

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2019 No. 546 JR]**

**BETWEEN**

**C.D.**

**APPLICANT**

**AND**

**THE CHILD AND FAMILY AGENCY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on Tuesday the 7th day of July, 2020**

1. Does the Child and Family Agency have jurisdiction to make a finding that an allegation of child sexual abuse is founded or unfounded, as opposed to simply finding that a future risk of child abuse exists in a particular case? The applicant submits that this issue of principle has not been decided. The respondent submits that this conclusion follows from existing caselaw.

**Facts**

2. It is unnecessary to set out the full facts of the matter. The following highlights will suffice for scene-setting purposes.
3. The Child and Family Agency was made aware of an allegation that the applicant abused a child when aged 13 or 14 and when the child was around three. No complaint was made, partly on the basis that the child's mother did not want the child to re-live the matter. The applicant's explanation to the Child and Family Agency was that "*the trousers came off accidentally when they were playing*". That allegation does not seem to form part of the agency's reasoning in the impugned provisional decision.
4. On 20th July, 2017 a referral was received from a GP in relation to a later act of alleged child sexual abuse by the applicant in relation to another child aged around five to seven years.
5. On 8th January, 2018 a social work discussion took place involving the applicant in which he denied all allegations. That was prior to the start of the formal inquiry process.
6. On 24th May, 2018 the agency sent a letter to the applicant setting out the procedures that would apply to the formal process.
7. On 26th November, 2018 the agency wrote setting out provisional adverse conclusions and giving the applicant an opportunity to respond.
8. On 19th July, 2019 the applicant's solicitor was informed that the DPP had directed no prosecution in relation to the alleged abuse the subject of the agency's provisional conclusions.
9. On 29th July, 2019 the applicant obtained leave from Noonan J. for an order of prohibition restraining the agency from making conclusions and a stay on such conclusions pending the determination of the proceedings.

### **Grounds**

10. Ground 1 is just a set of statements of fact. Grounds 2, 3 and 6 are the relevant ones for present purposes. Grounds 4 and 5 are being in effect reserved by the applicant to whatever process follows the judgment, and grounds 7 to 9 are essentially ancillary. I have now received helpful submissions from Mr. Ronan Munro S.C. (with Ms. Caroline McGrath B.L.) for the applicant and from Mr. Bernard Condon S.C. (with Mr. Conor McKenna B.L.) for the respondent.
11. The agency has not confined itself to a defence on the merits, but has launched the contradictory objections, both of which are unfounded in the present context, of acquiescence and prematurity. Fortunately, one of those was not pursued, but for completeness I will refer to both below.

### **Acquiescence**

12. Mr. Condon was sensibly not pushing the objection of acquiescence. I say sensibly for three reasons:
  - (i). this is in effect an allegation of delay and is thus irreconcilable with the complaint of prematurity which is also made;
  - (ii). if there is a lack of statutory jurisdiction, such jurisdiction is not created just because the applicant doesn't challenge the matter before doing anything else; and
  - (iii). the applicant did not approbate the jurisdiction still less obtain any tactical benefit in doing so, nor did the respondent suffer any detriment from the applicant not challenging the alleged lack of jurisdiction at an earlier point. Thus, there is no disqualifying acquiescence in any event.

### **Prematurity**

13. The agency has predictably launched a complaint of prematurity in para. 1 of the statement of opposition. There is a grain of truth to this objection because the normal procedure is that a process should be allowed to continue to conclusion before the court intervenes. As I pointed out *Habte v. The Minister for Justice and Equality* [2019] IEHC 47, [2019] 2 JIC 0405 (Unreported, High Court, 4th February, 2019), there are exceptions to that general approach, particularly if there is an allegation of improper purpose or of *ultra vires* (see para. 63 and see also *Habte v. Minister for Justice and Equality* [2020] IECA 22).
14. More broadly, there is an exception if there is an inevitability of unfairness or unlawfulness. It is clear that if the applicant's contention is correct and the process is *ultra vires* then there is an inevitability of unlawfulness, so the present action sails through this test. It is true that judicial intervention in child sexual abuse investigations "should be kept very much in reserve, perhaps confined to the exceptional case which involves a point of principle" per Butler-Sloss L.J. in *R v. Harrow London Borough Council, Ex parte D.* [1990] 3 All E.R. 12 at 16. But the CFA policy and procedures document was adopted in 2014, so we are in the relatively early days of its operation. As time goes by one might expect the major points of principle to be challenged and decided so that the

