AN CHÚIRT UACHTARACH
THE SUPREME COURT

[2024] IESC 6

Supreme Court Appeal Numbers: S:AP:IE:2023/000132
S:AP:IE:2023/000133
S:AP:IE:2023/000134
S:AP:IE:2023/000135

O'Donnell C.J.
Woulfe J.
Hogan J.
Murray J.
Donnelly J.

IN THE MATTER OF M McD, A CHILD

BETWEEN/

THE CHILD AND FAMILY AGENCY

APPLICANT/APPELLANT

- AND -

P McD

FIRST RESPONDENT

- AND -

W McD

SECOND RESPONDENT

- AND -

HELEN TULLY

THIRD RESPONDENT,

GUARDIAN AD LITEM

IN THE MATTER OF J B, A CHILD

BETWEEN/

THE CHILD AND FAMILY AGENCY

APPLICANT/APPELLANT

- AND -

D B

FIRST RESPONDENT

- AND -

R B

SECOND RESPONDENT

- AND -

FRANCIS O'CALLAGHAN

THIRD RESPONDENT,

GUARDIAN AD LITEM

IN THE MATTER OF M McD

- AND -

IN THE MATTER OF ARTICLE 40.3 AND ARTICLE 42A OF THE CONSTITUTION

- AND -

IN THE MATTER OF THE CHILDCARE ACT, 1991 (AS AMENDED)

- AND -

THE INHERENT JURISDICTION OF THE HIGH COURT

BETWEEN/

THE CHILD AND FAMILY AGENCY

APPLICANT/APPELLANT

- AND -

M McD

(A MINOR SUING THROUGH HER GUARDIAN AD LITEM AND NEXT FRIEND HELEN TULLY)

FIRST RESPONDENT

- AND -

P McD

FIRST NOTICE PARTY

- AND -

W McD

SECOND NOTICE PARTY

IN THE MATTER OF

J B (A MINOR)

- AND –

IN THE MATTER OF ARTICLE 40.3 AND ARTICLE 42A OF THE CONSTITUTION

- AND -

IN THE MATTER OF THE CHILDCARE ACT, 1991 (AS AMENDED)

- AND -

THE INHERENT JURISDICTION OF THE HIGH COURT

BETWEEN/

THE CHILD AND FAMILY AGENCY

APPLICANT/APPELLANT

- AND -

J B

(A MINOR SUING THROUGH HIS GUARDIAN AD LITEM AND NEXT FRIEND FRANCIS O'CALLAGHAN)

FIRST RESPONDENT

- AND -

D B

FIRST NOTICE PARTY

- AND -

R B

SECOND NOTICE PARTY

JUDGMENT of Mr. Justice Brian Murray delivered the 28th of February 2024

1. I agree fully with the conclusion Hogan J. explains in his judgment and, subject to what follows here, I agree with his reasons. I am grateful for the careful recitation by Hogan J. of the facts, the law, the submissions of the parties and his consideration of the legal issues that arise, all of which I adopt.

2. In analysing the appeals it is important to remember that the Court was concerned with two different applications which, while dependant upon each other, were of a distinct legal character. The applications heard by Heslin J. were for mandatory Orders requiring the Child and Family Agency ('*the CFA*') to discharge the *statutory duty* imposed upon it by s. 23F(8) of the Child Care Act, 1991 ('*the 1991 Act'*). Although the duty was imposed by the 1991 Act, the relief was not sought pursuant to any provision of that statute. Instead, it was sought pursuant to the Court's general supervisory jurisdiction. To that extent the discretion generally enjoyed by the Court when deciding whether to grant relief by way of Judicial Review was engaged. In contrast, the applications heard by Jordan J. were for Orders which the Court had the express power under s. 23H of the 1991 Act to make. They thus fell to be considered only within the confines of the Statute.

3. The procedural framework of the cases was highly unusual – the High Court was asked in the first applications to direct the CFA to apply to the High Court itself for an Order under s. 23H. That roundabout process arose because an Order could only be made under s. 23H if the CFA applied for one. But the important feature of the applications for present purposes was

clear. At each stage, the Court had a discretion whether or not to make the Order sought. In the case of the application before Jordan J., this was because the statute said so. In the case of the application before Heslin J. it was because the Court's supervisory jurisdiction admits of such a discretion.

