Pursuant to the provisions of s. 41 of the Act of 1997 a decision refusing to grant the appellant's request was deemed to have been made upon the expiration of the time limited by the statute and by an application dated the 18th February, 2000, the appellant sought a review of this refusal. Pursuant to the provisions of s. 41 of the Act, a decision affirming the refusal was deemed for the purposes of the Act to have been made upon the expiration of the requisite time limit and on the 10th March, 2000, the appellant applied pursuant to s. 34 of the 1997 Act for a review by the respondent of the decision which was deemed to have been made by the hospital. By letter dated the 14th March, 2000, the respondent wrote to the appellant and agreed to conduct a review pursuant to s. 34 of the Act.

On the 15th April, 2002, Ms. A T, an investigator from the respondent's office spoke with the appellant by telephone and apparently advised him

that a key consideration in the review which was then underway on behalf of the respondent was the issue of whether access by the appellant to his daughter's records would be in her best interests, including

"...a consideration of whether or not the appellant had demonstrated this to the satisfaction of the respondent..."

By letter dated the 12th August, 2002, Mr. F B, who was a Senior Investigator in the respondent's office, wrote to the appellant and advised him in the following terms:

"Having carried out a review under s. 34 (2) of the Freedom of Information Act, 1997, I hereby affirm the decision of the Hospital to refuse access to the records sought in your request of the 17th January, 2000."

By Notice of Motion dated the 10th September, 2002, the appellant initiated this appeal pursuant to the provisions of s. 42 of the 1997 Act.

THE APPELLANT'S CASE

The appellant enjoys a statutory right to appeal on a point of law (but not on the merits) from the decision of the respondent, having regard to the provisions of s. 42(1) of the 1997 Act which provides 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".

Section 28 (1) of the 1997 Act provides as follows:

"Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if, in the opinion of the head, access to the record concerned would involve the disclosure of personal information..."

However sub-section (6) of s. 28 provides inter alia that:

"Notwithstanding subsection (1), the Minister may provide by regulations for the grant of a request under s. 7 where -

The individual to whom the record concerned relates belongs to a class specified in the regulations and the requester concerned is the parent or guardian of the individual..."

The Freedom of Information Act, 1997 (section 28 (6)) Regulations, 1999 (S.I. 47 of 1999) provide (at Article 3 (1) thereof) as follows:

"Notwithstanding s. 28 (1), a request under section 7 in relation to a record access to which involves the disclosure of personal information... shall, subject to the other provisions of the Freedom of Information Act, 1997, be granted where:

(a) the requester is a parent or guardian of the individual to whom the record concerned relates and that individual belongs to one of the following classes of individuals:

(I) individuals who, on the date of the request, have not attained full age (within the meaning of the Age of Majority Act, 1985...) access to whose records would, in the opinion of the head having regard to all the circumstances and to any guidelines drawn up and published by the Minister, be in their best interests..."

It is acknowledged by the parties that a total of 26 of the records to which the appellant seeks access comprise "joint personal information" which is confined solely to material relating to the appellant's daughter and himself and it is those records which are the subject of this appeal.

The decision reviewed by the respondent was the decision deemed (by s. 41 of the Act of 1997) to have been made refusing the appellant access to his daughter's records. Having conducted the review the respondent published a written decision dated the 12th August, 2002, which provided inter alia as follows:

"The Regulation provides that a request for records relating to personal information about a minor may be granted where the requester is the minor's parent or guardian and where, having regard to all the circumstances, to release the records to the parent/guardian would be in the minor's best interests."

It continued

"...As you are the father and joint guardian of L, it is clear that you satisfy the first of the two requirements set out above. Accordingly, the question to be addressed is whether release to you of material containing personal information relating solely to L, or relating jointly to L and to yourself, would be in L's best interests.

In the ordinary course of events, and in general terms, one might accept that it is likely to be in the best interests of a minor that a parent/guardian will have access to the minor's medical records. However, in the ordinary course of events, the parents/guardians are likely to be in agreement on the matter. As you know, both in contacts with this office and with the hospital, Mr. and Mrs. J (joint guardians and custodians of L) have opposed the release of these records. Following the recent and regrettable death of her husband, I understand that Mrs. J remains firmly opposed to these records being released to you. Furthermore, it is the view of the hospital that the records should not be released to you. In any situation in which there is disagreement between parents/guardians regarding the release of records relating to a minor, the Commissioner has taken the view that

release would only be directed where there is tangible evidence that such release would actually serve the best interests of the minor.

