Neutral Citation Number: [2008] IEHC 398

**THE HIGH COURT**

**2006 630 JR**

**BETWEEN**

**CAROL ENGLISH**

**APPLICANT**

**AND**

**HEALTH SERVICE EXECUTIVE AND JUDGE BROPHY AND THE MINISTER FOR HEALTH AND CHILDREN**

**RESPONDENTS**

**Judgment of Mr. Justice McMahon delivered on the 5th day of December, 2008**

Leave to judicially review an order of the second-named respondent was given by order of the High Court (Peart J.) on the 29th May 2006.

**Factual Summary**

1. The applicant, Carol English, was convicted of an offence following prosecution by the Health Service Executive ("the HSE") under s. 57 of the Child Care Act 1991, in Navan District Court on the 10th May, 2006, for her failure to comply with Article 7 of the Child Care (Pre-School Services) Regulations 1996 (S.I. 398 of 1996). More precisely, the applicant was charged with failing to ensure that a "sufficient" number of competent adults supervised the pre-school children in her service at all times. A fine of €250.00, as well as costs, was imposed. A stay on the execution of the District Court Order was agreed pending the determination of the judicial review proceedings.

**The Applicant's Claim**

2. The applicant seeks an order of *certiorari* quashing the conviction imposed by the second-named defendant. The applicant's central claim is that Article 7 of the Child Care (Pre-School Services) Regulations 1996 (S.I. 398 of 1996) ("the Regulations") is not capable of constituting a criminal offence as it lacks certainty as the statutory instrument itself does not specify either the appropriate staff/child ratios in order to ensure sufficiency or the qualifications required of the staff in order to meet the competence requirement. Article 7 of the Regulations of 1996 provides:-

> "A person carrying on a pre-school service shall ensure that a sufficient number of competent adults are supervising the pre-school children in the service at all times."

3. The argument is ever more cogent, according to the applicant, when it is realised that the Article purports to create an offence of strict liability.

4. The applicant further asserts that the Minister for Health ("the Minister") failed to act within its powers under ss. 50, 63 and 68 of the Child Care Act 1991, ("the Act") in wrongly delegating its powers and in neglecting to stipulate the precise number of staff required in childcare centres, and in wrongly delegating its powers to either civil servants or the HSE who in turn wrongly usurped the Minister's powers when they produced the *Explanatory Guide to Requirements and Procedure for Notification and Inspection (*"*the Guide*"). This claim is based on the principle of *delegatus non potest delegare*.

5. A declaration is further sought by the applicant that the Guide has no legal effect.

**First Respondent**

6. The first respondent, the HSE, contends that it acted at all times within its powers as conferred on it by the Act of 1991 and the Regulations of 1996 and takes particular exception to the applicant's claim that it led the District Court to exceed its jurisdiction in this matter. It also disputes that it is the author of the Guide and emphasises that the Guide was produced by the Department of Health. Finally, the HSE argues that the offence in question is not so vague or unclear in the circumstances of this case as to render it jurisprudentially infirm.

**Third Respondent**

7. The third respondent, the Minister for Health and Children, also refutes the applicant's claim that due to uncertainty, there is no valid offence created in law under Article 7 of the Regulations of 1996.

8. Furthermore, the third respondent denies any failure to act within its powers under the Act by not enumerating specific staff child ratios, as it asserts that there was no such obligation to prescribe ratios under the Act. In its view valid public policy considerations are the basis for the language used in Article 7 of the Regulations. As regards the Guide, it suggests that this was "published as one document along with the regulations whereby a degree of certainty was afforded for a pre-school provider". The third respondent states that the ratios were prescribed in the Guide and not in the Regulations as this afforded a measure of necessary flexibility for the HSE., whose inspectors, in carrying out inspections fully appraise and advise pre-school service providers of the standards required of them. In response to the applicant's suggestion that the Guide, by claiming to "expand on the 1991 Act", is wrongfully usurping powers which are vested properly elsewhere, the third respondent highlights that the Guide itself merely professes to "briefly outline" the requirements in the Regulations of 1996, and that any claim that it "expands" the Regulations in a legal sense, is based on a "selective reading". The third respondent asserts that the determination of "sufficiency" is at the end of the day a matter for the Judge.

