

THE HIGH COURT
JUDICIAL REVIEW

[2013 No. 438 J.R.]

BETWEEN:

G. M.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 24th day of March, 2015

Introduction

1. In the within judicial review proceedings, the applicant seeks:

(a) An order of prohibition by way of an application for judicial review or in the alternative an injunction by way of an application for judicial review prohibiting or restraining the continuation of the prosecution entitled: "*The People (at the suit of the Director of Public Prosecutions) v. [G. M.]*" as set out in indictment bill no. KE29-12 and which currently stands adjourned before Naas Circuit Criminal Court;

(b) A declaration by way of an application for judicial review that continuing the prosecution of the applicant herein in the circumstances would be contrary to the concept of a fair trial as guaranteed by Article 38 of the Constitution of Ireland, 1937 in light of the provisions of s. 28 of the Residential Institutions Redress Act 2002 (as amended).

2. Leave to bring the within application was granted by order of Peart J. on the 10th of June, 2013.

Facts

3. On the 1st of February, 2012, the applicant was charged with an offence of possession of stolen property, contrary to s. 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001, being that on the 20th of December, 2012 at Unit 2 Naas Industrial Estate, Maudlings, Naas, County Kildare, without lawful authority or excuse, he possessed Coca Cola products to the value of €12,532, a battery operated pallet truck valued at €3,000 and three hand trucks valued at €400, total value of property being €15,932.

4. The prosecution alleges the following facts. On the 19th of December, 2010, members of An Garda Síochána came across two lorries that were stopped on the Dublin Road, Naas, County Kildare. The lorries were branded with Coca Cola logos. The Gardaí established that they had been the subject of unauthorised taking and use. A man found in charge of the lorries was arrested and taken into custody.

5. On the 20th of December, 2010, the Gardaí attended at and searched a premises at Unit 2A Naas Industrial Estate, Naas, County Kildare, on foot of a search warrant obtained the previous day. A number of pallets of branded soft drinks were discovered on the premises together with pallets of toys and food items. The applicant admitted to being the lessee of the premises. He further admitted to receiving a delivery of pallets of soft drinks from a Coca Cola lorry on the morning of the 19th of December, 2012 and said that he believed the goods to be legitimate but "short dated" i.e. their "best before" date was nearing expiry. The applicant was sent forward for trial to Naas Circuit Criminal Court where his trial is stayed by the said order of Peart J. pending the outcome of these proceedings.

6. The applicant met with his solicitor and counsel and instructed them that he would be pleading not guilty and further that he wished to put forward in evidence certain information arising out of his interaction with the Residential Institutions Redress Board. This information is said to be important to his defence but he is precluded from disclosing it pursuant to s. 28 (1) of the Residential Institutions Redress Act 2002 (as amended).

Residential Institutions Redress Act 2002

7. Section 28 of the Act, as amended by s. 34 of the Commission to Inquire into Child Abuse (Amendment) Act 2005, provides as follows:

"(1) A person (including the Board and the Review Committee) shall not, subject to this section, disclose information other than the information specified in *subsection (4) or (5)* that is provided to the Board or the Review Committee and obtained by that person in the course of the performance of the functions of the person under this Act.

(2) A person referred to in *subsection (1)* shall disclose information so referred to for the purpose of the performance of the functions of the person under this Act.

(3) Documents that are—

(a) provided to or prepared by the Board and where appropriate the Review Committee, or

(b) prepared by a person for the Board or the Review Committee in the course of the performance of the functions of such person as a member of the Board, Review Committee, a member of the staff of the Board or the Review

Committee or an adviser, shall not constitute Departmental records within the meaning of section 2 (2) of the National Archives Act, 1986.

(4) The Board shall keep a record of the following information—

- (a) the name, address and date of birth of an applicant,
- (b) the name of the institution concerned,
- (c) the period in which the applicant was resident at the institution, and
- (d) the amount awarded to the applicant under this Act,

and such records shall be available to the Minister for the purposes of *section 13 (13)* and to any party against whom proceedings are initiated contrary to *section 13 (12)*.

