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Stokes v. Minister for Public Enterprise [2000] IEHC 191 (3rd July, 2000)

THE HIGH COURT

No. 53 MCA 2000

IN THE MATTER OF THE AIR NAVIGATION AND TRANSPORTS ACTS 1936 -1998

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 4 OF THE AIR NAVIGATION (NOTIFICATION AND INVESTIGATION OF ACCIDENTS AND INCIDENTS) REGULATIONS 1997 S.I. 205-1997

AND

IN THE MATTER OF AN APPLICATION OF IRENE STOKES

APPLICANT

AND

THE MINISTER FOR PUBLIC ENTERPRISE, THE CHIEF INSPECTOR OF AIR ACCIDENTS AND FRANK RUSSELL

RESPONDENTS

Judgment of Mr. Justice Kelly delivered the 3rd day of July. 2000

INTRODUCTION

1. The crash of a helicopter at Cornakelly, Co. Longford on the 27th August, 1999 has given rise to this application. The Applicant is the widow of the pilot of the aircraft who, together with his passenger, was killed in the crash.

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2. An investigation has been carried out into the incident by the Second and Third Named Respondents. The investigation has been carried out pursuant to the provisions of the Air Navigation (Notification and Investigation of Accidents and Incidents) Regulations SI. 205/1997 (the Regulations). These regulations have been promulgated pursuant to the provisions of Council Directive 194/56/EEC. The Regulations set forth the principles which govern the investigation of civil aviation accidents and incidents.

3. On the 15th May, 2000 a draft final report of the investigation was furnished to the Applicant. That was done pursuant to the provisions of Section 18(1)(a) of the Regulations. That section provides that where an investigator is of opinion that a person is likely to be adversely reflected on by the report he may serve what is called a Notice of Findings upon such a party. The person so served is entitled to make comments in respect of the draft report and the inspector is obliged to consider those comments before proceeding to the delivery of the final report.

4. The Applicant, having been so served, desires to make comments to the inspector. It is in that context that this application is made. She seeks an order directing the Respondents to make available to her “all records, notes and memoranda concerning or pertaining to the investigation”. She does so in purported reliance upon the provisions of Section 24 of the Regulations.

5. At the hearing the Applicant’s Counsel confined the application to documents which fall within the express terms of Section 24 of the Regulations which I will consider in due course.

6. The basis for the application is an assertion on the part of the Applicant that the advisor whom she has retained to assist her in making comments requires access to these documents in order to “comprehensively comment on the draft final report”.

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RELEVANT FEATURES OF THE REGULATIONS

7. The Regulations seek to implement the obligations of the State pursuant to the provisions of Council Directive 94/56/EC. Article 1 of that directive recites that its purpose is “to improve air safety by facilitating the expeditious holding of investigations, the sole object of which is the

prevention of future accidents and incidents”. That objective of the directive is reproduced verbatim as the objective of the Regulations (see Section 4 thereof).

8. That air safety and the prevention of accidents is the objective of an investigation carried out under the Regulations is underscored by a number of specific provisions contained therein. For example, under Section 14 the report prepared on foot of an investigation into an accident must state that the sole objective of the investigation is that which is referred to in Section 4 of the Regulations and must contain, where appropriate, safety recommendations. Section 10 (4) of the Regulations provides that investigations carried out under them “shall in no case be concerned with apportioning blame or liability”.

9. Section 17 (1) of the Regulations provides that a safety recommendation “shall in no case create a presumption of blame or liability for an occurrence

10. It is clear from these provisions that the purpose of an investigation carried out pursuant to the Regulations is directed not towards the apportionment of blame or liability but rather the improvement of air safety and the prevention of accidents in the future.

11. Part 2 of the Regulations sets out in considerable detail both the powers of inspectors and the procedures which they must follow in conducting their investigations. This part of the Regulations also deals with the report which must be prepared after such an investigation together with the recommendations to be made on foot of it. It is clear that this part of the Regulations also seeks to address in a real and substantive way the rights and entitlements of

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parties who may be concerned with the outcome of such an investigation. I will consider these in greater detail in a moment.

12. Part 3 of the Regulations provides a procedure whereby the Final Report which emanates on foot of an investigation can be the subject of re-examination. This part also makes provision for the holding of a public enquiry if it appears to the Minister expedient to hold one. In such event the procedures to be followed at such a public enquiry are set out in detail in the Second Schedule to the Regulations. This part also contains provisions for the rehearing of a public enquiry.

13. The section which is relied upon by the Applicant in these proceedings is contained in the miscellaneous part of the Regulations and I will consider that section later in this judgment.

SECTION 18 OF THE REGULATIONS

14. This section provides that no report of an investigation into an accident or incident may be made to the Minister or made public until the investigator in charge has:

15. “where it appears to him or her practical to do so, served a notice (in this regulation referred to as “the Notice of Findings”) on any party involved in the occurrence and on any other person, including the Minister, who is, in the Inspector’s opinion, likely to be adversely reflected on by the report or, where such a person is deceased, on the person who appears to the investigator to best represent the interests of the deceased person

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16. Sub-section 2 of Section 18 provides that the Notice of Findings shall include particulars of any proposed analysis of facts and conclusions as to the circumstances and causes of the accident or incident which may concern the person on whom it is served.