I note you make the case that, as the father of L and as a person holding joint guardianship and custody in relation to her, you hold certain rights in relation to decision-making regarding her health and general welfare. You maintain that release of the records to you may assist in the making of such decisions regarding L and would therefore be in her best interests. I accept that in certain instances access by parents or guardians to medical records in relation to children may offer substantial assistance to them in making decisions in relation to the seeking of medical treatment of their children or consenting to such treatment. Having regard to the contents of the records in this case, I consider that their release would not offer substantial assistance to you in relation to the making of decisions to seek medical treatment or to consent to medical treatment, for L in the future. Further I note that, where appropriate such records could be made available to medical personnel treating L in the future. On balance, I find that you have not presented evidence that release of L's medical records to you would actually serve her best interests.

In the absence of evidence showing that disclosure would actually be in L's best interests, the requirement to protect her privacy remains strong. While it has not been proven that release of the records would be to the detriment of your daughter, neither am I satisfied that release of the information would be to her benefit or serve her best interests. I do not see any significant benefit accruing, or likely to accrue, to your daughter by granting you access to these records. I am not satisfied that the requirements of S.I. 47 of 1999 are met in this case and I find, therefore, that you do not have the right of access to these records pursuant to its provisions."

It is contended on behalf of the appellant that the provisions of s. 28 (6) of the Act of 1997 and Article 3 (1) of the 1999 Regulations must be construed in the light of the provisions of Bunreacht na hÉireann and in particular Articles 41 and 42 thereof and in a manner consistent therewith. Mr. H S.C on behalf of the appellant argues that the appellant is the father, joint guardian and joint custodian of the minor in this case and that his decisions as parent of the child concerned enjoy the presumption that they are in her best interests until such time as that presumption has been displaced. In support of his contention he relies upon the decision of the Supreme Court in the case of North Western Health Board v. H. W. 3 I.R. 622 and in particular the dicta of Hardiman J. at p. 764.

He argues that the test which was applied by the respondent to the facts under review was the converse of what it should have been and was not only erroneous but sanctions an interpretation of the legislation which is constitutionally offensive.

The respondent contends that the only constitutional right enjoyed by the appellant which was relevant to the review undertaken by the respondent was the appellant's constitutionally protected right to fair procedures. The respondent argues that the appellant was provided with perfectly fair procedures and a review wholly consistent with the principles of natural justice.

CONCLUSION

Prima facie the terms of Article 3 (1) of the 1999 Regulations are imperative and positive requiring that access to appropriate records shall be granted where the requester is a parent or guardian and where the record relates to a minor (as in this case).

The only relevant qualification upon the requirement to grant access is the requirement that such access:

"...would, in the opinion of the head, having regard to all the circumstances and to any guidelines drawn up and published by the Minister, be in [the minor's] best interests..."

It has been acknowledged that no guidelines of the kind contemplated in the Regulations have been drawn up or published so it follows that the regulation imposes an obligation upon the respondent to form an opinion as to whether access to the records would, having regard to all the circumstances, be in the minor's best interests.

It is important to consider the terms of the Act of 1997 which relate to access to personal information and in particular s. 28 thereof.

In enacting that section, the Legislature made express provision (at sub-s. (6)) for Regulations permitting the release of records involving personal information (i) where the requester was the parent or guardian and (ii) where the record concerned a minor. By that enactment the Legislature indicated an intention that such records should come within an exceptional category which would be unaffected by the provisions of s. 28 (1) of the Act.

Regulation 3 (1) of the 1999 Regulations gave effect to the intention of the Legislature that such records should, subject to the terms of that Regulation be made available to parents or guardians of minors.

The respondent has construed Regulation 3 in the following terms:

"...The Commissioner has taken the view that release should only be directed where there is tangible evidence that such release would actually serve the best interests of the minor..."

and continued:

"In the absence of evidence showing that disclosure would actually be in L’s best interests, the requirement to protect her privacy remains strong. While it has not been proven that release of the records would be to the detriment of your daughter, neither am I satisfied that release of the information would be to her benefit or serve her best interests. I do not see any significant benefit accruing, or likely to accrue, to your daughter by granting you access to these records. I am not satisfied that the requirement of S.I. 47 of 1999 are met in this case and I find, therefore, that you do not have a right of access to these records pursuant to its provisions."

The foregoing operative passage from the decision of the respondent indicates that the respondent has construed the provisions of Regulation 3 (1) of the 1999 Regulation as imposing an onus upon the appellant to prove by way of evidence that the granting of access to the records concerned would result in a tangible benefit to his child. The respondent has decided that access "...should only be directed..." where such evidence has been adduced to the satisfaction of the respondent.