level of judicial review in this area would decline. However, the present case clearly involves a point of principle.

**Ground 2 – *ultra vires***

15. The CFA's statutory jurisdiction derives from s. 3(1) of the Child Care Act 1991 so ultimately the question of *vires* comes down to whether the section covers the kind of situation that arises in the present case. Section 3(1) as originally enacted provided that "[i]t shall be a function of every health board to promote the welfare of children in its area who are not receiving adequate care and protection." Schedule 7 of the Health Act 2004 replaced "every health board" with "the Health Service Executive" and repealed the words "in its area". The functions of the HSE were then transferred to the CFA by the Child and Family Agency Act 2013.
16. In *M.Q. v. Gleeson* [1997] IEHC 26, [1998] 4 I.R. 85 (at p.100, para. 94), Barr J. construed the powers under s. 3(1) of the 1991 Act in very broad terms: "*I have no doubt that in the exercise of their statutory function to promote the welfare of children, health boards are not confined to acting in the interest of specific identified or identifiable children who are already at risk of abuse and require immediate care and protection, but that their duty extends also to children not yet identifiable who may be at risk in the future by reason of a specific potential hazard to them which a board reasonably suspects may come about in the future.*" For some reason, in the unreported version of the judgment, the word "not" is omitted before the word "confined", but the reported version reads more correctly.
17. On that logic, the duty to promote the welfare of children in need of protection is a foundation for a wide-ranging power to investigate and make findings of child abuse against potentially anybody against whom an allegation is made, because any child abuser could in future abuse children in need of protection. That logic is a very slender and wobbly basis for an entire statutory jurisdiction to conduct child sexual abuse inquiries and findings or indeed findings as to any other form of child abuse or neglect. One can only suggest that perhaps the Oireachtas might consider that this particular area warrants a more explicit statutory underpinning for the procedures of investigation of child harm.
18. Mr. Condon suggests that the statute being in place since 1991 and being accepted as a basis for such inquiries amounts to a sort of parliamentary and judicial acquiescence, and has garnered strength from both precedent and practice. He concedes that the statute could have been drafted more explicitly, but a more accurate view might be that it could hardly have been drafted less explicitly. Of some relevance now is that the matter must be viewed in the context of the rights of the child, recognised in Article 42A.1 of the Constitution, albeit that doesn't itself answer the question at issue. Despite my misgivings as to the lack of specificity in the legislation, it seems to follow from *M.Q.* that the jurisdiction contended for here exists and given that *M.Q.* is very much established law, I will apply it here. It is clear that *M.Q.* is not just about investigations as such, but also involves the power to make findings "*that a particular person is likely to be (or to have been) a child abuser*" (at p. 100, para. 96).

