



THE COURT OF APPEAL

APPROVED

Record Number: 2024/70

High Court Record Number: 2023/95 MCA

Neutral Citation Number [2024] IECA 208

Noonan J.

Faherty J.

Meenan J.

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2014

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 24 OF

**THAT ACT AND ORDER 130 AND ORDER 84C OF THE RULES OF THE
SUPERIOR COURTS**

BETWEEN/

PATRICK MCGREAL

APPELLANT

-AND-

THE INFORMATION COMMISSIONER

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 31st day of July, 2024

1. This appeal is brought by the appellant, Mr. McGreal, against the respondent (“the Commissioner”) pursuant to the provisions of the Freedom of Information Act, 2014 as

amended. It arises from a number of interactions Mr. McGreal had with Westmeath County Council (“WCC”), the local authority for the area in which he resides. Mr. McGreal has been in receipt of housing assistance payments (“HAP”) under a scheme that provides social housing support for qualifying persons in its functional area.

2. In 2022, Mr. McGreal sought an increase to his HAP which was refused by WCC. This in turn was the subject of an appeal by Mr. McGreal who remains in dispute with WCC on this issue, on the basis that it wrongly assessed the information provided by him regarding his personal and family circumstances. In order to pursue the matter further, on the 1st September, 2022 Mr. McGreal made a FOI request pursuant to the 2014 Act for a copy of his housing file and any correspondence with WCC’s Housing Department as well as a copy of all decisions regarding his housing application and the reasons for the withdrawal of his HAP raise. He requested all documents, correspondence, notes, memos and everything regarding himself, his housing application and everything relating to these.

3. WCC responded on the 30th September, 2022 and furnished him with a copy of his housing application file and his HAP file. He was informed of his right to appeal this decision to an Appeals Officer in WCC.

4. Mr. McGreal did appeal by letter of the 12th October, 2022, primarily on the basis that the information regarding the withdrawal of his HAP raise was not furnished. Nor was he furnished with any reason for its non-disclosure. On the 2nd November, 2022, the Appeals Officer communicated his decision to Mr. McGreal upholding the earlier decision of the 30th September, 2022. Since the earlier decision had been taken, a further record had come into existence and this was furnished to the appellant. He was informed of his right to appeal to the Commissioner.

5. Mr. McGreal duly appealed on the 9th November, 2022 but before the Commissioner delivered a decision, on the 15th December, 2022 WCC released 280 additional records to the appellant.

6. On the 17th February, 2023, the Commissioner's Office wrote to the appellant having reviewed the matter and received submissions from both parties, with an indicative conclusion. The Commissioner referred to the provisions of s. 15(1)(a) of the 2014 Act which provides as follows:

"15.(1) A head to whom an FOI request is made may refuse to grant the request where –

(a) the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken..."

7. The officer concerned at the conclusion of the letter says:

"Regarding the section 15(1)(a) aspect of this case, I am satisfied that the Council has confirmed that further records relevant to your request do not exist or cannot be found after all reasonable steps to ascertain their whereabouts have been taken."

The letter goes on to detail the various measures undertaken by the Council with a view to finding all relevant records in relation to the appellant's request.

8. With regard to the next steps in the Commissioner's review, the letter indicated that if Mr. McGreal did not agree with the proposed conclusion, he should provide his reasons. At that stage, the officer concerned was of the view that in the light of the information provided by WCC, if the matter were to proceed to a formally binding decision, her recommendation to the senior investigator would be to affirm WCC's original decision. Mr. McGreal was

advised that he may wish to consider withdrawing his application for a review but he was entitled to proceed if he so wished. It would appear that Mr. McGreal did not withdraw the application and accordingly a binding decision was issued by the investigating officer on behalf of the Commissioner on the 3rd March, 2023 upholding WCC's decision for the reasons already indicated. The decision indicated that Mr. McGreal had a right to appeal to the High Court on a point of law pursuant to s. 24 of the 2014 Act.

9. In his notice of motion bringing the appeal before the High Court, the appellant suggests that because WCC released additional records to him on the 15th December, 2022, its original decision of the 30th September, 2022 furnishing him with records pursuant to his request was "*untrue*" as was the subsequent affirmation of that decision on the 2nd November, 2022. He also appears to make some complaints about the merits of WCC's decision to withdraw the discretionary HAP additional payment.

