THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2016] IECA 361

Birmingham J.
Mahon J.
Edwards J.

Appeal No. 2016/507

H.C. No. 2016/864JR

BETWEEN

L. K.

Appellant

AND

THE MINISTER FOR JUSTICE & EQUALITY

Respondent

Judgment delivered on the 25th day of November, 2016 by Mr. Justice Edwards

Introduction
1. This appeal is against the judgment and order of the High Court (Humphreys J.) dated the 21st of November 2016 refusing an application for various declarations, orders of *certiorari*, an injunction and an order of *mandamus*, as well as certain interim relief, by way of judicial review.

Facts
2. The facts of the case are that on the 13th May, 2016 a letter of request was received by the Minister from the UK authorities pursuant to the provisions of the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union signed at Brussels on the 29th of May 2000 (the Convention) 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 appellant who was a witness at a previous trial of the said defendant that was aborted for unrelated reasons and who will be a witness in the retrial. In the first trial, in which the appellant gave her evidence by video link from this jurisdiction, it was put to her in cross-examination that her evidence was unreliable due to a medical issue, a matter she vehemently denied.

4. In preparation for the forthcoming re-trial the defence legal have now requested the Crown Prosecution Service (C.P.S.) in the UK, pursuant to its obligations under the UK's Criminal Procedure and Investigations Act, 1996, to make disclosure of the appellant's medical records, presumably with a view to the defendant's lawyers renewing their attack on the appellant's reliability in cross-examination of her when she testifies again at the re-trial.

5. The Convention is given effect in Irish law by the Criminal Justice (Mutual Assistance) Act 2008, (the "Act of 2008"), and the relevant provisions in the context of this case are s. 63 and s. 64 respectively. I will set these out in full in the next section of this judgment. However, in brief summary s. 63 allows the Minister to request the nomination of a District Judge to receive the evidence to which the request relates, and for that purpose the District Judge is given all the powers of the District Court in criminal proceedings including its powers to secure the attendance of witnesses and the production of documents, the taking of evidence on oath and to compel witnesses to give evidence or to produce documents or other things. S.64 then deals with the claiming of privilege by witnesses in respect of oral evidence to be given by them or in respect of documents they would otherwise be required to produce in the course of the s.63 procedure.

6. 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 in Court No 8 in the Criminal Courts of Justice on 20th October, 2016.

7. Three witnesses were summoned to appear on that occasion and to bring with them medical records pertaining to the appellant. The witnesses in question were a religious sister from a particular charitable organisation that provides a certain form of medical treatment, the appellant's general practitioner and a patient services officer with the H.S.E., based at a particular hospital where the appellant was treated following a road traffic accident. None of these witnesses are intended to be witnesses at the trial of the said defendant, and in which the appellant is expected to be called as a witness. They were summoned before the District Court solely to produce medical records pertaining to the appellant so that these might be transmitted to the C.P.S. in the UK to enable that body to comply with its disclosure obligations.

8. The appellant was duly notified, as the law now requires, of her entitlements in respect of claiming privilege and the appellant communicated both to the members of An Garda Siochána and other representatives of the State who canvassed her views that she was vehemently opposed to the release of her medical records and wished to claim privilege over them. It is understood that this is based on medical confidentiality and her constitutional right to privacy in respect of intimate and personal matters such as her state of health both past and present, as well her right to respect for her private life guaranteed under Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("the ECHR"). Moreover, she caused it to be made known to each of the three witnesses who had been summoned, in the context of the mutual assistance procedure, for the purpose of producing her medical records that she does not consent to their release.

9. Although the appellant was not herself legally represented on the 20th of October, and did not personally make any legal submissions to the District Judge, the issue of the privilege she was asserting was debated at some length before Judge O'Neill because the three witnesses who had been summoned to produce her records had all, understandably, thought it prudent to be legally represented in circumstances where she had made known to them that she was not consenting to her records being released. In the course of that debate it was suggested to Judge O'Neill by counsel representing the three witnesses that privilege had been validly asserted and could be relied upon as production of the documents being sought was not compellable in this jurisdiction. In support of that submission certain jurisprudence was opened to Judge O'Neill including *The People (Director of Public Prosecutions) v Sweeney* [2001] 4 I.R. 102; *D.H. v His Honour Judge Groarke & Ors* [2002] 3 I.R. 522; *J.F. v District Judge Reilly & Ors* [2008] 1 I.R. 753 and *The H.S.E. v His Honour Judge White & Ors* [2009] IEHC 242 (Unreported, High Court, Edwards J, 22nd May 2009).