19. As a matter of first principles, going beyond the present child welfare context, it is implicit that if the law confers a function on a public law body, such a body has the power to make whatever findings of fact are necessary for the execution of those functions, unless the statute, properly interpreted, otherwise provides. No direct authority has immediately come to hand for that proposition although it is implicit in some of the administrative law authorities. A couple of examples may illustrate the point.
20. The UK Housing Act 1985, s. 62 provided for inquiries as to whether a person was homeless or threatened with homelessness and certain related matters. Sir Louis Blom-Cooper Q.C., sitting as a Deputy High Court Judge, in *R. v Westminster City Council Ex p. Moozary-Oraky* (1994) 26 H.L.R. 213, held that factual matters would come within the remit of the council in that "*the issue would always in the first instance be determined by the local authority under the section 62 duty to inquire*", thereby implicitly accepting that a statutory duty to inquire into certain matters carried with it the power to determine issues or alternatively to find facts. Similar implicit acceptance of that authority can be found in the judgment of Brooke J. in *R. v. Horsham District Council & West Sussex District Council* (1992) 24 H.L.R. 669 where he referred to "*the kind of fact finding exercise on disputed facts that a court at first instance, or a statutory body with statutory responsibilities to investigate facts, is equipped to perform*", thereby equating investigation of facts with the power to find facts.
21. A judgment on whether a finding of fact is necessary to the exercise of a statutory function is in the first instance one for the decision-maker and a certain margin of appreciation must be allowed. Mr. Condon submits that the CFA could not perform its child protection function without making findings as to whether complaints were founded or unfounded and it certainly hasn't been shown that that approach is invalid.
22. While reliance is placed on the judgment in *M.I. v. H.S.E. (Ex tempore, Not circulated, Supreme Court, Murray C.J. (Hardiman and O'Donnell JJ. concurring), 11th June, 2010)* that is of no real relevance. That was a decision on an injunction restraining the making of a finding by the HSE pending the applicant's imminent criminal trial. The Supreme Court held that such a finding was not necessary as the HSE could take any necessary actions in the meantime based on the fact that the applicant had been charged. It doesn't establish any lack of jurisdiction to make findings of fact. It is clear from *T.R. v. Child & Family Agency* [2017] IEHC 595 (Unreported, High Court, McDermott J., 27th July, 2017), that such findings must be made on the balance of probabilities.
23. Having said all of that, I come to such a view with some misgivings. First of all, there are clear dangers in allowing an administrative decision-maker, possibly even coming down to an individual social worker with the support of his or her superiors, to make a finding that has the consequence that it is officially asserted that an individual has been guilty of actions which amount to extremely serious criminal offences. Mr. Condon says there must be safeguards, but whether safeguards are real or illusory depends a lot on how they are implemented in practice. Much was made in submissions of the appeal panel, but whether their level of scrutiny is meaningful or not very much depends on how they

go about their work. The appeal panel is not a *de novo* hearing, nor is it a substantive consideration of whether all of the material pro and con clearly establishes past child abuse. If the appeal panel merely asks whether the procedures in the policy document were followed, as it appears to do, then it is hard to see how that could be viewed as providing an effective remedy.

24. McDermott J. in *W.M. v. Child and Family Agency* [2017] IEHC 587 (Unreported, High Court, 31st July, 2017) noted of the decision-maker in that case (at para. 75) that "*the overall approach is one of scepticism towards the applicant and acceptance of the complainant's allegations.*" Applying that concern more generally, it does not appear that a process whereby the same social workers involved in the earlier stage in informal meetings before the s. 3 process, including exposure to matters that don't form part of the statutory decision, who then makes a provisional finding, and goes on to make a final finding albeit under the supervision of a senior social worker (see para. 12 of the respondent's affidavit), is one that can be said to comply with the appearance of fair procedures. That, strictly speaking, doesn't arise as yet in this case because no final finding has been made. Mr. Condon replies that the appeal process serves the function of an independent decision, but I don't accept that. The final finding is a finding and a decision. and if made without fair procedures, is flawed. The fact that there is an appeal is not an answer, even assuming that the appeal constitutes an effective remedy, which is quite an assumption since the focus of the appeal panel seems to be confirming that procedures were followed rather than independently weighing the evidence. In other contexts, such as the approval of search warrants, the Supreme Court has emphasised the importance of an independent mind being brought to bear before a decision is made (*Damache v DPP & Others* [2012] IESC 11, [2012] 2 I.R. 266). If that principle is a requirement for something that is merely investigatory such as a search warrant, one wonders can it be said to be irrelevant in the context of a finding of facts that amount to serious criminal offences with devastating practical consequences for the recipient of that finding. The obvious safeguard would be that rather than a particular social worker being in effect investigator, interviewer, liaison point for the complainant, prosecutor, judge and jury, right from the earliest stages before the formal process (as here) to the final finding (albeit with supervision), instead the investigation and decision stages should be separated so that a senior social work practitioner who has not been involved in the investigation would make the final decision having been presented with a report from the investigating social worker, and would bring a dispassionate and independent mind to bear on it. Such a safeguard would appear to be a requirement of fair procedures, because it is very hard to see how the sort of investigator-prosecutor-judge type process that seems to be envisaged in this case would comply with fair procedures. But that does not arise as yet pending the actual decision.
25. To some extent the determination of whether to uphold or not a complaint is something of a grey area in that strands of thought in social work can change and evolve. I have been given a document "*Understanding and Managing Sexualised Behaviour in Children and Adolescents*" by Kieran McGrath, which I'm told is along similar lines to, although not necessarily identical to, the training materials which are explicitly referred to in the

