THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 204

Record No. 2019/139

Peart J.
McGovern J.
Kennedy J.

BETWEEN/

M.P.

APPELLANT

- AND–

THE TEACHING COUNCIL OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice McGovern delivered on the 23rd day of July 2019

1. This appeal arises out of a challenge by the appellant to the respondent's invoking of s. 19(1) of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 (hereinafter referred to as "the Act of 2012") to refer a matter to the National Vetting Bureau. The appellant brought an application for an interlocutory injunction restraining the respondent from making the notification and on the 1st August, 2018 the High Court made an order restraining the respondent from making the notification until further order. The appellant gave an undertaking not to carry out any activities for which a vetting disclosure would be required pending the trial of the action.

2. Section 47 of the Teaching Council Act 2001 ("the Act of 2001") provides at sub-s.(1):-

> "Where the Council is satisfied that it is in the public interest, the Council may, in relation to a registered teacher, apply to the High Court for an order that during the period specified in the order his or her registration shall be suspended."

Such an application shall be made in a summary manner and shall be heard otherwise than in public.

3. The appellant took these proceedings by way of plenary summons and directions were given from time to time as to how the action should proceed. The parties agreed that documents which had been discovered could be put into evidence without formal proof and neither party called evidence at the trial of the action but relied on the pleadings, affidavits which had been exchanged at the interlocutory application and a core bundle of documents from the respondent's discovery.

4. The matter proceeded to a full hearing and the plaintiff's claim was dismissed in a judgment delivered by Allen J. on the 26th February, 2019. This is an appeal against that decision. The appeal is brought on the following grounds.

> (i) The High Court judge erred in law in finding that s. 19 did not impose successive obligations at the end of each of any investigation enquiry or regulatory process;
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> (ii) the High Court judge erred in fact and in law in finding that the reason for the collapse of an enquiry are matters which would be of great weight in deciding whether there is a *bona fide* concern;
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> (iii) the High Court judge erred in fact and in law in acknowledging that there was a significant lapse of time between the complaint and the decision to make the notification but not having any concern about that delay;
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> (iv) the High Court judge erred in fact and in law in finding that the views formed by the statutory committee of the respondent do not amount to an assessment by the respondent for the purposes of s. 19;
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> (v) the High Court judge erred in fact and in law in finding that while the papers show that at the time of the s. 47 application some consideration was given to the respondent's obligations under s. 19. This showed that the respondent's obligations under s. 19 had not at that stage been "teased out";
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> (vi) the High Court judge erred in fact and in law in finding that there was no delay by the respondent;
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> (vii) the High Court judge erred in fact and in law in finding that even if there had been a delay on the part of the respondent in deciding whether it had a concern or in notifying any such concerns that would not have absolved the respondent of its obligations, or deprived it of its power to make a notification;
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> (viii) the High Court judge erred in fact and in law in finding that while the scheme of vetting has the potential to impact on the rights of the subject of an application for disclosure, those rights are affected not by the collection of information but by its disclosure; and
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> (ix) the High Court judge erred in fact and in law in finding that the s. 19 protections in terms of matters to be considered by the chief bureau officer are proportionate to the requirement to balance the rights of the subject and the declared purpose of the act.

Background
5. The appellant is a registered teacher. A complaint was made to the respondent arising out of an incident that occurred at night between the 28th-29th November, 2016 involving a male student, student A, who was aged nineteen at the time and who was picked up by the gardai in a distressed state on a motorway shortly after midnight on the 29th November, 2016. There was a smell of alcohol on his breath but he was not drunk. He explained that he was a student at a nearby school and he was brought back there where he was interviewed by the headmaster and later by a detective at a garda station. Student A described how he and the appellant had spent the evening drinking together and that the appellant tried to remove his tracksuit bottoms and had become angry when student A had refused to let him. After an argument, student A left the room on the pretext of looking for a cigarette but instead made his way onto a nearby motorway with a view to getting to Dublin Airport and going to his home which was in another E.U. country. Student B was also interviewed and gave evidence of drinking and smoking cannabis with the appellant and student A and described how the appellant had taken students A and B to his cottage in the country on weekends when they should have been at school. He also described the appellant's attempts to groom student A into engaging in a relationship describing how the appellant had said "… that he loves [student A] in a weird way". Evidence was given in the High Court that after student A was brought back to the school by the gardai the appellant approached him and said "You don't have to do this. Come here now and talk to me." This upset student A. Evidence was also given of an exchange of WhatsApp messages between the appellant and student A in which the appellant tried to persuade student A to change his account of events. The judgment of the High Court judge sets out in some detail the text of these messages.