10. On the 27th of October 2016 Judge O'Neill indicated that he was not disposed to uphold the claim of privilege, giving as his reasons that he was conscious both that he was not the court of trial but simply a go between, and also that "*the Minister has received the appropriate assurances, which will protect the individuals (*sic*) involved in the criminal matter"*. Accordingly on that date he made an order under s. 63 of the Act of 2008 requiring the first witness to go into the witness box and produce the medical records in her possession relating to the applicant. Later, on the 3rd of November 2016 he made a similar order and made a similar requirement of the other two witnesses. The records were duly produced by each witness.

11. Immediately subsequent to these events, the appellant instructed legal advisers and on the 14th of November 2016 an application was made to the High Court (Humphreys J.) for leave to apply for various reliefs by way of judicial review aimed at preventing the appellant's records being actually transmitted to the C.P.S., by or on behalf of the Minister. As the re-trial in the UK was due to commence on the following day, and the appellant was due to give evidence, again by video link, on the 21st of November 2016, Humphreys J. granted an *interim* stay on transmission of the material and directed that the matter proceed by way of a telescoped hearing.

12. On the 18th of November 2016 the High Court indicated, in a decision given ex tempore with reasons to be given later, that it was refusing the application for relief by way of judicial review. The High Court judge's reasons were subsequently provided in a written judgment delivered on the 21st of November 2016, to which more detailed reference will be made later in this judgment.

13. The appellant has now appealed to this Court against the High Court's judgment and Order. Pending the determination of this appeal we have granted a further *interim* stay on transmission of the material. It is understood that *pro temp* matters have been rescheduled before the court of trial in the UK and the appellant is not now due to testify until the middle of next week.

14. The appeal is based on a single umbrella argument to which there are two components. The umbrella argument is that the documents being sought did not amount to compellable evidence on a correct application of s. 64(1) of the Act of 2008 and accordingly the claim of privilege should have been upheld and the District Court Judge acted *ultra vires* the statute in failing to do so.

15. It is contended that the evidence is not compellable on two distinct bases. First, it is suggested that the current request is de facto an attempt to obtain what amounts to third party discovery of the appellant's medical records in circumstances where there is a clear line of Irish jurisprudence to say that there is no power to do so under Irish law. Secondly, it is contended that in any event production of the records would breach the appellant's right to privacy guaranteed under Article 40.3 of the Constitution and/or her right to respect for her private life guaranteed under Article 8 of the ECHR, and that accordingly their production would not be compellable under Irish law.

16. In circumstances in which the trial for which the documents are said to be required is already under way in the UK, and having regard to the time constraints thereby created, we have decided to hear and determine only the first component of the appellant's umbrella argument in the first instance. If this Court upholds the appellant's claim based on that component it will not be necessary to proceed to address the second component. However, in the event of holding against the appellant in relation to the first issue we will arrange to reconvene in early course for the purposes of considering whether it is necessary to hear and determine the second component of her umbrella argument.

The relevant legislative provisions

17. Sections 63 and 64, respectively, of the Act of 2008 are in the following terms:

> "63.— (1) This section applies, subject to section 64 , in relation to a request for assistance in obtaining evidence in the State from a person (in this section referred to as a "witness") for the purpose of criminal proceedings, or a criminal investigation, in a designated state.
>
> (2) On receipt of such a request the Minister, if of opinion that this section applies in relation to it, may, subject to subsection (3)—
>
> (a) request the President of the District Court to nominate a judge of that Court to receive the evidence to which the request relates, and
>
> (b) send the judge a copy of the request and of any accompanying or related documents.
>
> (3) The Minister shall not exercise the power conferred by subsection (2) unless an assurance is given by the requesting authority that any evidence that may be supplied in response to the request will not, without the consent of the nominated judge or the witness, be used for any purpose other than that permitted by the relevant international instrument or specified in the letter of request.
>
> (4) For the purposes of this section the nominated judge—
>
> (a) has the powers of the District Court in criminal proceedings, including its powers—
> (i) in relation to securing the attendance of witnesses, the production of documents or other articles, taking evidence on oath, compelling witnesses to give evidence or to produce documents or other things and the conduct generally of the proceedings for the taking of evidence, and

(ii) under any enactment or rule of law relating to the protection of witnesses against intimidation,

(b) may direct that the evidence, or any part of it, be received otherwise than in public if of opinion that such a direction is necessary to protect—

(i) the witness or other person, or

(ii) confidential or sensitive information, and

(c) shall inform the witness of his or her rights under section 64 .

