THE COURT OF APPEAL

[2014 No. 1436]

The President

Kelly J.

Hogan J.

BETWEEN

PATRICK KELLY

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

JUDGMENT of the Court delivered on 30th November 2015

Introduction

1. This is an appeal brought by Dr. Kelly against the judgment and order of O'Malley J. in the High Court on 7th October 2014. The principal question that arises in the case is the meaning of s. 42(1) of the Freedom of Information Act 1997. For reasons that will become clear, that is effectively the only question in the case.

2. The background to the case may be very briefly noted although it does not have relevance to the issues under consideration. This is another episode in a saga of dispute between Dr. Kelly and UCD which has its origin in 2001 when he applied for a place on a Social Science course. The dispute in various forms has been before the courts on many occasions. The factual basis of this case is Dr. Kelly's applications to UCD under the Freedom of Information Act and his seven review applications made to the Commissioner pursuant to s. 34 of the 1997 Act.

3. Dr. Kelly brought the series of applications to the Information Commissioner under s. 34(2) of the Act for the review of decisions to refuse him access to certain records. The Commissioner initially embarked on a review of the decisions, but subsequently invoked her discretion under s. 34(9)(a) to discontinue the review on the ground that his applications or the applications to which the review related were vexatious. Dr. Kelly then appealed to the High Court against the discontinuation of the review, seeking to exercise a right in that behalf under s. 42(1) of the Act.

4. The Commissioner resisted the application to the High Court on the primary and principal ground that an appeal does not lie to the High Court under s. 42(1) in respect of a discontinuation pursuant to s. 34(9)(a). O'Malley J. in the High Court accepted that submission as being sound in law and held that Dr. Kelly did not have a statutory right to appeal. He was not without remedy because he could apply for judicial review if he was aggrieved and was able to show the ground for such an application.

5. The High Court also held against Dr. Kelly on other grounds. Having dealt with the question of an appeal under s. 42(1), the judge proceeded to consider a limited number of other points that he had raised which might have been considered to be points of law, doing so on the conditional basis that she was wrong in her finding on the main question.

6. The High Court considered an objection that Dr. Kelly made to the authority and capacity of the deponent of the affidavits in response to his application to speak on behalf of the Commissioner. This court is in agreement with the conclusion of O'Malley J. on that question. Any other arguments that Dr. Kelly put forward in his High Court application will only arise if he is correct in contending that he has a statutory right of appeal. It is an essential part of Dr. Kelly's case that the Commissioner was wrong in discontinuing her review, and that he is entitled to appeal to the High Court to seek the reversal thereof. Thus, the question of capacity or authority on the part of the deponent of the responding affidavits is irrelevant on the principal issue and could only arise if this Court were to decide in Dr. Kelly's favour on the question of interpretation.

Dr. Kelly's case on this issue is, first, that the statutory provisions, properly understood, confirm his entitlement to appeal. Secondly, he argues that there is relevant High Court precedent in the decision of Murphy J. in Killilea v. Information Commissioner [2003] 2 I.R. 402 that O'Malley J. ought to have followed. Dr. Kelly submits that the analysis made by Murphy J. is in fact the correct interpretation of the appeal provision. In respect of a decision of Birmingham J which the trial judge cited with approval, Nowak v. Data Protection Commissioner [2012] IEHC 449, he argues that it is not relevant.

The Proceedings

7. By notice of motion dated 7th October 2013, Dr. Patrick Kelly applied to the High Court for a series of orders, including an order allowing his appeal under s. 42(1) of the Freedom of Information Acts 1997 and 2003, and an order setting aside the decision of 11th

September 2013 of the Information Commissioner. He sought a variety of other reliefs and set out as points of law some nine issues. The Information Commissioner had written to Dr. Kelly on the date mentioned to inform him that she had decided to discontinue her review in seven separate review applications made by Dr. Kelly in connection with requests he had made to UCD. In the course of this letter, the Commissioner explained in detail why she had come to the conclusion in relation to Dr. Kelly's application and she concluded as follows.

