Neutral Citation [2016] IEHC 706

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 864 J.R.]

BETWEEN

L.K.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of November, 2016.

1. The Criminal Justice (Mutual Assistance) Act 2008 provides for the taking of evidence in the State for use in criminal proceedings abroad. A person subject to those procedures cannot be compelled to give evidence that he or she could not be compelled to give in a criminal trial here. But the statute is ambiguous: does this exception refer to evidence that could not be compellable if the person was a third party, or if the person was formally a witness at the trial?

Facts

2. On 13th May, 2016 a letter of request was received by the Minister from the UK authorities for the taking of evidence in relation to a criminal trial against a named defendant who is a UK citizen accused of the murder of an Irish citizen whose body has never been located.

3. The evidence relates essentially to medical information concerning the applicant who is a witness at a previous trial of the defendant that was aborted for unrelated reasons and who will be a witness in the retrial. There is a suggestion by the defence in that trial that her evidence may not be entirely reliable (hence their interest in obtaining her medical records), but Mr. Sean Gillane S.C. who appears (with Mr. Tony McGillicuddy B.L.) for the respondent in the present proceedings tells me that as far as the State is concerned it is accepted that the applicant "*has conducted herself entirely honourably throughout*". I entirely accept that and I appreciate that the situation is an uncomfortable one for the applicant who has very honourably made her evidence available but who is nonetheless understandably anxious to limit disclosure of her medical records.

4. On 19th September, 2016, the Minister requested the nomination of a judge of the District Court to take the evidence in question. Judge John O'Neill was nominated for that purpose. The matter then came before Judge O'Neill on 20th October, 2016.

5. Three witnesses were summoned to appear at Court 8 with medical records pertaining to the applicant and these witnesses were a sister from a particular charitable organisation, the applicant's general practitioner and a patient services officer with the H.S.E.

6. On 27th October, 2016 Judge O'Neill made the formal order in respect of the first witness for reception of evidence including medical records and on 3rd November, 2016 made orders in respect of the other two witnesses.

7. The applicant then sought leave to apply for judicial review on 14th November, 2016 in relation to the orders of Judge O'Neill and on that occasion I granted an interim stay on transmission of the material and directed that the matter proceed by way of a telescoped hearing. The retrial of the defendant began on 15th November, 2016 and the applicant was due to give evidence on 21st November, 2016.

8. In order to ensure that there is not undue interference with the applicant's right to privacy, as emphasised by the European Court of Human Rights in *Z. v. Finland* (1997) 25 E.H.R.R.371, I directed, pursuant to the inherent jurisdiction of the Court, in order to give effect to s. 63(4) (b) of the Criminal Justice (Mutual Assistance) Act, 2008 that the publication of the identity of the applicant or any medical information referable to her be restrained.

9. On 18th November, 2016 I gave an ex tempore decision refusing the application and I now set out more formally the reasons for doing so.

Are the orders ultra vires the 2008 Act?

10. Ms. Tara Burns S.C. (with Mr. Barry Murphy B.L.) in a very able submission for the applicant attacked the orders of Judge O'Neill on two bases, firstly that they are *ultra vires* the 2008 Act and secondly that they are an impermissible interference with the applicant's constitutional right to privacy.

11. Section 64(1)(a) of the 2008 Act provides that a person cannot be compelled to give evidence under the mutual assistance provisions of the Act if he or she could not be so compelled in criminal proceedings in the State. It is clear from *H.S.E. v White* [2009] IEHC 242 (Unreported. High Court, Edwards J., 22nd May, 2009) that there is no power to compel third parties to furnish information in criminal proceedings. It is also clear from *J.F. v. O'Reilly* [2008] 1 I.R. 753 that the procedure under Part IA of the Criminal Procedure Act, 1967 (formerly preliminary examination) is not a disclosure device to enable such third-party disclosure to be done at the District Court level.