(5) The evidence may be given through a live television link in any case where it may be so given in proceedings under any enactment.

(6) Any person who is summoned to give evidence and who, without reasonable excuse, does not answer any question or comply with a requirement to produce any document or other thing is guilty of an offence and liable, on summary conviction, to a fine not exceeding €2,500 or imprisonment for a term not exceeding 6 months or both.

(7) The Bankers' Books Evidence Act 1879 applies to proceedings under this section as it applies to other proceedings before a court.

(8) No order for costs may be made in the proceedings."

"64.— (1) A person is not compelled to give any evidence in proceedings under section 63 which he or she could not be compelled to give—

(a) in criminal proceedings in the State, or

(b) subject to subsection (2), in criminal proceedings in the state concerned.

(2) Subsection (1)(b) does not apply unless the claim of the person to be exempt from giving the evidence is conceded by the requesting authority.

(3) Where the claim is not conceded, the person may (subject to the other provisions of this section) be required to give the evidence to which the claim relates, but the evidence shall not be transmitted to the requesting authority if a court in the state concerned, on the matter being referred to it, upholds the claim.

(4) Without prejudice to subsection (1), a person may not be compelled under this section to give any evidence—

(a) in his or her capacity as an officer or servant of the State, or

(b) if to do so would be prejudicial to the security of the State.

(5) In any proceedings referred to in subsection (1) a certificate purporting to be signed by or on behalf of the Minister to the effect that it would be prejudicial to the security of the State for a person to give any evidence is admissible, without further proof, as evidence of that fact.

(6) In this section references to giving evidence include references to answering any question and to producing any document or other thing, and the reference in subsection (3) to the transmission of evidence given by a person is to be construed accordingly."

The judgment of the High Court

18. The High Court judge addressed the case under two main headings. The first was "*Are the orders ultra vires the 2008 Act?"*. The second was "*Do the orders wrongfully interfere with the applicant's right to privacy?"*. For the moment it is only necessary to be concerned with the first question.

19. The High Court Judge noted that section 64(l)(a) of the Act of 2008 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. He accepted that it was clear from *The H.S.E. v His Honour Judge White & Ors* [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. He also accepted that it was clear from *J.F. v. District Judge Reilly & Ors* [2008] 1 I.R. 753 that the procedure under Part IA of the Criminal Procedure Act, 1967 ("the Act of 1967") (formerly preliminary examination) is not a disclosure device to enable such third-party disclosure to be done at the District Court level. He further observed that while Barrett J in *C. v. O Donnabhain* [2016] IEHC 74 (Unreported, High Court, 11th February, 2016) had raised (*obiter dictum*) the issue of the possible relevance of s.4L of the Act of 1967 in such a context, he personally had doubts that it could be used for such a purpose in the light of current jurisprudence.

20. The High Court judge went on to state that 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 (the Rules of 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(l)(b) of the Act of 1967 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"*.

21. In the High Court judge's view the issue to be determined depended on the meaning of s. 64(1)(a) of the 2008 Act which in his view was somewhat ambiguous and capable of two alternative interpretations. 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. 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.

22. The High Court judge felt that to give s. 64(1)(a) of the Act of 2008 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.

23. In his view the interpretation that gives best effect to s. 64(1)(a) of the Act of 2008 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. He concluded that 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 Rules of 1997 rules and s. 4K of the Act of 1967. That being so in his belief, the first ground of challenge had to be rejected.

Submissions by the Parties

The Appellant's Submissions.

24. It was submitted on behalf of the appellant that the High Court judge erred in holding that simply because persons may be ordered to attend a court with documents under the Act of 1967 and the Rules of 1997, such persons are compellable for the purposes of section 64(1)(a) of the Act of 2008.