"I conclude, based on the evidence before me, that you are using FOI tactically in pursuit of your long-standing grievance with UCD. I am satisfied, therefore, that these reviews form part of a pattern of conduct that amounts to an abuse of the FOI process and I find, therefore, that your applications or the applications to which the reviews relate are vexatious. Accordingly, in the exercise of my discretion under section 34 (9) (b), I discontinue these reviews pursuant to the provisions of section 34 (9) (a) (i) of the FOI Act."

8. In her judgment on the application brought by Dr. Kelly to the High Court, O'Malley J. held that the Court had no jurisdiction to entertain the appeal because of her interpretation of s. 42(1) of the 1997 Act, but nevertheless also addressed some questions of law that she felt would have arisen if decision on the interpretation was incorrect.

The Relevant Provisions

9. The provisions of the legislation with which we are directly concerned in this appeal are subsections of sections 34 and 42. Section 34(2) and (9) are as follows:

"(2) Subject to the provisions of this Act, the Commissioner may, on application to him or her in that behalf, in writing or in such other form as may be determined, by a relevant person—

(a) review a decision to which this section applies, and

(b) following the review, may, as he or she considers appropriate—

(i) affirm or vary the decision, or

(ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper,

in accordance with this Act.

(9) (a) The Commissioner may refuse to grant an application under subsection (2) or discontinue a review under this section if he or she is or becomes of the opinion that—

(i) the application aforesaid or the application to which the review relates ('the application') is frivolous or vexatious,

(ii) the application does not relate to a decision specified in subsection (1), or

(iii) the matter to which the application relates is, has been or will be, the subject of another review under this section.

(b) In determining whether to refuse to grant an application under subsection (2) or to discontinue a review under this section, the Commissioner shall, subject to the provisions of this Act, act in accordance with his or her own discretion."

Section 42 (1) is as follows:

"42.—(1) A party to a review under section 34 or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision."

10. Dr. Kelly claimed to be entitled to appeal the discontinuance of the review that the Commissioner notified to him in her letter of 11th September 2013. The Commissioner's position was that s. 42(1) only applies when a review has been completed, at which point a party or a person affected by the decision may appeal to the High Court on a point of law. The important words are "following such a review". In his case, the review had not proceeded to a conclusion, but had instead been discontinued and on the true interpretation of s. 42(1) no appeal lay. This did not mean that the Commissioner was immune from challenge in respect of a discontinuation but that would have to be pursued by way of judicial review rather than statutory appeal.

The Judgment

11. In her judgment, O'Malley J. analysed the scheme of the Act. She identified the purpose as being encapsulated in s. 6(1) providing:

"6.—(1) Subject to the provisions of this Act, every person has a right to and shall, on request therefor, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access."

The judge quoted sub-sections (6) and (8) of s. 34 as well as the provisions set out above. Sub-section (6) provides that the Commissioner must give notice to parties concerned "if the Commissioner proposes to review the decision concerned". Sub-section (8) refers to "a proposed review" under the section.

12. Before dealing with the issue of jurisdiction under s. 42(1), the judge addressed another of Dr. Kelly's points. He objected to the authority of a senior official in the Office of the Commissioner to swear an affidavit on behalf of the Commissioner at a time when the Commissioner who had discontinued the review had been appointed to another position and a new Commissioner had not yet been appointed. The High Court judge held that there was no substance to Dr. Kelly's objections. The staff of public service bodies or agencies do not lose the legal right to continue to do their jobs if there is an interregnum in the position of the head of the agency. Such a rule, the judge held, would "mean that any such body would present an open goal for litigants during such periods".

13. The court is satisfied that the learned trial judge was entirely correct in this conclusion. The senior official had obvious and

express authority to speak on behalf of the previous Commissioner, as is apparent from the correspondence. But independently of that, he had continuing implied authority to speak on behalf of the Commissioner and his or her office. Having said that, a decision on this point is not necessary in determining the question of jurisdiction. The facts are not in dispute. Dr. Kelly's complaint and the basis of his application to the High Court is because the review of the UCD decisions did not proceed because it was discontinued. Affidavit evidence was not required to establish that the Commissioner discontinued the review.