12. I note in this context a remark of Barrett J. at para. 11 of *C. v. Ó Donnabháin* [2016] IEHC 74 (Unreported, High Court, 11th February, 2016) where he raised the issue of the possible relevance of s. 4L of the 1967 Act in such a context. While Barrett J. describes s. 4L as "*a broad power*", it is not a broad power because (having regard to *J.F.* and *H.S.E. v. White*) it can only apply to a witness who is on the book of evidence or who is intended to be called at trial and does not, as Mr. Gillane correctly submits, create a jurisdiction to "*just drag someone in off the street*". (In passing I note that the C. case is oddly titled "*Mr." C. v. Ó Donnabháin* in the version on the courts service website, but that would not be the appropriate way to cite the case. Established norms of case citation dispense with the basic personal honorific. Hence *Donoghue v. Stevenson* not "Mrs." Donoghue v. "Mr." Stevenson. Case citation conventions are not apposite for individual innovation as they are an objective framework and an overarching intellectual infrastructure which is the common property of all stakeholders in the legal process.)

13. However there is a separate jurisdiction to compel witnesses (as opposed to third parties) in the criminal trial proper to produce documents as appears from O. 21 r. 1(1) of the District Court Rules 1997 which provides that a witness summons may require a person to "*produce any accounts, papers, documents or things to the court*". Likewise s. 4K(1)(b) of the 1967 Act allows a witness order to be made by the District Court to require the witness to "*produce to the court any document or thing specified in the order*".

14. The question then comes down to the meaning of s. 64(1)(a) of the 2008 Act which in my view is somewhat ambiguous and capable of two alternative interpretations.

15. One, narrow, interpretation is that the persons to whom the section is sought to be applied cannot be compelled to give evidence if they were not so compellable in the criminal proceedings in which they were a third party.

16. The other, broader, interpretation is that they cannot be so compelled if they were not compellable in the proceedings in which they were a witness.

17. The court must "*uphold*" the statute law of the State (as provided for by the declaration of office in Article 34.6.1° of the Constitution; a requirement which judges continually bear in mind) and in doing so one must have regard to the purpose for which the legislation is enacted. It seems to me that to give the 2008 Act the narrow interpretation would be to significantly emasculate the mutual assistance system because it would essentially mean that the documentary disclosure provisions of the 2008 Act would be largely a dead letter without the consent of persons affected, such as the consent of an applicant in relation to medical information or consent of the person who had the information in the case of non-confidential information.

18. In my view the interpretation that gives best effect to the 2008 Act is to read the section as only prohibiting the obtaining of information by way of mutual assistance if that information is such that a *witness* (as opposed to a third party) in a criminal trial could not be compelled to furnish that information. In this case if the three persons whose evidence was sought had been witnesses in hypothetical criminal proceedings here then they could be compelled to furnish documents by virtue of O. 21 of the 1997 rules and s. 4K of the 1967 Act, so on that basis the first ground of challenge has to be rejected.

Do the orders wrongly interfere with the applicant's right to privacy?

19. The second ground of challenge is based on the constitutional right to privacy. Reliance is placed on *Brady v. Haughton* [2006] 1 I.R. 1 and *Burns v. O'Neill* [2015] IEHC 553 (Unreported, High Court, O'Malley J., 18th August, 2015). For present purposes *Brady* essentially comes down to an entitlement on the part of a person affected to notice of an intention to obtain confidential health related information, which has been afforded here. It is not a decision that says in principle that such information cannot be furnished under the 2008 Act.

20. Ms. Burns submits that the undoubted constitutional right to privacy of the applicant pursuant to *Kennedy v. Ireland* [1987] I.R. 587 and subsequent cases such as *E.M.I. Records (Ireland) Ltd v. The Data Protection Commissioner* [2013] 2 I.R. 669 at 690 *per* Charleton J., has to have priority because it is not outweighed in this context by a balancing exercise with the rights of any other citizen of the country and because the issue relates to a trial in another jurisdiction.

21. But it seems to me there are two significant public interest considerations applicable here.

22. The first is the public interest in international cooperation, as given effect to by the European Convention on Mutual Assistance in Criminal Matters of 20th April, 1959, the protocols to that Convention, the European Union Convention giving effect to it on the 29th May, 2000 and the protocol to the EU Convention the 16th October, 2001 (which systems of co-operation are made a matter of EU obligation in certain respects by the EU Framework decision 2003/577/JHA of the 22nd July, 2003). International cooperation in this instance involves assisting the UK authorities but by definition Ireland obtains a benefit from the process on other occasions and in other cases by virtue of the mutual nature of the obligations concerned.

