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THE HIGH COURT

[2005 No. 12 MCA]

IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS 1997-2003

AND IN THE MATTER ON APPEAL PURSUANT TO SECTION 42(1) OF

THAT ACT

BETWEEN

HAROLD J. GANNON

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

JUDGMENT of Quirke J. delivered on the 31st day of January, 2006.

This is an appeal by Harold J. Gannon (“the appellant”), on a point of law, pursuant to s. 42(1) of the Freedom of Information Act 1997. His appeal is against a decision of the respondent to affirm an earlier decision of the Legal Aid Board (“the Board”) to refuse him access to certain written records within the possession of the Board. The records relate to an application made on behalf of an applicant (“the Third Party”) for free legal aid. Notice of the respondent’s decision was delivered to the appellant by letter dated the 23rd December 2004.

RELEVANT ACTS

1. By letter to the Board dated 14th May, 2004 the appellant made a request to the Board pursuant to the Freedom of Information Act for access to “*any and all*

documents (records) submitted by the ... (Third Party) ... and/or his legal or personal representative(s) to the ... (Board)."

In his letter of request the appellant explained that a decision of the Board to grant legal aid to the Third Party had *"adverse consequences on my pending legal action."*

He said that he was unclear how the decision had been reached.

2. By letter dated 24th May, 2004 Mr. Bernard O'Shea, the appointed Deciding Officer under the Act of 1997 responded to the appellants request. He advised that *"I have decided to refuse you access to all of the records covered by your request. I am refusing your request under ss. 22, 23, 26 and 32 of the ... (Act of 1997)."*

The letter of response provided *inter alia* as follows

"Section 26 Information obtained in confidence.

Section 26(1) provides amongst other things that the Board shall refuse to grant a request if the record concerned contains information given to the public body concerned in confidence and on the understanding that it would be treated by it as confidential and, in the opinion of the Board if disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body or disclosure of the information concerned would constitute a breach of duty of confidence provided by a provision of an agreement or enactment or otherwise by law. It is my opinion that the records which you seek are exempt under this section".

3. The appellant sought a review of the decision of the Deciding Officer. He delivered extensive written submissions to the Board's Freedom of Information Unit.

By letter dated 13th August, 2004 Mr. Pat Fitzsimons, the Board's Director of Human Resources, wrote to the appellant advising that;

"In accordance with s. 14 of the Freedom of Information Act 1997, I have reviewed all of the records relating to your request and the decision notified to you by letter of 24th May, 2004. I wish to advise you that following my review of the documentation, I can affirm the decision notified to you by letter of 24th May, 2004."

4. By letter dated 13th August, 2004 the appellant requested a review by the respondent of that decision. By letter dated 1st September, 2004 the appellant was advised that the respondent had agreed to conduct a review.

By letter dated 17th November, 2004 Ms. Ciara Burns, who is an investigator for the respondent, wrote to the appellant. She indicated that she had examined all of the correspondence between the appellant and the Board and the appellant's submissions to the Board. She noted that the appellant had been invited to make a submission to the respondent but had chosen not to do so.

Ms. Burns advised that *"it is my preliminary view that s. 26(1)(a) applies to the records. As you are probably aware, s. 26(1)(a) provides for the refusal of requests if the record concerned contains information given to the public body in confidence."*

She continued:-

"the records in this case are records provided by (Third Party) to the ... (Board). The Commissioner interprets the term "confidence" for the purposes of s. 26(1)(a) ... by reference to the following definition which is derived from the law relating to a breach of duty of confidence: A confidence is formed whenever one party ("the confider") imparts to another ("the confidant") private or secret matters on the express or implied understanding that the communication is for a restricted purpose" ("B" v. Brisbane North Regional Health Authority (1994) 1 Q.A.R. 279)... the Commissioner considers that,

first, information given in confidence is concerned with private or secret matters rather than information which is trite or which is already in the public domain i.e. that it is necessary to establish that the information has the necessary quality of confidence. Second, the communication must be for a restricted or limited purpose. Third, there must be an understanding that the information is being communicated for a restricted purpose."

Referring to s. 26(3) of the Act of 1997 Ms. Burns stated that *"it is my preliminary view that the public interest in release does not outweigh the public interest in the right to privacy of individuals and their right to correspond in confidence, with their legal advisors"*.