17. Once served on the relevant person they are entitled to make comments to the inspector and he is obliged to consider those comments. Having done so the inspector is then obliged under sub-section 1 (c) of Section 18 to inform in writing the person who made the comments of the result of the inspector’s consideration of the comments.

18. Section 18 (3) makes it clear that any comments which may be forthcoming from a person served with a Notice of Findings must be made in writing and be served within a period of 28 days from the service of the Notice of Findings. Following consideration of such comments the inspector is of course entitled to amend the report or to append the comments made to him to the report.

19. The Applicant was served with the draft report pursuant to the provisions of Section 18 and wishes to exercise her right to make comments in that regard.

SECTION 24 OF THE REGULATIONS

20. Section 24 recites as follows:

“1. The Minister, the Chief Inspector, the investigator in charge, or any other person concerned with the conduct of an investigation into an occurrence, wherever it occurred, shall not make any of the following records available to any person for purposes other than such an investigation, unless the appropriate authority for the administration of justice in the state of occurrence determines that the benefits resulting from disclosure of the records outweighs the adverse

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domestic and international impact the disclosure may have on that or any future investigation:

- (a) Statements taken from persons by the investigation authorities in the course of their investigation;
- (b) Communications between persons involved in the operation of the aircraft;
- (c) Medical or private information regarding persons involved in the occurrence;
- (d) Voice recordings or transcripts from such recordings;
- (e) Data recordings or output from such recordings; and
- (f) Opinions expressed in the analysis of information, including flight recorder information.

2. The records referred to in paragraph (1) shall be included in a Final Report or its appendices or in any other report, only when pertinent to the analysis of the occurrence. Parts of the record not relevant to the analysis shall not be disclosed in the Final Report or in any other report”.

21. It is pursuant to this section that this application is made to the Court.

22. The Applicant contends that, pursuant to the Section, she has an entitlement to the documents which she seeks. Alternatively she says that fair procedures require that she be furnished with these documents for the purposes of preparing her comments.

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DOES SECTION 24 OF THE REGULATIONS CONFER A RIGHT TO THE DOCUMENTS?

23. In my view this question must be answered in the negative. The Section provides that the authorities shall not make the relevant records available unless the Court is of the view that the benefits resulting from disclosure outweigh the adverse domestic and international impact that disclosure may have on the instant or any future investigation. The negative way in which the wording is framed suggests to me that no right to these documents is created or established by Section

24. What it does is establish criteria which must be applied by the Court in circumstances where an Applicant is able to demonstrate a right to such information and seeks to exercise that right.

24. I come to this conclusion not merely by reference to the negative way in which Section 24 is itself framed. When the section is read in conjunction with the rest of the statutory instrument it seems to me that the Regulations as a whole do not envisage a situation where a person who wishes to make comment to an investigator has a right of access to information gathered by the investigator. If such an entitlement existed it would be inconsistent with a period of 28 days specified for the making of such comments by Section 18 (3). Such a right would also not sit comfortably with the object of the Regulations which is not to apportion blame for accidents or incidents but to ensure that similar accidents do not occur in the future. In order to achieve that, there is the very limited time within which the Regulations require the investigation to be conducted. That time scale would be difficult if not impossible to achieve if a right of the type contended for arose under Section 24 necessitating in each case an application to the Court for an order so as to have the documents disclosed.

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25. In these circumstances I am of the view that the first part of the Applicant's case fails in that a right to these documents is not created by the provisions of Section 24 of the Regulations.

IS THERE A RIGHT TO THE PAPERS APART FROM SECTION 24?

26. If I am correct in the view which I have taken, then one does not even begin to conduct the balancing test which is required under Section 24 unless a right to the documents is established. It is necessary to ascertain whether such a right subsists in the Applicant.

In ***Hausman -v- Minister for the Marine and Others*** (1991) I.L.R.M. 382 Blayney J. (when a Judge of this Court) had to deal with an application which sought the production of a report made to the Minister for the Marine following an enquiry into the sinking of a fishery patrol vessel in 1990. The Minister had appointed an inspector to report to him upon the nature and causes of the accident and that report was duly prepared and delivered to the Minister. Subsequently the Minister appointed the inspector to hold a preliminary enquiry under Section 465 of the [Merchant Shipping Act, 1894](#) but that preliminary enquiry was not proceeded with. A formal enquiry was then held presided over by a District Justice with two nautical assessors. This was carried out under [Section 466](#) of the [Merchant Shipping Act](#). Before that enquiry commenced its sittings to hear evidence the Applicant, who was the widow of the one of the four officers who lost their lives in the tragedy, made an application seeking the production of a copy of the report which had been prepared. Blayney J. said in the course of his judgment:

“But the Minister is not prepared to hand over a copy of the report itself and the issue I have to decide is whether there is an obligation on him to do so.

