

THE HIGH COURT
JUDICIAL REVIEW

[2011 No.185 J.R]

BETWEEN/

JAMES O'LOUGHLIN

APPLICANT

AND

INFORMATION COMMISSIONER, MINISTER FOR FINANCE, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

AND

HEALTH SERVICE EXECUTIVE

NOTICE PARTY

JUDGMENT of Mr. Justice Michael White delivered on the 8th day of March, 2012

1. The applicant by notice of motion of 9th March, 2011, has sought relief pursuant to an order of 28th February, 2011 of the court granting leave by way of an application for judicial review for the following reliefs:-

(1) An order of certiorari quashing the decision of the first named respondent dated 30th November, 2010, affirming the decision of the notice party to refuse the applicant access to records requested under the Freedom of Information Act 1997, as amended.

(2) A declaration that the Freedom of Information Act 1997, s. 28(6) Regulations 2009 S.I. 387 of 2009 in particular Article 4(1)(B)(iii) thereof are *ultra vires*, void and/or invalid.

(3) A declaration that guidance notes made by the second named respondent in September 2009 entitled access to records by parent/guardians access to records relating to deceased persons under s 28(6) of the Freedom of Information Act 1997, as amended, are *ultra vires*, void and/or invalid.

(4) In the alternative to the above a declaration that s. 28(6) of the Freedom of Information Act 1997, as amended, is an unconstitutional delegation of legislative power in breach of Article 15.2 of the Constitution.

The application was heard on 1st, 9th 11th of November and 1st December, 2011. Judgment was reserved on that date

2. James O'Loughlin the applicant was married to Anne Marie O'Loughlin who died tragically on 21st January, 2009 aged 36. It is alleged she committed suicide, as a consequence of trauma she suffered in witnessing the murder of one of her brothers by another brother in or around 22nd June, 2007. The applicant wished to apply to the Criminal Injuries Compensation Tribunal for compensation on his own behalf and on behalf of the five children of the marriage, three of whom are still minors. There are some issues as to the marital status of the parties; the applicant has denied the parties were separated.

3. The deceased Anne Marie O'Loughlin had been treated for a psychiatric illness prior to her death, and the applicant sought medical records pursuant to the Freedom of Information Act 1997, from:-

(1) Limerick Mental Health Services.

(2) Clare Mental Health Services

4. Partial access was granted to records at Ennis Regional Hospital and the childcare services Ennis and no access was granted to the records of St. Joseph's Hospital Limerick

5. Following review Edmund Murphy, internal reviewer St. Joseph's Hospital wrote to the applicant's solicitors on 8th June, 2010, confirming refusal to release the records. The letter stated:-

"As is required under Section 28 (6) of the FOI. Act the S.I. number 387 of 2009 regulations were taken into consideration for this particular case. As is required under these regulations under section 28(5)(a) a public interest test was undertaken. Details of this test are listed below.

Public interest arguments: Please note that for all of the exemptions listed on the schedule of records a public interest was undertaken. This requires the internal reviewer to consider if it would be in the interest to release the records even though they may be exempted. This is required under Section 28(5) (a) of the Freedom of Information Acts. Access to these records is refused under section 28.1 of the Act. ..This exemption was considered for Volume 1, at pages 1 - 16 of the record requested. The following public interest arguments were considered as required under Section 28(5)(a):
Favouring release

Right of access to ensure that personal information held by public bodies is accurate.

Accountability of the public body.

Against release

Obligation on the public body to protect privacy.

Requirement for personal privacy for people when dealing with public bodies.

The need to maintain personal privacy of third parties."

6. Teresa Duggan a decision maker of Clare Mental Health Services, HSE West wrote to the applicant's solicitors on 9th July, 2010 refusing access. That letter stated:-

"As is required under Section 28 (6) of the FOI Act the S.I. No 387 of 2009 regulations were taken into consideration for this particular case. As is required under these Regulations and under Section 28(5)(a) a public interest test was undertaken.

Public interest arguments: Please note that for all of the exemptions listed on the schedule of records a public interest test was undertaken. This requires the decision maker to consider if it would be in the public interest to release the records even though they may be exempted. This is required under Section 28 (5) (a) of the Freedom of Information Acts."

7. The applicant appealed both decisions to the Information Commissioner the first named respondent who decided to review the case in accordance with s. 34(2) of the Act.