She concluded that *"all of the records in the scope of this review are exempt and ... there is no public interest in their release."*

5. By letter dated 7th December, 2004 the Board wrote to Ms. Burns advising *inter alia* that *"the records furnished by ... (the Third Party) to the Board were clearly furnished in confidence and that was self-evidently both ... (the Third Party's) ... and the Board's understanding generally."*

The Board indicated in its letter that the relationship between the Board's solicitors and its clients was acknowledged to be a solicitor/client relationship which attracted *"the 'badge of confidentiality' so that the imparting of information by a client such as ... (the Third Party) ... to the Board and its solicitors will, unless the contrary were capable of being shown, be considered to have been effected in confidence."*

6. In her decision delivered by letter dated 23rd December, 2004 the respondent adopted the earlier view of Ms. Burns and her interpretation of the term "confidence" for the purposes of s. 26(1)(a) of the Act of 1997. The respondent continued:-

"I consider that disclosure would prejudice the giving to the body of further similar information from other persons in the future and it is important to the ... (Board) that such further similar information should be continue to be given to it. I find that s. 26(1)(a) applies to the records".

Finally the respondent declared " ... I am aware of no public interest in this case which would justify the loss of privacy of the individual in question, and the consequent erosion of the expectation that recipients of legal aid would be treated in same way as those who were in a position to pay for legal services. "

7. By notice of Motion dated 28th February, 2005 the appellant appealed to this court against the respondent's decision.

RELEVANT LEGISLATIVE PROVISIONS

It is acknowledged by the parties that the decision of the respondent resulted from the exercise by the respondent of her jurisdiction to conduct a review of the decision of the Board to refuse the appellant access to the documents sought. That jurisdiction was conferred upon her by the provisions of s. 34 of the Act of 1997.

For the purposes of the review the appellant enjoyed the presumption that the decision of the Board was not justified.

Section 43 (3) of the Act of 1997 (as amended) provides as follows:-

"In the performance of his or her functions under this Act, the Commissioner shall take all reasonable precautions (including conducting the whole or part of a review under s. 34 ...otherwise than in public) to prevent the disclosure to the public or, in the case of such a review, to a party (other than a head) to the proceedings concerned of information specified in paragraph (a) or (b) of

subsection (1) [contained in an exempt record . . .] or matter that, if it were concluded in a record would cause the record to be an exempt record."

Section 42(1) of the Act of 1997 (as amended) provides *inter alia* that:

"A party to a review under section 34 or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision."

Section 6(1) of the Act of 1997 (as amended) provides as follows:-

"Subject to the provisions of this Act, every 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 8 (4) of the Act of 1997 provides that:-

"Subject to the provisions of this Act, in deciding whether to grant or refuse to grant a request under s. 7

- (a) any reason that the requester gives for the request, and*
- (b) any belief or opinion of the head as to what are the reasons of the requester for the request, shall be disregarded.*

Section 26 (1) (a) of the Act of 1997 provides as follows:-

Subject to the provisions of this section, a head shall refuse to grant a request under s. 7 if-

- (a) the record concerned contains information given to the public body concerned in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar*

information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body."

Section 26(3) of the Act of 1997, provides that the exemption referred to in s. 26(1)(a) of the Act:

"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 s. 7 concerned."

THE APPELLANT'S CASE

During the course of these proceedings the appellant stated that he wished to confine his claim for access to documents which he described as "*financial documents.*" These documents comprise preliminary documentation provided by the Third Party to the Board in support of his application for legal aid. He argues that the documents to which he now seeks access were not provided to the Board by the Third Party in confidence. Accordingly, he says, the Board's decision to deny him access is irrational and unreasonable.

The appellant contends that nothing on the face of the documents provided by the Board to applicants for legal aid suggests that the Board will deal with the information provided to the Board on a confidential basis. He says that there is no duty upon the State to treat information received from applicants for such State assistance in confidence. He says that the documents which he seeks, do not, accordingly, enjoy the exemption provided by s. 26 (1) (a) of the Act of 1997.

He says that there is no reason for the court to believe that the disclosure of the information contained within the documentation would be likely to prejudice the provision of similar information from future legal aid applicants.

He argues further that the provisions of s. 32 (2) of the Civil Legal Aid Act 1995 supports his contention that the information contained in the documents which he seeks was not provided to the Board in confidence. He says that the respondent failed to apply any appropriate standard to the review which she undertook and erred in finding that the documents attracted solicitor/client privilege.

Finally the appellant argues that he was denied fair procedures contrary to the provisions of natural and constitutional law and justice.