14. The trial judge held that the Information Commissioner is not constrained to make a decision as to whether a matter raised by an applicant is frivolous or vexatious at the commencement of the process, but can do so at any stage. Under s. 34(9)(a) of the Act, if he or she is or becomes of the opinion, the Commissioner may then refuse to grant the application or may discontinue a review:

"There are therefore two possible scenarios here. The Commissioner can decide, whether before or after receipt of submissions as to a 'proposed review' not to embark upon a review or may, having embarked upon it, decide to discontinue it for the reasons stated."

15. The judge held that "following the review" meant "following the completion of a full process of review". The appellate jurisdiction of the High Court under s. 42(1) applies to "a substantive decision on the merits of the matter after completion of the full process of review. The statutory appeal process is intended therefore to relate to points of law arising from such substantive decisions and not to a decision made by the Commissioner as to whether to carry out a review or to discontinue one that has commenced. Complaints as to these latter decisions, as with any other aspect of the process adopted by the Commissioner, are more properly addressed by judicial review".

16. O'Malley J. considered the decision of Murphy J. in Killilea v. Information Commissioner [2003] 2 I.R. 402. Dr. Kelly relied on this case as authority for his interpretation of s. 42(1). The respondent submitted that the decision actually concerned a different sub-section; that by contrast with Killilea, in the instant case the Commissioner had not made a concession that there had been a review; that the point had not been fully argued and that a later decision on the Data Protection legislation was inconsistent with the decision. The trial judge considered Killilea v. Information Commissioner as well as the later case of Nowak v. Data Protection Commissioner [2012] IEHC 449, a decision of Birmingham J concerning somewhat analogous provisions contained in the Data Protection Acts 1988-2003. O'Malley J. acknowledged that her analysis might not fully accord with that of Murphy J. in Killilea, but she said that it was "clear from that judgment that this issue was not fully pressed or argued".

17. O'Malley J. went on to consider a point raised by Dr. Kelly as to the meaning of frivolous and vexatious because that could be considered a point of law. In other words, if she was found to be wrong in her decision as to the jurisdiction under s. 42(1) and there was in fact an appeal on a point of law, the judge addressed this question because it could come into that category. On the other hand, she was careful to make a distinction that she would not address any other issue which might be appropriate in an application for judicial review because that would in effect be furnishing an advisory opinion on an issue that did not arise in this case on any view of the matter. It is relevant to draw attention to this reservation properly made by the High Court judge because Dr. Kelly complains that seven of his grounds of appeal to the High Court were not considered by the judge.

18. Dr. Kelly relies on Killilea v Information Commissioner [2003] 2 IR 402, arguing that O'Malley J ought to have followed the decision of Murphy J in that case. In Killilea the Information Commissioner initially accepted the request for a review but formed the view that the appellant had failed to specify to the Department to whom he directed his request the act for which he required reasons and had failed to properly request a statement of reasons. He accordingly decided to discontinue the review, pursuant to s. 34(9). The appellant challenged that decision, pursuant to s. 42. Murphy J in dismissing the appeal held inter alia that a person who requested information pursuant to the Freedom of Information Act 1997 must demonstrate a right of access. The original request was not properly made in accordance with the Act and the Commissioner had exercised his discretion to discontinue the review rationally and reasonably.

19. Murphy J. also addressed s. 42(1). He noted that it was submitted:

"that, strictly speaking, the current proceedings are not within the scope of s. 42. In this regard, it is submitted that s. 42 is restricted in its scope to an appeal against a decision of the respondent 'following a review' and that it does not extend to a decision of the respondent in his discretion to discontinue a review pursuant to s. 34(9)(a)(ii) of the Act of 1997. A decision to discontinue a review, being an exercise of a statutorily conferred discretionary power, ought only be challenged by way of application for judicial review".

Nevertheless, the judge said "As the appellant has, until recently, represented himself in these proceedings, this procedural point was not taken" (page 423).

20. Murphy J. held that there had been a review. The respondent's affidavit said that "In carrying out my review in this case, I had regard to …" and referred to various letters and applications. Having carried out the review, his decision was to discontinue it (page 425).