9. The third respondent avows that any delegation of powers was lawfully and validly done. Specifically as regards the Guide, the third respondent argues that powers were delegated pursuant to section 50 of the Act and Article 33 of the Regulations. As regards the applicant's claim that the authors of the Guide usurped the powers of the Minister, this is denied, as the Guide, it is contended, was prepared by a group led by the Minister.

10. The State increasingly and for a variety of reasons controls entry into various economic activities in modern society. Although no general regulatory legislation exists for industrial or commercial activities there are many examples in Ireland of specific legislation which regulates or restricts specific activities of a commercial or industrial character. Such specific regulatory legislation usually commences by establishing a licensing authority or a registration authority and persons who are unregistered or unlicensed are prohibited from carrying on the named activity. The legislation normally specifies that certain conditions are to be fulfilled before a person is to be on the register. Such conditions might require the applicant to have a certain level of knowledge (education and training requirements), and/or be of good character and/or be financially sound and/or be of a certain age. There may also be requirements as to the condition and quality of premises used in the activity and requirements regarding the keeping of proper records and accounts. Traditional public policy considerations that justify such regulation typically related to public safety, public health and

welfare, public morality, public security as well as the stability of financial institutions and the good order at local government level. Sometimes a less rigorous system may be preferred by the State for various reasons and the State's interest may then take the form of a softer model to allow for greater flexibility in the administration of the system and to engage the participants in a more voluntary and more participatory way.

11. The soft regulation model favoured by the Oireachtas in the area of pre-school service, (no prior license is required) was a clear preference for a flexible type of regulation, which could be justified by the fact that a rigid, "one fits all" approach would not be appropriate for various economic and sociological reasons. It must be recalled that the increase in the demand for such facilities was a relatively recent phenomenon and was linked to the economic boom recently enjoyed in this State and the sociological consequences for families of a more liberal and tolerant society with both parents committed to the labour force and sometimes having to commute great distances to their place of work.

12. The legislature in such situations does not always wish to engage in micro-regulation, preferring, in a changing sociological and economic environment, to leave the details for others to work out. This approach guarantees that all the stakeholders can be involved in agreeing the conditions for participants in the activity and ensures desirable flexibility while avoiding rigid over regulation.

13. Delegation of this sort is acceptable in an economic activity such as we have here. Such delegation has for a long time been not only allowed, but deemed inevitable given the complexity of modern society. In C*ityview Press Limited & Oliver Fogarty v. An Chomlairle Oiliúna, the Minister for Labour and the Attorney General* [1980] 1 I.R. 381, O'Higgins C.J. stated:-

> "The giving of powers to a designated Minister or subordinate body to make regulations or orders under a particular statute has been a feature of legislation for many years… if it be within the permitted limits — if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body — there is no unauthorised delegation of legislative power." (At pp. 398 – 9).

14. In many, but not all cases, the Minister to whom the regulatory task is delegated will exercise his powers by making regulations in the form of a statutory instrument. But this is not the only way he can exercise his functions, and where he opts for such a formal instrument it must not be thought that the Minister is obliged to spell out in every detail all the specifics required of the participant.

15. In the present case in exercising its powers under s. 50 and s. 68 of the Child Care Act 1991, the relevant Minister made Regulations in 1996 (S.I. No. 398 of 1996) and 1997 (S.I. No. 268 of 1997). (New regulations have since been introduced: Child Care (Pre-School Services) Regulations 2006 (S.I. No. 505 of 2006)). Nonetheless, on the issue of adult/child ratio, Article 7 of the 1996 Regulations provides that:-

> "A person carrying on a pre-school service shall ensure that a sufficient number of competent adults are supervising the pre-school children in the service at all times".

