Neutral Citation: [2016] IEHC 254

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 81 J.R.]

BETWEEN

M.M.

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT delivered by Mr. Justice Michael White on the 4th May, 2016

1. The applicant was granted leave to bring judicial review proceedings on 16th February, 2015, seeking the following reliefs:-

(i) An order of *certiorari* by way of application for judicial review quashing the decision of An Garda Síochána dated 18th November, 2014, refusing to erase and/or remove the data recorded on the PULSE system, and in particular, PULSE Incident No's 8596443 and 9596470, relating to (i) the applicant's son, (ii) the applicant's daughter and (iii) the applicant herself.

(ii) An order of *mandamus* by way of application for judicial review compelling the respondent to erase and/or remove or otherwise delete the records on the PULSE system, and in particular, PULSE Incident No's 8596443 and 9596470, relating to (i) the applicant's son, (ii) the applicant's daughter, and (iii) the applicant herself.

(iii) A declaration that the respondent, her servants or agents, fettered her discretion in applying a fixed policy of refusing to erase and/or remove any data recorded on the PULSE system, in the decision of An Garda Síochána dated 18th November, 2014, without fully considering the merits of the applicant's request for erasure/removal and/or whether the retention of the records was necessary or proportionate in all the circumstances of the case.

(iv) A declaration that the respondent has breached the applicant and her children's' rights to dignity and to privacy and to the family rights under the Constitution and under Article 8 ECHR.

(v) A declaration that the retention of the records in question on PULSE constitutes a disproportionate interference with the applicant and her children's rights under the Constitution and under Article 8 ECHR.

(vi) A declaration that the respondent, her servants or agents has acted in breach of fair procedures, and breach of natural and constitutional justice and in breach of the duty to give reasons in failing to give any or any adequate reasons for the refusal to erase and/or remove the data in question from the PULSE system.

(vii) An injunction by way of application for judicial review restraining the respondent from communicating or otherwise disclosing any information about the applicant and her children without their express permission.

(viii) Damages.

(ix) Such further or other order as to this Honourable Court should deem appropriate.

(x) An order providing for costs.

The grounds relied on by the applicant are as follows,

• That the respondent has refused to erase and remove the data recorded on the PULSE system in No's 8596443 and 9596470, and has thus unduly fettered her discretion by applying a so called long standing policy without considering individual facts and circumstances surrounding the applicant's request.

• The refusal to remove the record constitutes a disproportionate interference with the applicant and her children's rights to dignity, privacy and family life, given its blanket and open ended nature.

• The records in question are open to subjective interpretation and speculation on the part of a person who has access to them.

• The precise reasoning of the respondent is unclear and is incapable of being ascertained in relation to the core issue of why exactly the respondent is applying a policy decision in this particular case.

2. The applicant issued a motion on 24th February, 2015, returnable originally for 10th March, 2015, seeking the reliefs.

3. The grounds relied on by the respondent in the statement of opposition filed and served on 28th April, 2015 are,

• The respondent contests the applicant's standing to seek the reliefs sought in the proceedings.

• The applicant is not entitled to relief by reason of the availability of the more appropriate alternative remedy to make a complaint to the Data Protection Commissioner.

• The judicial review is brought on a mistaken basis that the PULSE record is inaccurate.

• The applicant's concern regarding evidence is misconceived.

• That the maintenance of a complete PULSE record which is factually accurate is not capable of causing any harm to the applicant or her children and does not breach any of their rights.

• Insofar as the respondent's policy as regards the maintaining of data on PULSE can properly be described as a fixed policy. It is not an unlawful fettering of discretion.

• In order to properly conduct its functions, the respondent requires to maintain an accurate record of incidents such as the making of a complaint and a subsequent notification to the HSE/Child and Family Agency.

• That the PULSE records in relation to the applicant's children or departmental records within the meaning of s. 2 of the National Archives Act 1986, and the respondent is obliged to retain and preserve the records pursuant to s. 7 of the said Act unless the Director of the National Archive has authorised their disposal.