Judgment of the High Court

10. Having heard the matter, the trial judge delivered an *ex tempore* judgment on the 23rd January, 2024. In it, he outlines the purposes and effect of the FOI legislation, noting that the process bears some similarities to discovery in litigation. He notes that in both, the obligation to disclose documents is a continuing obligation "*which means that if people find additional materials that they may have mislaid or not realised the importance of, they must then make that disclosure at the time they find those materials.*"

11. The judge proceeded to set out the facts as broadly as I have outlined them. He noted that Mr. McGreal appealed the original decision on the basis that there must be further information and on foot of that, the Commissioner conducted an investigation. Arising from that investigation, further enquiries were made by WCC which turned up a further quantity of documents that were then disclosed to Mr. McGreal. The judge points to the fact that

those additional documents are referred to in the final decision of the Commissioner which makes it clear that the decision maker knew that a mistake had been made by WCC. He noted that the Commissioner's investigator concluded that WCC had addressed the matters in issue having regard to s. 15(1)(a). The investigator was satisfied from the enquiries she made, and was entitled to be so satisfied, that WCC had confirmed that further records relating to the appellant's request either did not exist or could not be found.

12. The judge noted the extensive steps taken in the course of the investigation by WCC to unearth any further documents, which steps are referred to in the decision of the Commissioner.

13. The judge observed that the Commissioner affirmed the decision not on the basis of the material that was before the original decision maker because clearly, the original decision was incorrect in light of the further information that was subsequently made available to Mr. McGreal. The decision, as the judge points out, was, insofar as WCC were concerned at the time it was made originally, correct, as was the decision of the Commissioner at the time it was made, by reference to all the records that had by then been disclosed. However, in the view of the judge, the disclosure of the subsequent records did not have the effect of invalidating the original decision, taken on the basis of such records as were then available.

14. The judge observed that if he were to vary or set aside the decision, it wouldn't affect the rights or wrongs of the matter because Mr. McGreal now had all the material that he was entitled to receive at the beginning. It remained the case that at some future time further material might be discovered but that would not have the effect of invalidating the appellate decision maker's decision either. His view was that an appeal to the High Court was not appropriate in the circumstances that arose. The judge noted that the original rights or wrongs of the dispute that Mr. McGreal had with WCC were not relevant to the issues that

arise in this case which concerns only FOI. The fact that those matters are referred to in the relevant decisions did not in the judge's view invalidate them either. Accordingly he dismissed the appeal.

The appeal to this Court

15. In his notice of appeal, Mr. McGreal sets out a large number of grounds which, on their face, appear to bear no relationship to the issues that were agitated in the High Court. Instead, Mr. McGreal suggests that the order of the High Court was made on the basis of a non-existent provision of the Freedom of Information Act, 2014. It has to be said that it is very difficult to understand what point is being made in the notice of appeal in this regard. There are various serious allegations made against the Commissioner and his legal team that they deliberately misled the High Court and WCC on the basis of a provision of law that does not exist. What this so-called provision of law is remains unexplained by the appellant. The basis for this appeal is perhaps best understood by reference to Ground 10(b)(iv) of the appellant's notice of appeal in which he says:

"... I lacked the expertise to articulate this during the High Court hearing, and it was only after reading section 22 of the 2014 Act post hearing that I realised the OIC had provided false information to Justice Owens and Owens relied on that unverified information against my presented independent evidence."

16. Section 22 is a lengthy section comprising 16 subsections and is entitled "*review by Commissioner of decisions*". The appellant does not identify at any stage what part of s. 22 it is alleged the Commissioner acted outside or in what manner. The notice of appeal makes a number of scurrilous allegations including that the Commissioner and his legal team engaged in "*an audacious attempt to deceive the honourable judicial process.*"

17. Despite the length of the appellant's notice of appeal and its reference to s. 22, it is nigh on impossible to discern what point is actually being made, save to the extent that it is clear that whatever that point is, it was not made in the High Court. Indeed, the original basis upon which the decision was challenged, namely that it was "*untrue*", now appears to no longer feature.

18. The appellant's written submissions, again despite their length, do not really put matters significantly further, nor are they of much assistance to this Court in endeavouring to discover the point being made. They do at least identify a subsection of s. 22 that is supposedly relevant which is subsection (9)(a). This section broadly provides that the Commissioner may refuse to accept an application for a review if of the opinion that any of the grounds enumerated in the subsection arise, such as for example that the application is frivolous or vexatious or does not relate to a decision covered by the 2014 Act and so forth. However, since the subsection is concerned only with the powers of the Commissioner to either refuse an application for a review or discontinue one in certain circumstances, it is again impossible to see how it has any bearing on this case in circumstances where neither of those things occurred. In his submissions, the appellant repeatedly refers to the Commissioner as having falsely represented the provisions of the 2014 Act to the High Court, leading it into error, without ever once identifying how that is said to have occurred. For example, in this regard Mr. McGreal says at para. 71 of his written submission:

"False provision of law: the OIC argued before Mr. Justice Owens that it provided WCC with the legal provision under the 2014 Act, which, upon careful examination, does not exist. This argument led to a misunderstanding and misapplication of the law in my case."

