THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 684 J.R.]

BETWEEN

P.O'T.

APPLICANT

AND

CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of February, 2016.

1. On 19th October, 2011, the complainant in this case alleged that the applicant had committed acts of child sexual abuse against her in the 1970s and 1980s, when she was between the ages of 6 and 16 years of age. She made this allegation by way of complaint to Garda authorities. On 13th August, 2012, a subsequent complaint was made to the H.S.E. as the predecessor of the Child and Family Agency by the complainant's mother.

2. The H.S.E. took more than a year to investigate this complaint, and appears to have notified no-one about it, even though it would seem that the applicant was involved with the G.A.A. in the coaching of young people during this period.

3. On 6th June, 2013, the applicant's solicitor responded to a request for consent to take up his medical records, which was of some significance in investigating the factual background because his medical condition at the time of the alleged incidents was of relevance to an assessment of the veracity of the complaint. By letter dated 6th June, 2013, solicitors on his behalf refused to disclose his medical records, stating that "*our client has already provided details of the dates concerned and confirms that he received this medical treatment at Navan Hospital and care of his GP, Dr. Coleman who is no longer in practice. Mr. Scannell performed surgery on our client.*"

4. On 2nd September, 2013, the H.S.E. made, what is described as a "*final determination*" to the effect that it took the view that the applicant had committed child abuse, was a current threat to children and that third parties should be informed. Following this, the applicant was told that if the matter was not appealed, or if an appeal was made and was unsuccessful, third parties would be informed.

5. I am told that the applicant voluntarily ceased to carry out coaching of young people during the last two years, which would suggest that his decision was only taken after this determination by the H.S.E.

6. On 7th October, 2013, the applicant indicated that he would be appealing the determination.

7. The H.S.E. continued to seek responses from the applicant by letters dated 21st August and 19th September, 2014, which the applicant says is inconsistent with their having made a decision in 2013.

8. These letters were one part of significant correspondence that ensued over more than a two year period following the 2013 decision, culminating in a letter from the applicant dated 16th November, 2015, stating that he was seeking disclosure of certain material from the agency, failing which he would apply for judicial review as well as *certiorari* of the initial findings. The material sought included an unredacted version of the statement of complaint. The version furnished to date is heavily redacted in certain parts.

9. The chairperson of the appeal panel replied by letter dated 20th November, 2015, indicating that the applicant had not set out the relevance of the disclosure sought, and also that he had engaged with the appeal process and that seeking relief was premature at that point.

Application for leave

10. Mr. Damien Colgan S.C. (with Ms. Irene Sands B.L.) now applies on behalf of the applicant for leave to seek judicial review in respect of this process. Following a direction that the application be made on notice, I have also heard from Mr. Feichín Mac Donagh S.C. (with Mr. James Benson B.L.), following initial submissions from Mr. Birmingham, solicitor, for the respondent.

11. As stated in the letter of 16th November, 2015, the applicant seeks an order of *mandamus* directing the appeal panel to comply with the applicant's request for "*full disclosure*" in relation to the allegation in issue, and what is described as an order of prohibition preventing it from dealing with the appeal until this issue has been determined, although in reality an order of the type sought is a stay or injunction rather than prohibition. As it is sought on an interlocutory basis only it is not a substantive relief.

12. The applicant also seeks an order of *certiorari* quashing the original findings in 2013, but this relief is obviously out of time given the three-month time limit that applies. There are not sufficient grounds to extend the time, even if an extension of time had been sought, which it was not.

13. The investigation of allegations of child abuse poses obvious policy and legal questions relating to important but conflicting rights. On the one hand, credible allegations must be examined. On the other hand, the mere making of an allegation is so potentially devastating to the life of the person subject to it that enormous care needs to be adopted in this process.

14. In the present case, the applicant is nearly 3 and a half years on from the making of an allegation against him, and the process

remains ongoing. The agency has so far upheld the complaint but taken no particular steps to mitigate any risks involved, if there are any. As against that, the applicant is dissatisfied with the level of natural justice which he has received to date.