25. Section 4K of the Act of 1967, as amended, empowers a trial court to issue a witness summons ordering a person attend the trial court and to produce documents at that trial court. The provision states:

> (1) The trial court may, in relation to the trial of the accused, make an order requiring a person whose statement of evidence was served on the accused or whose deposition was taken to—
>
> (a) attend before the trial court and give evidence at the trial of the accused, and
>
> (b) produce to that court any document or thing specified in the order.
>
> (2) A person who without just excuse disobeys a witness order shall be guilty of contempt of the trial court.
>
> (3) If, on application by the prosecutor or the accused, the trial court is satisfied by evidence on oath that any person is unlikely to comply with a witness order, the court—
>
> (a) may bind the person by recognisance to appear at the trial,
>
> (b) if the person refuses to be so bound, may, by warrant, commit him to custody until the trial or until he enters into a recognisance, and
>
> I shall have the same powers for enforcing the person's attendance before the trial court for the purposes of this sub-section as that court has in relation to witnesses in criminal proceedings.
>
> (4) In this section, "witness order" means an order made under subsection (1).

26. Order 21, rule 1 of the District Court Rules states:

> "Any party desiring the attendance of any person to give evidence or to produce any accounts, papers, documents or things to the Court, may apply for, and the Judge, Clerk or a Peace Commissioner may issue, a witness summons (Form 21.1 Schedule B) requiring the person to whom the summons is directed to comply with the requirements thereof at the time and place stated therein."

27. Counsel for the appellant observes that s.4K and O. 21, r.1 apply both to the giving of oral testimony and the production of documents and this distinction is also applicable to sections 63 and 64 of the Act of 2008 wherein the definition of "giving evidence" includes:

> "…references to answering any question and to producing any document or other thing, and the reference in subsection (3) to the transmission of evidence given by a person is to be construed accordingly".

28. It was submitted on behalf of the appellant that the High Court judge erroneously took a view that the existence of a witness summons procedure renders any person compellable to produce documents at a criminal trial or hearing. The existence of a witness summons procedure does not render as void any rule of law whereby a person cannot be compelled to give evidence or produce documents in a criminal trial or hearing. If a person cannot be compelled to give oral testimony or produce documents for the purpose of criminal proceedings in this jurisdiction, that person cannot be so compelled to give such evidence or produce those documents pursuant to a request under section 63.

29. The appellant has contends that in this jurisdiction, the use of section 4K of the Act of 1967 in order to compel third parties to produce documents, in particular, medical records, for the purposes of criminal proceedings has been held to be compulsion without a legal basis and jurisdiction. In *J.F. v. District Judge Reilly & Ors* [2008] 1 IR 753 ("JF"), the Supreme Court considered the use of the *subpoena duces tecum* procedure to seek the production of documents from third parties extraneous to criminal proceedings.

30. In *JF*, the appellant therein appealed to Supreme Court against the refusal of the High Court to grant judicial review of the decision of a District Court trial judge declining to order healthcare workers to produce medical documentation in the absence of consent of the patient to such production. The appellant in JF was being returned for trial to the Central Criminal Court on sexual offence charges and depositions had been taken at the District Court pursuant to the provisions of section 7(2) of the Act 1967

(since repealed). For the purposes of the depositions hearing, the applicant sought reports and documents from social workers connected to the Midland Health Board pertaining to the complainant as it was believed the documents:

> *"…[made] reference to unlawful sexual activity on the part of a person other than the applicant and that at any rate the complainant was at the relevant time "out of control". [Counsel for applicant therein] submitted that any professional dealings relating to the mental state of the complainant could be relevant to credibility, and, therefore, relevant to the defence." (JF at p. 757)*

31. The Midland Health Board claimed privilege over the information sought and the applicant's solicitor served subpoenas duces tecum on the social workers. A number of social workers attended and, following an objection by the prosecution therein, the District Court Judge refused to direct the social worker to produce the documents for the sight of the applicant's solicitor.

32. Geoghegan J., delivering the single judgment and unanimous decision of the Supreme Court held (at p.760) that, *"quite clearly, the deposition procedure cannot be used in the way it was"*. The Court found that:

> *"[t]he device of using or, more accurately, misusing the deposition procedure is an even less appropriate method of getting around the difficulty of obtaining documentation from a third party than the condemned use of the civil discovery procedure".*

33. Counsel for the appellant in the present case asks us to note that the condemnation referred to by Geoghegan J refers to the clear jurisprudence in this jurisdiction that third parties cannot be compelled to produce documents for the purposes of criminal proceedings. In *The People (Director of Public Prosecutions) v Sweeney* [2001] 4 IR 102 ("Sweeney"), the judge presiding at trial at the Central Criminal Court purported to exercise a power under discovery rules in the Rules of the Superior Courts in a criminal trial and made the order against the Rape Crisis Centre. Geoghegan J., again delivering a unanimous decision of the Supreme Court, undertook a comprehensive analysis of the rules of discovery and jurisdiction relating to discovery. However, in respect of the order made by the trial judge in that case, Geoghegan J. found that the High Court judge had no jurisdiction to make the purported discovery order.

