Neutral Citation Number: [2005 IEHC 438

THE HIGH COURT
JUDICIAL REVIEW

[2003 No. 798 JR]

BETWEEN

CECILY CUNNINGHAM

APPLICANT

AND
THE PRESIDENT OF THE CIRCUIT COURT
AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Roderick Murphy dated the 19th day of December, 2005.

1. Pleadings
The applicant, a professional officer of the Blood Transfusion Service Board (BTSB), seeks discovery of documents from the second named respondent in relation to alleged prosecutorial delay.

The applicant had obtained leave to bring judicial review proceedings against the President of the Circuit Court and the Director of Public Prosecutions. By order of O'Sullivan J. on 3rd November, 2003, for an order of prohibition by way of judicial review staying the trial of the applicant in respect of seven charge sheets.

The Director opposed the proceedings and referred to the grounds of opposition denying that the applicant was entitled to the declaration sought and that all reasonable steps had been taken in prosecuting the matter. The Garda investigation was one of the most complicated ever to have been mounted due to the volume of material, the number of complainants and the complexity of the subject matter which arose out of the provision of contaminated blood products by the BTSB. This led to the report by the former Chief Justice dated 11th March, 1997. ("the Finlay Report"); the investigation of the Garda Commissioner pursuant to a request made by the DPP on 25th July, 1997, relating to the names and addresses and the dates of death of the 57 people who allegedly died as a result of being infected by the contaminated blood and the source of that blood.

Subsequently, the Garda investigation team carried out cautioned interviews with a number of persons including the applicant.

The present application concerns the request by the applicant for discovery on oath of all documents which are or had been in the power, possession or procurement of the Director, the second named respondent, for the reasons given in the affidavit of Mr. William Egan, solicitor for the applicant, pursuant to the provisions of O. 31, r. 12 of the Rules of the Superior Courts and Rules of the superior courts (No. 2) (Discovery) 1999, (S.I. No. 233 of 1999). The judicial review involves a claim of prosecutorial delay on the part of the authorities. The documents requested relate, in the applicant's submission, to that delay.

2. Documents requested
2.0 The applicant seeks discovery of the following four categories of documents for the reasons given hereunder.

2.1 All documents relating to the communication between the prosecution authorities and the BTSB after October, 1999 in relation to the criminal investigation resulting in the prosecution of the applicant.

The reasons provided are as follows:

> (a) the affidavit of Detective Superintendent John O'Mahoney, sworn on 18th March, 2004, referred to correspondence between the Gardaí and the BTSB by way of explanation for delay but were not exhibited in his affidavit;
>
> (b) no further statements were taken as a result of that correspondence.

2.2 All documents relating to communication between the prosecution authorities and Dr. Yap after October, 1999 in relation to the criminal investigation. The reasons given were that that correspondence was referred to in the affidavit of Detective Superintendent O'Mahoney and that there is no reference to any further statements being taken as a result thereof. The applicant notes that all correspondence from Dr. Yap was dated not later than 9th June, 1999. Leave was given to cross-examine Detective Superintendent O'Mahony.

2.3 All correspondence between the office of the DPP and the Gardaí in respect of the progress of the criminal investigation into the applicant and in particular the report referred to in para. 33, the correspondence referred to in paras. 34 and 35 of the affidavit of Detective Superintendent O'Mahoney and the correspondence referred to in para. 7 of the affidavit of Mr. Jarlath Spellman of the DPP's office, sworn on 19th May, 2004. Leave was also granted to cross-examine Mr. Spellman.

2.4 All documents in relation to consideration of matters in the office of the DPP resulting from the prosecution of the applicant. The reason therefor was that the applicant was at a disadvantage in that the DPP had particular knowledge of the categories of documentation in respect of the matters which are the subject of the proceedings. As the judicial review involves a claim of prosecutorial delay, unless the applicant can examine the documentation requested, it would not be possible to resolve if the prosecution authorities proceeded with due expedition. This was relevant and necessary for the determination of the case.

3. Submissions of the applicant
Ms. Kathleen Leader, Counsel for the applicant referred to paras. 30 to 35 of the affidavit of Detective Superintendent John O'Mahoney, which deal with the investigation of complaints of seventy-three injured parties and the submission of the garda file to the office of the Director in October, 1999. Included in the file were fifteen sample cases. After considering the file and obtaining preliminary advices from counsel who had raised a number of matters which required further investigation, the DPP requested the garda investigation team to deal with those matters in June, 2000. Correspondence was sent to the BTSB and to Dr. Yap requesting clarification on outstanding matters. Both parties requested time to fully clarify those matters.

