THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2016] IECA 362

Birmingham J.
Mahon J.
Edwards J.

Appeal No. 2016/507

H.C. No. 2016/864JR

BETWEEN

L. K.

Appellant

AND

THE MINISTER FOR JUSTICE & EQUALITY

Respondent

Judgment delivered on the 30th day of November, 2016 by Mr. Justice Edwards

Introduction

1. On the 27th of October 2016 and on 3rd of November 2016 a District Court judge made orders pursuant to s.63 of the Criminal Justice (Mutual Assistance) Act 2008, requiring three separate witnesses to hand over medical records pertaining to the appellant on foot of a request that had been received by the respondent from the UK authorities pursuant to the provisions of the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union signed at Brussels on the 29th of May 2000 (the Convention).

2. The records have been sought in the context of a pending criminal trial to be held shortly in the requesting state against a named defendant who is a UK citizen accused of the murder of an Irish citizen whose body has never been located. This pending trial will in fact be a re-trial. The appellant was a witness at a previous trial of the said defendant that was aborted for reasons unrelated to her evidence. The appellant will be a witness in the retrial. In the first trial, in which the appellant gave her evidence by video link from this jurisdiction, it was put to her in cross-examination that her evidence was unreliable due to a medical issue, a matter she vehemently denied.

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

4. The appellant, having been notified of the request, indicated her objection to the said records being handed over, and her objection was communicated both to the persons holding her medical records and also to the District Court judge.

5. Notwithstanding the appellant's objections the District Court judge ordered that the records be handed over. The appellant then applied to the High Court for various declarations, orders of *certiorari*, an injunction and an order of *mandamus*, as well as certain interim relief, in a challenge by way of judicial review to the District Court judge's said orders, on the basis that the records the subject matter of these orders were not compellable records.

6. This appeal is against the judgment and order of the High Court (Humphreys J.) dated the 21st of November 2016 refusing to grant the appellant relief by way of judicial review.

7. In my judgment dated the 25th of November 2016, in which my colleagues Birmingham J and Mahon J concurred, I indicated (at paras 14 -16) that the case made in the High Court, and again in this Court where the arguments were reiterated, was based on a single umbrella argument to the effect that the documents being sought did not amount to compellable evidence on a correct application of s. 64(1) of the Act of 2008 and accordingly the claim of privilege should have been upheld and the District Court Judge acted ultra vires the statute in failing to do so.

8. The first component of the umbrella argument suggested that the mutual assistance request was *de facto* an attempt to obtain disclosure on foot of a mandatory order, amounting in effect to third party discovery, of the appellant's medical records for use in a trial in circumstances where there is a clear line of Irish jurisprudence to say that there is no power to do so under Irish law. The second component was the contention that in any event production of the records would in the circumstances of the case breach the appellant's right to privacy guaranteed under Article 40.3 of the Constitution and/or her right to respect for her private life guaranteed under Article 8 European Convention on Human Rights and Fundamental Freedoms ("ECHR"), and that accordingly their production was not compellable under Irish law.

9. This Court has already upheld the High Court's judgment in regard to the first component of the umbrella argument for the reasons given in the aforementioned judgment of the 25th November 2016.

10. It was indicated that if we held against the appellant in relation to the first issue we would then proceed, having heard any further submissions that the parties wished to make, to address and determine the second component of her umbrella argument. Having heard further submissions from both sides this further judgment now addresses that issue.

The rights at issue.
11. It is not controversial that by virtue of the mutual assistance request, the appellant's expectation that her medical records would be kept confidential, arising by virtue of the relationship between doctor /health service provider and patient in each instance, was potentially engaged.

12. However, and of greater significance, is the fact that it also potentially engaged the appellant's right to privacy guaranteed to her as an unenumerated personal right arising under Article 40.3 of the Constitution of Ireland, as well as her right to respect for her private life guaranteed under Article 8 of the ECHR

13. However, the mere fact that such rights were engaged does not automatically mean that the District Court judge's orders necessarily breached, or even had the potential to breach, any or all of those rights. Neither the right to confidentiality arising by custom, convention or contract, nor the right to privacy arising under the Constitution, nor the right to respect for one's private life arising under Article 8 ECHR is expressed to be an absolute right. Their exercise may be restricted in appropriate circumstances in pursuit of some competing legitimate aim necessitating a balancing of rights. The need to do so may arise in order to respect and vindicate the constitutional rights of others, or in the furtherance of the public interest and common good, or in the interests of upholding public order and morality. The rights at issue may be legitimately interfered with in pursuance of competing legitimate aims provided that any proposed interference is proportionate to the legitimate aim being pursued and to the minimum extent necessary, and further provided that there is a pressing need to do so.