34. In *D.H. v His Honour Judge Groarke & Ors* [2002] 3 IR 522 ("DH"), the Circuit Court trial judge in that case refused to make an order directing that the North Eastern Health Board make discovery of documents in the possession of the Health Board. In that case, two social workers, with whom the complainant engaged, made statements which were contained in the Book of Evidence. At the depositions hearing, the social workers referred to notes they made of conversations with the complainant. A motion on notice, on behalf of the accused, was served on the Health Board and the DPP requiring those parties to make discovery of all reports, notes and records in respect of any allegations of sexual offences perpetrated on the complainant. The Supreme Court found (at p. 525) that:

> *"the essential reason for the decision of the [Circuit Court] Judge to refuse the motion…was that the applicant was not entitled in advance of the trial to obtain the material sought from the first notice party".*

35. The applicant in *DH* had sought that the Supreme Court overturn that Court's decision in Sweeney. However, the Supreme Court declined to do so. Keane CJ (delivering the unanimous decision of the five member bench) held that Sweeney was "*correct in point of law*" and the Circuit Court Judge had no jurisdiction to make the order sought by the applicant.

36. This Court was also referred to my own decision in *The H.S.E. v. His Honour Judge White & Ors* [2009] IEHC 242 (Unreported. High Court, Edwards J., 22nd May, 2009) *("HSE v. White"*). In that case a motion was brought before the Circuit Criminal Court, on behalf of an accused person who was facing trial for manslaughter and reckless endangerment, seeking orders for disclosure against the HSE in relation to records of that organisation's investigation into the deceased, whose death laid the basis for the prosecution against the applicant. The Circuit Court Judge granted the orders sought and directed that the disclosure be made to the DPP for onward transmission to the accused. I held, at page 129 of my judgment, that the order made by the Circuit Court Judge was:

> *"…in effect a mandatory order, in reality an injunction, directed to a non-party in the criminal proceedings requiring that party to disclose the material in controversy to the first named notice party. Though not an order for discovery it is a mandatory order that is in certain respects, but not in other respects, analogous to or akin to an order for third party discovery on the civil side."*

37. I had gone on to state that it was an unsatisfactory situation that the law does not provide for a third party disclosure procedure. However, this was a matter for the Oireachtas to remedy. I held that in the circumstances the Circuit Court judge had exceeded his jurisdiction in making the orders.

38. Counsel for the appellant has submitted that, arising from this jurisprudence, it is clear that there is no jurisdiction to compel a person who is not a party to criminal proceedings to produce documents for inspection by a party to criminal proceedings. Moreover it is also clear that, in criminal proceedings, a form of mandatory order not intended for that purpose, including the *subpoena duces tecum* procedure, cannot be deployed to that end.

39. Counsel for the appellant contends that the view held and realised by the High Court judge is one which departs from a required practical application of the "compellability" requirement in s. 64 of the Act of 2008. Sections 4K of the Act of 1967 and O. 21, r. 1, of the Rules of 1997 cannot be viewed in a manner detached from the context in which the rules of compellability may require to be applied in the particular case, merely on the basis that a potential witness or a holder of documents is a person who might be compellable in a different factual scenario. Any provisions which allow generally for the compulsion of persons to give oral testimony or to produce documents do not surpass laws that render persons non-compellable in a specific context or contexts from giving oral testimony or producing documents.

40. As s. 64 of the Act of 2008 refers to the evidence sought to be given on foot of a request for specific evidence under s. 63, the factually specific profile of the person from whom evidence is sought cannot be overlooked as it is only by reference to the specific factual profile of an individual that s 64(1)(a) can be relevant. It is urged that one cannot determine a person's "compellability" or legal standing as a witness without considering facts specific to that person. Therefore, the finding of the High Court judge disregards the fact that these medical personnel, being non parties to, or even witnesses in, any criminal case, would not be compellable in this jurisdiction to produce appellant's medical records for inspection by a party to such a case, without the consent of the appellant.