History of the involvement of An Garda Síochána
4. On 18th September, 2009, a notification was received by the Domestic Violence and Sexual Assault Investigation Unit, Harcourt Square, Harcourt Street, Dublin 2, from the Provincial office of a particular order of the Catholic Church This notification related to allegations of sexual abuse that were made in 1995 by Ms. M. against a former priest, Fr. Z. The alleged abuse took place in a provincial city in or around 1981, when Fr Z was a member of that particular order of priests. This notification stated that Ms. M. had met with the Provincial of that Order and it stated that she did not want him prosecuted and did not want her own parents to know of the abuse. It was outlined in the notification that Fr Z had left the Order in the mid 90s and changed his name back to his baptismal name of A. The notification also stated that A resided abroad with his wife and two children but his exact location was not provided.

5. Further correspondence was received from the Order on 4th April, 2011, and 31st August, 2011, by An Garda Síochána which established the last known address in Ireland of A and of the names and dates of births of the children.

6. In accordance with the Children's First guidelines in the National Guidance for the Protection and Welfare of Children published by the Department of Children and Youth Affairs in 2011, An Garda Síochána issued a written notification to the HSE.

7. There were notifications in relation to each child which were completed on a standard form template document headed "Notification of Suspected Child Abuse to Health Service Executive".

8. Part of the standard form document also stated "the above named child has come to notice as a possible victim of child abuse". Part of the standard form at para. 2, stated, "form of abuse suspected". There were four boxes which had to be ticked: neglect, physical, sexual or emotional. In each notification, the sexual box was ticked.

9. Both notifications then contained additional information which recited the nature of the original complaint of sexual abuse made by Ms. M. against A The other information was a straight forward narrative account.

10. Unconnected with this referral to the HSE in respect of A's children, An Garda Síochána initiated an investigation into the original allegations of abuse. Statements were taken from two alleged victims, Ms. M. and Ms. A.M. who did not wish to pursue the allegations. However, a file was assembled, prepared and sent to the Director of Public Prosecutions and a direction of no prosecution was received by An Garda Síochána on 13th March, 2014. As part of this separate investigation, An Garda Síochána did not interview A

11. The applicant married A after he left the priesthood and they have two children, already referred to. In 2009, the family moved abroad to reside. They returned to Ireland in 2010 and remained in Ireland in 2010 and most of 2011. In early 2012, they decided to move abroad again.

12. The first time the applicant became aware of the referral by An Garda Síochána to the HSE was on 14th March, 2012, when two HSE social workers visited her home. The occupants of the family home at that time made contact with her.

13. The applicant and her husband, A cooperated fully with the child protection investigation carried out by the HSE and in furtherance of that investigation, an independent assessment was carried out by Mr. Kieran McGrath, an independent child welfare consultant, with very extensive experience in dealing with child sexual abuse.

14. The report was concluded on 7th December, 2012.

15. Mr. McGrath concluded that A had fully admitted what had transpired with the M. sisters was wrong and should not have occurred.

16. He concluded that A was at the lowest point possible of the low risk end of the scale for any repeat sexual abuse and he concluded that the risk was of such a low level that the HSE was entitled to close the case.

17. He noted that the applicant had cooperated fully with him in the carrying out of the risk assessment and resented any inference that she herself may have been a victim of A in her youth and that she would never tolerate any risk of inappropriate behaviour towards her children from anyone. She would never allow her love for her husband, A to cloud her judgment to the detriment of her children.

18. Both children were interviewed by Mr. McGrath and he found that they presented as intelligent, articulate and happy children who gave no indication of having any personal problems beyond what any child of their age would have. He did not recommend any further counselling.

19. Mr. McGrath recommended that the updating of the Garda PULSE Database should occur.

20. The applicant's solicitors wrote to the solicitors for the HSE on 31st January, 2013 and 8th February, 2013, and the HSE agreed to close their file on the applicant's family in February 2013. By email of 21st March, 2014, Detective Inspector Declan Daly confirmed

to the solicitor for the applicant that no prosecution was to be instigated against A It should be noted that the solicitors for the applicant in these proceedings also acted for A in respect of matters arising out of the investigation of the original allegations of abuse in the early 1980s.

21. The solicitors for the applicant first wrote directly to An Garda Síochána on 6th June, 2014, requesting that the children be removed from the PULSE system.

