Neutral Citation Number: [2010] IEHC 159

THE HIGH COURT

JUDICIAL REVIEW

2009 1228 JR

BETWEEN

M. I.

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

Judgment of Mr. Justice Hedigan delivered on the 5th day of May, 2010.

1. The applicant in this case seeks an order quashing the decision of the respondent to investigate whether any child protection concerns arise from the allegation that the applicant sexually abused a 13 year old girl and for an injunction restraining it from proceeding with that investigation, pending the conclusion of criminal proceedings against the applicant. He also seeks an order prohibiting it disseminating any determination that it might make. The issues that arise in this case seem to me to be:-

(1) Does Section 3 of the Childcare Act 1991, as amended, empower the respondent to investigate the veracity of the complaint against the applicant while there are criminal proceedings in being?

(2) If so, is this an administration of justice and therefore a usurpation by the executive of judicial power?

(3) Is the manner in which the respondent proposes to conduct this investigation in breach of the fair procedures to which the applicant is constitutionally entitled?

2. The relevant legislation is Section. 3 of the Childcare Act 1991, as amended. Section 3 reads:-

> *"**3.**- (1) It shall be a function of every health board to promote the welfare of children in its area who are not receiving adequate care and protection.*
>
> *(2) In the performance of this function, a health board shall—*
>
> *(a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children in its area;*
>
> *(b) having regard to the rights and duties of parents, whether under the Constitution or otherwise—*
>
> *(i) regard the welfare of the child as the first and paramount consideration, and*
>
> *(ii) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and*
>
> (c) have regard to the principle that it is generally in the best interests of a child to be brought up in his own family."

3. The judgment of Barr J in *M.Q. v. Gleeson* [1998] 4 I.R. 85 has been opened to me by both sides. I consider a number of extracts to be very germane to the issues that arise in this case. At pp. 99-100:-

> *"I have no doubt that in the exercise of their statutory function to promote the welfare of children, health boards are not confined to acting in the interest of specific identified or identifiable children who are already at risk of abuse and require immediate care and protection, but that their duty extends also to children not yet identifiable who may be at risk in the future by reason of a specific potential hazard to them which a board reasonably suspects may come about in the future. Subject to the proper exercise of its functions in the matter of complaints about child abuse and its duty to afford the applicant the benefit of fair procedures, I have no doubt that in the instant case, on the premise that it had taken appropriate steps to inform itself, the fourth respondent would have been entitled to form an opinion that the applicant was unfit for child care work and would have had an obligation under s. 3(1) of the Act of 1991 to communicate its opinion to the second respondent with a view to having the applicant removed from the social studies course of which he was engaged. The fourth respondent was not obliged to wait until a child or children had been actually abused by the applicant after he had taken up child care employment. On the contrary, on becoming aware that he proposed to embark on a career in child care and that he was attending a educational course to qualify for such work, the fourth respondent had an obligation to protect children who in its considered opinion would be at risk of abuse by the applicant should he carry out his stated intention of embarking on a career in that area. Such an obligation would require the communication by the fourth respondent of its opinion to the second respondent coupled with a request to remove him from the course in question."*

Then, carrying on at pp.100-101:-

> *"I accept counsel for the fourth respondent's submission that a health board has a child protection function which differs fundamentally from that of the prosecutorial function of the police and the Director of Public Prosecutions. In the former the emphasis is on protection of vulnerable children. In the latter, the objective is the detection and conviction of child abusers. There are many circumstances which may indicate that a particular person is likely to be (or to have been) a child abuser, but there is insufficient evidence to establish such abuse in accordance with the standards of proof required in a criminal or civil trial. For example, the abused child through fear, family pressure, age or mental capacity may be unable to testify against the abuser or, in the case of repeated physical injuries sustained by a child, there may not be sufficient evidence to rule out accidents and to establish proof of abuse in law by a particular suspect. However, there may be evidence sufficient to create, after reasonable investigation, a significant doubt in the minds of competent, experienced health board or related professional personnel that there has been abuse by a particular person. If such a doubt has been established then it follows that a health board cannot stand idly by but has an obligation to take appropriate action in circumstances where a person who the board reasonably suspects has indulged in child abuse is in a situation, or is planning to take up a position, which may expose any other child to abuse by him/her.*
>
> *Arising out of its obligation to investigate allegations of child abuse made to it or of which it becomes aware, a health board is entitled to keep records of such allegations, whether substantiated or not, and, indeed, has an obligation so to do in the interests of professional competence."*