41. It was further submitted that the purpose, or, at least, the effect of s. 64(1)(a) is to ensure that the legal position of a person, and the laws delineating the boundaries of their role in criminal proceedings, in this State remains unchanged and protected in the

face of a demand by another state wherein such a legal position or protection may not exist. Indeed, persons giving evidence under s. 63 must have that protection under s. 64 as the failure to comply, within this jurisdiction, with a summons pursuant to s. 63 may give rise to penal sanctions for failure to cooperate with and assist the criminal process of another jurisdiction. It was suggested that it could hardly have been the intention of the Oireachtas that a more onerous duty would be owed by a person in terms of co-operation with the criminal process of a foreign state than would be owed by that person in connection with the criminal process of own State.

42. Counsel for the appellant suggests that, if the DPP, or a defence legal team, in criminal proceedings in this jurisdiction sought the compulsory production of medical records from persons outside of the proceedings, such persons would not be compellable to give such evidence as such compulsion is without jurisdiction. Yet, it is said, this is precisely what the respondent is seeking on behalf of the CPS.

43. Finally, it was urged upon us that the jurisdiction of the District Court Judge, to receive the evidence and then transmit onwards the subject of the request made on the 13th of May, 2016, is predicated on the three medical personnel being compellable to produce the documents under s. 64. As those witnesses are not compellable within this jurisdiction to so produce the medical records, the jurisdiction of the District Court Judge was exceeded.

The Respondent's Submissions

44. In reply, the respondent has submitted that s. 64(1) of the Act of 2008 must be given effect in accordance with its clear and specific terms. It is contended that the subsection means that a person cannot be compelled to give evidence in proceedings pursuant to s.63 of the Act of 2008 which he or she could not be compelled to give in criminal proceedings in the State, and the following examples are proffered:

> (i) An accused can not be compelled to give evidence in criminal proceedings at the behest of the prosecution;
>
> (ii) A spouse is only compellable at the instance of the prosecution in certain instances as set out in s.22 of the Criminal Evidence Act, 1992;
>
> (iii) A co-accused is not compellable at the instance of another co-accused in criminal proceedings;
>
> (iv) A person called to give evidence can invoke the privilege against self-incrimination and their evidence is non-compellable in those circumstances;
>
> (v) Such other issues of non-compellability as are recognised by law.

45. Counsel for the respondent has submitted that apart from the matters outlined above, s.64 must be given an interpretation in accordance with its specific terms in the context that the Act of 2008 applies to mutual assistance applications involving co-operation with another State. It does not relate to the issue of the non-availability of a third party discovery application procedure in criminal proceedings in the State itself. Rather, the correct test it is contended, which was applied by Humphreys J. in the High Court, was to consider the section on its own terms and consider whether the witnesses in question would have been compellable in criminal proceedings in the State. It is submitted that the decision of the District Judge was also correct where he decided to require the witnesses to provide the documents in question.

46. Counsel for the respondent contends that support for this construction can be found in the judgment of Denham J. (as she then was) in *Brady v. District Judge Haughton* [2006] 1 IR 1 at para 125 (p. 43):

> *"The [Criminal Justice] Act of 1994 [which in so far as it related to mutual assistance was replaced by the Act of 2008] enables the obligations undertaken by the State in the European Convention on Mutual Assistance in Criminal Matters and the Protocol on Mutual Assistance to be fulfilled under domestic legislation. This Convention is, as stated in the preamble, "to achieve greater unity among" members of the Council of Europe, in the belief that "the adoption of common rules in the field of mutual assistance in criminal matters will contribute to the attainment of this aim". It is reasonable to construe this intention to the Oireachtas in incorporating the Convention within the domestic law of Ireland by the Act of 1994. This construction is supported by the words of the preamble which state "An Act … to make provision for international co-operation in respect of certain criminal law enforcement procedures". Consequently this legislation was enacted by the Oireachtas with the intention of establishing common rules to support the development of mutual assistance between the states. It should be construed accordingly."*

47. Thus, it was submitted, the High Court assessed and interpreted the legislative provision at issue, i.e., s. 64(1)(a) of the Act of 2008, appropriately, and with due regard to the fact s. 63 and s. 64 are together intended to give effect to the State's international commitments.