The respondent is not of the opinion that access by the appellant to the records will accrue to the detriment of the minor. The respondent construes the section as requiring that access must invariably be denied unless and until "tangible" evidence has been furnished demonstrating that the access will result in a benefit to the minor.

I do not believe that this construction is the correct one. It imposes upon an applicant such as the appellant in this case, the obligation to discharge an onus which is not apparent from the terms of the legislation. The Act and the Regulations, when read together, provide that access "shall" be granted where, in the opinion of the deciding officers it is in the best interests of the minor "having regard to all the circumstances".

When considering those circumstances deciding officers must have regard to the proximity of the relationship between parent and child.

In North Western Health Board. v. H.W. 3 I.R 622, the Supreme Court (Hardiman J.) declared at p. 754 that:

"Where the State has legislated in the interest of vindicating and defending the rights of children, such legislation has fallen to be interpreted in the light of the provisions of the Constitution generally and of Articles 41 and 42 in particular."

He went on to state (at p. 755) that:

"...a presumption exists that the welfare of the child is to be found in the family exercising its authority as such. If this presumption applies in the construction of a statute which makes no express reference to the authority of the family, it must, a fortiori, apply where the contest is between the

parents of the child and a stranger, in this case a statutory body, outside any statutory framework."

He continued:

"The presumption to which I have referred is not, of course, a presumption that the parents are always correct in their decisions according to some objective criterion. It is a presumption that where the constitutional family exists and is discharging its functions as such and the parents have not for physical or moral reasons failed in their duty towards their children, their decisions should not be overridden by the State or in particular by the Courts in the absence of a jurisdiction conferred by statute. Where there is at least a statutory jurisdiction, the presumption will colour its exercise and may preclude it.

The presumption is not of course conclusive and might be open to displacement by countervailing constitutional considerations, as perhaps in the case of an immediate threat to life."

Still later (at p. 764) under the heading "Parents and Child" he declared:

"A family, such as the family of which the defendants are the heads, consists of parents and children. Since a child will not himself or herself be capable of making or of acting upon any decision as to its own welfare, these decisions must necessarily be made by some person or agency on his or her behalf. In practice, this will almost invariably be either the parents or a parent on the one hand or a State or public agency of some sort on the other. The plaintiff urges us to let a particular decision to be taken by an entity of the latter sort because it says the decision that such a body will take has been rationally shown to be in the objective best interests of the child. But in the choice of decision maker, the Constitution plainly accords a primacy to the parent and this primacy, in my view gives rises to a presumption that the welfare of the child is to be found in the family exercising its authority as such. This reflects the right, both of the parents and of the children, to have the family protected in its Constitution and authority."

In the instant case I am satisfied that by enacting s. 28 (6) of the 1997 Act the Legislature was, inter alia, legislating in the interests of vindicating and defending the rights of children. Accordingly, the provisions of the Act fall to be interpreted in the light of the provisions of the Constitution generally and of Articles 41 and 42 in particular.

Although a complaint has in the past been made about the appellant, it remains unsubstantiated and the appellant comes before this Court enjoying the presumption of innocence which is enjoyed by every citizen of the State. The evidence indicates that he is concerned with the welfare of

both of his children and avails of his rights of access to them in a conscientious fashion.

No suggestion has been made of any failure of duty on the part of the appellant of the kind contemplated by Article 42.5 of the Constitution.

Accordingly the appellant, as a parent, joint guardian and joint custodian of the child concerned enjoys the parental primacy identified by Hardiman J. in North Western Health Board v. H.W.[2001] 3 I.R. 622 and the presumption that he has the welfare of his child at heart in the absence of evidence to the contrary.

The presumption is of course rebuttable, but there is no suggestion of rebuttal in this case.

Reluctance by another family member to agree to access does not, in the absence of any supporting evidence, amount to rebuttal sufficient to displace the presumption referred to.

It follows from the foregoing that I am satisfied that in reaching the decision made in this case the respondent has misconstrued the provisions of s. 28 (6) of the Act of 1997 and Regulation 3 (1) of the 1999 Regulations by failing to recognize that the decisions of the parent of minors are presumed to be in the best interests of that minor in the absence of evidence to the contrary. The appellant should not have been required to discharge an onus of the type identified by the respondent and the test applied by the respondent in so doing was incorrect in the circumstances.

It follows from all of the foregoing that the appellant’s appeal is allowed and that he is entitled to the relief which he seeks.