6. When questioned by a detective garda, student A did not wish to make any complaint and the assessment of the gardai was that there did not appear to have been any offence disclosed.

7. At 7.30 a.m. on the 29th November, 2016 the school headmaster sent for the appellant who was suspended on full pay pending the outcome of an investigation. He was also required to leave the school premises immediately.

8. An internal investigation took place within the school which led to a disciplinary hearing before a panel of three board members. The panel found that some of the allegations formulated by the headmaster had been made out and others not. It concluded that the allegations which had been made out amounted to gross misconduct and recommended that the appellant be dismissed with pay in lieu of notice and this was done by letter of the 23rd December, 2016. The appellant exercised his right of appeal under the school's disciplinary procedures but later decided not to pursue the appeal.

9. On the 16th March, 2017 the headmaster filed a complaint with the respondent under Part 5 of the Act of 2001. Part 5 of the Act deals with fitness to practice enquiries, professional misconduct and other related matters. The headmaster expressed the view that the findings of gross misconduct made by the panel on the disciplinary hearing amounted to professional misconduct under. s. 42(1) of the Act of 2001.

10. At the commencement of the appeal, the Court was informed that the appellant was not proceeding with the grounds of mala fides or misfeasance. Essentially, the appeal turned on the question of delay and the meaning of the words "*as soon as may be*" in s.19 of the Act of 2012.

The Law
11. The respondent was established by Part 2 of the Act of 2001 and is a scheduled organisation under the Act of 2012. If the respondent has a *bona fide* concern that a person who is subject to an investigation enquiry or regulatory process may harm any child or vulnerable person it has a statutory obligation to notify that concern and the reasons for it to the National Vetting Bureau.

12. In this case following the conclusion of the Part 5 enquiry the respondent notified the appellant of its intention to make a notification to the bureau.

13. The Act of 2012 came into operation on the 29th April, 2016. Section 12 provides that "[a] relevant organisation shall not employ or engage or permit any person to undertake "relevant work or activities" unless the organisation has a vetting disclosure from the National Vetting Bureau". Section 13(4)(e) provides that an application for vetting disclosure must be accompanied by a declaration of consent by the subject of the application. Section 13 provides that when the bureau receives an application it is obliged to make such enquiries of An Garda Síochána as it deems necessary and undertake an examination of its database to establish whether there is any criminal record or "specified information" relating to the person concerned. In this context "criminal record" includes any record of pending prosecutions as well as convictions and whether within or outside the State "specified information" is defined as meaning information concerning a finding or allegation of harm to another person which has been received by the bureau from An Garda Síochána or a scheduled organisation, which is of such a nature as to reasonably give rise to a *bona fide* concern that the subject may:-

> "(i) harm any child or vulnerable person;
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> (ii) cause any child or vulnerable person to be harmed;
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> (iii) put any child or vulnerable person at risk of harm;
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> (iv) attempt to harm any child or vulnerable person; or
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> (v) incite another person to harm any child or vulnerable person.

14. It is not necessary that the concerns of the bureau relate to a child or vulnerable person who was the subject matter of the finding or allegation which has been received by the bureau. Nor does the person alleged or found to have been harmed have to be a child or vulnerable person. The question is whether the finding or allegation gives rise to a concern that the person against whom the finding or allegation is made may pose a risk to children or vulnerable persons.

15. When the prescribed enquiries and examinations have been concluded, if a member of staff of the bureau considers that there is specified information relating to the subject of the application, that person must refer the matter to the chief bureau officer. That officer must then notify the subject of the finding or allegation and invite a written submission from them. At that stage the chief bureau officer must make a determination whether the information should be disclosed, but must not make a determination that the information should be disclosed unless he or she reasonable believes that the information is of such a nature as to give rise to a *bona fide* concern that the subject may harm any child or vulnerable person or cause that child or vulnerable person to be harmed or put at

risk of harm or that he or she might attempt to harm any child or vulnerable person or incite another to do so; (see s. 15). The chief bureau officer must be satisfied that disclosure is necessary, proportionate and reasonable in the circumstances for the protection of children or vulnerable persons or both, as the case may be; (s. 15(3)(b)).

16. If the chief bureau officer determines that specified information should be disclosed, he or she must notify the subject of the determination and the reasons for it and inform the subject that he or she has a right of appeal to an appeals officer.

17. The notification obligations imposed on scheduled organisations are set out in s. 19 of the Act of 2012.

18. The statutory regime of the Act of 2001 and the Act of 2012 are comprehensively set out by the trial judge in his judgment. It has not been necessary to set them out in *extenso* in this judgment save where they are relevant to the points raised in the appeal.