4. I stress this lest the decision in this case be understood as a precedent for something that it is not. The discretion enjoyed by Jordan J. arises under the 1991 Act. The factors which may be taken into account in exercising that discretion must accordingly be found in that Statute and only in that Statute. The careful and erudite analysis of the 1991 Act that has been conducted by Hogan J. leaves no doubt in my mind that the difficulties facing the CFA – whether they are characterised as deriving from limitations on its financial resources or whether they are to be described as arising from constraints imposed by other agencies on the CFA's ability to hire suitable staff– do not afford a basis on which Jordan J. could have declined to make the Orders that the CFA itself applied to him to make.

5. In particular, the Statute does not envisage an application afflicted by contradiction inherent in the CFA's case – that it would apply to the Court to make an Order under s. 23H, and then outline in the affidavits grounding that application the evidential basis on which it asked the Court *not* to make the Orders for which it was applying. That peculiarity confirms what Hogan J.'s analysis otherwise makes clear: the scheme of the 1991 Act is not consistent having regard to the purpose, context and terms of that legislation, with an outcome whereby difficulties of the kind identified by the CFA

could deprive the children whose appalling circumstances gave rise to these proceedings, of the facilities the Oireachtas itself had determined should be put in place to protect their rights.

6. The unusual posture the CFA was forced to adopt in making an application under s. 23H, one must presume, informed its anxiety not to make or to be compelled to make the applications. Hence the necessity for the matter to come before Heslin J. in the form it did. But here, Heslin J. also had a discretion, and a key issue in this case depends on the basis on which the discretion he undoubtedly enjoyed *not* to make the Orders sought by the applicants, could be exercised.

7. Counterintuitively, the height of the case made by the CFA on the application to Heslin J. depended on the discretion under s. 23H being limited in precisely the way Jordan J. (and now this Court) ultimately decided it was. In other words, if Jordan J. could not refuse to make an Order under s. 23H because the CFA was facing obstacles in securing the necessary staff, the logic of the CFA's case had to be (as it was) that Heslin J. should have declined in *his* discretion to make the Orders sought. The CFA, on this argument, should not have been compelled by Heslin J. to make an application which would result in an Order which it was impossible for it to comply with.

8. That argument assumed that the difficulties identified and relied upon by CFA had to be relevant *at some point* and if that point was not when the

application was made before Jordan J., then it had to be at the point at which an attempt was made to compel it to bring such an application. Insofar as this argument depended on the proposition that Heslin J. had a discretion not to make an order of mandamus, that was in theory true. However, whether a given factor (staffing issues, lack of resources or otherwise) would justify the exercise of that discretion against such relief depends on the legal and factual context. And here, that context was dominated by the terms of the statute, its purpose and the interests of the persons it was intended to protect.

9. It is for this reason I think it important that the very particular facts of and issues in this case be stressed. Orders of *mandamus* or Orders by way of mandatory injunction are discretionary, and as a general – if fairly obvious – principle, a person should not be compelled to do something that it is not possible for them to do. Between private persons, determining what is possible or not possible is usually quite straightforward. When mapped onto public law, however, the context is considerably more complex because apparent limitations on the freedom of action of a State body (whether that be a limitation of legal capacity, or because of constraints on financial or other resources) might, in many cases, be capable of being removed by the intervention of the Oireachtas or, in some situations, by the Executive. So, it may often be quite possible for the State generally to enable or equip a State body to do something which, without that intervention, it is otherwise impossible for the body to do. And, of course, where statutory duties have been imposed on a body by the Oireachtas, as Hogan J. explains in his judgment, important questions touching on the rule of law will arise where

the effect of a defence of impossibility is, for all intents and purposes, to exempt the body from the statutory duty which has been so prescribed.