48. Counsel for the respondent suggests that further support for the correctness of the High Court judge's interpretation is to be found in the fact that the limited number of circumstances where assistance may be refused by the respondent are specified in s.3 of the Act of 2008 . The fact that documents such as medical records are held on behalf of another party is not a ground specified. In addition, the Minister must, pursuant to s.63(2) of the Act of 2008, be satisfied that any request received by him to obtain evidence for use in the requesting state comes within the terms of the section. It is therefore the Minister and not the District Court who must ensure that the request complies with the provisions of the Act.

49. It has been further urged that while s. 64 of the Act then refers to non-compellability of witnesses in criminal proceedings in the State, it does not go so far as to exclude the evidence of otherwise compellable witnesses where that is for the purposes of providing documentation for disclosure in criminal proceedings in the requesting state. The witnesses in this application were all summonsed to the District Court and they could not avail of any prohibition on their compellability as witnesses.

50. It was indicated on behalf of the respondent that she accepts the decisions of the Superior Courts, including those in *Sweeney, DH, JF* and *HSE v. White* to the effect that third-party discovery or disclosure type procedures are not available in criminal proceedings in the State. However, counsel for the respondent submits, the appellant's submissions proceed on a fundamental misunderstanding of the s. 63 process itself whereby they contend that the non-availability of that procedure for criminal proceedings in this jurisdiction applies to the s.64 of the 2008 Act. Section 64 of the 2008 Act is not stated in those terms and it is submitted that this Court must give effect to the section in accordance with its terms.

51. The respondent argues that the three witnesses who produced the controversial records were summonsed to give evidence before District Judge O'Neill in October/November 2016 and were required to produce documents as part of their evidence. Those witness summonses were issued pursuant to s.63(4) of the 2008 Act, which gave District Judge O'Neill the same powers as he would have in criminal proceedings in the State itself. Thus, the analogy with Order 21 rule 1 of the District Court Rules does arise. The issue of **compellability** pursuant to s.64 of the 2008 Act can only be assessed in that framework and not with regard to the wider issues of third party discovery and third party disclosure in criminal proceedings in this jurisdiction.

52. We were reminded by counsel for the respondent that the District Judge does not sit as a court of law for the purposes of the application. He is instead a *persona designata* for the purposes of the application itself as determined by the High Court in *de Gartori v. Smithwic*k [2000] 2 I.R. 553, and re-iterated by the Supreme Court in *Brady v. Haughton* [2006] 1 I.R. 1.

53. Further, our attention has been drawn to *Agrama v. Minister for Justice* [2015] IESC 94 in which O'Donnell J, giving judgment in the Supreme Court, said the following with respect to the role of the District Judge (at para 20):

> *"For the purposes of this case, it is I think important to appreciate the limited function performed by the District judge under the Act. It is merely the gathering and transmission of evidence, in this case in aid of an investigation. While it makes sense that such a process should be carried out in a court setting, both from the point of view of formality, and for ease of cooperation since in many civil law countries, investigations are carried out under court supervision, court proceedings were not required either as a matter of Irish constitutional law or for compliance with the Convention. The role of the District Court was limited to the issuance of summonses if requested, and engaging, in the words of Murray C.J. at p.23 (para. 61) of the judgment, in the 'process of identifying what evidence before him [or her] has been sought in the request and furnishing it to [the Minister]."*

54. Relying on the *de Gartori, Brady* and *Agrama* line of jurisprudence, counsel for the respondent has submitted that, since the District Judge does not sit as a court of law, issues concerning third party discovery cannot and do not arise in those circumstances.

55. It was submitted that in the circumstances the three persons called as witnesses in the application were compellable witnesses. They did not have any of the reasons for non-compellability which might arise for an accused person, a spouse (in some circumstances) a co-accused or other person in the circumstances instanced earlier, so as to be exempt from giving evidence.

56. Counsel submitted that they were obliged by the witness summonses served on each of them to produce records. They could have been similarly obliged by a witness summons served in District Court criminal proceedings under Order 21 rule 1 of the Rules of 1997 or in the Circuit Court in a criminal trial under s. 4K of the Act of 1967. Thus, it was submitted, the order made by the District Judge was valid. He had proceeded to duly received the evidence, acting in his capacity as the designated person to do so, and on the basis that same would be transmitted to the UK authorities by the Central Authority (the respondent). In the circumstances, it was submitted, the application to quash his orders, and for other reliefs, by way of judicial review was correctly refused.