(5) Notwithstanding *subsection (1)* or any other provision of, or an instrument made under, a statute or any other rule of law, a person shall disclose information other than the information specified in *subsection (4)* that is provided to the Board or the Review Committee and obtained by that person in the course of the performance of the functions of the person under this Act to—

- (a) a member of the Garda Síochána if the person is acting in good faith and reasonably believes that such disclosure is necessary in order to prevent an act or omission constituting a serious offence, and
- (b) to an appropriate person (within the meaning of the Protections for Persons Reporting Child Abuse Act, 1998) if the person is acting in good faith and reasonably believes that such disclosure is necessary to prevent, reduce or remove a substantial risk to the life or to prevent the continuance of abuse of a child

(5A) Nothing in *subsection (1)* operates to prohibit the production of a document prepared for the purposes or in contemplation of an application to the Board or a submission for a review by the Review Committee, or given in evidence in such application or review, to –

- (a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter, or
- (b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing the functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.

(5B) nothing in *subsection (1)* operates to prohibit the giving of information or evidence provided or given to the board or the review committee to –

- (a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter, or
- (b) such body or other person as may be prescribed by order made by the minister, when the body or person concerned is performing the functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.

(6) A person shall not publish any information concerning an application or an award made under this Act that refers to any other person (including an applicant), relevant person or institution by name or which could reasonably lead to the identification of any other person (including and applicant), a relevant person or an institution referred to in an applicant under this Act.

(7) The board, shall, prior to the making of an order under *section 3 (3)* determine the disposal of the documents concerning applications made to it.

(8) The review, prior to the making of an order under *section 14 (3)*, determine the disposal of the documents concerning applications made to it.

(9) A person who contravenes *subsection (1)* or *subsection (6)* shall be guilty of an offence."

Submissions

8. Mr. Aylmer SC for the applicant contends that the effect of s. 28 (1) of the 2002 Act is to prevent the applicant from disclosing the information he wants to disclose at his trial. Were he to do so, he would be committing a criminal offence. The information is of the utmost importance to his defence and consequently, the effect of the statutory prohibition on its disclosure means that he cannot get a fair trial. It would not be possible to devise any legal artifice or device that would satisfactorily surmount this difficulty before a jury and it is not something capable of being remedied by direction of the trial judge. The applicant has a right under Article 38.1 of the Constitution and Article 6 of the European Convention on Human Rights to defend himself at his trial and as it is clear that the 2002 Act prevents him from doing so, the trial should be prohibited.

9. Ms. Brennan BL for the respondent submits that if the information in question relates to an award obtained by the applicant, he is not in fact prohibited by the 2002 Act from disclosing it to the jury. Even if that were not the case, an applicant seeking an order of prohibition in relation to a criminal trial has a very heavy onus cast upon him to establish that there is a real risk of an unfair trial as opposed to one that is theoretical. It is very difficult to see how the information in question would assist in establishing that he is innocent of the offence with which he is charged. It would in any event be a matter easily capable of being dealt with by way of an appropriate direction from the trial judge who has ultimate responsibility for the fairness of the trial.

Relevant case law

10. In *F McK v. O. L.* [2011] 1 I.R. 263, the applicant in family law proceedings sought maintenance from the respondent for the support of their children in the applicant's custody. It emerged in the District Court that the respondent was in receipt of an award from the Residential Institutions Redress Board. She argued however that she could not divulge any information in relation to the award by virtue of s. 28 of the Act of 2002, which made it an offence to publish such information. The respondent appealed to the Circuit Court, which stated a case for the opinion of the Supreme Court on the point. The Supreme Court held that the applicant was entitled to details of the award made to the respondent and the court could take it into account when deciding the issue of maintenance.

11. In delivering the judgment of the Supreme Court, Finnegan J. set out the provisions of s. 28 and said (at p. 270):

"[12] Section 28 (1) of the Act of 2002 in its terms is directed to: -

1. The Board;
2. The Review Committee;
3. Persons who obtain information in the course of the performance and functions of that person under the Act.