8. A decision on the review application was made in writing on 30th November 2010, and held that the HSE was justified in its decision to refuse access to the records on the basis of s. 28(1), s. 28(6) and the 2009 Regulations.

9. The Information Commissioner in a detailed written review, having considered the relevant provisions of the Freedom of Information Act, the 2009 Regulations, and the relevant guidance notes published by the Minister for Finance, took a number of factors into consideration including the public interest test, the fact that records released under the Freedom of Information are released without restriction as to how they may be used and is a release to the world at large, and the fact that the Criminal Injuries Compensation Tribunal had authority to obtain medical reports.

10. In dealing with the public interest test the Information Commissioner stated:

"Among the public interest factors in favour of releasing the records are the right of access to personal information of deceased persons to ensure that the information held by public bodies is accurate. Also there is a public interest in ensuring that patients are provided with the appropriate medical attention and care while being treated in the health services. The public interest factors in favour of withholding the records include the strong public interest in protecting sensitive personal information of deceased persons and the public interest in protecting the good name and character of deceased persons. The 2009 Regulations refer to the public interest and the confidentiality of personal information".

Following that decision the applicant has applied to this Court for the reliefs already set out.

Freedom of Information Act 1997

11. The Freedom of Information Act 1997 is described in the heading as:-

"An Act to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies and to enable persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions to that right and for assistance to persons to enable them to exercise it, to provide for the independent review both of decisions of such Bodies relating to that right and of the operation of this Act generally (including the proceedings of such bodies pursuant to this Act) and, for those purposes, to provide for the establishment of the Office of Information Commissioner and to define its functions, to provide for the publication by such bodies of certain information about them relevant to the purposes of this Act, to amend the Official Secrets Act, 1963, and to provide for related matters."

12. Exempt record is defined in s. 2(1) as:-

(a) a record in relation to which the grant of a request under section 7 would be refused pursuant to Part III or by virtue of section 46, or

(b) A record that is created for or held by an office holder and relates to the functions or activities of -

(i) the office holder as a member of the Oireachtas or a political party, or

(ii) a political party."

13. Personal information is defined in the Act at section 2(1):-

"'Personal information' means information about an identifiable individual that -

(a) would, in the ordinary course of events, be known only to the individual or members of the family, or friends, of the individual, or

(b) is held by a public body on the understanding that it would be treated by it as confidential,

and, without prejudice to the generality of the foregoing, includes -

(i) information relating to the educational, medical, psychiatric or psychological history of the individual."

14. Section 3 deals with the Minister's powers to make regulations and states:-

"(1) The Minister may -

(a) by regulations provide, subject to the provisions of this Act, for any matter referred to in this Act as prescribed or to be prescribed, and

(b) in addition to any other power conferred on him or her to make regulations, make regulations generally for the purposes of, and for the purpose of giving full effect to, this Act,

(2) Regulations under this Act may contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations."

15. Section 28 of the Act prohibits the disclosure of personal information except in specific circumstances. Section 28(1) states:-

"(1) Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if, in the opinion of the head, access to the record concerned would involve the disclosure of personal information (including personal information relating to a deceased individual).

...

(5) Where, as respects a request under section 7 the grant of which would, but for this subsection, fall to be refused under subsection (1), in the opinion of the head concerned, on balance -

(a) the public interest that the request should be granted outweighs the public interest that the right to privacy of the individual to whom the information relates should be upheld, or

(b) the grant of the request would benefit the individual aforesaid, the head may, subject to section 29, grant the request.

(6) Notwithstanding subsection (1), the Minister may provide by regulations for the grant of a request under section 7 where -

(a) the individual to whom the record concerned relates belongs to a class specified in the regulations and the requester concerned is the parent or guardian of the individual, or

(b) the individual to whom the record concerned relates is dead and the requester concerned is a member of a class specified in the regulations."

16. Regulation 4 of S.I. 387 of 2009 states:-

"(1) Notwithstanding section 28(1), a request under section 7 in relation to a record access to which involves the disclosure of personal information (including personal information relating to a deceased individual) shall, subject to the other provisions of the Freedom of Information Act 1997, be granted where:-

(b) the individual to whom the record concerned relates is dead ('the individual') and the requester concerned belongs to one of the following classes or requester:-

(iii) the spouse or the next of kin of the individual where in the opinion of the head, having regard to all the circumstances and to any relevant guidelines published by the Minister, the public interest, including the public interest in the confidentiality of personal information, would on balance be better served by granting than by refusing to grant the request."