10. The issues here, however, were more confined. When one starts the analysis in this case with the judgment of Jordan J. and the provisions of s. 23H, and when it is appreciated that resource issues of the kind in issue here cannot justify the refusal of an Order under s. 23H, it becomes immediately obvious that for Heslin J. to have refused to enforce the statutory duty imposed by s. 23F(8) on these very same grounds, would have cut right across s. 23H. The CFA's argument around why Heslin J. ought to have refused to grant a mandatory injunction illuminated the fundamental weakness of its case: if resources were not a ground for precluding a *discretionary* Order under s. 23H. they could never have afforded a basis on which the CFA could avoid the consequence of the *mandatory* terms of s. 23F(8). The basic reason in both cases was the same: the 1991 Act as properly construed simply did not envisage these considerations as relevant to the scheme for the care of vulnerable children it put in place.

11. It is because this case arises in a tight and detailed statutory scheme which intervenes to discharge the constitutional obligations of the State vis-à-vis a class of particularly vulnerable children that both Heslin J. and Jordan J. were correct to reach the conclusions that they did. It would, however, be wrong to suggest this means that in all other cases in which a statutory duty has been imposed on a public body, orders for *mandamus* will issue in any case in the teeth of detailed evidence that establishes that for the public body

concerned, compliance with the duty would in a particular case be impossible because of restrictions on resources. The grant of an order of mandamus is discretionary and the Oireachtas must be taken to have understood when it imposed such a duty on a statutory body that circumstances might arise in which the body would not be compelled by Court order to comply with that duty, these falling to be assessed and the discretion exercised by the Court in accordance with established principle.

12. As shown by a careful analysis of the judgment of Lord Sales in *R(Imam) v. London Borough of Croydon* [2023] UKSC 45, [2023] 3 WLR 1178 ('*Croydon'*), to which Hogan J. in his judgment refers, the law is, necessarily, nuanced in its response to such a situation. In that case, in fact, the United Kingdom Supreme Court declined to make such a mandatory Order where the Appellant local authority had failed in its statutory duty to provide suitable accommodation to the claimant, instead remitting the case to the High Court for the taking of further evidence, including evidence as to the impact upon the claimant if the Order for *mandamus* were not granted. Notwithstanding that there had been a failure to comply with the statutory duty, the question of whether an Order would be made compelling such compliance was dependant on the up to date evidential position.

13. That decision shows, unsurprisingly, that everything depends on the nature of the duty, the interests of the applicant for the relief in play, the impact upon the applicant if the relief they seek is not granted, the period of time over which the public body has been default, the type of public body in issue

(and in particular how it is financed), the reason the public body gives for not complying with the duty, and the consequence in a particular case of the Court granting such mandatory relief. One passage in that judgment shows that in some cases the constitutional considerations arising when a Court is asked to grant such relief are more demanding than that yielded by the simple marrying of the fact of a statutory duty, and the proposal that the Oireachtas should either make more resources available or change the law (paras. 61 and 62):

> '*In planning its affairs and setting its budgets, an authority has to balance all the demands placed upon it by Parliament and match these with the sources of income available to it. A court cannot carry out that function itself, since it lacks the democratic authority, detailed knowledge of the range of demands and range of funding options available and the administrative expertise required for this …*
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> *… The authority is the clearing house for meeting all the claims made upon it. A court should be careful not to exceed its own proper role by disrupting without good justification the authority's own attempt to reconcile those claims in a fair way through its ordinary budgeting process, once that has been finalised.'*

14. The overall constitutional context in this jurisdiction is, obviously, quite different, but the importance of democratic accountability and the

institutional competence of the Courts are equally valid considerations in the analysis of contemporary rule of law and separation of powers jurisprudence in this jurisdiction. How these factors should knit together will, necessarily, be case specific. Partly for that reason, but also because this appeal is concerned with a very particular statutory regime, the question of whether *Brady v. Cavan Co. Co.* [1999] IESC 49, [1999] 4 IR 99 was correctly decided should, as Hogan J. in his judgment suggests, be reserved to a case in which it arises and in which the relevant considerations can be assessed by reference to a defined factual and legal matrix.