Was the District Court obliged to consider the rights of the appellant?
14. The appellant was not a party to the mutual assistance application in the District Court. However, arising from the Supreme Court's decision in *Brady v District Judge Haughton* [2006] 1 IR 1 it is accepted by the respondent that she was entitled to be notified of it, and to be heard either in person or through a legal representative, in relation to the proposed interference with her said rights. In this case the appellant was in fact duly notified of the application, and was advised that the State would fund legal representation for her should she wish to avail of that. Moreover, it is also uncontroversial that from the moment the appellant was notified of what was proposed she had voiced her objection to her records being disclosed.

15. The appellant did not seek legal representation but opted to appear in person. She did not in fact appear on the first two occasions that the matter was before the District Court (i.e., on the 20th and 27th of October, respectively) as she claimed to have been on holiday and to have had some communication difficulties. Nevertheless, she did appear in person on the 3rd of November 2016 on which occasion she was invited to address the court.

16. The transcript of the proceedings on the 3rd of November reveals the following exchanges:

> *MS LACEY [counsel for the respondent]: Now, although on the 20th of October and indeed on the 27th of October there was no appearance by or on behalf of Ms K, you did hear the stance that was adopted by counsel who was representing Sister … [witness no 1] of [a named charitable organisation] and I think that you were aware I think that -- and also through myself, I think I informed you that Ms K was extremely unhappy about her records being uplifted and being sent not just to anyone but even out of the jurisdiction and I informed you that she had been notified by Mr Quinlan in the appropriate fashion pursuant to the provisions of the Brady case and that she had also been spoken to by Detective Garda Aine O'Sullivan from NBCI, I think, who had spoken to her on a number of occasions. Subsequently, Ms K was informed by Mr Quinlan of your ruling and the effect of that ruling and — by the gardai I think rather than by Mr Quinlan but by the gardai and as a result of that Ms K has attended here today. She is in court and I think that she wishes to address the Court in relation to the ruling that you have made and in relation to her position in terms of the uplifting and conveying of her medical records. Now, as the Court will be aware the records have not actually been sent out of the jurisdiction as of yet because the transcript has not been signed. Today was the day for the signing of the transcript and that has not been done. Additionally, there are two further proposed witnesses, a Dr … [witness No 2] who is Ms K's GP and a Ms … [witness No 3] of the Medical Records Department at [a named hospital] . So, my understanding is that witness summonses having been served on them, their evidence is due to be heard today in the normal run of events taking into account your ruling of the 27th of October. Before that is done, however, it seems to me as a matter of the utmost fairness to Ms K that if she wishes to address you that she is in court and ready to do so if the Court is willing to hear her.*
>
> *JUDGE: Very well. Mr Smith, have you anything to say at this stage?*
>
> *MR SMITH [counsel for witness No 1]: Nothing to say at this stage, Judge. It's more for the benefit of Ms K than the Court but just because Ms K wasn't there on the last occasion it's just to make it clear to her that we opposed the application and you made your ruling and as far as we're concerned that's pretty much the end of it but just to make it clear that because she wasn't present that [the named charitable organisation] did oppose the application and the chips fell as they did in relation to it.*
>
> *JUDGE: Very well. Where is Ms K?*
>
> *MS LACEY: She's here, Judge.*
>
> *JUDGE: Ms K, are you represented, legally?*
>
> *MS K: No.*
>
> *JUDGE: Ms K, I do want to confirm what Mr Smith has said on behalf of [the named charitable organisation]. On the last occasion it was made absolutely clear to me by Mr Quinlan that you were objecting to any medical records being handed over and you were strongly objecting and you were not agreeing and you were not consenting to any medical records being handed over. [The named charitable organisation] as represented by Mr Smith, counsel, strongly opposed the application by Ms Lacey on behalf of the Minister, strongly opposed and in fact furnished to the Court submissions, typed submissions setting out [the named charitable organisation's] objection to the records or to the Court forcing them to hand over the records. So, I do want you to understand that [the named charitable organisation] were looking after your interests and were strenuously objecting to the application and, as I am repeating myself, some written submissions were handed to me by counsel on behalf of [the named charitable organisation] in support of his and their objections. So, insofar as [the named charitable organisation] are concerned they moved heaven and earth to stop me making the order I did make eventually*

MS K: Thank you, your honour.