The Minister also published guidance notes on access to records relating to deceased persons under s. 28(6) of the Act.

Grounds of Challenge

17. The applicant contends the addition of a public interest test in s. 4(1) (b) (iii) of the regulations is *ultra vires*. He has argued that the additional detailed test laid down in the regulations is outside the authority or jurisdiction of the Minister to make, and is not within the contemplation or intention of the Oireachtas under s. 28 (6) and that the extent of the Minister's authority is merely to specify a class of requestors who shall be granted access to the records of an individual who is deceased, but the regulation goes beyond specifying a "class" to whom the records shall be released, leaving the class unspecified.

18. It is argued that because this test includes a requirement to have regard to all the circumstances and to any relevant guidelines published by the Minister, it goes beyond any stated principles and policies contained in the enabling s. 28(6), and introduces an open ended range of considerations which may include reasons for the request which conflicts with s. 8(4) of the Act.

19. It is argued that the guidance notes are invalid on the basis that they are *ultra vires* insofar as they are given weight by being incorporated into the regulations without going through the prescribed procedure involving the laying of regulations before the Oireachtas, and its power to pass a resolution annulling same.

20. In addition the guidance notes contain policies and principles not contained in s. 28(6), and go beyond guidelines, including contradicting s. 8(4) of the Act.

21. In the alternative the applicant argues that if the regulations and guidance notes are not invalid, s. 28(6) constitutes and unauthorised delegation of legislative power insofar as it authorises the Minister to make regulations and guidelines relating to principles and policies and goes beyond filling in the details of principles and policies.

Locus Standi

22. The respondent has argued that the applicant does not have locus standi to bring the application, as no benefit will accrue to him by the striking down of the relevant regulation.

23. The applicant is a requestor pursuant to s. 7 of the Act, he comes within the class envisaged by s. 28 (6) of the Act being the spouse of a deceased person in respect of whom the notice party held personal information.

24. The Information Commissioner in the ruling of 30th November, 2010, relied on s. 28(6) of the Act. If the regulation were to be struck down, the applicant would be likely successful in the statutory appeal to the High Court, and some benefit therefore may accrue.

25. The applicant has the appropriate *locus standi* to apply for judicial review.

The Vires of Secondary Legislation

26. Enactment is defined in s. 2 of the Interpretation Act 2005, as follows:-

"an 'enactment' means an Act or a statutory instrument or any portion of an Act or statutory instrument;

27. Secondary legislation is subordinate to primary legislation, and the same principles of interpretation apply to delegated as to principal legislation.

28. To be *intra vires* the provisions of the statutory instrument should not go beyond what was intended by the parent act.

29. The test of *ultra vires* is summarised in two cases.

30. In *City View Press v. An Comhairle Oiliuna* [1980] I.R. 381, O'Higgins J. stated at p. 399:-

"In the view of this Court the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised: for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the Statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of the legislative power".

31. In *Cassidy v. Minister for Industry & Commerce* [1978] 1 I.R. 297 at 310 Henchy J. stated:-

"The general rule of law is that where Parliament has by Statute delegated a power of subordinate legislation, the power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation. Otherwise it will be held to have been invalidly exercised for being *ultra vires*. And it is a necessary implication in such a statutory delegation that the power to issue subordinate legislation should be exercised reasonably."

The Power of the Minister to Make Regulations

32. The relevant regulations made pursuant to S.I. No. 387/2009 are headed Freedom of Information Act 1997, s. 28 (6) regulations 2009. The body of the regulations state that the regulations were made in exercise of the powers conferred on the Minister by ss. 3 and 28(6) of the Freedom of Information Act 1997. I have already outlined the provisions of Sections 3 and 28 (6).

33. The power pursuant to s. 3 of the Act is comprehensive and allows him to deal with such incidental supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations.

34. When assessing if the Minister acted *ultra vires* in making Regulation 4(1)(b)(iii), the court is not confined to the provisions of s. 28(6) of the Act but may also assess the effect of his power to make regulations pursuant to s. 3 on the matter contained in the regulation challenged.

