Neutral Citation Number: [2011] IEHC 507

THE HIGH COURT

JUDICIAL REVIEW

2010 1020 JR

BETWEEN

ESTHER NATASHA ENGUYE

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

2010 1019 JR

BETWEEN

NANA AMA TWUMASI

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Mr. Justice Gilligan delivered on the 26th day of October, 2011

1. Both the above applications revolve on the same facts and circumstances and it has been agreed by counsel that the Court will deal with the application of Esther Natasha Enguye under record number 2010 1020/JR.

2. The applicant is a citizen of the Republic of Congo who arrived into the State as an unaccompanied minor aged sixteen years in 2008 and was taken into the care of the respondent pursuant to s. 4 of the Child Care Act 1991, and in particular s. 8(5)(a) of the Refugee Act 1996, as amended. The applicant remained in the respondent's care until the 10th June, 2010. During this period of time the applicant was housed at Chester House Hostel in Dublin, a hostel for separated children. The applicant attained her majority on the 23rd April, 2010. The applicant applied for asylum status which was refused and she remains in Ireland pending an application which is presently with the Minister for Justice, Equality and Law Reform to remain on humanitarian grounds.

3. During her initial period in Ireland the applicant attended at St. Joseph's Secondary School and at the time of her eighteenth birthday in April, 2010 she was a fifth year student. There is absolutely no doubt from the collective information available that the applicant is a vulnerable young girl who applied herself very successfully while at St. Joseph's Secondary School, and greatly impressed her peers. There was further no doubt that she participated in full in the school activities and was making substantial headway. The various tributes to her are fulsome in their praise and she is to be commended for what she has achieved to date in clearly difficult circumstances.

4. Having reached the age of majority and on completion of her fifth year school programme on 10th June, 2010, the applicant was transferred under the auspices of the Reception and Integration Agency (Department of Justice) to accommodation in Galway in Eglington House Hostel in Salthill and she was also enrolled in a school there to enable her to complete her leaving certificate studies, so as to progress to sit the leaving certificate examination in June, 2011.

5. Subsequently, as a result of deep unhappiness and having been visited in early October, 2010 by a consultant clinical psychologist, the applicant was removed from Eglington House Hostel in Galway and she was taken under the umbrella of a voluntary organisation, Young People at Risk ("YPAR"), who brought her back to Dublin and who have housed and fed her since and returned her to St. Joseph's Secondary School. The ongoing situation is that the applicant sat her leaving certificate in June, 2011 and, subject to her results, has been accepted into her chosen course for third level education.

6. In essence, the applicant has had no contact with the respondent since she was transferred to Galway in early October, 2010 and as has been stated in open Court by YPAR the voluntary organisation that has looked after the applicant since early October, 2010, it is understandably concerned as regards the ongoing situation from a funding aspect.

7. The applicant seeks a number of reliefs by way of judicial review and in particular:-

> 1. An order of *certiorari* quashing the decision of the respondent in or about March 2010 to cease having care of the applicant on June 10th 2010.

2. A declaration that section 45 of the Child Care Act 1991, is mandatory requiring the respondent as the agency empowered by the said statute to exercise its powers where the need arises.

3. A declaration that the respondent was and is obliged to consider the applicant's aftercare needs pursuant to section 45 of the Child Care Act 1991, and failed to so do at all or adequately and breached fair procedures by failing to take adequate account of independent evidence that the applicant needed aftercare.

4. In the alternative and without prejudice to the foregoing a declaration that the respondent's discretion pursuant to section 45 of the Child Care Act 1991, was unlawfully fettered by the respondent's adherence to an inflexible policy rule.

5. In the alternative and without prejudice to the foregoing an order of mandamus compelling the respondent to exercise its discretion pursuant to section 45 Child Care Act 1991 properly, and to consider the applicant's need for aftercare in a fair and impartial manner.