DECISION

The principles applicable to appeals pursuant to the provisions of s. 42 (1) of the Act of 1997 are those identified by the High Court (McKechnie J.) in *John Deely v. The Information Commissioner* [2001] 3 I.R. 439 in the following terms at p.452:-

“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.*”

IRRATIONALITY

In this case the appellant has argued that the decision of the respondent was unreasonable or “*irrational*” in the sense identified by the courts within this jurisdiction in cases such as *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R.39 and *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642. I do not accept that contention.

There was adequate material before the respondent to enable her to make the determination which she made. That determination cannot be described as a decision which “*flies in the face of fundamental reason and common sense.*” (See the judgment of Henchy J. at p.658 of *The State (Keegan) v. Stardust Compensation Tribunal (Supra)*).

The respondent found that s. 26 (1) (a) applies to the documents concerned.

She adopted the preliminary view of her investigator Ms. Burns. She was “*satisfied that the records in this case have the necessary quality of confidence in that they were provided in circumstances imposing a duty of confidence.*”

In making that determination she had before her the evidence of the Board that the documents were furnished in confidence and that this was “*self evidently both the.. (Third Party’s).. and the Board’s understanding generally, as a result of the provisions of the of the Civil Legal Aid Act 1995, and the examination of the records themselves.*”

This court has also had the opportunity to examine the documents.

It is well settled that the courts will not intervene with the decisions of administrative bodies on grounds of unreasonableness or irrationality unless satisfied either (a), that there was no relevant material before the decision-maker which could reasonably have given rise to the impugned decision, or (b), that the decision-maker wholly failed to take into account relevant material or (c), that the impugned decision *“flies in the face of fundamental reason and common sense.”*

None of those considerations apply in the instant case. Accordingly I am quite satisfied that the decision sought to be impugned was not “irrational” or unreasonable in the sense which would render it unlawful or invalid for the purposes of this appeal.

SECTION 26(1)(A) OF THE ACT OF 1997

The respondent correctly applied a presumption of non-justification to the decision of the Board not to grant access to the documents sought.

Her decision to refuse access was based upon her finding that s. 26(1)(a) applied to the documents.

The appellant contends that her finding was erroneous in law.

Section 26(1)(a) requires refusal to grant access where information is contained in documents given to a public body:

- (1) in confidence,
- (2) on the understanding that the information will be treated as confidential,
- (3) where disclosure will be likely to prejudice the giving of further similar information by the same or other persons and
- (4) where it is of importance that such further or similar information should continue to be given to the public body in question.

(1) and (2). Confidentiality

The respondent adopted the preliminary view of her investigator Ms. Burns. She concluded that the documents in question had been provided to the Board by the Third Party in confidence. She concluded also that the information within the documents had been provided on the understanding that it would be treated as confidential by the Board.

In arriving at that decision the respondent interpreted the term “confidence” for the purposes of s. 26(1)(a) by referring to a decision of the Information Commissioner in Queensland, Australia in “*B v. Brisbane North Regional Health Authority* (1994) 1 Q.A.R. 279.

That case was concerned with the terms of s. 46(1)(b) of the Freedom of Information Act, 1992, in Queensland which provided *inter alia* that documentary information (described as “matter”) is exempt from disclosure in Queensland if:-

“(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could be reasonably expected to prejudice the future supply of such information, unless its disclosure would, on balance be in the public interest.”

The Commissioner in that case adopted the following definition of the word “confidence” for the purposes of that section:-

“A confidence is formed whenever one party (“the confider”) imparts to another (the confidant) private or secret matters on the expressed or implied understanding that the communication is for a restricted purpose.”

That definition itself derived from an essay “*Breach Of Confidence*” by

F. Gurry in a work entitled "*Essays in Equity*" published by the Law Book Company in 1985 in Australia. The definition was described as the "*existing law*" within Australia at the time of publication.

The respondent adopted that definition of the word "*confidence*" for the purposes of 26(1)(a) of the 1997 Act. I am satisfied that she was correct to do so.

Whether information is "*given to the public body concerned in confidence and on the understanding that it would be treated by it as confidential*" (see s. 26(1)(a) of the Act of 1997) is a question of fact. Undisputed evidence that the information was regarded and treated as confidential by and between supplier and recipient public body could certainly ground a lawful decision that the information was communicated in confidence - (See *Ryder v. Booth* [1985] V.R. 869. (T883)).

The respondent found as a fact that the documents were provided to the Board in confidence and on the understanding that it would be treated by the Board as confidential.

When making that finding of fact the respondent had before her a number of documents including the Board's letter dated 7th December, 2004, which advised that the records in issue had been furnished in confidence and on the understanding that it would be treated as confidential.