Discussion

21. If we look first at s. 34(2), it seems clear that the subsection envisages, first, an application to the Commissioner by a relevant person; second, a review by the Commissioner; third, a response by the Commissioner consequent on the outcome of the review. There is to begin with a step that the relevant person takes, namely, he or she applies to the Commissioner. There does not seem to be any difficulty about that interpretation. The process is initiated by an application. The application provokes or produces a response by the Commissioner. In respect of the application, the Commissioner has power under subsection (2) to review the decision in question, that is, a decision to which s. 34 applies. This provision does not provide for a refusal of the application; for that we must look elsewhere in s. 34 at subsection (9).

22. Subsection (9)(a) provides for a number of different situations in which the Commissioner may refuse to grant an application under subsection (2), or alternatively may discontinue a review that has already begun. Refusing to grant an application for a review means that the review does not begin. Discontinuing a review necessarily implies that the review has begun but has been aborted. The reasons why the Commissioner may refuse an application or discontinue a review are enumerated in subparagraphs (i), (ii) and (iii). The various circumstances provided for which justify refusal of an application or discontinuation of a review are as follows.

• The Commissioner may refuse to embark on a review or discontinue one already begun if she is of opinion or becomes of opinion that the application for the review is frivolous or vexatious;

• The Commissioner may behave similarly if she is of opinion or becomes of opinion that the application to which the review relates (which I take to be the original request) is frivolous or vexatious;

• The application does not relate to a decision specified in section 34 (1)

• The matter to which the application relates is the subject of another review under section 34 or has been or will be subject thereto.

The Commissioner acts in accordance with her own discretion in exercising the power given by section 34(9).

23. Dr. Kelly's application to the Commissioner was the subject of a discontinuance of a review that had begun because the Commissioner became of the opinion that his application was vexatious, as she notified him by letter of the 11th September 2013. The position, therefore, was that a review was begun, but was aborted – it was discontinued, in the words of the Act, because the Commissioner became of opinion that the application was vexatious. The review did not come to a conclusion. The Commissioner did not decide to affirm or vary the decision in question in relation to the documents or to annul it. The Commissioner could not have reached any of those decisions because they only arise following the review.

24. In the course of oral submission, Dr. Kelly proposed a reading of s. 42(1) as follows. On the face of it, the subsection means that a party to a review under s. 34 or any other person affected by the decision of the Commissioner following the review may appeal to the High Court on a point of law. He suggests a disjunction between a party to a review and any other person affected by the decision. This means that a party to a review is given a right of appeal to the High Court on a point of law but that the situation for any other person affected is different. In the latter case it is only following the review that the person may appeal, on this submission. It seems to the court that this interpretation is contrary to the sense of the provision in the subsection as well as to any rule of plain meaning. It is not in accordance with recognised principles of statutory interpretation. There is simply no reason why that interpretation should be applied. The suggested reading is strained and artificial.

25. On this analysis, it follows that the question for consideration on the appeal has been answered. It is clear that s. 42 does not apply. Dr. Kelly was a party to the review but there was no decision following the review. The process of review stopped so there was no conclusion. That is the exercise of the Commissioner's discretion under s. 34(9). Section 42(1) is conditional on a review coming to a conclusion.

26. In our judgment, Killilea v Information Commissioner is, at best, very weak authority for the proposition put forward by Dr. Kelly. The principal argument concerned whether the applicant had made a proper request for the information in the first place. It is true that the Court considered s. 42(1), but only in circumstances where the point was submitted but not actually taken. It was not, therefore, necessary for the judge to consider the question in any detail. We do not think that this case represented a precedent that O'Malley J. was obliged to follow. Having said that, this court would, if necessary, come to the conclusion that the decision in Killilea does not represent a correct interpretation of the subsection.

27. The court's judgment, accordingly, is that O'Malley J. was correct in her interpretation and in her decision that no appeal lay from the discontinuance by the Commissioner of the review. The mode of challenging that is by way of judicial review, as the High Court held.

28. Since there is no appeal under s. 42(1) in the case of the discontinuance of a review by the Commissioner, it is unnecessary to consider points that might have arisen if there had been an appeal. O'Malley J. addressed some limited matters that could be considered to be points of law, but carefully avoided discussion of questions that might arise on a judicial review, if Dr. Kelly were to pursue that procedure. In doing that, this court is of the view that she was entirely correct. The appellant has apparently not understood why the judge did not consider these extra grounds.

29. The appeal is accordingly dismissed.