In October, 2000, a garda report was sent to the DPP outlining that the investigation team was continuing with enquiries in relation to the request of June, 2000. Correspondence between the DPP and the investigation team required clarification and further investigations over a protracted period. In January, 2002 a meeting was held between the DPP's office and the investigation team relating to the identification of hepatitis C victims subsequent to 10th August, 1977, who were screened by Dr. Yap and scientifically

sequenced back to either patient X or Donor Y, together with those that could be linked to patient X in 1976 and 1977.

The affidavit continues in relation to further queries subsequent to that date. On 17th July, 2003, directions were finalised and received from the DPP to charge the applicant and another person. Return for trial was fixed for 24th September, 2003.

The applicant also referred to the affidavit of Mr. Jarlath Spellman, professional officer of the DPP's office, who had dealt with the file in respect of the criminal investigation into the applicant from October, 2001 to the present date, having taken over from his colleague, Mr. Declan Murphy, who had dealt with the file from March, 1997 to October, 2001. Mr. Spellman referred to meetings with counsel and advices received from 7th November, 2001, to April, 2003 when senior counsel was asked to review a draft book of evidence. Arising from that, further queries were raised which required clarification. On 1st July, 2003 a direction was made by the office of the DPP to prosecute, *inter alia*, the applicant. Mr. Spellman said that it was one of the most complex cases that the office ever had to deal with and begged to refer to the book of evidence.

The applicant referred to the order of cross-examination of deponents on their affidavit which had been granted by the court and of the necessity to have discovery of the documents requested before this would take place.

Counsel for the applicant referred to Bradley, Judicial Review (Dublin, 2000) at para. 11-04 and to *J.F. v. Director of Public Prosecutions*, Unreported, Supreme Court, 26 April, 2005.

4. Submissions on behalf of the DPP
Mr. Shane Murphy S.C., distinguished between the third and fourth categories, on the one hand and the first and second on the other.

In relation to the third and fourth, he submitted that the application was clearly an attempt to penetrate the special protection that the DPP had in relation to his decision making. There were numerous examples of legitimate distinctions, or disparities throughout our law, based on differences of individual functions or circumstances.

He referred to *Dunphy v. DPP* (Unreported, Supreme Court, 2nd November) and *Hanrahan v. Merck Sharp and Dohme* [1998] I.L.R.M. 629.

5. Applicant's reply
Counsel for the applicant stated that the third and fourth categories in Dunphy related to the decision to prosecute rather than to the delay in prosecuting . In the present application delay is being raised and K.A. v. Minister for Justice [2003] 2 I.R. 93 applied. In that case, discovery was sought in aid of an attempt to quash the respondent's refusal to grant the applicant refugee status. The applicant had sought particulars of the total number of decisions reached by each member of the Refugee Appeals Tribunal which were not affirmed or accepted by the Minister and, secondly, the total number of decisions recommending grant and refusal respectively of refugee status by each member of the Tribunal and the appeal authority. Counsel also referred to Breathnach v. Ireland [1993] 2 I.R. 458.

6. Decision of the Court
6.1 Discovery is an interlocutory procedure used in principle to clarify factual matters or obtain further details of the factual background to any given dispute.

In judicial review applications discovery would appear to be unnecessary or, indeed, inappropriate where the central issue of a dispute is the *manner* in which the decision was taken or the legality of the decision-making process.

In the *Glór na nGael application* [1991] N.I. 117. Carswell J. dismissed the application for discovery on a number of grounds. Significantly it was held that there was a distinction between discovery in judicial review and discovery in plenary actions. An order for discovery or documents concerning the issues of unreasonableness in relation to the manner in which decisions had been reached would not be made unless there was material which indicated that the evidence put before the court was inaccurate or false. Carswell J., at 129,132 stated that:

> "There has been considerable development in the law governing applications for judicial review in a series of recent cases in England, which regrettably have not been reported but which state propositions of some importance in this field. They all lay stress on the necessity to examine closely and with care the issues involved in the case, since there is a definite distinction to be made between discovery and judicial review and discovery in plenary actions …
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> The series of cases which I have quoted forms a consistent current of authority in judicial review proceedings against ordering discovery of documents relating to the issues of *Wednesbury* unreasonableness, unless there is material on which the applicant can make the case that the evidence before the court on behalf of the respondent was inaccurate or false. While I am not, as counsel pointed out, strictly bound to follow decisions of these courts, I respectfully agree with their conclusions and propose to follow them."

