THE HIGH COURT

JUDICIAL REVIEW

2012/911 JR

Between/

A.MCD. (A MINOR SUING BY HER FATHER AND NEXT FRIEND J. MCD.)

Applicant

-and-

THE MINISTER FOR EDUCATION AND SKILLS, THE HEALTH SERVICE EXECUTIVE, THE BOARD OF MANAGEMENT OF ST. MICHAEL'S HOUSE GROSVENOR SCHOOL, TOMMY FLYNN, FRANK MURRAY, JACQUELINE NI FHEARGHUSA, THE ATTORNEY GENERAL and IRELAND

Respondents

Judgment of Ms. Justice Iseult O'Malley delivered the 17th April. 2013

1. Introduction

This is an application for a mandatory interlocutory injunction directing the first, seventh and eighth respondents to provide forthwith an appropriate educational placement for the applicant. The applicant is a teenage girl with a variety of mental health problems. She has been expelled from school and an appeal against that decision was turned down. In the substantive proceedings in the case she seeks orders of *certiorari* in relation to those decisions; in the alternative orders of *mandamus* directing the first, second, seventh and eighth respondents to provide for her an appropriate educational placement together with appropriate educational, therapeutic and support services suitable to her needs; a declaration that the failure to provide her with the foregoing has deprived her of her constitutional rights under Articles 40, 41 and 42 of the Constitution and also her rights under s.7 of the Education Act, constitutional and statutory rights.

2. The application currently before the court arises from the fact that she has been out of school since the expulsion and efforts to find an alternative placement have to date been unsuccessful. At the moment her education is limited to 10 hours per week although funding is available to her for up to 20 hours.

Background

3. The applicant was born on the 3rd July, 1998 and lives with her father and younger brother. The diagnosis of her condition is complex and includes moderate intellectual disability, mixed emotional and conduct disorder with significant challenging behaviour, a history of attachment disorder, attention deficit hyperactivity disorder and, possibly, foetal alcohol syndrome. What this means in terms of her behaviour is described by her father in his affidavit sworn on the 2nd November, 2012:

> *[A.] can be hostile towards both me and my son and has often been violent towards me. This has taken the form of hitting, kicking, punching and biting, all of which are regular occurrences. She sleeps very poorly in spite of the fact that she has been prescribed sleep medication for a number of years. She frequently wakes up after only a few hours sleep, and will often begin assaulting me with no reason while I am asleep. There have been many times when I have had to lock M., my son, into his bedroom at night, because he too has been subjected to assaults in the middle of the night. A. also regularly assaults M. during daylight hours, and this is often exacerbated if she has seen me showing him affection. She dislikes me showing him any affection and this has caused a significant difficulty for both M. and me.*
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> *A is often effectively kept under house arrest for her own protection, and in those circumstances she has been known to break furniture and smash windows in frustration. The incidents of her being kept in the house have increased over the last year due to the fact that I have no respite care available for A. A previous respite arrangement, which I had in place with my sister, whereby she would take A. every weekend, broke down and a subsequent respite arrangement that had been arranged through the HSE also broke down after a very short time due to A.'s violent behaviour towards the respite carer and her husband.*
>
> *A will often lie on the floor and scream at the top of her voice if she does not get her own way and she has done this in public on a regular basis. This has resulted in a significant diminution of my ability to have a normal family life with her.*

4. Is should be said that A's father has demonstrated enormous motivation and determination in caring for his children in extraordinarily difficult circumstances and that A.'s relationship with him is spoken of highly.

5. Between 2005 and 2008 A. and her family were living in Northern Ireland. A. attended school there and had access to therapeutic supports but it is noted in the reports that her violence to other pupils was a difficulty. In 2008 the family came back to this jurisdiction. It seems to have taken quite some time to organise an appropriate school placement for her. In 2010 A. finally obtained a place in St. Michael's House Grosvenor School ("St. Michael's"). It appears from the reports that initially she was in a class of eight, with a teacher and two Special Needs Assistants. Her behaviour was very challenging, and after some time she was put in a class with only one other pupil, a teacher supported by two SNAs. It seems that even with this level of attention there were incidents of violence. By the end of December, 2011 she had been suspended three times. On the one day that she went to school in January, 2012 she was violent to another pupil and was re-suspended.

6. On the 20th February the Board of Management decided to expel A. "in order to ensure good order, discipline and the smooth and safe running of the school". After a 20 school-day consultation period the Board confirmed its decision on the 20th March, 2012, stating that

> *"The Board considers that A.'s behaviour is a persistent cause of significant disruption to the learning of others and to*

the teaching process, and that her continued presence in the school constitutes a real and significant threat to the health and safety of other pupils and staff"

7. An appeal pursuant to s.29 of the Education Act, 1998 was turned down by the fourth, fifth and sixth named respondents on the 22nct May, 2012. The appeals committee considered that the sanction was proportionate to the behavioural challenges experienced by school management and staff when dealing with A.