JUDGE: Now, I take it that you are still objecting to ~ yes, you may move up. Come up here. I take it you're still objecting to any medical records being handed over?

MS K: First and foremost, I apologise for not being in court –

JUDGE: Pardon me?

MS K: I apologise to yourself for not being in court. There was one phone call between the police and I, Aine [a member of An Garda Siochána] and I, and I was on holiday.

JUDGE: I see.

MS K: Where I was on holiday, I was very embarrassed. There were four people that didn't know anything about that case. So, I went into a toilet to take the call. Anyway, moving on from that, I'm asking you, Judge, since that time that I was given that statement I can't take back and it's the same statement anyway. My life has totally changed. I haven't drank in a good few years and I've remained in recovery and I'm very proud of myself. I have re-educated myself in university and yesterday I was at a very good job interview and I'm hoping I get it. My relationships with my children are very strong and I am now a grandmother and I am asking you to please don't allow that. I feel stripped bare and I have worked far too hard to allow it. The place that I was living at the time ~

JUDGE: Ms K, it was argued before the Court on the last occasion that this is not the court of trial.

MS K: I understand that.

JUDGE: This is simply a go-between. It's not the court of trial.

MS K: Sure.

JUDGE: And it would be open to have at the court of trial to have challenged the presentation of medical reports relating to you. That would be an option that would be open.

MS K: There was a longer list than [a named person] had said.

JUDGE: Just bear with me a moment. Just bear with me a moment, please. I do understand where you're coming from.

MS K: Thank you.

JUDGE: But I'm trying to explain to you that I have made my order. If you feel that you are being prejudiced in any way or you feel that your rights are not being properly protected, you should take steps to do something about it and when I say take steps to do something about it I mean get legal advice quickly.

MS K: I will do.

JUDGE: Because –

MS K: If you give that privilege of enough time.

JUDGE: Because that's the only way you can overturn my order. I have made the order and insofar as I am aware it has not been appealed. It was only made a week ago and I can't turn it back. I can't do what you're asking me to do. I can't vacate that order. If you feel that you're justified in attempting to have that order revoked, then you must take whatever steps you deem necessary to protect your interests. I can't say today, "Okay. Forget about it." I can't do that. I'm after making an order since the last day and again I'll repeat Mr Smith on behalf of [the named charitable organisation] fought as if he was representing you. He fought to stop the Court making the order it did.

MS K: I know that and thank you.

JUDGE: But the only other thing is that the admission of that evidence can be challenged in the court of trial.

MS K: Okay.

JUDGE: I am simply a go-between and there is nothing I can do for your today.

MS K: Well, thanks for listening to me.

JUDGE: And you should get legal advice. I wish you well and I'm glad to hear that you're — you look very well and I'm glad to hear you're back on your own two feet and that you're fighting your demons.

MS K: I am. Thank you.

JUDGE: But go to a solicitor and please get advice.

MS K: Thank you. I will do that. I will take that advice.

JUDGE: Because obviously this is a worry to you and an upset to you as well. Okay.

MS K: Yes. Thank you.

JUDGE: Very good.

MS LACEY: Judge, can I just say, again just for the record, that in terms of Mr Smith's submissions to you, on behalf of the Minister I did support him in terms of his apprisal of the law in relation to non-party discovery in criminal matters and so in terms of the manner in which that was addressed to you, both in the submissions and orally by Mr Smith, the Minister's position was the same. The Minister is ad idem in relation to the law. The only aspect of the submission with which I said that the Minister would potentially disagree with was in relation to the availability or potential availability of a subpoena duces tecum process but even in those circumstances I think I submitted on behalf of the Minister it would not apply in these circumstances because of the fact that you are not the court of trial. So, I just want to make that clear from the Minister's perspective.

JUDGE: Yes."

17. A review of the transcripts of the proceedings before the District Court on both the 20th and 27th of October 2016, copies of which have been exhibited in the affidavit of Ciara Hallinan, solicitor for the appellant in the present appeal, reveals that, while it was correct to say that counsel representing the named charitable organisation had argued strongly that the records should not be disclosed, and that he did make clear that the appellant was vehemently objecting to their disclosure, his argument was based entirely on the contention that the records were not compellable because the request amounted to an attempt to obtain disclosure on foot of a mandatory order, amounting in effect to an order for third party discovery, of the appellant's medical records for use in a trial in circumstances where there is a clear line of Irish jurisprudence to say that there is no power to do so under Irish law for the purposes of a trial in this jurisdiction.