16. The Regulations do not specify in any greater detail what "sufficient" means in that context. Nevertheless, the person carrying on a pre-school service is required under the Regulations to forward to the relevant health board, certain specific information relating to the staff employed and the children registered including "details of the staff/child ratios in the service". Moreover, Article 15 of the Regulations *obliges* the person carrying on a pre-school service to provide the parents with details of staff/child ratios prior to registration. It is clear from this, that although "sufficient" was not specifically quantified in the Regulations, the staff/child ratio was very much in play for the plaintiff in this case when her facility was being set up. Furthermore, the plaintiff did submit such figures and forwarded them to the parents who contemplated availing of the facility, from which it is clear that she herself proposed to adhere to the particular staff/child ratio set out in the Guide to the Regulations.

17. On the day the Regulations were published, an Explanatory Guide to the Regulations was also published by the Government Publications Office. In referring to Article 7 of the Regulations, the Guide states that:-

> "A competent adult is a person who has appropriate experience in caring for children under six years of age and/or who has an appropriate qualification in child care and is a suitable person to care for children.

The following adult/child ratios are recommended:-

> …
>
> (ii) Full Day Care

| Age | Adult /Child Ratio |
|---|---|
| 0-1 Year | 1:3 |
| 1-3 years | 1:6 |
| 3-6 years | 1:8 |

> Where a full day care service also caters for children who do not attend on a full day basis, the adult/child ratio for sessional services should apply."

18. I have no difficulty in accepting the plaintiff's argument that these guidelines are not legally binding and do not bind the court when it is considering the meaning of "sufficient" in Article 7 of the Regulations. But it cannot be argued in the context of these proceedings that the guide is of no relevance. Having been drafted by a committee established by the Minister and chaired by the Minister's nominee and having representatives from all the stakeholders in the childcare service industry, the Guide has some relevance when the court has to interpret the word "sufficient". In particular, it reflects what the stakeholders consider to be the appropriate ratio, it also represents what the applicant herself adopted as the appropriate ratio for her facility and the ratio she advertised as the one she was going to operate. When the matter came before the District Court, although the guide may not have full legal obligatory affect on the District Judge, he was entitled to consider it in determining what "sufficient" means in that context.

19. In *King v. Attorney General* [1981] I.R. 233, the applicant argues that Henchy J. set out a test for the degree of specificity required of a valid criminal offence. At p. 257 the learned judged stated:-

> "In my opinion, the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful

> and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance."

20. In that case the relevant parts of s. 4 of the Vagrancy Act 1824, was the provision which was before the court. I will reproduce it here for the purposes of comparison:-

> "every suspected person or reputed thief, frequenting [or loitering about or in] any river, canal or navigable stream, dock or basin, or any quay, wharf or warehouse near or adjoining thereto, or any street, highway or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, or any highway or any place adjacent to a street or highway, with intent to commit felony…shall be deemed a rogue and vagabond, within the true intent and meaning of this Act; and it shall be lawful for any Justice of the Peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the House of Correction, there to be kept to hard labour for any time not exceeding three calendar months… and…in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the Justice of the Peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony…" (See [1981] 1 I.R. 233, at p. 256).

21. It is not surprising that Henchy J. should conclude that such a statutory provision inherited from the pre-1922 Statute Book was contrary to several provisions of the Constitution. The provisions of s. 4 of the Vagrancy Act 1824, however, bear no resemblance to what is at issue in our case. Nor could the dicta of Henchy J. be considered to set out the test for the degree of specificity required of a valid criminal offence in general. The provisions of the section were so outrageous that the learned judge could content himself in declaring it to be unconstitutional without having to trouble himself to formulate more clearly in a positive way an abstract principle or rule as to the level of specificity required in general to constitute a valid criminal offence.

