SOUTH EASTERN CIRCUIT

COUNTY OF TIPPERARY

Record numbers: DCA 3/2019 and 4/2019

BETWEEN:

THE CHILD AND FAMILY AGENCY (TUSLA)

PROSECUTOR/RESPONDENT

And

[redacted]

ACCUSED/APPELLANTS

Judgement of the Court delivered 26 September 2019

1. Evidence was heard before me on these appeals on 8 July 2019. At the end of the prosecution case, I heard submissions from both sides. As each side had made out an arguable case, I sought written submissions. I fixed a timescale for the delivery and filing of such submissions. Shortly afterwards, having considered the matter, I sent to the parties – through the Court Registrar – some thoughts on the matter, which I hoped might lead to discussions towards a mutually satisfactory resolution of a matter in which entrenched positions had been adopted by both sides. The reasons for doing so were that: an unfavourable result for them would have involved confirmation of the recording of a criminal conviction against both of the Appellants, persons who manifestly are

responsible and caring parents who want what is best for their son [redacted]; an adverse result for the prosecuting authority would inevitably conduce to consideration being given, in consultation with the Minister and his Department, to the necessity to consider amending the legislation relating to the issue of home schooling, or – at the least – the preparation and bringing into force of secondary legislation; the fact that, this being a criminal prosecution, and each of the parties having – as it were – painted themselves into a corner in relation to the disputed issues, the same consideration has not been given to seeking a mutually acceptable resolution as might be the case when legal representation is obtained on both sides of a **civil** dispute; and the evidence of Catherine Brindsley at the hearing might have reassured the Appellants that the authorities have at their disposal a wide range of expertise, something which may not have been apparent to them, by reason of the stand-off, before hearing such evidence. As I have had no further communication in relation to this, I have to assume that my intervention has not borne fruit. This could be because one party or both did not wish to depart from the position already adopted, because one party or both felt under undue pressure to engage in such talks, or because discussions took place which did not lead to a mutually satisfactory result. I am appending a copy of the document to this judgement.

2. It has been submitted on behalf of the Prosecution that the challenge being raised by the Appellants ought to have been by way of judicial review procedure in the High Court. Had such course been taken, I have little doubt that the argument would have been made that the proper course would have been to proceed by way of appeal from the District Court. Very frequently, the High Court

upholds such arguments in judicial review proceedings, and I am satisfied – having regard to the issues which have been raised – that the matter has been brought before the correct forum.

3. It has been argued on behalf of the Appellants that consideration should be given to stating a case to the Court of Appeal. I feel there is sufficient clarity with regard to the disputed issues to render that course unnecessary.

4. Boiled down to its essence, the central issue in this case is: is full completion of CFA Form R1 by parents who wish to educate a child at home a *sine qua non* to compliance with the requirements of the Education (Welfare) Act 2000?

5. Section 14 of the Act of 2000 deals with the Register of children receiving education in a place other than a recognised school. Subsection 1 sets out that the National Education Welfare Board shall cause to be established and maintained a register of all such children. Subsections 2 and 3 require a parent to apply to the Board to have the child concerned registered. Subsection 4 sets out that such application should be in writing, should specify the place to which such application relates, and should *"comply with such requirements (if any) as may be prescribed by the Minister or developed by the Board with the approval of the Minister"*. Subsection 5 provides that, subsequent to such application, and so as to comply with the State's constitutional requirement to provide *"a certain minimum education"*, the Board must have an authorised person carry out, in consultation with the parent who made the application, an assessment of the education to be provided, the materials used, and the time spent in the provision of such education, and gives rights to such person to enable the preparation of such assessment. It also provides that if, upon receipt of a report from such

authorised person, the Board is of opinion that it is unable to determine the matter, it shall, with the consent of the parent, cause such authorised person to enter the place at which the child is being educated, inspect the premises, equipment and materials used in the provision of the child's education, and carry out an assessment of the child having regard to intellectual, emotional and physical development. Subsection 9 requires the Board to serve a copy of such report on the parent of the child, and provides *"and shall invite such parent to make representations to the Board concerning the matters to which the report relates"*. Subsection 13 provides that where the parent of such a child fails or refuses to give consent to the carrying out of such assessment, the Board must refuse to register the child. Subsection 18 mandates the Board to have regard to such guidelines as may be issued, or such recommendations as may be made, by the Minister, under section 16.

6. On foot of that section, the Minister may issue guidelines and make recommendations of a general nature to the Board for the purpose of assisting that body in determining whether a child is receiving a certain minimum education.