provisional conclusions. That does appear to be an insightful document borne of Mr McGrath's immense expertise and gives indeed a case study at p. 10 which is not a million miles removed from the present case (or at least from the first unproven instance) in which the matter is discussed in terms of providing help as opposed to the process of formal findings and risk assessment. That, if anything, illustrates the multiplicity of dimensions to the particular problem at issue here. No matter how sympathetic the CFA social workers may be to a particular complaint, they must at all times be alive to the possibility of a complaint not being accurate - whether by reference to unconscious infirmities of memory, the correctness or otherwise of islands of fact that can be isolated, the question of any background history or motive for the child to give an incorrect account, or indeed the possibility which can occur in certain cases (although there is no suggestion of it here), whereby there may be a motive for an adult to coach a child to make a false allegation. One wishes the latter phenomenon didn't happen, but in a probably small minority of cases it does, and again social workers must be highly alert to that where there are grounds to suspect it.

26. Mr. Munro makes the point that his client, if the provisional view is upheld, is going to be branded a child sexual abuser for life. That raises the important point that there must be some reality to the risk assessment as opposed to a finding of indefinitely ongoing risk following reflexively and automatically from upholding a complaint. On the one hand, inappropriate sexual expression as a young person doesn't in 100% of cases translate into a lifelong risk to children; on the other hand sometimes it does, which makes the job of the CFA all the more difficult. However, the question of the risk assessment does not arise at this point in the process.
27. Mr. Munro makes much of the problems that may be caused if the findings are disseminated, but that problem also arises if communications to third-parties are made on the basis of a view of risk as opposed to upholding a complaint. Again that is a future matter. Generally, if there is going to be dissemination, the person should be given the opportunity to disseminate it himself or herself first in the absence of some sort of extreme urgency.
28. While Mr. Condon agrees that the CFA must be scrupulous in applying fair procedures, the reliance in legal submissions on the decision in *A. v Child & Family Agency* [2015] IEHC 679 (Unreported, High Court, 4th November, 2015), at para. 25, as a complete answer to the applicant's claim here doesn't automatically provide reassurance. Barrett J. was of opinion there that "[t]here is no "fixed menu" as to what is required by fair procedures. Though precedent is of assistance, when it comes to discerning the fair and unfair one enters the realm of the (somewhat) à la carte: all depends on the circumstances of the case and the stage that the process is at. So, for example, in *W. v. United Kingdom* (1988) 10 EHRR 29, para. 64, the European Court of Human Rights indicated that in a case such as this the key question arising is whether 'the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests'. But with great respect, reliance on the Strasbourg criterion for the margin of appreciation in the context of determining the