6. A declaration that the respondent breached its statutory and regulatory duty in failing to provide adequate care to the applicant since coming into the care of the respondent in February, 2008 to date.

7. A declaration that the respondent's acts and/or omissions breached the applicant's rights pursuant to the Constitution.

8. Initially the applicant made a claim for damages but the court was advised by counsel for the applicant that this aspect was no longer being pursued.

9. The respondent initially raises a number of objections to the granting of the relief as sought by reason of delay, the absence of any sufficient evidence to explain the delay, the lack of reasonable specificity in the orders for relief sought on the application, the failure of the applicant to exhaust a statutory alternative remedy, that the orders for relief sought are an attempt to have the High Court determine the assessment, provision and allocation of scarce public resources contrary to the constitutional doctrine of the separation of powers, and based on the facts, they contend, that the application is now moot.

10. The respondent contends that the applicant was informed in March, 2010 of the decision of the respondent to close Chester House in Dublin. In April, 2010 the applicant achieved her majority and was no longer a child within the meaning of the Child Care Act 1991. The applicant was, after due consultation and inquiry, informed of the arrangements, accommodation, education and provision for her in Galway and was relocated to Galway in June, 2010. On the 15th July, 2010, the applicant's solicitors wrote to the respondent giving twenty four hours notice of her requirement that her former provision of a child in care be reinstated and the application for the relief as claimed herein was made to the High Court on the 22nd July, 2010.

11. The respondent contends that the application was not made promptly within the meaning of O. 84, r. 21(1) of the Rules of the Superior Courts 1986, as amended, that no extension of time was sought and that there was no adequate or sufficient evidence upon which this Court could exercise its discretion to extend for good reason the period within which to seek relief by way of a declaration and injunction mandamus and damages.

12. The applicant was a minor up until the 23rd April, 2010. The background was somewhat complicated by reason of the fact that the applicant was permitted to remain in Chester House in Dublin until the 10th June, 2010, prior to which extensive efforts by correspondence and through meetings were made to the respondent to have the decision overturned. It was confirmed in letters from the respondent's childcare manager, Ms. Diane McHugh, on the 28th May, 2010, and the 29th June, 2010, that the decision as taken stood. The reliefs as claimed herein were sought after those dates but the proceedings were instigated within six weeks and in the applicant's contention, well within the three month rule pursuant to O. 84.

13. I take the view that the Court is entitled to exercise its discretion with regard to the aspect of delay herein. Clearly the applicant was in a position of vulnerability and while she may have been advised in March, 2010 of the decision of the Health Service Executive to close her hostel accommodation in Dublin, she only achieved her majority in April, 2010 and was subsequently advised after due consultation of the arrangements for her to leave for Galway. It is clear from a perusal of the documentation that there was extensive communication on behalf of the applicant, and having regard to the strength of the applications that were made on her behalf and taking into account the various surrounding circumstances and, in particular, the absence of any prejudice to the respondent, in my view the delay such as it was, was reasonable and can be excused.

14. As regards the aspect of the lack of specificity it does appear that the applicant was originally seeking a variety of reliefs, but I am satisfied that these have now been clarified and narrowed, and I do not consider that the applicant is inappropriately vague in relation to the reliefs as sought in this application.

15. It is further contended on the respondent's behalf that there has been a failure to exhaust the alternative remedy of complaint under Part 9 of the Health Act 2004. The respondent contends that the applicant had an entitlement to make a statutory complaint to a complaints officer of the Health Service Executive in respect of *"anything done or omitted to be done"* by the Health Service Executive within a statutory period of twelve months from the date of the action giving rise to the complaint. Following such a complaint the relevant officer can issue recommendations following an investigation and, in addition, the complainant can refer a complaint to the Ombudsman or the Ombudsman for Children and these aspects are far broader than those applicable to judicial review.