15. The Oireachtas has recently enacted the Children First Act 2015 which will impose upon tens of thousands of professionals throughout the State an obligation to report suspicions and allegations to the agency. If the time taken to process the allegation being examined in the present case is anything to go by, one could be forgiven for wondering what level of preparedness and capacity exists within the agency to address the huge increase in reporting that can be expected, and indeed what the impact will be on the High Court which can anticipate a potentially commensurate increase in applications for judicial review.

16. Four questions capable of applying to such future cases appear to arise in particular. Firstly, the amenability of the process to judicial review; secondly the level of natural justice required; thirdly the relevance of discretion and full disclosure to the intervention of the court and any necessary undertakings; and fourthly, the need for the applicant personally to swear the grounding affidavit.

Amenability of the investigative process to judicial review
17. At the level of broad principle, any executive or administrative act, or (save in relation to the Superior Courts) judicial act, and, in certain circumstances, a legislative act (although proceeding by plenary summons is frequently more appropriate), that has legal or even practical effect on the rights of an applicant (whether those rights be legal, constitutional, EU or ECHR in nature) is amenable to judicial review.

18. In relation to child abuse and child neglect investigations there appear to be two critical acts involved; the formation of an opinion that a complaint against an applicant is sustained, and the decision to notify a third party. I would be inclined to the view that, in principle, either or both of these decisions are amenable to *certiorari*, subject of course to their being sufficient grounds to do so. To that extent I prefer the analysis of O'Malley J. in *J.G. v. Child and Family Agency* [2015] IEHC 172 (Unreported, High Court, 11th March, 2015) para. 103 and to that of Barrett J. in *A. v. Child and Family Agency* [2015] IEHC 679 (Unreported, High Court, 4th November, 2015). In particular, the decision to notify third parties can have irreversible effects on the lives of all concerned. It is frequently impossible for a person to resume employment or a position, once that is "temporarily" suspended, as may happen arising from such a notification. Family relationships may be irreversibly sundered on the mere making a third party aware of a complaint, even if it is not ultimately upheld. Clearly enormous care is required in this context, and where possible voluntary mitigation of risk by the person the subject of the complaint rather than third party notification by the agency is a more proportionate response. If third party notification is required, apart from in an emergency, adequate notice (of some days at least) should be given to enable the court to intervene if there are grounds to do so, albeit that the court will, in such situations, normally be required to start from a position of deference to the risk assessment carried out by the agency. Another balancing element in any such intervention, whether on this ground or any other, would be the discretion of the court, to which I will return.

19. To what extent can or should the court intervene, as here, in advance of the formation of an opinion as to whether a complaint is well-founded? In the criminal process, a court can intervene if there is an *inevitability* of unfairness in the process rather than the mere *possibility* of unfairness (see the caselaw which I discussed in *Nulty v. D.P.P.* [2015] IEHC 758 (Unreported, High Court, 27th November, 2015)). However there is no exact analogy with the criminal process because that process is presided over by the judicial branch of government. No such safeguard exists in the case of a child abuse investigation, and previous cases involving denial of natural justice in that context do not of themselves lend confidence to the robustness of the process in legal terms (e.g., *P.D.P. v. Board of Management of a Secondary School and H.S.E.* [2010] IEHC 189 (Unreported, High Court, 20th May, 2010); *A. v. Child and Family Agency*). A guide to the correct approach is the judgment of Hedigan J. in M.I. v. H.S.E. [2010] IEHC 159 (Unreported, High Court, 5th May, 2010) para. 6 in which he said, speaking of review during the actual course of the process, by way of prohibition, that while judicial review of the process should be rare, it should be "*limited to points of principle that need to be established"* (citing Butler-Sloss L.J. (as she then was) in *Regina v. Harrow L.B.C.* ex parte D. [1989] 3 W.L.R. 1239). It seems to me that to obtain leave to seek prohibition of a child abuse investigation, the applicant must show some new point of principle regarding a shortcoming in the procedures being applied by the agency in such investigations, as opposed to the mere possibility that the agency will not afford him or her due process within the scope of established procedures which are themselves adequate to ensure natural justice.