Further on:-

> *"The health board's records in each case should include factors favourable to the alleged abuser. The board's assessment of the weight it attaches to each such allegation should be stated and should be objectively based. The purpose should be to create a fair, reasonable assessment of each complaint or finding about an alleged wrongdoer. This also necessarily entails reasonable investigation of each such complaint by the health board. In the ordinary course in serious cases the complaint should be put to the alleged abuser in the course of the investigation and he/she should be given an opportunity of responding to it. However, an exception in that regard may arise where the board official concerned has a reasonable concern that to do so might put the child in question in further jeopardy as, for example, where the abused child is the complainant. An obligation to offer an alleged abuser an opportunity to answer complaints made against him or her would arise in circumstances where the board contemplates making active views of the particular information against the interests of the alleged wrongdoer - such as publication to a third party, as in the present case, or embarking on proceeding to have a child or children taken into care."*

Finally, at pp. 102-103:

> *"If a health board takes all reasonable steps to investigate the likely veracity of a complaint of child abuse, including its obligation to the accused as stipulated herein, and it forms a considered opinion that the complaint may be well-founded, then it has an obligation to take appropriate action which may include a report to the police and/or, as in the instant case, a report to the second respondent that the alleged abuser may not be suitable for a particular course of education which leads to employment as a child-care worker."*

4. It seems to me that the judgment of Mr. Justice Barr in that case is a judgment of great common sense and also soundly grounded in the law. No adequate grounds have been raised before me today that would suggest that I should in any way disregard or should disagree with that judgment and I do not propose to do so. I note also that the principles established in that particular case have become known as the "Barr principles".

5. As applicable here it seems to me that those principles are as follows:-

> (1) The respondent herein has a duty to investigate in the circumstances here. There may be a risk and that risk must be assessed.
>
> (2) The respondent must afford the applicant fair procedures.
>
> (3) If the respondent comes to the conclusion that there is a risk, it is under a duty to communicate that to an appropriate party.
>
> (4) The respondent's role in conducting this investigation is not an administration of justice. It does not make any determination of guilt or innocence. Its role is quite distinct from that of the Director of Public Prosecutions. Its role is the protection of vulnerable children. The Director of Public Prosecutions's role is the detection and conviction of criminals, including child abusers.

6. Whether or not the respondent in its correspondence borrowed from the judgment of Mr. Justice Barr the phrase *"investigate the likely veracity of the complaint"* is not relevant. The nature of the investigation is and was to anyone taking the trouble to inquire quite clear. It was and is manifestly not one of a parallel criminal investigation. It is an inquiry into whether there are any concerns that arise for the safety of a girl from the allegation of sexual abuse against her which require to be addressed and dealt with. This type of investigation is a most serious obligation that falls on the respondent. The safety of vulnerable children is at stake. Such an investigation should always occur at the earliest possible time after the risk to a vulnerable child is apprehended and before the risk crystallises into actual harm. In this case the applicant was informed of the intention to conduct the investigation. He was invited to attend a meeting to assist the investigation and to comment on the allegation or to comment in writing. The applicant sought and got an adjournment of his meeting. The respondent wrote to the applicant's solicitors on the 24th November, 2009 outlining its concerns and referring to the basis upon which it intended to proceed and to the standards of fair procedures to which the respondent considered the applicant was entitled, *i.e.* those as set out by Mr. Justice Barr in *M. Q.* The response of the applicant was the issue of these proceedings. I consider the issue of these proceedings precipitate in light of the principles set out in Mr. Justice Barr's judgment in *M.Q.* The better and obvious course, in my view, was that the applicant's solicitors, if they had any concerns, should have engaged further with the respondent and ascertained further information as to the procedures that concerned them. I share the views expressed by Butler-Sloss L.J. in *Regina v. Harrow LBC ex parte D* [1989] 3 W.L.R. 1239 that judicial review in this type of case should be very rare and limited to points of principle that need to be established. The HSE ought to be able to conduct these vital investigations without having to constantly look over their shoulder for possible intervention by the courts. The principles referred to as the "Barr principles" are well established and, based upon them, it is, in my view, perfectly feasible for the respondent to carry out an investigation of this kind with full regard to the applicant's right to fair procedures and to a fair trial.

7. As to the dissemination of information to third parties, clearly any such dissemination should be minimal and only to the extent necessary to protect children who may be at risk. Such communication should be targeted in a context of specific child protection concerns. This is exactly how the respondent perceives its obligations in this regard as it has outlined in its written submissions herein and which are based upon the principles set out in *M.Q. v. Gleeson.* In my view adopting this approach, such information as needs to be disseminated can be with all due regard to the applicants good name and his right to a fair trial.

8. It is for those reasons that I am refusing the application for relief sought herein.