Bradley, at para. 11-04 in commenting on the judgment of Mr. Justice Carswell, stated:

> "It follows that an order for discovery of documents concerning the issue of unreasonableness in relation to the *manner* in which the decision had been reached would not be made unless there was material which indicated that the evidence put before the court was inaccurate or false."

6.2 Counsel for the applicant had referred to *J.F. v. DPP*, (Unreported, Supreme Court, 26th April, 2005). That judicial review application arose in the context of an accused seeking to have the complainant examined by a psychologist nominated by the defence for the purpose of assessing the complaint. The complainant was not willing to do so. The applicant/accused then applied by motion to strike out the statement of opposition or to strike out the psychiatrist's affidavit and report as it was impossible to assess the actual cause of delay without carrying out an independent assessment of the complainant.

In that case, Hardiman J. stated at p. 10:

> "I also consider that a refusal of access to the complainant for the applicant's expert subverts the right to cross-examination. Oral contradiction in a public forum is the culmination of the work of the cross-examiner but it is by no means the whole of it. All effective cross-examinations, not least of expert witnesses, are the result of intensive preparation. It is of the essence of the right to cross-examine that the cross-examiner, the advocate selected by the

> person impugned, should have access to the materials for cross-examination. Study and assessment of these materials is a vital part of the process of cross-examination. It is also a vital factor in the formulation of the advice an advocate gives to his clients. In a case with a significant issue of expert evidence this process of preparation will take place in consultation with the party's own expert. If this expert is at a disadvantage *vis-à-vi*s with the other side's expert, counsel will be at a disadvantage in conducting the cross-examination. … It would be gross negligence for a Solicitor, advised as this Solicitor has been, not to endeavour to put in place assessment facilities for his own expert."

The applicant submitted that she was entitled to discovery on the same basis.

The court recognises the force of this argument in relation to equality of arms in complaint delay cases.

6.3 In *Dunphy v. DPP* [2005] IESC 75, the High Court had refused the applicant's motion for discovery in criminal proceedings which involved the unlawful possession of a controlled drug and the applicant appealed to the Supreme Court. The applicant's solicitor had requested that the DPP disclose "the precise basis and documentation in existence touching on same (including internal memoranda) on which the decision was reached to prosecute our client and to deal otherwise with a person who is much more culpable than our client".

The High Court (Kearns J.) had stated as follows in refusing the application:

> "I consider that there are significant public policy considerations and that a very high threshold is required in relation to a decision of the DPP to prosecute – a high threshold has been set because as Mr. McDonagh said, every criminal case could be affected by discovery applications of this sort. If the only inference to be drawn was that the Director was, in making his decision, acting *mala fide* or on the basis of improper motives then the high threshold would have been reached. A number of considerations could be said to be at play here – an ostensible decision to treat one person differently, however, doesn't warrant the description that he acted *mala fide* or on the basis of an improper motive. The line of jurisprudence is clear here – the case of *Eviston* was distinguished by peculiar facts and its narrow grounds and the considerations that arose in *Eviston* are not at play here. The reality here is an attempt to overcome the protection that the Director Public Prosecution enjoys."

Hardiman J., for the Supreme Court, distinguished *Hanrahan v. Merck*, *Sharp & Dolme* [1998] I.L.R.M. 629, which was concerned with information which did not attract the special protection available to the Director of Public Prosecution's reason for a decision to prosecute or not to prosecute. He stated that, in a case where the special protection is relied upon, there is a special evidential standard for the applicant as described in the cases cited. The granting of discovery, even if the applicant failed to get inspection, would or might undermine the special protection available to the Director. His entitlement to that protection is beyond argument, certainly in the court as at present constituted. In order validate it, the applicant must show at least suggestive evidence of an impropriety.