20. As further cases are decided on the scope of natural justice in this context, the need to grant leave during the process itself to allow new "*points of principle*" to be teased out should reduce. That does not remove the entitlement of the applicant to challenge the decision ultimately arrived at by way of *certiorari*.

21. The present case seems to me to come well within this test. The question of what level of disclosure of unredacted documents should be made to a person the subject of a complaint is not the subject of previous authority to which I have been made aware. The suggestion offered that the redaction was justified for data protection reasons seems questionable at best. The suggestion that the applicant should be denied relief because he did not specify why the documents were relevant is unsustainable in the context of this case. Insofar as the redacted statement of complaint is concerned, one might rather ask why is it not relevant? And indeed how is an applicant to know whether the redacted parts are relevant when all he has to go on are blacked out pages?

Level of natural justice required
22. It would be a truism to say that the agency must comply with natural justice in its investigations. Natural justice is not of course a set of absolute requirements, and I have already adverted to the right of the agency to notify third parties without notice to a person against whom an allegation is made if an emergency arises.

23. The procedures being applied by the agency at present appear to be those set out in a document entitled *Policy and Procedures: Responding to Allegations of Child Abuse and Neglect* published by the agency in 2014 and discussed in J.G.

24. Some features of this document appear to be unsatisfactory in terms of natural justice. The respondent to a complaint is termed throughout as an "*alleged abuser*". The 2014 document references (*e.g.*, at p. 36) a further document entitled Child Protection and Welfare Practice Handbook (HSE, 2011). At p. 32, that document advises those involved in child protection to "*Accept what the child has to say – false disclosures are very rare*". It also states, primarily in the context of interviews with children, that "*Questions should be supportive and for the purpose of clarification only*." Whether these or other elements of the process would survive an analysis in terms of natural justice will have to await a future case.

25. The procedures applied by the agency do, however, recognise the need to furnish all documentation to the respondent to a complaint. For that if for no other reason, the present complaint relates to matters that come well within the level of natural justice that arguably must be afforded.

Discretion and undertakings
26. While there is occasionally a perception that the threshold for the grant of leave to seek judicial review is quite low (sometimes

said to be so low as to warrant the abolition of the leave process) and consists only a showing of arguability, it is clear from the Supreme Court in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374 that there are a number of separate thresholds that must be crossed, even at the leave stage (see also *Nulty*). The leave filter is, I would respectfully suggest, an important element of the legal process in terms of striking a balance between the right to pursue a complaint to a full hearing and the public interest in not subjecting the machinery of public administration to legal processes that may cause delay and expense or prejudice to third parties or the common good more generally, where there is an insufficient factual or legal basis for the complaint, where the complaint relates to merits rather than legality or where the applicant lacks a sufficient interest, where there is an alternative remedy, where the matter is either premature or moot or has been delayed, or where there exist strong countervailing legal considerations, such as a want of disclosure, a lack of good faith, a failure to comply with legal requirements, or other factors. If leave is to be granted, the court still has a role in ensuring that the statement of grounds is focused and does not include an excessive number of grounds, and may be called on to strike a balance between competing interests in terms of the grant or otherwise of a stay. All of these protections and checks and balances would be lost if the leave requirement were to be abolished. Indeed, if anything, there is a case for strengthening that requirement so that in a case where leave is on notice, a threshold of substantial rather than arguable grounds would apply.

27. Of particular relevance in the context of judicial review of child abuse and neglect investigations is the duty of full disclosure and the court's discretion to refuse relief. The disclosure requirement applies to any *ex parte* application. The discretion to refuse relief is frequently encountered after a full hearing, but as a matter of first principles it must be even more relevant to the leave application, because to put a respondent through a full trial and then refuse relief as a matter of discretion would seem to be a much less satisfactory process than to apply the discretion at the leave stage.