8. On the 12th June, 2012 the Department wrote to A.'s father to inform him of the result of the appeal and to further inform him of the availability of assistance in securing a school place from the National Educational Welfare Board.

9. The decisions in relation to the expulsion are, as noted above, yet to be dealt with as part of the subject-matter of the substantive proceedings.

Developments since A.'s expulsion from school

10. From the 23rct April to the 29th June, 2012 A. received two hours home tuition per day.

11. On the 21st June, 2012 A.'s solicitor wrote to the Department of Education and Skills referring to the failure of the appeal, the fact that A. was now to make appropriate provision for her schooling. The letter stated that it was "very important that she has social interaction with her peers in a school environment". In closing, it was stipulated that in the event that no reply was received within 14 days, application would be made to court.

12. The Department replied on the 5th July and again, in greater detail, on the 26th July, 2012. This letter set out the first named respondent's understanding of his constitutional obligations (specifically, "to provide for education and, where the public good requires it, to provide other educational facilities or institutions rather than to provide education directly") and his obligations pursuant to the Education Act, 1998 ("to ensure, subject to the provisions of the Act, that there is made available to each person resident in the State a level and quality of education which is appropriate to meeting the needs and abilities of that person"). The services provided by the National Council for Special Education, the National Educational Welfare Board ("the NEWB") and the National Educational Psychological Service were outlined. Of these, it would appear that the NEWB was the most immediately relevant body, as it is responsible for school attendance and is charged with giving assistance in cases where there is difficulty in finding a placement.

13. In relation to the specific circumstances of A.'s case, it was stressed that the Minister did not have a direct role in identifying school placements but that, in an effort to be of assistance, applications for enrolment had been made to Carmona Special School in Dun Laoghaire and St. Augustine's School in Blackrock. It was considered that Carmona would be appropriate because it was planning to establish a new class in September 2012, while St. Augustine's could also be suitable because A. lived in its catchment area and it had a special class attached to St. John of God's hospital. The Department said that a named Education Welfare Officer was liaising with Carmona Services and that if additional resources were required for A.'s support in accessing the placement the NCSE would consider any applications from the school.

14. The Department also referred to the fact that Ms. Elaine Nolan, of the NEWB, was in the process of convening a meeting on the 9th August, 2012 for the purpose of facilitating A.'s return to school at the earliest opportunity. The persons to be invited to attend were described as "key personnel (including education stakeholders) who have been involved in A.'s case to date."

15. After the meeting the applications to Carmona (originally made in May) and St. Augustine's (originally made in July) were followed up, although according to Ms. Nolan A.'s father wished to prioritise an appeal against the expulsion. St. Augustine's turned down the application because it is a school for children with mild intellectual disability and not suitable for A., who has moderate intellectual disability. Carmona's initial response was that it could not take A. because it did not have access to psychiatric supports and therefore felt unable to meet her needs. Ms. Nolan continued to pursue this application, asking for it to be brought to the school's Board of Management and, as appears from the correspondence, liaising with the Health Service Executive, requesting support services to address the school's concerns. Carmona responded in October, requesting reports from A.'s school in Northern Ireland, St Michael's, hospital and psychological reports and information in relation to involvement with the HSE from birth to date. Ms Nolan was not in a position to furnish these as the NEWB considered that they should be sourced directly by the school. She continued to ask Carmona to progress the application. It would appear that Carmona replied in late December saying that it could not progress matters without the reports. Ms Nolan then requested a meeting in January, to which she proposed to invite the relevant organisations to gather the information required by Carmona.

16. Meanwhile, by order made on the 5th November, 2012 the applicant had been granted leave to seek judicial review as set out above. This Notice of Motion was issued on the 6th November, 2012 and came on for hearing on the 6th March, 2013.

17. On the 8th November, 2012 the Department sanctioned a further grant of home tuition for up to 20 hours per week. This is still available to A. but as it happens she is not able to cope with more than two hours per day. There is no complaint about the tutor who is working with A.

18. The requested meeting with Carmona was scheduled for February, 2013 and then re-scheduled for the 4thMarch, 2013, two days before the hearing of this application. It was attended by A.'s father and her home tutor, representatives of the NEWB, Carmona School, the HSE and the Department of Education. Carmona confirmed its view that it did not have the clinical and therapeutic supports needed by A. and it would not, therefore, offer her a place.