16. I do not consider that the opportunity to voice a complaint pursuant to Part 9 of the Health Act 2004 as a matter of law, especially against the particular background circumstances of this case, is one that has to be undertaken prior to contending for judicial review and it has to be borne in mind that the applicant in the present proceedings makes an allegation of errors of law, breaches of constitutional rights and her rights under the European Convention on Human Rights.

17. In any event the alternative statutory remedy in this instance is the entitlement to make a statutory complaint to a complaints officer of the Health Service Executive and not an appeal mechanism. I note in particular from the provisions of Part 9 of the Health Act 2004, that a party who is dissatisfied with the ruling of the complaints officer can then refer the matter to the Ombudsman or the Ombudsman for Children.

18. There is no doubt that unaccompanied minors such as the applicant entering the State are governed by s. 8(5)(a) of the Refugee Act 1996 (as amended by the Immigration Act 1999) which states that:-

"Where it appears to an Immigration Officer or an authorised officer that a child under the age of eighteen years who has

either arrived at the frontiers of the State or has entered the State is not in the custody of any person the officer shall as soon as practicable so inform the Health Board in whose functional area the child is and thereupon the provisions of the Child Care Act 1991, shall apply in relation to the child."

19. In my view this application breaks down into two parts. The first being that period of time from the date when the applicant entered the State until she attained her majority on her eighteenth birthday on the 23rd day of April, 2010. The second part is the situation that has pertained since that date including the applicant's transfer from Chester House Hostel and St. Joseph's Secondary School in Dublin to the Eglington Hotel Hostel and St. Mary's Secondary School, Salthill,Galway.

20. The applicant complains that Chester House was an unregulated hostel operated by the respondent through a private operator which system was criticised in the Ryan Report. The applicant complains that Chester House did not have any properly qualified staff to care for her and that she was just sixteen years of age when she was placed there. She needed emotional support which she did not receive. She complains that she received very little attention and that she should have been placed in a registered residential unit where there was full-time staff and where her emotional, social and physical needs would have been met in a very caring environment. Subsequently, in March, 2010 the applicant says that Cross Care workers came to take care of the children in Chester House but that this was just for a short period before she was actually transferred to Galway.

21. The applicant complains that she was sexually abused in her home country and that she received inadequate support in this regard. She is of the view that she should have been seen by specially trained persons. The applicant complains that no care plan was put in place for her, nor was she taught any life skills such as cooking or money management or social skills.

22. The applicant is correct that pursuant to Statutory Instrument 259/1995 Child Care (Placement of Children in Residential Care) Regulations 1995, the respondent should have put in place a care plan for the applicant which effectively would have set out the aims and objectives of the placement of the applicant in Chester House Hostel, the support to be provided to her, and arrangements for the ongoing review of the plan. Insofar as the respondent did not have in place the designated care plan for the applicant, it was in breach of the statutory regulations.

23. However, the reality of the factual background situation is that following the applicant's placement in the Chester House Hostel and St. Joseph's Secondary School, she made an application pursuant to the Refugee Act 1996, as amended, for asylum in the State, which application was unsuccessful. The applicant remains in the State having applied for leave to remain on humanitarian grounds. Having brought the fact of the allegation that she was sexually abused in her home country prior to arrival in Ireland to the attention of the respondent, she was specifically seen by a social worker and her assigned project worker in this regard, and in consultation with the psychological services, a decision was determined that it was neither necessary nor appropriate that the applicant be referred for further assessment or treatment in relation to this aspect. Furthermore, it has been pointed out that in the applicant's application for refugee status, there is no reference to an allegation that the applicant was sexually abused in her home country. It may be that the respondent's care for this particular applicant fell short of a desired norm, but it is abundantly evident from the school reports from St. Joseph's and from the various testimonials and letters of support, that the applicant received in attempting to prevent, if at all possible, her being moved from Dublin to Galway in June, 2010 that this particular applicant had developed into a well balanced girl, although vulnerable because of her particular circumstances, who had done particularly well since her arrival in Ireland and she is to be commended in this regard. She certainly has secured the hearts and minds of those who came in contact with her.