Here again, this is an absolutely impenetrable submission that does not assist this Court in any way.

19. As far as it can be understood, there appears to be a suggestion by the appellant that the Commissioner acted outside the scope of his jurisdiction under the Act but again, regrettably, why that should be so is not explained.

20. The oral hearing of the appeal brought some welcome clarity to the appellant's case. He submitted that the power of the Commissioner to conduct a review was circumscribed by the terms of s. 22(2) of the 2014 Act which provides:

“Subject to this Act, the Commissioner may, on application to him or her in that behalf, in writing or in such other form as may be determined, by a relevant person-

(a) review a decision to which this section applies, and

(b) following the review, may, as he or she considers appropriate-

(i) affirm or vary the decision, or

(ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper,

in accordance with this Act.”

21. The essence of the appellant's oral argument was that the section confines the power of the Commissioner to doing one of three things, namely, to affirm, vary or annul the decision the subject of the review. However, in purporting to affirm the decision, the Commissioner “*stepped outside the box*”, as the appellant described it, by appearing to affirm a decision which has been shown to have been incorrect by virtue of the subsequent release

of additional records, and therefore not capable of being affirmed. In other words, the appellant argues that in affirming the original decision, the Commissioner acted *ultra vires*.

Discussion and Decision

22. I think the first point to be made is that in this appeal, the appellant does not in substance engage in any way with the judgment of the High Court. Instead, he purports to agitate an issue, which as I have said is one that was initially difficult to comprehend, that was never raised in the High Court. The law in this regard is clear going back as far as the judgment of the Supreme Court in *KD v MC* [1985] IR 697 where Finlay CJ said (at 701):

“It is a fundamental principle, arising from the exclusively appellate jurisdiction of this Court in cases such as this that, save in the most exceptional circumstances, the Court should not hear and determine an issue which has not been tried and decided in the High Court. To that fundamental rule or principle there may be exceptions, but they must be clearly required in the interests of justice.”

23. These principles have been refined in subsequent cases, most notably *Lough Swilly Shellfish Growers Co-operative Society Limited v Bradley* [2013] 1 IR 227 where O’Donnell J., as he then was, set out the broad parameters for the consideration of new arguments on appeal not advanced in the High Court. He described a “*spectrum*” within which such new grounds might arise ranging at one end from grounds that are closely connected with arguments previously made and called for no new evidence to entirely new grounds requiring further evidence or which contradict grounds previously advanced. Here, the argument advanced by the appellant amounts to an entirely new case which he seeks to substitute for that made in the High Court. That is impermissible, not least because it requires this Court to embark on a determination of an issue *de novo* never considered by the High Court.

24. The appellant says that this arises because he realised the relevance of the point after the conclusion of the hearing in the High Court. He prays in aid the fact that he is a litigant in person. However, as has been repeatedly said in many judgments, the rules are the same for all parties, whether represented or not, and parties cannot put themselves in a better position by electing not to be represented. I am satisfied therefore that on this ground alone, the appeal must fail.

25. Even were that not so, this appeal is misconceived. The appellant's reliance on s. 22(9)(a) of the 2014 Act is entirely misplaced. It clearly has no application to the circumstances arising in this matter. It is concerned solely with the Commissioner's discretion to either refuse or accept an application to conduct a review, or to discontinue a review already underway, in the circumstances detailed in the subsection. Since in the present case, the Commissioner conducted the review to conclusion, neither of these scenarios arise and the section is accordingly entirely irrelevant. The High Court obviously made no determination in relation to s. 22(9)(a) in circumstances where it was neither raised, nor was it relevant.

26. Insofar as the appellant suggests that the disclosure of the new material after the commencement of the Commissioner's review meant that he should have abandoned it and started again, that too is misconceived. As the High Court pointed out, it is a common occurrence in the context, for example, of discovery applications that documents are found or come to light after an affidavit of discovery has been sworn in which a deponent will say that there are no further documents other than those listed in the affidavit. The fact that documents are subsequently discovered does not render this a "*lie*" as the appellant seems to think as the discovery process is one that entails a continuing obligation to discover

documents after the original discovery has been made, and the same is equally true of FOI requests.