19. While the notice of appeal raised issues of whether or not the respondent had a *bona fide* concern this was not pursued. Essentially the appeal turned on the question of delay on the part of the defendant in deciding whether it had a concern or in notifying any such concerns and the meaning of the words "as soon as may be" in s. 19 of the Act of 2012.

20. The respondent has power under s. 47 of the Act of 2001 to apply to the High Court for an order for the suspension of registration of a registered teacher if it is satisfied that it is in the public interest to do so. The executive committee of the defendant convened to consider whether such an application should be made. The appellant was unable to attend the meeting but was represented by solicitors. Having considered materials submitted to the meeting and written and oral submissions from the parties a decision was made in the public interest to make an application to the High Court for an order pursuant to s. 47 the Act of 2001. This was done by proceedings commenced by special summons on the 28th April, 2017.

21. The decision of the executive committee has not been challenged by the appellant and in the course of his judgment the High Court judge stated that it was never suggested that the concern which motivated the s. 47 application was not a proper concern or that the application was not properly brought in the public interest.

22. At the hearing of the s. 47 application the appellant offered a voluntary undertaking not to teach in any school in this jurisdiction or any member state of the European Union until further order of the court and he consented to the council making a notification of the terms of the order to the competent authorities identified in E.U. Directive 2005/36/EC, as amended. The directive facilitates the recognition of professional qualifications and to that end provides for, *inter alia*, competent authorities and single points of contact in each of the member states.

23. One of the reliefs sought by the respondent in the s. 47 application was an order giving liberty to communicate the terms of any order that the Court might make to the National Vetting Bureau. The issue is resolved by the respondent giving an undertaking in the following terms:-

> "(a) Advance reasonable notification will be given to [M.P.'s] solicitors should the [Council] decide in the course of its investigation that the statutory application of s. 19 of the Natural Vetting (Children and Vulnerable Persons) Act, 2012 [is] applicable and it decides to inform the Natural Vetting Bureau of this matter.
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> (b) Should the aforesaid investigation be determined in favour of [M.P.] the [Council] will give notification of same to all relevant parties even if there is no express statutory obligation to do so."

24. The undertaking was a reflection of the respondent's statutory obligations imposed by s. 19(3). The Court gave liberty to the appellant to apply in the event that he alleged that the respondent delayed in progressing with the investigation against him.

25. The following significant findings made by the trial judge have not been contested on the appeal:-

> (i) There was no evidence to support an allegation misfeasance in public office;
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> (ii) there was ample justification for the concern held by the respondent which required it to notify the National Vetting Bureau;
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> (iii) there was no justification for the allegation that the respondent's concern was not *bona fide* and that it therefore had an obligation to notify the National Vetting Bureau;
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> (iv) the respondent delegated the task of assessing whether the circumstances gave rise to a concern to the evidence of character panel which met on the 18th June, 2018 and decided that they did;
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> (v) the respondent sought and took advice regarding the requirements of s. 19 between January and June 2018;
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> (vi) the evidence of the Character Panel was unconnected with the disciplinary process; and
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> (vii) the reasons given by a "specified organisation" are not amenable to judicial review. The quality and weight of the reasons are matters to be considered by the chief bureau officer in deciding whether the information is such as to give rise to a reasonable belief.

26. The respondent argues that in view of these uncontested findings it follows that the respondent's decision to notify the National Vetting Bureau in June 2018 is unimpeachable on the merits.

27. I accept the submission of the respondent that the intention of the Oireachtas in enacting s. 19 of the Act of 2012 has to be construed in the context of the legalisation as a whole and that the long title of the Act is instructive in that regard. The title of the Act identifies its objects as being:-

> "…to make provision for the protection of children and vulnerable persons and, for that purpose, to provide for the establishment and maintenance of a National Vetting Bureau (Children and Vulnerable Persons) Database System; to provide for the establishment of procedures that are to apply in respect of persons who wish to undertake certain work or activities relating to children or vulnerable persons or to provide certain services to children or vulnerable persons; to amend the Garda Siochana Act 2005; to provide for the change of name of the Garda Central Vetting Unit to the National Vetting Bureau; and to provide for related matters."

28. A s. 19 notification does not involve a determination of facts but simply carries into effect the obligation of any scheduled organisation to notify the National Vetting Bureau of the specified information and also to notify the person affected of the fact of that concern and of the intention to notify the Bureau.

Discussion
29. The appellant argues that the steps taken by the respondent in relation to him fell into three separate processes. The section 47 regulatory process was followed by an investigation which in turn was followed by an enquiry. He complains that the investigation ended in July 2017 but the enquiry ended in January 2018. The appellant argues that s. 19 imposed successive obligations at the end of each and any investigation enquiry or regulatory process. The High Court judge did not accept that contention and it seems to me that he was correct in so doing. What is required is that at the end of the investigation process the scheduled organisation has formed a *bona fide* concern.