24. The applicant has withdrawn any claim for damages, but in my view this was absolutely the correct decision because quite clearly, while there may have been a breach of the regulations in that no care plan was put in place, and while it may be that the care afforded to the applicant fell short of a required standard, the fact is that the applicant did very well and thus, in my view, nothing of any significance in the circumstances of this application turns on the failure of the respondent to have in place a care plan. It goes without saying that there is no allegation whatsoever that the applicant was in any way ill treated or taken advantage of during this period of time.

25. Accordingly, the application in effect centres on the applicant being moved from Dublin to Galway in June, 2010 clearly against her own wishes, clearly against the wishes of her designated project worker, clearly against the wishes of the school authorities and probably against the wishes of all those who came in contact with her. Indeed, on an overview of the case if it was at all possible, it would appear that the applicant should have been left in Dublin but it has to be borne in mind that the decision taken herein has to balance the best interests of the applicant against a background of a myriad of other considerations, not the least of which is the aspect of scarce resources, the numbers of other persons in the same situation as the applicant and the availability of accommodation both in Dublin, Galway and elsewhere.

26. Mr. Cristle on behalf of the applicant claims that in transferring the applicant from Dublin to Galway, the respondent erred in failing to adopt the correct procedure and failed to follow Government policy of equity of care, and seeks for this error to be rectified. With regard to the move of the applicant from Dublin to Galway, the application narrows itself to a consideration of s. 45 of the Child Care Act 1991, which in relation to after care states as follows:-

"1.

(a) Where a child leaves the care of the Health Service Executive, the Executive may in accordance with *subsection* (2), assist him for so long as the Executive is satisfied as to this need for assistance and, subject to *paragraph* (b), he has not attained the age of 21 years.

(b) Where the Health Service Executive is assisting a person in accordance with *subsection* (2)(b), and that person attains the age of 21 years, the Executive may continue to provide such assistance until the completion of the course of education in which he is engaged."

27. Mr. Cristle contends that the respondent has failed in the duty it owed to the applicant in respect of after care pursuant to s. 45 of the Child Care Act 1991.

28. Clearly there is now a substantial change in emphasis with regard to the application brought about undoubtedly by the background facts and circumstances where both applicants herein were apparently deeply unhappy with their accommodation and general educational circumstances in Galway and there was an intervention by a clinical psychologist, Dr. Edel McAndrew, who came to the conclusion that both the applicants herein were at risk mentally and physically in their placement in Galway and in particular, the first named applicant was depressed and physically ill. Dr. McAndrew made contact with the applicants legal team, and Young People At Risk ("YPAR"), a Dublin based voluntary body known to the two applicants. YPAR arranged for the girls to be collected and taken to Dublin on the 2nd October, 2010, and essentially both girls returned to their original schools, have been cared for since that

time by this voluntary body and have stepped outside the State's system. Since their return to Dublin in early October, 2010 both girls have apparently done very well in school, have completed their leaving certificate examinations, applied for and been accepted on the educational courses of their choice subject to the results as achieved in their leaving certificate. It has been stated openly in court that YPAR, the voluntary body of persons who has been looking after the two applicants, are encountering financial difficulties with the expenses involved. Essentially both applicants want to remain in Dublin in accommodation provided by the respondent and wish to be assisted in the continuance of their education.

29. The applicants appear to lose sight of the fact that they entered this State as unaccompanied minors, have been provided for while they applied for refugee status and following their unsuccessful application in this regard, have been provided for pending the determination of their application to stay on humanitarian grounds. They remain as a matter of law under the system as provided for in the Refugee Act and pursuant to the decisions arrived at by the respondent on both applicants attaining the age of eighteen years, they have come under the auspices of the Reception and Integration Agency which agency is operated by the Department of Justice and comes under the umbrella of the overall asylum system.