7. Section 17 is a provision highly relevant to these summonses. Subsection 2 excuses a child from attending a recognised school where that child is already on the register set up under section 14, where an application pursuant to section 14 has not concluded, or where *"there exists some other sufficient cause for (the child) not so attending"*.

8. Section 25 of the Act lays down that, where the Board is of opinion that a parent is failing to cause his or her child to attend a recognised school in accordance

with the Act, it must serve a "School Attendance Notice" on such parent, requiring the parent to cause the child to attend and to continue to attend a recognised school and, in that notice, inform the parent that failure to comply is a criminal offence.

9. The Appellants applied informally to the CFA for the placing of their son [redacted] on the Register referred to above. Thereafter, further correspondence ensued in the course of which, on 11 May 2017, [redacted] stated: "this assessment shall be conducted through written means only and all correspondence must be sent to our solicitor Mr Ken Smyth". Much of the tenor of the correspondence was in the same vein. It is not surprising to me that the use of such imperative terms towards a state body (which must be presumed to be acting in good faith) met with a stiff response, and I would deprecate much of the tone of the correspondence from the Appellants' side. Nor would I approve the refusal to furnish the child's birth certificate, even if this is not a statutory requirement. I do note, however, that [redacted] parents were subsequently open to modifying their requirements, and simply wanted the assessment process initiated. Subsequently, a School Attendance Notice pursuant to Section 25 of the Act was served on the parents, followed in due course by the summonses which brought the matter before the District Court.

10. It would appear that no statutory instrument has been brought into force in relation to any of the requirements of the Act. However, pursuant to section 16, the Minister has indeed issued guidelines for the assistance of the Board. The CFA Form R1 is referred to in these guidelines.

11. It seems clear, and it does not appear to be disputed, that section 14 (5) envisages the possibility of two separate assessments by an authorised person. Paragraph 5.2 of the Guidelines is headed "Two Stages of Assessment". It states that the authorised person might not necessarily visit the place where education is provided, or meet the child concerned, in the first stage, and goes on to say *"in some cases this may conclude the process"*. Thus, in some cases, what is referred to in the Guidelines as the "Preliminary Assessment" will be found to be sufficient, without the necessity to undertake the "Comprehensive Assessment".

12. At paragraph 5.3 of the Guidelines, there is reference to Form R1. This states that, on an application for registration (Form R1) the parent will be invited to submit relevant information about the child's education, and will be required to grant consent for an assessment to take place. This appears to be the only specific reference to that document in the Guidelines. However, later under the same heading is found the following: *"the written consent of the parent must be obtained by the Board for an assessment to take place. This consent will normally be obtained at the time that a parent seeks registration with the National Education Welfare Board. A copy of the application form or other document indicating the consent of the parent should be included in the file sent to the Authorised Person..."*.

13. The Cambridge English Dictionary defines "guideline" as *"information intended to advise people on how something should be done or what something should be"*. Among examples quoted in relation to the usage in that entry is the following: *"it is intended that these guidelines should be applied flexibly and pragmatically"*. It seems to me to be abundantly clear from this that matters which are set out in

guidelines fall well short of the imperative or prescriptive level which applies when the word "shall" is used in statutes or statutory instruments. The inclusion of the phrases "parent will be invited to submit" and "consent will normally be obtained" tend to bear this out. Moreover, the heading of these guidelines reads *"Guidelines on the Assessment of Education in Places Other Than Recognised Schools"*; this is unsurprising, in view of the fact that section 16 envisages the issuance of such guidelines *"for the purpose of assisting the Board in determining whether a child is receiving a certain minimum education"*; thus, they are directed at the assessment process, and not the application process. With regard to the latter, power is given to the Minister under Section 14 (4) (c) to prescribe how that process should proceed; it would appear that such power has not as yet been invoked.

14. For these reasons, I am satisfied that the prosecuting authority is incorrect in asserting that full completion of Form R1 is a necessary prerequisite to the Preliminary Assessment.

15. With regard to the summonses, these are brought pursuant to section 25 (4) of the Act for contravention of a requirement in a School Attendance Notice. It is the Prosecution case that such Notice was valid by reason of a contravention of section 17(2)(b). With regard to that provision, it is my finding that an application has indeed been made in respect of the child in question and duly served on the Board; it is my further finding that the Board has not made a decision in relation thereto; accordingly, the School Attendance Notice is not valid in law.

16. I therefore allow the appeal is in full, and dismiss the summonses.