scope of fair procedures under the Constitution of Ireland is a conceptual misunderstanding. Strasbourg only decides whether the State has exceeded a margin of appreciation, a much looser test to the constitutional requirements of fair procedures. Without taking from the importance of context which was acknowledged by McDermott J. in *W.M.* (at para. 68), the constitutional requirements of fair procedures have a definite and objective content. They are not necessarily adequately summarised by saying that it "*all depends*" and that everything is "*(somewhat) à la carte*", especially in the child abuse context. Indeed such a characterisation seems particularly inapposite in that context because it is hard to think of many administrative situations where there is a greater need for clear, objective and robust safeguards than a finding by an administrative agency that a person has committed child abuse or neglect, with all the potentially unending odium, contempt, and devastatingly negative life-constraining consequences thereby unleashed.

29. Another dimension is that the policy and procedures of the CFA must be seen as providing a neutral and unbiased venue for the respondent to make his or her case. The fact that the procedures document labels the respondent from the word go as an "*alleged abuser*" is not necessarily suggestive of such neutrality. Imagine if a defendant was referred to throughout a criminal trial as the "*alleged criminal*". It is true that that phrase is used in *M.Q.*, but judgments are not statutes (and no judgment, however hallowed, sets out all law on a given subject for all time). Such a phrase certainly doesn't give the impression of fairness. However, the policy document is not challenged on that basis here.
30. Overall, my conclusion under this heading is that a finding of whether a complaint of child abuse or neglect is founded or unfounded is not *ultra vires* the Child and Family Agency and that s. 3 of the Child Care Act 1991 does provide a sufficient statutory basis for such findings. That is not to take away from either the need for safeguards, the extent of which may need to be explored further in future caselaw, or the desirability of the Oireachtas at least considering whether a more explicit statutory basis for that jurisdiction should be provided.

### **Ground 3 – disproportionality**

31. Ground 3 alleges that the procedure whereby the CFA can find facts is lacking in proportionality and breaches the rights of the applicant. Reliance is placed under this heading on *M.I. v. HSE*. As noted above, that submission misunderstands the decision in *M.I.* The possibility of a finding by the CFA of child abuse is not disproportionate on an *a priori* basis. Insofar as the CFA are finding facts, the question of disproportionality strictly speaking doesn't arise – proportionality in administrative law is about discretionary decisions.

### **Ground 6 – breach of the right to a fair trial**

32. Ground 6 complains that the alleged jurisdiction to find facts attacks the presumption of innocence and potentially contaminates witnesses and risks rendering a trial unfair. Mr. Munro submits that the CFA cannot form a meaningful conclusion if the respondent is inhibited from engaging due to fears about self-incrimination and that even when denying an allegation there could be a risk of exposure by confirming certain details.

33. Even assuming that engagement with the complaint is problematic for the respondent in terms of the way in which a defence to actual proposed or even possible criminal proceedings is concerned, if an act has both a civil (including administrative) and a criminal consequence, one can't contend that the civil process should not be allowed to proceed as a matter of principle or that it can't proceed on a balance of probabilities basis. There may be issues of timing and sequencing as the Supreme Court acknowledged in *M.I. v. HSE*, but especially whereas here the criminal matter doesn't look likely to proceed any further, there is no basis to restrain the civil or administrative process.
34. An example of the overlap between civil and criminal concerns was provided by the Court of Appeal of England and Wales in the *London Steamship Owners Mutual Insurance Association Ltd. v. Kingdom of Spain* [2015] EWCA Civ. 333, where the court noted (at para. 78) that "[i]t was not disputed that in the ordinary way an arbitrator has jurisdiction to find facts which constitute a criminal offence (fraud being an all too common example) or that in an appropriate case an arbitrator also has jurisdiction to find that a criminal offence has been committed." That is simply one example of the more general principle that wrongful acts may have a multiplicity of consequences, whether civil, administrative or criminal. Merely because there is a criminal dimension does not mean that the civil or administrative process must run into the sand.

**Order**

35. Accordingly, the application is dismissed and the stay on the CFA's fact-finding process is discharged.