Hardiman J. referred to *K.A. v. Minister for Justice* [2003] 2 I.R. 93 where Finlay Geoghegan J. set out the ordinary principles on which discovery was ordered and stated:

> "It is, however, inherent in the nature of judicial review that the necessity for discovery will be more difficult to establish than in plenary proceedings. This follows from the fact that in judicial review what is at issue is the legality of the decision challenged.
>
> Discovery will normally, but not exclusively, be confined to factual issues in dispute. It can be envisaged that an applicant for judicial review may raise a factual issue and, while not disputed, consider that there are documents in the possession of the respondent which would assist in the proof of the relevant related fact at the hearing, and that a court would take the view that discovery of such documents is necessary for disposing fairly of the application for judicial review. The limitation of discovery in such circumstances is that it must not be considered to be a fishing exercise. It is difficult to state in a general way the precise dividing line but it is clear that it is not sufficient for the applicant simply to make an assertion not based in any substantiate act and then seek discovery in the hope that they will exit documents which support the assertion."

The decision in *K.A.* also relied on the decision of Bingham M.R. in *R. v. Secretary of State for Health, ex parte London Borough*, (Unreported, Court of Appeal, 24th July, 1994). The test to be met by an applicant for discovery in judicial review proceedings was stated to be as follows:

> "Having raised a factual issue of sufficient substance, or adduced evidence which grounds a reasonable suspicion of unlawfulness, such that the application cannot fairly be resolved without discovery."

The Supreme Court stated that in *K.A.*, the form of illegality alleged was that the Minister, in making his decision to deport, failed to exercise his discretion and/or adhered to an inflexible policy rule. But there was no evidence of this: the applicant sought discovery in the hope of finding some, which is the activity usually described as "fishing".

In *Dunphy*, Hardiman J. was of the view that the disparity alleged between the applicant and the DPP was not such as to give rise to any *prima facie* apprehension of impropriety: it did not even suggest impropriety. The application for discovery was refused.

Counsel added that in the affidavits there was specific reference to documents which were relied on in relation to the prosecutorial delay.

6.4 Counsel for the applicant had made reference to *Breathnach v. Ireland* [1993] 2 I.R. 458, where Keane J., as he then was, held that the notice party's claim of privilege should be rejected to the extent that it was based upon the claim that the documents concerned belonged to a particular class of documents, namely, documents concerning communications between members of An Garda Síochána acting in the course of their duties. He further held that the grounds stated in support of the public interest privilege would apply equally to a wide range of other criminal prosecutions. It would be wholly at odds with the constitutional principle, that the administration of justice was the exclusive preserve of the courts, were the notice party to be in a position to prevent the courts from inspecting any document which came into being for the purpose of criminal proceedings by making a claim of public interest privilege.

This Court distinguishes the *Breathnach* case which related to privilege where the issue was a claim for malicious prosecution and assault and battery and had raised a reasonable suspicion of unlawfulness and gave rise to a prima facie apprehension of impropriety.

6.5 In K.A. it was difficult to state the dividing line but that it was clear that the DPP was distinguished from other parties and was entitled to the significant public policy considerations in relation to the discovery of documents which relates to the decision of the Director to prosecute.

There is no evidence that the Director, in relation to whom discovery is sought in all four categories, had acted *mala fide* or on the basis of improper motives.

The distinction recognised by Carswell J. in *Re Glór na nGael* between discovery in judicial review actions and in other actions, restricts the ability of an applicant to get discovery in a judicial review application. Carswell J. cites authorities against ordering discovery of documents relating to unreasonableness unless there is material on which the applicant can make the case that the evidence before the court on behalf of the respondent was inaccurate or false. There is no such suggestion in this case.

6.6 However in this case the court is mindful that the application is for judicial review on the basis of prosecutorial delay. While the judicial review application was not opened to this Court, it is clear from the statement of opposition that the applicant's claim is unreasonableness in the delay. It was denied that all reasonable steps had not been taken in prosecuting the case or that there had been unnecessary delay in processing the matters. While, it is clear that the affidavits of Detective Superintendent O'Mahony and Mr. Jarlath Spellman referred to some detail in relation to the steps taken they do not exhibit the correspondence on which they rely. It appears to this Court that that the content of the documents referred to are necessary to ascertain the reasons of unreasonable delay.

I have also considered the request for discovery in the context of the order for cross-examination of the deponents to the relevant affidavits. It does not seem to this court that in any event the content of the documents referred to in categories one and two of the applicant's affidavits, are relevant to the issue of delay.

The third and fourth categories relate to the criminal investigation and to the decision of the Director to prosecute and have a recognised special protection in relation to the Director's independence. It follows that the documents which relate to the progress of the investigation and the consideration of matters resulting from the prosecution as instanced in the third and fourth categories are not susceptible to an order for discovery.

Accordingly, I allow the application in respect of categories one and two and refuse the application in relation to categories three and four.