22. An Garda Síochána replied on 18th November, 2014, and as this is the letter on which the challenge is based, it is appropriate to quote it in full:-

> "Dear Ms. B.
>
> I acknowledge receipt of your correspondence of 6th June, 2014, concerning your client J & A and their children. The Garda Síochána and HSE work closely on issues relating to any reports that impact on the welfare of a child.
>
> Where a matter is brought to the attention of An Garda Síochána it is recorded internally. Any reports recorded are done so in accordance with Garda Síochána policy. This report and the information contained in the report is reviewed by supervisors and updated on a regular basis. Any additional information recorded associated with that report undergoes a continuous process of review by supervisors. It has been the long standing policy that for obvious reasons, the Garda Síochána does not erase any data recorded on the PULSE system.
>
> The Garda Síochána does not release statistics on data concerning the operation of the Garda PULSE system. Where an individual seeks to have sight of data held by the Garda Síochána, it is entirely open to that person to make a data protection application seeking the data relevant to them held by An Garda Síochána. If an individual wishes to make such an application it shall be processed in the usual manner.
>
> The Garda Síochána and HSE act in accordance with the Children First Policy 2011 when dealing with reported incidents. The recording of such reports has moved from a largely paper based system to a computerised system which includes the use of the PULSE system. It is Garda Síochána policy and in compliance with data protection obligations that only persons authorised may access information concerning any report of alleged sexual crimes within their official duties. No other person has authority to access data on an alleged sexual assault or report from the HSE.
>
> It is and shall be the policy of the Garda Síochána that any and all recorded data on the PULSE system is only accessed where an authorised person is entitled or obliged to do so as part of their official duties.
>
> It is therefore the position in regard to your client's request that I must inform you that An Garda Síochána cannot accede to your request to erase official Garda records from the PULSE system or any other official Garda personnel. I trust this answers your request. If I can be of a further assistance, please feel free to contact my office again."

Conclusion of the Court on Facts in Issue

23. An Garda Síochána did not conduct any investigation into the applicant, nor has she been referred to on the PULSE record and was not interviewed by An Garda Síochána.

24. There was never any suggestion either expressed or implied by An Garda Síochána that the applicant acted inappropriately or inadequately in her role as a mother in any capacity nor was it ever intimated or suggested either in writing or verbally to any person or third party that the applicant may have ignored, facilitated or colluded in any form of abuse, sexual or otherwise. There was no evidence that the applicant was herself, a victim of her husband when she had known him as a youth.

25. Although the respondent has claimed privilege in respect of the actual PULSE documents, they have been made available to the court and Inspector Declan Daly in his affidavit sworn for these proceedings on 30th April, 2015, has summarised accurately the PULSE record. The only reference by name to the children is on the heading of the document relating to the PULSE ID number of the HSE notification.

26. In respect of the PULSE record of the firdt child it states:-

> "Historical allegations of child sexual abuse circa 1981 made against A a.k.a. Z former priest, he has two children under the age of 18 years and may be child protection issues. Mr A has been independently assessed re risk associated with him by Mr. Kieran McGrath and Mr. McGrath is of the view that any risk that may be associated with Mr. A should be considered to be of such a low level that the HSE is entitled to close the case. Link to hse Incid 8596470, and crime incids 9162358, 9162397. File submitted to DPP, reference No. 2003/11452/DCT01. Direction received no pros dated 19-3-14, Ian Doyle HSE informed 8-4-14 by Detective Garda Carey SCMU."

27. Likewise, the only reference to the second child is in the headline in respect of the notifications to the HSE.

28. The record of that incident No. 8596470 recorded on the PULSE system states:-

> "historical allegations of child sexual abuse received against A a.k.a. F. Z former priest, he has two children under the age of 18 years and may be child protection issues. Social Worker, Marie Whelan visited and informed A had left the jurisdiction, family residing at this address not cooperative and have subsequently, sent solicitor's letter to hse. A independently assessed (RE risk associated with A.) by Kieran McGrath, Mr. McGrath is of the view that any risk that may be associated with Mr. A should be considered to be of such a low level that the HSE is entitled to close the case. Link to hse Incid 8596443, and crime incids 9162358, 9162397. File submitted to DPP, reference No. 2003/11452/DCT01. Direction received no pros dated 19-3-14, Ian Doyle HSE informed 8-4-14 by Detective Garda Carey SCMU."

29. The matter already referred to on the Children's First notification form which caused concern to the applicant is not on the PULSE record.

30. The only reference on the PULSE record specifically to the children is "he has two children under the age of 18 years and may be child protection issues".