22. By no stretch of the imagination could the dicta of Henchy J. apply to the case before the court. The plaintiff here was operating within a well known and well defined system. The ratios were well published and accepted by all those who participated and had an interest in the pre-school service industry. The plaintiff herself adopted them in her advertisements and in her literature to parents of prospective pupils. She completed the relevant reporting forms for the Health Board periodically and disclosed the number of staff and children she was catering for. After frequent visits from the inspectors, it was made known to her, on a number of occasions, when she fell below the expected ratio and she apparently accepted these warnings and responded appropriately. She must have anticipated that if she did not maintain the indicated ratio, the likelihood would be that if she were prosecuted, that the court would interpret "sufficient" in line with the operating standards. It can have come as no surprise to her that a court would be very likely to interpret "sufficient" in these circumstances as requiring a minimum ratio of one adult to six children.

23. In *Dundalk Town Council v. Bill Lawlor* [2005] IEHC 73, the question of uncertainty arose in the context of planning law. Section 154 of the Planning and Development Act 2000, states that any person on whom an enforcement notice is served under s. 154(1) and who fails to comply with the requirement of the notice shall be guilty of an offence. Dundalk Town Council issued an enforcement notice under s. 154 requiring the defendant/appellant to:-

> (i) Cease all unauthorised development works on a particular site "within a period immediately commencing on the date of service of the enforcement notice";
>
> (ii) To return "the site to its previous condition".

24. When the matter came before O'Neill J. in the High Court, by way of case stated, he held that

> (i) There was no definite period specified in the enforcement notice; and
>
> (ii) The Council's enforcement notice in respect of its direction "to return the site to its previous condition" was too imprecise bearing in mind that that failure to comply with the notice, constituted a criminal offence under the Act.

25. Before it could be given this effect, according to O'Neill J., the notice should clearly set out the steps that the defendant/appellant should take "to return the site to its previous condition". According to the learned judge the defendant would not have to guess or speculate to achieve compliance in the present case:-

> "It is not sufficient, however, for the purposes of the notice merely to recite the phrases used in sub-s. (5)(b), such as demolition or alteration of any structure or as in this case, "return site to its previous condition" where the use of that kind of phraseology borrowed from the subsection, fails to clearly and precisely indicate to the person served with the notice what exactly has to be done in order to comply with the notice." (At p. 6 of unreported judgment)

26. The ratio of O'Neill J. in this case was that the defendant did not know how exactly he should comply with the notice and therefore it would be wrong in such circumstances to subject him to criminal liability.

27. There was no such uncertainty in the mind of the applicant in our case as to what "sufficient" meant in respect of the proper ratio to be applied in her pre-school. Her behaviour and her actions, including her acceptance of the published guidelines, her adoption of the ratios in her own advertisements, her compliance with reporting and disclosure duties on a periodic basis and finally her acceptance of the inspector's feedback satisfy me that she had knowledge of what would be deemed the "sufficient" ratio within the operating standards by a court of law.

28. When the courts are called to interpret and apply a statute, they must constantly bear in mind that under the separation of powers provisions in the Constitution their role is a restricted one. If the statute is clear they must apply it. Where the statute, however, is unclear either because of ambiguity or omission, the courts must traditionally look for the legislature's intent. Over the years the courts have developed various rules of interpretation, sometimes referred to as canons of construction, to assist them in

this search. Some lawyers in the Realist tradition are sceptical about this exercise, claiming that the legislative intent is nothing more than "a will-o'-the-wisp" that can never be identified and that the whole exercise is nothing more than some kind of judicial charade. They point to the fact that for every rule of construction one can cite a counter rule which permits the opposite conclusion.

29. For the most part, however, the courts when confronted with such a difficulty do not despair, but resolutely strive for a fair and reasonable solution using traditional tools and familiar terminologies. To assist in construing an ambiguity the courts most commonly seek assistance from rules of construction that first suggest that the word or phrase must be read in its immediate context. If this does not yield a satisfactory result, they look to the Act as a whole for guidance: the long title may be useful in this regard. Should this still not provide a solution, the historical mischief which caused the Act to be introduced may be of some assistance. In the event of an omission or a lacuna the purposive or teleological approach may be of assistance: the space should be filled to advance the objective of the Act. This latter approach has been approved as being the proper approach to be adopted when the courts have to interpret the Child Care Act 1991, which is the legislation at issue here.