Conclusion

35. In examining if the relevant regulations are *ultra vires*, the Minister's powers under the Act, the court is entitled to look beyond s. 28 of the Act to the other provisions of the Act and to examine the disclosed purpose and principals of the Act.

36. Personal information is an exempt record, to which there is no right of access unless where prescribed by the Act.

37. Section 28(5) allows the person responsible for the release of personal information to balance the public interest and the right to privacy and if in his opinion the public interest outweighs the right to privacy he is entitled to grant the request.

38. The Oireachtas has decided there is no automatic right to personal information relating to a deceased individual, and so specified in Section 28(1). It is exempt information, and the provisions in s. 28(5) and (6) facilitate the release of that information

39. The Minister is not mandated by s. 28(6) of the Act to make regulations, the making of same were within his discretion.

40. The currency of the Act is information and its release, and not to whom it is released. Once information is released pursuant to the Act it is released at large, and there is no restriction on the distribution of the information.

41. When the relevant public interest test at s. 4(1)(b)(iii) is being examined what is being dealt with is the criteria for the release of personal information to a class of persons designated, bearing in mind at all times the general prohibition on the release of personal information. The class is not unspecified, it is the spouse and next of kin of deceased persons in respect of whom personal information is held by the body from whom the request is made. What is unclear is the right of one or more of the class to the personal information held, which has to be determined in accordance with the test set out in the Regulation.

42. Looking at the principles and policies of the Act as a whole, it is not *ultra vires* for a Minister to insert a public interest clause in the regulations. To argue that a public interest clause should only have been in the regulations if it was specified in s. 28(6) of the Act, is too narrow an interpretation.

Guidance Notes

43. The powers vested in the Minister by s. 3 empower him to insert in the regulation a responsibility on the head in respect of the personal information to have regard to guidance notes which were subsequently published.

44. The words "having regard to" do not force a head to slavishly follow those guidance notes. Those notes are not mandatory upon the head.

45. The guidance notes specify that the purpose of the notes is to assist decision-makers in considering requests relating to categories of requester who may obtain access to the records of deceased persons. Para. 3, p. 8- 12 of the notes deal with requests in respect of deceased persons.

46. The architecture of the Act itself allows for a review of the original decision and an appeal to the Information Commissioner, and if a decision maker has erred in giving too much credence to those guidance notes, those matters should be dealt with in the course of the review and appeals procedures within the Act.

47. There is no requirement to lay guidance notes before the Oireachtas.

48. I do not consider that a reference in the regulation to have regard to relevant guidelines published by the Minister as *ultra vires* the Minister's powers under the Act.

Section 8(4)

49. The section states, (4) "Subject to the provisions of this Act, in deciding whether to grant or refuse to grant a request under section 7 -

(a) any reason that the requester gives for the request, and

(b) any belief or opinion of the head as to what are the reasons of the requester for the request,

shall be disregarded."

The court is of the view that this section is qualified by the words "subject to the provisions of this Act".

50. Section 28(5) and the regulations pursuant to s. 28(6) prescribe a public interest test. It would be illogical, if there were not some consideration given to the reason for the request, when a head is carrying out a test for the purposes of either granting or refusing a request to release personal information, which is exempted information pursuant to the Act.

The Rights of Deceased Persons

51. The court can decide the issues without having to decide what particular rights accrue to deceased persons. It seems on the face of it to be a contradiction that any rights would accrue to dead persons, other than for the benefit of surviving relatives.

52. However the Act is clear that as far as personal information is concerned, the personal information of deceased persons is protected under the Act. It again has to be stressed it is an exempt record not available as of right, and I can see nothing *ultra vires* about a concern to balance various factors. I accept that in law a deceased has no protection to his good name or character, but the Act deals with personal information sometimes given in confidence, as in this case.

53. The motive for the inclusion of the personal information relating to a deceased individual in s. 28(1) is irrelevant.

Section 28(6)

54. The section has the presumption of constitutionality. When one examines the principals and policies of the Act in respect of exempt records, one can see that s. 28(6) is in accordance with same as it facilitates the release of information which would otherwise be restricted. It does not introduce new policies and principals, nor does it in any way restrict the main purpose of the Act to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies.

55. I refuse the relief sought.