31. Throughout the judicial review proceedings, there is reference by and on behalf of the applicant to a separate investigation arising out of the referral by the religious order to An Garda Síochána of the complaint of Ms. M. This was a separate investigation conducted by An Garda Síochána and not the HSE. The fact that a complainant in an allegation of sexual abuse does not wish to give evidence does not preclude or should have precluded An Garda Síochána from conducting an appropriate investigation into the incident. It is acknowledged that A at a time when he was a priest and a person in authority conducted a sexual relationship with a child, which included sexual intercourse. Once the referral was made to An Garda Síochána on 18th September, 2009, An Garda Síochána had a duty to investigate the matter and bring that investigation to a conclusion. This investigation has no relevance to the issues to be determined in this judicial review, other than to note the seriousness of the alleged criminal offence.

32. There are very unsatisfactory aspects to the referral under Children First guidelines to the HSE. There was a very substantial delay from the first referral to An Garda Síochána in September 2009 to the formal notification to the HSE in January 2012. The standard form wording of the notification leaves a lot to be desired, and is inaccurate. There should have been some previous notice to the applicant before social workers called to her home in March 2012. More robust earlier investigation by An Garda Síochána could have traced their whereabouts.

33. However, from the date of the referral to the HSE on 21st January, 2012, until the HSE closed their file in February 2013, there was no undue delay.

The Law

Right to Privacy
34. The right to privacy is an unenumerated constitutional right. Hamilton P. in his judgment in *Kennedy v. Ireland* [1987] I.R. 284 at p. 592, stated that the right to privacy is not an unqualified right and that its exercise may be restricted "by the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality".

35. Where a decision affects a fundamental right such as the right to privacy any interference with that right must be proportionate. Denham J. (as she then was) in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, explained this as follows at paras. 133-134:-

> "Fundamental rights arise in some cases where decisions are being judicially reviewed. When the decision being reviewed involves fundamental rights and freedoms, the reviewing court should bear in mind the principles of the Constitution of Ireland, 1937, the European Convention on Human Rights Act 2003 , and the rule of law, while applying the principles of judicial review. This includes analysing the reasonableness of a decision in light of fundamental constitutional principles. Where fundamental rights and freedoms are factors in a review, they are relevant in analysing the reasonableness of a decision. This is inherent in the test of whether a decision is reasonable.
>
> And while the term 'proportionality' is relatively new in this jurisdiction, it is inherent in any analysis of the reasonableness of a decision."

Article 8 European Convention on Human Rights
36. Article 8 ECHR provides as follows:-

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

37. In *M.D. (Minor) v. Ireland, AG & DPP* [2012] 1 I.R. 697, Denham C.J., giving the judgment of the Supreme Court, stated:-

> "It is clear from the judgments of this Court in Mc D. v. L. [2010] 2 I.R. 199 that the European Convention on Human Rights Act 2003 did not give direct effect in Irish law to the European Convention on Human Rights. As Murray C.J. stated at page 248, 'The Convention does not of itself provide a remedy at national level for victims whose rights have been breached by reference to the provisions of the Convention.'…Section 2 of the Act places an obligation on the courts in "interpreting and applying any statutory provision or rule of law…. In so far as is possible, subject to the rules of law relating to such interpretation and application, [to] do so in a manner compatible with the State's obligations under the Convention provisions."

38. The court has no difficulty in examining the applicant's claim in a manner compatible with the State's obligation under the Convention provisions.

39. It is open to an applicant to apply by way of judicial review to have information or data stored by a public body, permanently removed, subject to the proviso that the applicant has good reason, to apply by way of judicial review rather than making a complaint to the Data Commissioner.

40. However, Morris J. reflecting on the function of judicial review in the decision of *Bailey v. Flood* (Unreported, 6th March 2000) stated:-

> "The function of the High Court on an application for judicial review is limited to determining whether or not the impugned decision was legal, not whether or not it was correct. The freedom to exercise a discretion necessarily entails the freedom to get it wrong; this does not make the decision unlawful. Consideration of the alternative position can only confirm this view."