28. Article 42A of the Constitution is also relevant in this context, and in my view imposes an autonomous duty on the court to uphold the natural and imprescriptible rights of the child independently of any positions adopted by the parties (see *e.g., Sivsivadze v. Minister for Justice and Equality* [2015] IESC 53).

29. In order to properly balance the interests involved, and to have regard to Article 42A of the Constitution, a high level of disclosure and an exacting level of scrutiny of the conduct of the applicant in terms of the discretion of the court are appropriate.

30. Mr. Colgan contends that all of this is irrelevant because the complaint is "*historical*". However that is a distortion of the nature of child abuse. Given the nature of the disorder that motivates child abusers, it has been sufficiently well established that even distantly historical allegations of child abuse may be a significant indicator of possible ongoing or future abuse, even decades later.

31. The net practical effect of the foregoing is that any stay granted on the process of child abuse and neglect investigation should be on specific terms which take those issues into account. Even in the absence of a formal stay, the order granting leave is a discretionary order and consequently is, in principle, capable of being made subject to terms, given that the intervention of the court is bound to cause delay in finalising the matter. Furthermore it should be emphasised that the grant of leave does not in any way inhibit the agency from proposing any action by way of notification of third parties that it may consider appropriate, or from actually carrying out such notification in case of emergency. The term I would have considered appropriate here and possibly in similar cases would be that the applicant undertake to furnish the agency on request with details of his contact with children, consent to this being verified, and undertake to take such steps to mitigate any risk that may be required by the agency from time to time pending the determination of the proceedings.

32. In the present case there was a distinct lack of co-operation from the applicant with the inquiry. He failed to consent to the release of his medical records. The reasons advanced for the failure to sign a consent to access his medical records are spurious and unconvincing. Furthermore he failed to arrange for his wife to give evidence to the inquiry. I do not believe that in the context of seeking prohibition, he can simply hide behind her non-cooperation without taking any steps to have her evidence made available.

33. However the agency in the present case does not appear to require such an undertaking at present, presumably because it accepts that the applicant is not now in contact with young people *via* the G.A.A. On that basis, I would not insist on such an undertaking in this case but I would in principle consider it appropriate in future similar cases.

The need for an applicant personally to swear the grounding affidavit

34. The applicant in this case did not swear the grounding affidavit himself. He did not set out on oath his own full version of events, still less the extent of his unsupervised access to children at all material times since the matters complained of, or the precise date on which he ceased to engage in the coaching of children, and his current level of unsupervised access to children, if any, his reasons for not co-operating in full with the inquiry or his attitude to any inspection or verification of these averments on behalf of the agency if required. More fundamentally, he did not personally verify the statement of grounds. The application for leave is grounded on an affidavit of his solicitor.

35. The Rules of the Superior Courts (Judicial Review) 2011 clearly require pleadings in judicial review to be verified by an affidavit of the parties personally. Form No. 14 in Appendix T, as required by O. 84 r. 20(2)(b), requires that the affidavit begins: *"I, AD., [applicant]* [respondent]* in these proceedings, make oath and say as follows …"* (obviously with the inapplicable word marked with an asterisk to be deleted as appropriate).

36. The other effect of an affidavit being sworn by a solicitor rather than an applicant is that it therefore constitutes hearsay. A court at the leave stage is not bound to admit hearsay evidence and, in the absence of consent, acquiescence or lawful exception, is not entitled to do so at the full hearing. For examples of the difficulties this can create see *Dunne v. D.P.P.* [2002] IEHC 27 (Unreported, High Court, 23rd March, 2011) per Kearns P., *O'Leary v Minister for Transport* [1999] IEHC 49 (Unreported, High Court 26th November, 1999) *per* Kelly J (as he then was). A claim of prejudice is classically a matter that is hearsay in the mouth of anyone else and can only be made by the applicant personally.