19. As a result of the discussions at the meeting Ms. Nolan contacted St. Catherine's Special School in Wicklow to enquire about applying for a place there. She says that she was told that there was a waiting list and A. was outside the catchment area. She further says that A.'s father contacted her the next day, after consulting his solicitor, to say that he did not want an application to be made at this time. Ms. Nolan says that she will continue to seek alternative placements for A.

20. Mr. McD., for his part, wishes to make it clear that he felt that it was obvious after the conversation Ms. Nolan had with the principal of St. Catherine's that A. would not be offered a place and that he thought there was no point pursuing it. He states his belief that Ms. Nolan has done all that she can do to find a placement for A. but that, through no fault of hers, no placement appears to be available.

21. As of the date of hearing, therefore, the position is that A has not attended school for well over a year. She now receives two hours home tuition per day, with the option of extending that up to four hours if she was able to cope with it.

22. It is Mr. McD.'s belief that the lack of a school place is having a deleterious impact on A.'s social skills as well as on her education,

with consequent limitations on her future prospects.

The Health Service Executive
23. Although the HSE was not a party to this motion its role was the subject of some comment and affidavits filed on its behalf in the main action were relied upon to some extent.

24. As it is not a party I will not make any findings or rulings in respect of the HSE and therefore I think I should not go into the affidavits in any great detail. It may however be important to note that in January 2012 a report by Dora Marciniak, Clinical Psychologist, remarked that

> *"A. seems not to know how to interact with her peers and other children. She would benefit from social skills activities, which would support development of abilities such as making friends, entering and ending conversations appropriately and playing with other children."*

25. The care plan drafted for A. by Celine Judge and Karen Hall, Acting Team Leader of the Protection and Welfare Social Work Team, after the institution of these proceedings states that

> *"A. requires an educational placement in a school for children with moderate learning difficulties, with a clinical team including speech and language, social work, psychology [and} psychiatry.*
>
> *It will be essential that a care plan is devised at a Multidisciplinary Meeting when A. recommences education, which will take into consideration A.'s educational needs and abilities, speech and language needs, attachment difficulties, behavioural difficulties and social skills and plan how best to meet any deficits in her development."*

Submissions
26. It is common case that the State has a constitutional obligation to provide for free primary education and the applicant has a right to receive free primary education. On behalf of the applicant Mr. de Blacam says that that right must be enforceable by way of a mandatory order where that is necessary to ensure that provision is made, or it will be meaningless. He acknowledges the principle, based on the separation of powers and most strongly enunciated in *Sinnott v Minister for Education* [2001] 2 IR 545 and *T.D. v Minister for Education* [2001] 4 IR 259, that the courts are reluctant to make mandatory orders against State parties and prefer where possible to grant relief by way of declaration but says that the authorities do provide scope for exceptional cases. This, he contends, is one such case. It is further argued that declaratory relief would not be appropriate in this application, there being no such thing as an interim or interlocutory declaration.

27. In particular, the applicant relies on the following dicta.

Sinnott

- Keane CJ at p. 631-

> *"..while in principle there is nothing to preclude the granting of mandatory relief directed to the Minister concerned, it is appropriate, in my view, for the courts to presume that where this court grants a declaration that he or she has failed to meet his or her constitutional obligations, the Minister will take the appropriate steps to comply with the law as laid down by the courts.'*

- Denham J at p. 656 -

> *"...the courts assume that decisions will be implemented and that mandatory orders are not necessary. Thus a declaratory order, if any order is necessary, is usually appropriate. However, I would not exclude the rare and exceptional case, where, to protect constitutional rights, the court may have a jurisdiction and even a duty to make a mandatory order."*

- Geoghegan J at p. 724 -

> *"...I do think that in very exceptional circumstances it may be open to a court to order allocation of funds where a constitutional right has been flouted without justification or reasonable excuse of any kind."*

- Murray J at p. 336-

> *"...I do not wish to determine that the courts may never make a mandatory order in anv form as opposed to a declaratory or other order, against an organ of state.*
>
> *In so far as McKenna v An Taoiseach (No.2) [1995] 2 IR 10, Crotty v An Taoiseach [1987] IR 713 and District judge McMenamin v Ireland [1996[3 IR 100 might be said to be authority for the making of some form of mandatory order where there is "a clear disregard" by the State of its constitutional obligations, it must be borne in mind that in none of those cases was a mandatory order granted .... For example, a mandatory order directing the executive to fulfil a legal obligation (without specifying the means or policy to be used in fulfilling the obligation) in lieu of a declaratory order as to the nature of its obligations could only be granted, if at all, in exceptional circumstances where an organ or agency of the State had disregarded its obligations in an exemplary fashion. In my view the phrase "clear disregard" can only be understood to mean a conscious and deliberate decision by the organ of state to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness".*

28. It might be noted in passing that this last passage was agreed with by Hardiman J, who however commented that he did not believe that any circumstances which would justify the making of such an order had occurred since the enactment of the Constitution.