30. In suggesting that each of the seven requirements of s. 19 be addressed separately, the appellant sets up an artificial construct which is at odds with the expressed intention of the Act. This court must consider whether the section imposes mandatory requirements of such a nature that a failure to observe any of the requirements deprives the respondent of the power to make a notification. The High Court judge accepted the argument of the respondent that the appellant's argument on this point was contrived and that the Court should focus on the purpose of the Act.

31. It seems to me that the High Court judge was correct in placing some reliance on the decision of the Supreme Court in *Gillen v. Commissioner of An Garda Siochana* [2001] 1 I.R. 574 which required that a disciplinary complaint against an garda "shall be investigated as soon as practicable". In *Gillen* it was argued that a lapse of three and a half years precluded an investigation. In *Gillen* Finnegan J. quoted with approval from the decision of the Supreme Court in *The State (Elm Developments Limited) v. An Bord Pleanála* [1981] I.L.R.M. 108 at 110:-

> "Whether a provision in a statute or statutory instrument, which on the face of it is obligatory (for example, by the use of the word 'shall'), should be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused."

32. He went on to quote from Lord Steyn in *R v. Soneji* [2006] 1 A.C. 340 at 353 where he said:-

> "…the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."

33. At para. 52 Finnegan J. stated:-

> "In having regard to the dual purpose of the statutory requirement for expedition in garda disciplinary proceedings, in each case regard must be had not just to the interests of the individual garda concerned, but also to the public interest in maintaining public confidence in An Garda Síochána."

34. The 2012 Act has at its heart the protection of children and vulnerable persons with an in-built balance to protect the constitutional rights of a person against whom findings or allegations have been made.

35. The trial judge held that the obligation to notify "as soon as may be" does not arise until a *bona fide* concern has been formed by the scheduled organisation. This finding has not been appealed. He also found that the respondent designated his decision making function under s.19 to its evidence of character panel which decided on 18th June, 2018 that it did have a concern. Its decision to notify the National Vetting Bureau was communicated to the appellant by way of letter dated 5th July, 2018. That evidence was not contradicted. Yet the appellant submits that the respondent had formed a prior *bona fide* concern for the purposes of s. 19 although this submission is unsupported by evidence.

36. A detailed examination took place in the High Court of the timeline from the events of the 28th/29th November, 2016 through to the complaint to the respondent on the 16th March, 2017 (received 21st March) section 47 regulatory process. A number of material facts that were considered by the judge were the unwillingness of student A and student B to participate in the enquiry and the reasonable steps taken to obtain legal advice regarding the implications of the Act of 2012 as this was only the second enquiry conveyed under the Teaching Council Acts. The evidence offered on behalf of the respondent regarding the timeline was not contradicted or challenged and it was open to the High Court judge to accept that evidence.

37. In the High Court the respondent gave evidence that part of the reason for the delay was the necessity to take legal advice. While the appellant argued that this was an unconvincing explanation the trial judge stated:-

> "…but the fact of the matter is that the evidence of the need for that advice, and the time taken to get and consider it, is unchallenged. Effectively the court is asked either to disregard the unchallenged evidence of the need for, and taking of, advice or to infer that in the teeth of the advice taken, a decision was made to abuse a statutory power to injure the plaintiff. I can see no conceivable justification for such an approach…", (para. 103).

38. At para. 112 of his judgment the High Court judge stated:-

> "It seems to me that if, as is argued on behalf of the plaintiff, the defendant is precluded from notifying a *bona fide* concern other than 'as soon as may be' the result would be that the database would be permanently, rather than, in the case of any delay, temporarily deficient. Such a construction, in my view, might very well lessen the protection that otherwise would be available to children and vulnerable persons and would be contrary to the declared purpose of the legislation. I cannot think that the Oireachtas would have intended such a consequence."

39. I agree with those observations of the trial judge.

Conclusion
40. This appeal turned on the question of delay and the meaning of the words "as soon as may be" in s. 19 of the Act of 2012.

41. I am satisfied that the learned trial judge was correct in concluding that the respondent complied with the requirements of s. 19. In paras. 96-112 of his judgment the High Court judge set out the reasons why he was satisfied that the respondent's decision to make a notification to the National Vetting Bureau was made "as soon as may be" having regard to the matters he referred to therein and the scheme and purpose of the Act of 2012.

42. I find no error in the conclusions reached by the High Court judge and I would therefore dismiss the appeal.