30. It is of some significance then in a letter of the 10th April, 2010, the second named applicant, Nana Ama Twumasi, wrote to the Reception and Integration Agency looking for accommodation from them, provided it was in Dublin. At the time she stated:-

> "I wish to be moved to any hostel in Dublin after Chester House to help me continue my course in Mount Carmel School. Mount Carmel is a good school and I am used to the way they teach. Also I have made lots of friends in the school and the school has lots of prospects. And even this year I won a silver Gaisce Award and the presentation was made by the President of Ireland."

As pointed out by Mr. McEnroy for the respondent, this is inconsistent with the position of the applicant as expressed by Mr. Cristle, that the applicant should go back into the care of the respondent, and not the Reception Integration Agency.

31. The first point that arises pursuant to s. 45 of the Child Care Act 1991, is that Mr. Cristle, on the applicants' behalf, contends that the respondent cannot take into account the asylum and immigration position or status of the applicants. I cannot agree with Mr. Cristle's submission because at all times from the moment they stepped onto Irish soil the applicants became involved in the asylum process pursuant to the Refugee Act 1996, and both are still involved in the asylum process.

32. As regards the particular wording of s. 45 of the Child Care Act 1991, I am satisfied that the word "may" is to be interpreted as not imposing upon the respondent an absolute duty to provide for the needs for assistance of a child leaving the care of the Health Service Executive up until the time when he or she attains the age of twenty one years. In my view s. 45(1)(a) imposes on the respondent a duty to exercise its discretion taking into account the need for assistance of the individual concerned and complying further with the general provisions of section 45. Mr. Cristle submits that at this stage what in fact what occurred was that the discretion of the respondent was fettered and that this is confirmed in the letter of the 28th day of May, 2010, to Fergus McCabe, Chairperson, YPAR, from Diane McHugh, Child Care Manager, wherein in Mr. Cristle's submission to the court she indicates that since January, 2009 it has been government policy that young persons over eighteen years who have not been granted status and/or leave to remain will be transferred to adult hostels and that a process is in place whereby meetings are held with RIA staff on a monthly basis. Mr. Cristle relies on a line of authority in the event that the Court is satisfied that the discretion of the respondent has been fettered. I do not agree that the government policy as outlined unduly fetters the discretion of the respondent to act within the parameters of their discretion. The discretion of the respondent is enshrined in statute, and it so happens that on this occasion the decision made by the respondent in relation to the applicant was in accordance with government policy. In the event that the respondent decides that an after care plan is warranted in a particular instance, it has the discretion to implement this pursuant to section 45.

33. Mr. Cristle contends on the applicants behalf that the respondent had no alternative but to refer the applicants to the Reception and Integration Agency and that this fact discriminates against these particular applicants and differentiates between them and persons who may have been successful in their application for refugee status and indigenous persons who find themselves in a similar situation, in breach of the equality guarantees contained in the Constitution. On this aspect, I agree with the submission of Mr. McEnroy, that s. 45 does not create a separate system for aged out minors, separate from the asylum and immigration process. On the basis of the *Keegan v. Stardust* principles [1986] I.R. 642, the respondent did not act so unreasonably that no public authority could reasonably have made the decision that it did.

34. On the basis of the foregoing, I conclude therefore that whilst the decision of the respondent to transfer the applicants to Galway may appear to be insensitive, it is one which the respondent was entitled to make in the exercise of its discretion. As the applicant has attained the age majority, the current status of the applicant falls to be considered under the Refugee Act, as an adult seeking asylum. In this regard both applicants voluntarily remain outside the asylum and immigration system to date. The applicant appear to be seeking now, not a return to the asylum system, but an individually crafted care plan outside of the system, whereby both would obtain the benefits of child care provision as an adult.

35. For the reasons set out herein, I come to the conclusion that there is no basis in law in either applicants claim for the reliefs as sought and in the circumstances, I decline to grant the reliefs as sought.