29. The applicant further relies on two High Court decisions that post-date *Sinnott* and *T.D.*, being the judgments of Herbert J in *Nagle v Southwestern Area Health Board* unrep. High Court, 30th October, 2001 and Laffey J in *Cronin v Minister for Education and Science* [2004] 3 IR 205.

30. In *Nagle*, a mandatory injunction was granted directed to the Minister for education requiring that he forthwith provide for appropriate, free primary education and support services to the plaintiff, who was not at the time receiving any education service at all. Herbert I said that he felt he had no option but to do so, since he could not make an "interim declaration" and believed that he should not make a final declaration at the interlocutory stage. In *Cronin*, Laffey J granted an order where the "refined, narrow matter" before the court was the provision of money for a programme specific to the plaintiff, limited both in quantum and duration and could have no significant resource or budgetary implications for the Minister.

31. In asserting an entitlement to an order at this stage of the proceedings the applicant relies on the decision of the Supreme Court in *Campus Oil Ltd v Minister for Industry and Energy (No. 2)* [1983] IR 88. In that case the defendant minister sought a mandatory injunction compelling the plaintiffs to comply with the terms of an order made by him pending the determination of the plaintiffs' claim that the order in question was unlawful. The plaintiffs resisted on the basis that it was probable that the validity of the order would not be upheld. The case is the leading authority for the proposition that a mandatory injunction may properly be granted where 1) the party seeking it can establish that there is a fair question concerning the right sought to be protected or enforced by the injunction and 2) the circumstances are such that the balance of convenience lies on the side of the granting of the injunction. It is argued on behalf of the applicant in the instant case that there can be no doubt as to either the existence of the right in question or the balance of convenience.

32. On behalf of the respondent Mr. Dignam SC contends as a preliminary argument that the applicant has failed to discharge the burden of proof in that, it is argued, it has not been shown by expert evidence that the current provision of home tuition, as opposed to a school placement, does not accord with her best interests or that it does not constitute an appropriate response to her educational needs. He relies on the principle that mandatory interlocutory injunctions should rarely be granted and invokes the authorities already referred to in relation to the separation of powers. Having regard to the failure of the applicant's previous placement, he says that it is clear that no placement will succeed without the support of services necessarily supplied by the HSE rather than by these respondents. (This latter proposition is accepted by the applicant, without resiling from the contention that it these respondents who bear the constitutional obligation to ensure that A.'s rights are respected.) The court should not, it said, make an order incapable of fulfilment- the Minister cannot compel a school to accept the applicant (except in the case of an appeal against a refusal to admit a pupil).

Conclusions

33. In my view the respondents are incorrect in the submission that the applicant has not discharged the burden of proof as to the shortcomings of her current educational provision. Apart from the obligation to provide for free primary education, Article 42 of the Constitution requires the State to ensure that children receive "a certain minimum education, moral, intellectual and social". It is absolutely clear from her father's evidence, from the psychologist's report and from her history in school that A.'s social education is gravely deficient. Further, it is clear that the efforts of everyone involved from the field of education have been to find her a school placement. Home tuition, as Mr. Dignam concedes, was only ever meant to be a stop-gap measure, sanctioned on a temporary basis from time to time because A was out of school. I do not believe that evidence is required from an educational expert to establish on the balance of probabilities that home tuition, even with the best of tutors, is not designed to replace the form of social education gained by learning how to get along with one's peers and other people. If this is not remedied, her future life will be difficult in the extreme.

34. However, it is not possible for me to find that the very high standard for a mandatory interlocutory injunction against these respondents has been met. The passages quoted above from *Sinnott* and *T.D.*, while supporting a general proposition that in extreme cases such an order may be made, do not assist this applicant since her situation, bad though it undoubtedly is, is not in the class of case envisaged by the Supreme Court as within the definition of "extreme". There is no element of bad faith, no matter how it might be described. This is not a situation where the rights of A have been consciously and deliberately disregarded or flouted. Notwithstanding the argument made in relation to the burden of proof at the hearing, nobody involved in her case thinks that she should receive only home tuition and efforts continue to be made to find a school. The case on her behalf is effectively made, without those elements, on the basis that she is entitled to a school place, she does not have one and this is having a harmful effect on her development. That does not suffice for an order of the type sought.

35. I also agree with the view of Herbert J expressed in Nagle that a declaration at this stage of proceedings is not appropriate. However, the applicant's substantive proceedings are at an advanced stage of readiness and I see no reason why a full hearing should not be held in early course.

36. I therefore refuse the relief sought in this application.