The section prohibits each of those to whom it is directed from disclosing information other than the information specified in subsection (4) or subsection (5) of the section. Neither subsection (4) or subsection (5) are relevant to the issues in the case stated.

[13] Subsections (5A) and (5B), introduced into the Act of 2002 by s. 34 (h) of the Commission to Inquire into Child Abuse (Amendment) Act 2005, provide that s. 28(1) shall not operate to prohibit the production of a document prepared for the purposes or in contemplation of an application to the Board or a submission for a review by the Review Committee, or given in evidence in such application or review or the giving of information or evidence provided or given to the Board or Review Committee to a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter. The Circuit Family Court is, I am satisfied, when hearing an application for a maintenance order a body or person performing functions under an enactment consisting of the conducting of a hearing and so subsections (5A) and (5B) apply and in consequence s. 28 (1) of the Act has no application; such information and documents, but not the fact or amount of the award, may be disclosed by the Board, the Review Committee and the persons to whom s. 28 (1) is directed to the Circuit Family Court.

[14] Section 28 (6) in its terms applies to any person. It prohibits the disclosure of any information concerning an application or an award made under the Act that refers to any other person, including an applicant, relevant person or institution by name or which could reasonably lead to the identification of any other person, including an applicant, a relevant person or an institution referred to in an application made under the Act. Section 1 of the Act defines relevant person as a person referred to in an application as having carried out the acts complained of or the institution in which the acts complained of were carried out and persons involved in the management of that institution. Institution is defined in s. 1 of the Act as an institution specified in the schedule to the Act.

[15] Thus subsection (6) prohibits a person publishing information concerning an award that refers to any other person by name or which could lead to the identification of any other person including an applicant, a relevant person or an institution. For the respondent to furnish information as to the amount of the award to her would not be to publish information concerning "any other person", relevant person or institution by name nor would this lead to the identification of any other person, relevant person or institution. In short the effect of subsection (6) is that an applicant may make known the amount of an award received so long as no other person, relevant person or institution is named and provided that the disclosure could not reasonably lead to the identification of any other person, a relevant person or an institution. Having regard to the provisions of s. 5A (3) of the Family Law (Maintenance of Spouses and Children) Act 1976, as inserted by s. 18 of the Status of Children Act 1987, there is an obligation to disclose the amount of the award; the source of the award may be disclosed by the recipient or if the source becomes relevant the recipient may be obliged to disclose it. The proceedings in respect of a maintenance order will be *in camera* and there will be no further disclosure of the fact of the application or the amount of the award. The clear policy of the Act of 2002 in preserving confidential information relating to applications will not be impaired by disclosure for the purposes of the proceedings in the Circuit Family Court."

12. In *Z v. DPP* [1994] 2 I.R. 476, the Supreme Court dealt with the appropriate principles of law applicable to applications for prohibition of criminal trials. In the course of delivering the unanimous judgment of the court, Finlay C.J. said (at p. 506-507):

"This court in the recent case of *D. v. The Director of Public Prosecutions* [1994] 2 I.R. 465 unanimously laid down the general principle that the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances (which in that case also were pre-trial publicity) he could not obtain a fair trial...

With regard to the general principles of law I would only add to the principles which I have already outlined the obvious fact to be implied from the decision of this Court in *D. v. The Director of Public Prosecutions* [1994] 2 I.R. 465, that where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

13. In *Scully v. DPP* [2005] 1 I.R. 242, the applicant was charged with offences which took place at a filling station which utilised a

video surveillance system. The applicant sought to inspect the video footage after a considerable delay on his part. He was informed that the footage had been viewed by the Gardaí who claimed that it did not cover the area where the offence occurred, was of poor quality and of no evidential value. The owner of the filling station supported that contention. The video was not retained and thus no longer available when the applicant sought to inspect it. He sought to prohibit his trial on the grounds that he could not receive a fair trial as there was a reasonable possibility that the video could have provided evidence tending to exculpate him.