23. The second element of public interest is in the effective conduct of a criminal prosecution in accordance with the law of the forum for that prosecution. That does seem to me to be a tangible element of the Irish public interest, especially so in the present case. Firstly the deceased was an Irish national whose remains have never been found. Secondly the accused is a British national and therefore benefits from the common travel area, and therefore also an EU national, and thus enjoys a concurrent right of free movement throughout the territory of the Union including Ireland. Thirdly the trial is being conducted in a Council of Europe member state to whom Ireland is bound by the to some extent mutual obligations of the ECHR (which include inter-state action as has occurred in cases such as in *Ireland v. U.K.* (1979-80) 2 E.H.R.R. 25); and therefore again it seems to me there is a public interest in any given member state that a trial in another member state is conducted effectively in accordance with the law of the forum concerned. Obviously many non-European countries are also bound to the State by similar mutual international agreements and relationships but those do not arise for consideration here.

24. The effective conduct of a criminal trial will normally override any privacy rights of those affected: *Three Rivers D.C. v. Bank of England (No. 6)* [2004] UKHL 48 [2005] 1 A.C. 610 at para. 28. At the EHCR level, *Z. v. Finland* is consistent with the view that disclosure of medical records or medical evidence for the purposes of criminal investigation is not in itself contrary to art. 8 of the ECHR, although unnecessary disclosure in the course of judicial proceedings was held to be a breach in that case. Indeed I would respectfully suggest that the English trial court might be asked to bear that decision in mind if and insofar as it has a jurisdiction to limit publication of evidence adverse to the interests of the applicant in the course of the trial there, bearing in mind the compulsory nature of the process by which the applicant's medical records have been sought to be put before that court.

25. In *Attorney General of England and Wales v. Brandon Book Publishers Ltd* [1986] I.R. 597, Carroll J. refused an application by the English Attorney General to restrain publication of a book by a former employee of MI5, which was alleged to contain confidential information. Carroll J.'s view was that consideration of the public interest would have arisen if the government of Ireland were the plaintiff, but *"[i]n this case the plaintiff is the representative of a foreign government there is no question of a public interest of this State being affected. Considerations which would move the courts in the United Kingdom in this matter are different to the considerations here"* (at p. 602). To my mind that seems an unduly narrow view, which possibly arose because the State was not a party to *Brandon Books* and thus not in a position to make submissions about the public interest in this country. It seems to me beyond question that the State obtains huge benefits from security and criminal justice cooperation with other friendly countries and probably above all with the UK. Damage to the security of our neighbouring jurisdiction is damage to the security of the State, all other things being equal. That was so in 1986 when *Brandon Books* was decided but is certainly even more true today. *Ar scáth a chéile a mhairimid* is an aphorism for international relations as much as for personal. Accordingly the *Brandon Books* approach seems to me to be too narrow and especially in a case such as the present one where the court must look at a broader suite of interests, including the effective conduct of criminal proceedings in a friendly territory and the benefits of international cooperation and; above all with the UK to which we are bound by history, geography and culture, with which we co-operate in the context of a range of

agreements and relationships, and on whom we depend in significant respects for our security, for our immigration control and for the prevention, detection and prosecution of offences with a cross-border dimension.

26. So on the basis of either of those considerations and *a fortiori* having regard to both in combination, the right to privacy of the applicant can clearly be outweighed by other public interest considerations. The Minister's position in that regard in requiring this evidence to be transmitted is one that it is reasonable and lawful for her to adopt.

Order

27. Accordingly the order I made on 18th November, 2016 was:

(i). that the substantive relief sought by the applicant be refused;

(ii). that the stay on transmission of the material be continued until close of business on Monday 21st November, 2016 and shall then stand discharged (unless continued by the Court of Appeal); and

(iii). that there is to be no order as to costs.