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If he has such an obligation, it can only be because of some right vested in the Plaintiff. So the question is, in the particular circumstances of this case has the Plaintiff a right to the production of the report? In the affidavit grounding the motion, sworn by the Plaintiff's solicitor, Mr. Raymond Lynn, the basis on which the report, and at that time the statements and other evidence also, was being sought was set out as follows:

(6) I say and believe that to enable the Plaintiff to avail adequately of the forthcoming public enquiry that copies of the notes of evidence and documentation utilised in the enquiry appointed by the First Named Defendant on 9th July, 1990 be made available to the Plaintiff. I say and believe that the copies of the notes of evidence and the report of the aforesaid enquiry on 9th July, 1990 constitute necessary evidence for the Plaintiff in the forthcoming public enquiry. I say that the Plaintiff will be seriously prejudiced in the forthcoming public enquiry if she is unable to have copies of the documentation and the notes of evidence of the enquiry appointed by the First Named Defendant on 9th July, 1990 into the same set of circumstances.

These grounds might be summarised as follows: the Plaintiff needs a copy of the report (1) to avail adequately of the enquiry, (2) because it constitutes necessary evidence for her at the enquiry and (3,) because she would be seriously prejudiced if she is unable to have it.

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I am not convinced by these reasons. To start with the last, I do not think that the Plaintiff will be in any way prejudiced. Her interest is to have the enquiry carry out as thorough an investigation as possible with a view hopefully to being able subsequently to establish that some party is civilly liable for her husband's death. The enquiry will not in any way be impeded in its investigation by not having Captain Kirwan's report before it, and so her interest in having as thorough an investigation as possible carried out will not be prejudiced.

As to the second point, the report is clearly not necessary evidence being no more than the findings of a third party based on evidence which the enquiry will undoubtedly have before it also; and there must be some doubt as to whether it would be admissible evidence since it would be purporting to express views on matters which it is now for the enquiry to decide.

Finally, I do not think that the report is necessary to enable the Plaintiff to avail adequately of the enquiry. The copies of the statements and other evidence which have been furnished to her contain all the information she will need in order to take part fully in the enquiry. I am satisfied accordingly that the grounds put forward by the Plaintiff cannot be supported and that it has not been shown that she has a right to the production of the report".

27. That decision seems to me to support the proposition that there is no right to these documents which exists per se.

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28. Neither is there any general entitlement to discovery of documents in the possession of the State or other bodies. That is so having regard to the decision of the Supreme Court in *Doyle -v- The Commissioner of An Garda Siochana* (1999) 1 I.R. 249 where Barrington J. at 263 said:

“there is no doubt that the High Court has jurisdiction at common law to entertain an action for sole discovery..., but the authorities establish that this is a jurisdiction to be exercised sparingly and it has been exercised only in cases where the Plaintiff was in the position to prove that he had suffered a wrong but was not, and the Defendant was, in a position to establish the identity of the wrongdoer “.

29. Clearly there is no entitlement of the type suggested in that passage which exists in the present case.

30. Having therefore found that there is no right to the documents given to the Applicant under the Regulations, nor does such a right exist per se at common law the only possible entitlement which she might have would arise by her demonstrating that either rights of natural justice or constitutional fairness enjoyed by her would be impaired by the non-production of the report.

31. All the parties to this litigation have a copy of the draft report and a copy was furnished to me. Having considered it I have come to the conclusion that the Applicant has not demonstrated that any of her entitlements to either natural justice or constitutional fairness would be impaired were she not to obtain the documents which she seeks. I have come to that conclusion for a number of reasons.

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32. First, as I have already pointed out, the object sought to be achieved by this report is the improvement of air safety and the prevention of future accidents and incidents. Not merely do the Regulations require that the investigation and the report which derives from it is not concerned with apportioning blame or liability but the draft report does not in fact attempt to do so.

33. In addition there is no presumption of blame or liability for an occurrence to derive from any safety recommendation contained in the report. In fact the report contains three safety recommendations.

34. Neither in the findings made by the Second and Third Respondents nor in the safety recommendations contained in the draft report is there anything which in my view would require the production of the documents which are sought in order to vindicate the Applicant's entitlements in natural justice or constitutional fairness.

35. Furthermore it is clear from the affidavit sworn by the Applicant's advisor Mr. Douglas Herlihy that on the basis of the draft report which has been shown to him he is already in a position to comment concerning what he alleges are short comings in the draft report. He is in a position to make those comments without sight of the documents in question and his comments in that regard will, when furnished to the Second and Third Respondents, have to be given due consideration.

36. In these circumstances I have come to the conclusion that a right or entitlement to these documents has not been established by the Applicant. It is not therefore necessary for me to conduct the balancing exercise which is prescribed under [Section 24](#) of the Regulations with a view to ascertaining whether the benefits resulting from the disclosure of the records would outweigh the adverse domestic and international impact which such disclosure might have on this or a future investigation.

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CONCLUSION

37. For the above reasons this application fails and is dismissed.

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