**Interpretation of Child Care Act 1991**

30. In interpreting the provisions of the Child Care Act 1991, the Supreme Court has indicated that a purposive interpretation is the appropriate approach. In *Western Health Board v. K.M.* [2002] 2 I.R. 493, McGuinness J. made the following statement on this issue:-

> "The first question that arises is whether the Statute under consideration is to be given a restrictive or a purposive interpretation. In *Bank of Ireland v. Purcell* [1989] I.R. 327, this court considered the proper approach to the construction of the Family Home Protection Act 1976,…I have already very briefly set out the history of the enactment of the Child Care Act 1991. There can be no doubt that it is a remedial social statute, and was seen to be such by all who were affected by its provisions. Its social and remedial importance was accepted by all, including this Court and more particularly the District Court, which for many years had striven to operate the provisions of the Children Act 1908, in a way which made sense in the latter part of the twentieth century. This is borne out in the decisions relied upon by counsel for the applicant in the cases of *The Director of Public Prosecutions (Houlihan) v. P.G.* [1996] 1 I.R. 281 and *M.F. v. Superintendent, Ballymun Garda Station* [1991] 1 I.R. 189.
>
> I would therefore accept the submission of the respondent that the construction of the Act of 1991, as a whole, should be approached in a purposive manner and that the Act, as stated by Walsh J., should be construed as widely and liberally as fairly can be done." (At p. 510)

31. In the present case the task for the court is to determine whether the District Court judge in this case acted properly when he convicted the applicant by finding that the staff on duty on that particular day was not "sufficient" within the meaning of Article 7 of the Regulations.

32. It is important to recall the rule of this court in judicial review proceedings such as are now before the court. The traditional standard of assessment is that contained in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 which can be summarised as requiring the judge's decision to have been such that no reasonable judge in his position could have come to the decision he came to, before this Court will strike it down. This is a high hurdle for the applicant to clear and strong evidence is required.

33. In the present case the judge did not have the benefit of a specific quantification as to the meaning of "sufficient". In the absence of such specificity he heard evidence from the prosecution as to what the agencies involved in the administration of the legislation were doing on the ground. He knew that the Minister had established a committee, under the chairmanship of his nominee, and comprising of representatives of other stakeholders, to consult widely with all the relevant interests and to formulate standards. This was done and a recommended ratio was adopted for the sector. This had been widely promulgated and accepted by the participants in the sector, including the applicant herself. In my view it was quite reasonable for the judge to have regard to these standards when he came to decide what in the circumstances was a "sufficient" ratio. Why should he not inform himself in this way before he made his decision? In discharging his judicial function and in the absence of a specific ratio set out in the regulations themselves, it was a responsible approach to take to determine the case before him. In my view it is quite logical for the judge to consider what is happening within the administrative agency concerned so that he can discharge his judicial function in the absence of specific legislative criteria. Indeed, in traditional language, it could be argued that in doing so he is looking for legislative intent, albeit in a situation where there is a lacuna and which may involve some independent judicial determination. I am not disturbed by this exercise of judicial power. It is an inevitable consequence given the intention of the legislature to leave the matter in an undefined manner. It is not in anyway usurping the legislative role but merely discharging the judicial function in a particular situation and where the legislature intentionally refrained from being more specific.

34. Whether one describes the decision of the judge in this case as one where he continues to act as an honest agent of the legislature or, given the incomplete guidance from the canons of interpretation, the judge is forced to give effect to the legislation by a more substantive intervention on his/her part, is something for academics to debate. For my part, to do so in a situation like the present one, where there are well known practices and generally accepted guidelines in the service concerned and where the applicant is fully aware of them and has accepted them as being proper guidelines until she was prosecuted, is no more than administering justice as he or she is constitutionally bound to do.