27. Mr. McGreal appears to think that because documents were subsequently released by WCC, this automatically invalidated all previous decisions and the review of the Commissioner's decision. That is, again, a misconception. Indeed, the Act itself expressly contemplates that precisely such a scenario will arise because it provides, at s. 22(9)(a)(iv) that the Commissioner may discontinue a review where there is no longer any issue requiring adjudication, as access to the records in question has been granted by the FOI body in the course of the review.

28. In other words, the review may become moot in circumstances where the basis for it was the failure to provide access to the records which are in fact subsequently disclosed. Here again, however, the Commissioner has a discretion to discontinue the review and if the applicant for the review is not satisfied with the disclosed records, the Commissioner may decline to discontinue and proceed to a binding decision. In fact, in the present case, the Commissioner invited the appellant to withdraw the application in the correspondence of the 17th February, 2023 on the basis that he agreed with the position of WCC but Mr. McGreal did not respond to that invitation.

29. However, as the trial judge found, the decision of the Commissioner was clearly based on the disclosure of all records up to the date of the binding decision, and not just those disclosed at the time of the original decision. The authorities make clear that the function of the Commissioner in conducting a review is to do so *de novo* and, as I have explained, it is a common feature of the investigations carried out by the Commissioner, which may often involve more detailed interrogation of the public body's records, that additional material will be found. This is part and parcel of the process. The logic of the appellant's argument

however is that if additional material is found, that invalidates the Commissioner's review and the process must start off all over again with the public body making a new decision which can then be the subject of further review and so on, potentially *ad infinitum*. That argument is entirely inconsistent with the scheme of the 2014 Act and is untenable.

30. While one might have some sympathy with the contention that the Commissioner cannot as a matter of logic purport to affirm a decision which is shown to have been incorrect, the Commissioner undoubtedly has a jurisdiction under s. 22(2) to make the decision he actually made in this case. So, the Commissioner might, in theory at least, have varied the original decision to take account of the subsequently found records, or could possibly have annulled it and made a new decision incorporating the new records, with the same effect. However, it is at least arguable that the Commissioner was entitled to affirm the original decision on the basis that the public body concerned had taken all reasonable steps to ascertain the whereabouts of the records, as s. 15(1)(a) provides, as of the time that the original decision was made. The fact that more records subsequently came to light does not necessarily establish that reasonable steps were not taken in the first place. As the trial judge pointed out, if even now further records emerge, that does not have the effect of retrospectively invalidating all previous decisions. It might provide a basis for arguing that reasonable steps were not taken initially, but that does not automatically follow.

31. It is important to bear in mind the standard of review in appeals from decisions of the Commissioner to the High Court on a point of law. This issue was considered by the Supreme Court in the *Enet* case (*Minister for Communications, Energy and Natural Resources v the Information Commissioner* [2020] IESC 57) in which Baker J., giving the judgment of the Court, followed the observations of the Court in *Sheedy v The Information Commissioner* [2005] IESC 35 at para. 79:

“Once there was some evidence before [the Commissioner] as to the circumstances in which these reports are compiled, as undoubtedly was the case here, the well-established principles of O’Keeffe v An Bord Pleanála [1993] 1 I.R. 39 make it clear that his decision is not to be interfered with”.

32. A not dissimilar situation to the present case arose more recently in *Landers v The Information Commissioner* [2022] IEHC 170 where the applicant appealed to the High Court against a decision of the Commissioner which affirmed a decision of the National Treasury management Agency to refuse access to certain records on the basis that they did not exist. The applicant was clearly of the view that they did. Ferriter J. in the course of his judgment identified the central issue arising (at para. 11):

“The question that arises on this appeal therefore is whether there was sufficient material before the Commissioner to form the view that the requirements of s. 15(1)(a) had been met on the facts of the case.”

33. He went on to hold, in line with the earlier authorities such as *Enet*, that once there was some evidence before the Commissioner as to whether the records existed, his decision could not be challenged on the basis of irrationality. The High Court held that the Commissioner was justified in coming to the conclusion, for which there was evidence, that WCC had no further records to disclose and accordingly there was no irrationality in the decision of the Commissioner. The appellant here has demonstrated no infirmity in that conclusion.

34. Accordingly, I would dismiss this appeal.

35. As the Commissioner has been entirely successful, my provisional view is that he is entitled to the costs of this appeal. If the appellant wishes to contend otherwise, he will have

liberty to deliver a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the Commissioner will have a similar period to respond likewise. In default of such a submission being received, an order in the proposed terms will be made.

36. As this judgment is delivered remotely, Faherty and Meenan JJ. have authorised me to record their agreement with it.