The respondent did not base her decision upon the solicitor/client relationship which existed between the third party and solicitor provided to him by the Board. She took that relationship into account in making her finding of fact.

She also had the opportunity to consider all of the other relevant documents and their contents. She was entitled to reach the conclusion which she reached. This court may not interfere with her finding.

(3) and (4). **Disclosure likely to prejudice the provision of similar information in the future.**

The review conducted by the respondent pursuant to the provisions of s. 34 of the Act of 1997 correctly comprised a *de novo* review of the appellant's request for access.

The provisions of s. 26(1), (a) of the Act of 1997 require the formation of an opinion as to whether access to documents:-

"would be likely to prejudice the giving to the body of further similar information from the same person or other persons" and whether "it is of importance to the body that such further similar information ... should continue to be given to the body."

The respondent in her letter dated 27th December, 2004, indicated that she had formed the opinion that disclosure would prejudice the provision of further information and that it was important that such further similar information should continue to be given to the Board.

The formation of that opinion was entirely within the jurisdiction of the respondent. The courts will not interfere with the exercise of that jurisdiction in the absence of irrationality in the sense outlined earlier. There was adequate relevant material before the respondent to enable her to form that opinion.

The Board is a body corporate with perpetual succession established by the Oireachtas pursuant to the provisions of s. 3 of the Civil Legal Aid Act, 1995. The Act is described (in its Preamble), as *"an Act to Make Provision for the Grant by the State of Legal Aid and Advice to Persons of Insufficient Means in Civil Cases."*

The provisions of the Act (including sections 24, 26 and 29) and the provisions of the Civil Legal Aid Regulations, 1996, have the combined effect of

empowering the Board to carry out assessments of the financial eligibility of applicants for Legal Aid by reference to their disposable income, disposable capital and general means.

It was open to the respondent to form the opinion that it was of importance to the Board that such information should be given, on an ongoing basis, to the Board from applicants for Legal Aid.

It was also open to the respondent to form the opinion that the provision of public access to such personal, private and sensitive information would be likely to inhibit and discourage applicants for legal aid from providing that information to the Board in the future.

It follows that the respondent lawfully formed the requisite opinion pursuant to the provisions of s 26(1) (a) of the Act of 1997.

It follows further that she correctly found that the documents sought were documents to which s 26 (1) (a) of the Act of 1997 applied.

The appellant, relying upon the provisions of s. 26(3) of the Act of 1997, contends that the public interest is better served by granting him access to the documents than by refusing to grant that access.

The "*public interest*" identified by him is the right of the public to know how public funds are being disbursed. I do not accept his contention. The documents concerned have been lawfully found to have been provided in confidence on the understanding that they would be treated by the Board as confidential.

Although there is a valid public interest in ensuring the proper distribution of public funds there was and is also a right vested in the Third Party to have his privacy and the confidential character of his private personal information respected and protected.

The appropriate exercise by the respondent of the jurisdiction conferred upon her by ss 26 (1)(a) and 26 (3), of the Act of 1997 required a balancing exercise between competing interests. That exercise was entirely within the jurisdiction of the respondent (see the judgment of the Supreme Court (Kearns J.) in *Sheedy v. Information Commissioner* [2005] 2 I.L.R.M. 374. There was adequate material before her to enable her to decide as she did.

The court will not interfere with her conclusion that: *"I am aware of no public interest in this case which would justify the loss of privacy of the individual in question and the consequent erosion of the expectation that recipients of legal aid would be treated in the same way as those who were in a position to pay for legal services."*

FAIR PROCEDURES

The appellant contends that in arriving at her decision the respondent denied him fair procedures contrary to the provisions of natural and constitutional law and justice.

That argument cannot be sustained. The procedures provided for the benefit of applicants for access to records under the Act of 1997 are those contained within the Act itself. They were applied and followed scrupulously by the Board and by the respondent throughout all phases of the applicant's requests and inquiries. At each stage of each process the appellant was acquainted with the remedies available to him under the Act. He was provided with ample opportunity to be heard and to make submissions. He was provided with the decisions of the appropriate persons together with reasons for those decisions within the time limits provided by the Act.

The Act has not been challenged by the appellant on grounds of constitutional infirmity. It enjoys the presumption of constitutionality.

It follows that I am satisfied that the appellant was not denied fair procedures and that the decision of the respondent was made in accordance with the provisions of natural and constitutional law and justice.

It follows further that the applicant's appeal is dismissed.

approved
John Dumbie
31-01-'06

PM

A COPY WHICH I ATTEST
FOR REGISTRATION