35. In the *Director of Public Prosecutions v. Christine Best* [2000] 2 I.R. 17 the respondent was charged in the District Court with an offence under the School Attendance Act 1926, which provided, *inter alia*, that:-

> "The parent of every child shall, unless there is a reasonable excuse for not so doing, cause the child to attend a national or other suitable school" (Section 4(1))

36. Section 17 of the same Act provides, *inter alia*, that when a child fails to attend school, the parent shall be served with a warning notice and if he/she fails to provide a reasonable excuse for failing to send his/her child to school, he/she shall be guilty of an offence. Section 4(2)(b) of the Act provides, *inter alia*, that it shall be a reasonable excuse for failing to comply with s. 4 that the child is receiving suitable elementary education in some manner other than by attending a national or other suitable school. The District Judge stated a case for the High Court and the determination of the High Court was eventually appealed to the Supreme Court. The Supreme Court held that the absence of a statutory definition of "certain minimum education" (as used in the Constitution) did not preclude the conviction of the accused under the Act of 1926. Referring to the statutory standard Denham J. states:-

> "The Act requires that the child 'is receiving suitable elementary education'. This has not been defined further in the Act or in any other legislation. It is not necessarily the primary school curriculum. It is a fact which must be determined by the District Judge on evidence presented before the court. It must be determined in accordance with the Constitution." (At p. 44)

37. The Health Service Executive relies on this case. It submits that the District Court, in determining a matter as to whether there was a competent number of adults supervising children in the pre-school, is determining a question of fact based on the evidence presented before the court. I agree with this submission.

**Hearing in the District Court**
38. When the matter came before the District Court, Ms. Maureen Joyce, Pre-school Services Officer, of the Health Service Executive gave evidence to the court. Ms. Joyce qualified as a registered general nurse in 1968, as a registered mid-wife in 1969 and a registered public health nurse in 1973. She also held the following qualifications:-

- Higher Diploma in Child Protection and Welfare (Trinity College Dublin)
- Diploma in Infant and Child Development (Royal College of Surgeons, Dublin)
- Diploma in Social Studies (Institute of Adult Education, Dublin)
- Certification in Continuing Professional Development in Early Childhood Education for Pre-school Inspectors (Dublin Institute of Technology)

39. She gave evidence that when she carries out an investigation or an assessment of a pre-school service she sought compliance with the requirements of the Child Care Act 1991, (Part 7) and the Child Care (the Pre-school Services) Regulations 1996 which demand basic minimum standards. Other factors which she bore in mind were: (i) the type of service being provided, i.e. a session or a service up to three and a half hours long or a full day care service; (ii) the ages and stages of development of the children and (iii) where the pre-school services cater for children with special needs what special provisions are required. In her affidavit to the court, Ms. Joyce said that the opinion she advanced in the District Court was an expert view and that the standards advanced by her was *bona fide* expert opinion furnished on the basis of the national standard applied in the particular context of this particular pre-school service. At no stage were her qualifications or experience or *bona fides* challenged in court. Ms. Joyce disagreed with the sworn evidence of the applicant that two adults were sufficient to ensure the care protection and welfare of the 24 children being cared for on that day. Having read the affidavits and the solicitor's attendance note of the proceedings in Navan District Court on 10th May, 2006 and noting that the District Judge in explaining the decision of the court finding the offence as alleged proved, stated, that the court was holding as a fact that the evidence of Ms. Joyce as to the level of supervision being inadequate was commonsense and that two adult supervisors was inadequate for 24 children. In my view, the District Judge was quite entitled to form this view and to make the actual determination he did in light of the evidence produced.

40. Finally it is the view of the court that the fact that "sufficient" is not defined with more specificity in the Regulations does not mean that a judge can never make a finding of insufficiency in a given case. If, for example, a pre-school provider had a ratio of one adult to one hundred children, could anyone seriously argue that a District Judge could not make a finding of insufficiency or that the operator in such a case could not be convicted of an offence on the grounds of lack of clarity? I think not.

41. This is what happened in this case too. The District Judge listened to all the evidence and determined that although four of the adult staff were rostered for the day, only two staff were present to care for 24 children at the relevant time. The District Judge accepted the evidence of Ms. Joyce as an expert, and concluded that it was a matter of commonsense that the ratio on that occasion was insufficient. In my view the District Judge was clearly entitled to reach this decision based on the evidence before him.