Analysis and Decision

57. It is not the case that records and information in the possession of a doctor or other health professional or a relevant institutional custodian of medical records enjoys any absolute constitutional or other recognised privilege against compulsory production in a court of law, and that the doctor, professional, or institution concerned can never be compelled to produce such material in evidence in criminal proceedings. For example, a doctor or health professional is not in the same position as a priest or confessor who has the benefit of sacerdotal privilege which is absolute, or even a lawyer who has the benefit of legal professional privilege which is also absolute where it arises. The relationship between a doctor or medical professional and a patient is rather a confidential relationship arising by virtue of long standing convention and contract, and reinforced by the patient's right to privacy. Neither the confidence of the patient, nor the right to privacy of the patient, will be lightly overridden by any court but it is a question of discretion, and will usually involve a balancing of rights and interests. It is not, however, a relationship that attracts an absolute privilege, unlike in the case of the other examples given.

58. I agree with counsel for the appellant, and to be fair counsel for the respondent does not dispute it, that it would not be possible to compel the three witnesses called under the mutual assistance procedure in this case to produce the appellant's medical records solely for the purposes of disclosure in connection with criminal proceedings in this jurisdiction. However, this is not because the material is privileged. It is because there is at present no lawful procedural means, whether one calls it third party discovery, or third party disclosure, to compel its production for **that purpose**, a matter that is capable of rectification by the legislature although legislation is required.

59. It is relevant, however, that the material at issue is not intended to be disclosed in connection with criminal proceedings in this jurisdiction. Rather it is intended to be transmitted to the prosecuting authority in the requesting state (the CPS) in the context of a statutory procedure in the requesting state that allows that authority to lawfully receive it for the purpose of assessing its potential significance in the context of criminal proceedings in the requesting state, and that further allows for its possible disclosure to the defence in those proceedings. Accordingly, what is proposed is not an attempt to get around a lacuna in Irish criminal procedure. The requesting state is not concerned with Irish criminal procedure. It is only concerned with its own criminal procedure, which allows them to do what they are seeking to do.

60. The critical point, it seems to me, is that the production of medical records is in principle otherwise compellable in a criminal proceedings in this jurisdiction. The doctor or other health professional or relevant institutional custodian can in theory be summonsed as a witness in criminal proceedings and be asked to bring with them, and to produce, the medical records of a patient. The doctor or other person concerned may certainly object before the relevant court to producing the records having regard to the confidential nature of the professional relationship and patient's right to privacy. Moreover, the patient, if he or she is on notice, which they should be, may also raise an objection. Those objections might or might not be upheld by the court as a matter of discretion, but neither doctor nor patient would be correct in asserting that the material was absolutely privileged and that its production could never be ordered in any circumstances.

61. Section 64 (1) (a) is couched in terms that "*a person is not compelled to give any evidence in proceedings under section 63 which he or she could not be compelled to give in criminal proceedings in the State".* Moreover "*evidence*" is said, by virtue of s.64(6) to include references "*to answering any question and to producing any document or other thing"*. It is clear to me from the wording of these provisions considered firstly on their own, then having regard to their place within the scheme of the Act of 2008 as a whole, and then having regard to the purpose of the Act of 2008 as expressed in its long title, that the Oireachtas intended compellability to be approached as a matter of law and not as a matter of procedure. The High Court judge was therefore right in his interpretation. The position in Irish law is that medical records are not per se absolutely privileged so that their production can never be required. It is, however, true that due to the procedural lacuna identified in the *Sweeney, DH, JF* and *HSE v White* there may be

practical obstacles to compelling their production for disclosure purposes in criminal proceedings in this jurisdiction. However, this is a procedural difficulty only, and one that only arises in particular circumstances. The material does not enjoy an absolute privilege precluding its production in evidence in any circumstances as a matter of law.

62. In circumstances where I would uphold the interpretation of the High Court judge with respect to s. 64(1)(a), it becomes necessary to proceed to consider whether the Court needs to reconvene to hear and determine the second component of the appellant's umbrella argument.

63. In that regard I will await counsel's submissions but would observe that before the High Court would have been entitled to interfere with the District Judge's decision with respect to second component issues it would have to have been satisfied that he had exceeded his jurisdiction in some respect. If his decision was ostensibly within jurisdiction then, even if the High Court judge, or for that matter this Court, were to disagree with his decision, that disagreement would not *per se* render his decision amenable to being interfered with in proceedings claiming relief by way of judicial review.