18. There is, however, not one single reference in those transcripts to the appellant's unenumerated constitutional right to privacy, arising under article 40.3 of the Constitution, in respect of matters of a highly personal nature such as the state of her physical and mental health, both present and past; or to her right under Article 8 of the ECHR to respect for her private life. Even when the District Court Judge asked: "*But has this lady a right to privacy"* the only answer he received was "*Well, she has the ability to assert her right of confidentiality in terms of her medical records and she has done that and she has made that very plain*" (transcript of the 20th of October 2016, page 21 at lines 31 to 33).

19. Neither is there any visible engagement with the idea that for a proposed interference with those rights to be lawful it requires to be in pursuit of a legitimate aim, to be proportionate and to be the subject of an immediate and pressing need. There is no acknowledgement that a balancing of rights and interests is required, much less any analysis, rigorous or otherwise, as to where the correct balance lies, bar a single oblique reference (on page 13, lines 24 to 26 of the transcript of the 20th of October 2016) where counsel for the named charitable organisation, having reiterated his client's belief that it owed an obligation of confidentiality, submitted that there *"are ancillary points dealing with maybe data protection, confidentiality, a weighing up of the interests on either side which we say hasn't necessarily been done."*

20. On the contrary, the discussion and analysis in the District Court was overwhelmingly focussed on the contention that what was being sought was in reality third party discovery, and that the evidence was therefore not compellable because Irish law does not provide for third party discovery in criminal proceedings. The final paragraph in the lengthy extract from the 3rd of November 2016 quoted above reflects exactly what occurred on the two previous dates. However, the entirely separate issue as to whether, in a balancing of the public interest in this State rendering co-operation with a mutual assistance request such as that made, with the appellant's interest in maintaining privacy with respect of intimate matters touching on her state of health past and present, the scales is tipped in one or other direction was never overtly engaged with.

21. In a terse ruling on the 27th of October 2016 the District Court Judge indicated that he was not disposed to uphold the claim of privilege, giving as his reasons that he was conscious both that he was not the court of trial but simply a go between, and also that "*the Minister has received the appropriate assurances, which will protect the individuals (sic) involved in the criminal matter*". The reference to assurances related to a commitment given by the authorities in the requesting state to use the materials only for the purposes for which they were being sought and for no other purpose.

22. The reasons given afford no insight as to the precise basis on which the privilege argument was being rejected. Even more significantly, they afford no insight into whether considerations other than those advanced by counsel for the named charitable organisation were taken into account, such as the appellant's constitutional right to privacy and her right to respect for her private life under the ECHR, and if so the basis on which they were being overridden.

23. The District Court Judge had an obligation to have regard to, and to take into account, the appellant's said rights even if they had not been expressly asserted either by the appellant herself or by an advocate putting forward a case on her behalf. That much is clear from the judgment of O'Malley J in *Burns v District Judge O'Neill* [2015 IEHC 553 (unreported, High Court, O'Malley J., 18th August 2015), wherein she states (at para 84):

"the designated judge would certainly have an obligation not to breach the rights of the individual concerned within the parameters of the role conferred on him or her by the Act. In that regard, I consider that the respondents are correct in arguing that this entails consideration of the question whether or not "the receipt of the evidence" in this jurisdiction involves a breach of the individual's rights."

24. There is simply no evidence that the District Court Judge did that, or, if he did do so, on what basis he concluded that the appellant's rights were outweighed by other considerations. There certainly were other considerations that he would have been entitled to take into account such as the public interest and the exigencies of the common good, and indeed the right of the defendant in the requesting state to receive a fair trial. However, in the absence of adequate reasons for the District Court Judge's decision it is impossible to know whether, and to what extent, his decision was in fact influenced by such considerations.

25. The High Court judge approached the matter on the basis that there were clear countervailing considerations that would have justified the District Court judge in ruling that the appellant's privacy rights had been outweighed. However, while that might well be the case, there was simply no evidence that the District Court Judge had given any consideration either to the appellant's privacy rights or to the possible countervailing considerations. Yes, the countervailing considerations were matters that he could have taken into account, but the question was not could he have done so, rather it was did he in fact do so. The evidence in that regard was so thin as to be virtually non-existent, and in my opinion the High Court judge had no basis for believing that that the appellant's privacy rights were considered adequately, or even at all. Accordingly, the manner in which he approached the rights issue was erroneous.