37. Leaving aside the special cases where a party is a corporate entity including a corporation sole, or an office-holder where it is not possible or appropriate for this requirement to be literally enforced, a court faced with an application for leave grounded on an affidavit sworn by the applicant's solicitor, rather than by the applicant personally, would, where a personal affidavit is in fact necessary, be entitled to refuse relief, or to adjourn the application pending the swearing of the necessary affidavit, or to grant leave premised on or subject to the filing of that affidavit in due course. However in the present case, I have already canvassed this question with Mr. Colgan, who informs me that the applicant is not putting in any further affidavits. He refers to what he says are his client's rights. However, no-one is forcing the applicant to bring the present application for leave to seek judicial review. That is a voluntary act on his part. If he wishes to engage in that process he must personally come forward to furnish positive evidence necessary to support that application. Mr. Colgan states that there has been no application to strike out the affidavit by the agency, although Mr. Mac Donagh expressly drew attention to the requirement to swear the affidavit personally. This was in the context that

he seemed to take the position that he did not wish to get too deeply involved in the leave application as there were matters he would wish to reserve to the full hearing if leave was granted. Mr. Colgan also relied on the historical nature of the allegation, which I have already referred to as being not decisive or even necessarily hugely relevant to the question of ongoing risk to children. And finally he said that to require an applicant to swear a grounding affidavit would set a "*dangerous precedent*". I would rather consider that the precedent has been well set the other way, and to allow a departure from it would be to create significant dangers and difficulties, not least for the court dealing with the substantive matter if leave were granted.

38. A party is of course entitled, as it were, to throw down a challenge to the court to decide an application on the basis of papers as crafted by that party, and is entitled to resist any invitation by the court to consider supplementing those papers in any way. In this case that invitation has been offered to, and expressly declined on behalf of, the applicant. While a gauntlet can of course be thrown down, a party cannot complain too strongly if it is then taken up by the court. In the present case, I consider that the applicant should have personally sworn the grounding affidavit because:

(i) that is what O. 84 and form No. 14 in Appendix T require;

(ii) the court has an autonomous obligation to uphold the provisions of statutes or statutory instruments (see Art. 34.6.1° of the Constitution) independently of how strongly an objection is pressed by a respondent;

(iii) the respondent has specifically drawn attention to the foregoing elements of O. 84 as inserted by S.I. 691 of 2011;

(iv) the applicant's solicitor's affidavit is hearsay in essential respects;

(v) a claim that he has been prejudiced by the alleged lack of natural justice must be made by him and not by someone on his behalf;

(vi) to grant leave on a hearsay affidavit in these circumstances would undermine the integrity of the hearing to be ultimately conducted;

(vii) it is well established that an applicant must *"engage with the facts"* per Hardiman J. in *Scully v. D.P.P.* [2005] 1 I.R. 242 (at p. 252); *per* O'Donnell J. in *Byrne v D.P.P* .[2011] 1 I.R. 346 (at p. 352); to do so he must personally engage in a context such as this;

(viii) the court has an autonomous duty under Article 42A to safeguard the rights of children in the State including children that could potentially be subject to present or future abuse if the complaint is well-founded;

(ix) the upholding of that duty may require disclosure and undertakings that can only be given effect to by the applicant personally;

(x) a respondent must have the right to apply for the cross-examination of a deponent. This right would be significantly curtailed if not set at nought if the relevant witness were to hide behind a paid professional engaged on his behalf, or indeed any other person.

39. Given that the applicant has expressly stated through his lawyers that he is not going to swear an affidavit, the appropriate course in the circumstances is therefore to refuse the application.

Order

40. For the foregoing reasons, I will order:-

(i) that the application for leave be refused;

(ii) that the order previously made under s. 45 of the Courts (Supplemental Provisions) Act 1961, restraining the publication of information identifying any persons referred to in the proceedings, will continue on a permanent basis.