Conclusion

The Standing of the Applicant
41. At the time of the order for leave on 10th February, 2015, the applicant's children were 17 and 13, respectively. The applicant is

seeking judicial review on a combination of grounds, one of which is an allegation that the respondent has breached family rights contrary to the Constitution and Article 8 of the European Convention on Human Rights. While the applicant has made specific claims about breach of the children's rights which could have been litigated in the children's names through a next friend, because of the combination of relief sought which includes a claim on her own behalf and the fact that the children were minors on the date the leave order was granted, the court finds that the applicant does have standing to apply for the orders sought.

Alternative Remedy
42. It was open to the applicant to make a complaint to the Data Protection Commissioner alleging breach of the provisions of the Data Protection Acts 1988 to 2003, and the court is entitled in its discretion to refuse relief because of the availability of the more appropriate alternative remedy.

43. In *Tomlinson v Criminal Injuries Compensation Tribunal* [2006] 4 I.R. 321, the Supreme Court held that the question of whether an application for judicial review should be refused when an appeal was available depended on which was the more appropriate remedy on the facts of the case and not just on whether an alternative remedy existed or whether the applicant had taken steps to pursue such a remedy.

44. In view of the issues in this application, in particular the application to remove the data completely rather than update it and the respondent's response of 18th November, 2014, the more appropriate remedy was

45. judicial review.

Admissibility and Weight of Opinion Evidence
46. An issue has arisen about the admissibility and weight of the opinion evidence of Kieran McGrath. He is an acknowledged expert in the field. Insofar as he has expressed an opinion, the court takes it into consideration but notes in his original report, he recommended that the record be updated.

Decision
47. The court does not need to determine the issue whether there is an absolute discretion vested in the respondent to preserve all records placed on the PULSE system. It is appropriate to determine this application for judicial review on the specific facts as found by the court in this case.

48. The maintenance of a complete PULSE record which is factually accurate, and where access is limited to authorised officers, is not in itself harmful to the children of the applicant. The applicant is not referred to at all in the PULSE record.

49. The PULSE system (Police Using Leading Systems Effectively), is a computer system introduced by An Garda Síochána originally in November 1999, and contains a wide variety of information in respect of a wide variety of matters. The practice of An Garda Síochána that entries are not deleted as circumstances change or as investigations develop but rather updated as required so as to ensure they are accurate is so that PULSE is maintained as an accurate history of events which have occurred. There is a code of practice in operation for Data Protection in An Garda Síochána approved by the Data Protection Commissioner and issued originally on 15th October, 2007.

50. Access to PULSE records is limited to selected persons within An Garda Síochána. The uncontradicted evidence in this application is the PULSE records at issue in these proceedings are not accessible to all members of An Garda Síochána but are limited to the investigating member, members in the domestic violence and sexual assault unit, garda vetting and members above the rank of inspector.

51. While the standard form element of the Children First notification from An Garda Síochána to the HSE was misleading, there is nothing misleading or inaccurate about the PULSE record which the respondent insists on retaining. Objectively viewed by the court, there were child protection issues thus it was appropriate for the Children First Guidelines to be activated.

52. Insofar as there is a complaint that appropriate reasons have not been advanced by the respondent for the maintenance of an accurate historical record of steps taken by An Garda Síochána in a child protection matter, the respondent relies on the letter to the applicant's solicitors of 18th November, 2014. This letter, in the court's opinion, is a comprehensive reply, setting out the policy and approach of An Garda Síochána. It specifically addresses the concern of the applicant about access to information on the system.

53. The duty of the court is to balance the public interest against the undoubted right of privacy of the applicant's family.

54. There is logic to the submission on behalf of the respondent to the court that the retention of an historical record in relation to an investigation should be maintained. Insistence that a record always has to be maintained may not be a proportionate response to a request to delete records in all cases, however, in this case, interference in the applicant's private family life for the purpose of ruling out child protection issues was a proportionate response and the privacy of the applicant's family was interfered with to a proportionate extent necessary for the completion of this process.

55. In a number of averments, Superintendent (former Inspector) Daly, has stated that any garda vetting process would not have a negative impact on the children. The applicant's fear is based on a possible unauthorised access to the system by a member of An Garda Síochána who will then use the information for nefarious purposes or an error arising when an officer in the Garda Vetting Unit gives inaccurate information to an inquiring party. That contention by the applicant is speculation and not sufficient to have this Court order the removal of an accurate historical record on the computer system.

56. The reliefs sought are refused.