26. The District Court judge very properly treated the appellant with dignity and respect, and indeed exhibited ostensible sympathy towards her, when she appeared before him on the 3rd of November 2016. However, in telling her that "*Mr Smith on behalf of* [the named charitable organisation] *fought as if he was representing you. He fought to stop the Court making the order it did"* he may

have inadvertently conveyed the impression to her that counsel had in fact put forward every possible argument on her behalf. However, that was not so. It is likely that the appellant as a lay person would, if she was representing herself, have articulated her objection first and foremost in terms of the proposed disclosure being an unacceptable intrusion into a highly personal area of her life that was nobody's business but her own, and that she had a right to personal privacy that she wanted upheld. Accordingly, she might reasonably have expected any advocate on her behalf to have done likewise. She would not have anticipated that a highly technical argument based on the jurisprudence around third party discovery would actually be the only one made. In offering this view I am not to be taken as criticising counsel for the named charitable organisation, or for that matter his client, in any way whatsoever. Counsel held no brief in fact or in law for the appellant, and to the extent that there was unsolicited advocacy on behalf of the appellant it was well intended. Be that as it may, although the intended reassurance offered by the District Court Judge to the appellant that her interests had effectively been looked after by counsel was also well intended, it did not in fact represent the true position.

27. In addition, the District Court Judge appeared to be of the view that having indicated a decision on the 27th of October 2016, in respect of the records actually produced by witness No 1, and those yet to be produced by witnesses No 2 and No 3 respectively, he was not at liberty to revisit that decision. However, those records had not yet been transmitted to the requesting state because the transcript in the case of witness No 1's testimony had yet to be signed, and witnesses No 2 and No 3 respectively had not yet testified.

28. The District Court is a court of record and normally it is the record that speaks. It is not clear whether an order had been made up and perfected by the 3rd of November 2016 reflecting the decision of the 27th of October 2016. However, even if that were the case, a District Court Judge does not sit as a Judge in a court of record when conducting a mutual assistance hearing. Rather he sits as a *persona designata* for the purposes of the Act of 2008 and in doing so he is performing a quasi-administrative / quasi-judicial role which is in truth *sui generis*. He is not, as the District Court Judge suggested when addressing the appellant, "simply a go-between". His role involves more than that. He is also required to ensure that the rights of affected persons are respected. Arguably, in circumstances where the proceedings were still in being, where the transcript in respect of witness No 1's evidence had not been signed, where witnesses No's 2 and 3 had yet to give evidence, and where no records at all had in fact been transmitted at that point, there was nothing to stop him re-opening the issue as to whether the records produced to date, and those yet to be produced, were in fact compellable, had he been minded to do so in light of the appellant's concern that her privacy rights should be taken fully into account.

29. If the District Court Judge had not fully appreciated the appellant's wishes in that regard before she addressed him on the 3rd of November 2016, he could scarcely have failed to appreciate them after she had addressed him, explaining as she did that she had been too embarrassed to discuss the issue on the phone with a Garda in front of her holiday companions, explaining how she had overcome the various adversities in her life, and imploring him as she did "…*please don't allow that. I feel stripped bare*…. ." Moreover, he must, or certainly ought to, have appreciated that the privacy rights she was asserting were rooted both in the Constitution and the ECHR even if the appellant herself did not articulate them in those terms.

30. In the circumstances outlined I am not satisfied that the District Court Judge in fact acted within jurisdiction in arriving at his decision that the records at issue were compellable. There is scant evidence that he had specific regard to the appellant's constitutional right to privacy, or her right to respect for her private life, and even if he did so there is no evidence at all concerning what countervailing considerations he regarded as outweighing those rights. In failing to properly consider whether the proposed measure would breach the appellant's rights, I conclude that the District Court Judge acted *ultra vires* his powers under the Act of 2008 in making his orders under s. 63 of the Act of 2008. I would therefore allow the appeal, grant *certiorari* to quash all three s.63 orders and remit the matter to the District Court for a proper reconsideration of the mutual assistance request that takes due account of the appellant's constitutional right to privacy and her right to respect for her private life arising under Article 8 ECHR, and any legitimate countervailing considerations advanced by the respondent.