14. The application failed before the High Court and was appealed to the Supreme Court. In the course of delivering the judgment of the court, Hardiman J. said (at p. 252):

"Delay is significant not so much for its bare length (in this case, for instance, it was considerably less than the unexplained delay in commencing the prosecution) but for the indication that it provides that the case is based on a 'remote fanciful or theoretical' *possibility*, rather than a real desire to obtain evidence believed to be potentially exculpatory. To put this another way, all the defendant has done here is merely to invoke the possibility that exculpatory evidence at one time existed, that there was something visible on the video, despite the new evidence. He must do more than that. In the words of Finlay C.J. in *Z. v. DPP* [1994] 2 I.R. 476 at p. 507, he must "establish a real risk of an unfair trial". The importance of the first adjective in this phrase is that it excludes a risk which is merely remote, fanciful or theoretical. The need to meet this requirement involves a much greater engagement with the actual state of the evidence than is apparent here. The applicant's case did not at all engage with the facts provided in the additional statements in April, 2003, but simply considered them as irrelevant. This omission represents a flight into unreality."

15. The appeal was dismissed.

Discussion

16. The applicant submits that he is a person referred to in s. 28 (1) of the 2002 Act and is thereby precluded from disclosing the information he wants to disclose at his trial. He says he cannot avail of the exemptions provided for in subsections (5A) and (5B) because the trial in the Circuit Criminal Court before a jury is not a "hearing, inquiry or investigation in relation to, or adjudication on, any matter" in the sense referred to in the subsection.

17. As stated by Finnegan J. above, s. 28 (1) is directed to the Board, the Review Committee and persons who obtain information in the course of the performance of functions of that person under the Act. The applicant however says, as he must, that he is a person performing functions under the Act in that he must comply with its provisions in order to make an application for an award. Section 1 (1) of the Act provides for "functions" which include powers and duties. It further provides that "applicant" shall be construed in accordance with s. 7 (1), which describes an "applicant" as a person who makes an application for an award to the Board.

18. Section 5 of the Act imposes duties upon the Board and gives it certain powers. These are described in the marginal note as the "functions of Board". Section 14 of the Act establishes the Review Committee and refers throughout to the performance of its functions by the Committee.

19. The long title of the Act is as follows:

"An Act to provide for the making of financial awards to assist in the recovery of certain persons who as children were resident in certain institutions in the State and who have or have had injuries that are consistent with abuse received while so resident and for that purpose to establish the Residential Institutions Redress Board to make such awards and to provide for the review of such awards by the Residential Institutions Review Committee and to provide for related matters."

20. It seems to me that the use of the expression "function" in the Act is intended by the legislature to refer to the execution of an act required for the purpose of implementing the statute and its objective and includes the powers and duties provided for by the Act.

20. Viewed as such, I cannot see how an applicant for a redress award could be regarded as a person performing a function under the Act. Accordingly, in my view s. 28 (1) has no application to the applicant in these proceedings.

21. Section 28 (6) does however apply to the applicant. Thus, as pointed out by the Supreme Court in *F McK*, for the applicant to publish information regarding the fact or amount of an award he himself received would not contravene the subsection as it would not relate to "any other person" but to the applicant himself. The subsection permits such publication by an applicant provided that no relevant person or institution, as defined, is thereby identified.

22. I am satisfied therefore that there is no legal impediment to the applicant giving evidence of the kind referred to in his own defence. Even if that were not the case, I am far from satisfied that the applicant would thereby be prevented from having a fair trial. The applicant must establish a real risk of an unfair trial. As pointed out by Hardiman J. in *Scully*, the applicant has to engage with the facts of his case in a meaningful way so as to demonstrate the likelihood of such a risk arising. The applicant is here charged with the offence of possession of stolen property. The connection between such offence and the fact that the applicant may or may not have received a redress award of whatever amount is not an immediately obvious one. It is certainly not beyond the bounds of possibility that such evidence could be regarded as both relevant and admissible but it is nonetheless difficult to conceive how it could ever be of more than fairly tangential relevance to the issues in the case.

23. If it did become in some way material to the issues, I can see no good reason why the trial judge could not effectively deal with such issue by appropriate rulings and directions.

Conclusion

24. For these reasons, it seems to me that the applicant has not made out any of the grounds upon which leave was granted and I will therefore dismiss this application.