Neutral Citation: [2017] IEHC 633

THE HIGH COURT

[2016 No. 532 J.R.]

BETWEEN

L. G.

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

Judgment of Ms Justice Faherty delivered on the 18th day of October, 2017

1. In these proceedings, the applicant seeks an order of certiorari by way of an application for judicial review quashing the Order of the District Court of 27th May, 2016, made in proceedings entitled "*Child and Family Agency Applicant v. [L.G.] respondent*" refusing the applicant her costs.

Background

2. The applicant gave birth to a baby on the morning of 12th April, 2016. That evening she was served by the respondent with an application for a care order and informed that an interim care application would be made on Friday 15th April, 2016.

3. According to the affidavit of Ms. Lisa McCaffrey, Social Worker with the Child and Family Agency ("CFA"), the grounds of the application was that the applicant's child was at risk of suffering neglect, harm or impairment of development due to the applicant's homelessness and lack of preparation for the child's birth; that the child was at risk of suffering physical abuse by reason that allegations of numerous incidents of physical abuse were made against the applicant and other members of her extended family by the applicant's niece and nephew; and that the child was at risk of suffering sexual abuse which could occur if the child was in the care of the applicant or her extended family due to allegations of sexual abuse made against the applicant and other members of her extended family by her niece and nephew.

4. On being served with the application for a care order, the applicant contacted her solicitor, Mr. Pol Ó Murchú, who duly briefed counsel for the hearing in the District Court on 15th April, 2016.

5. The allegations which were being made against the applicant were also the subject of separate District Court childcare proceedings concerning the applicant's niece and nephew. The applicant was not a party to those proceedings. In advance of the interim care application, Mr. Ó Murchú requested Dr. Sarah Krahenbuhl, Chartered Psychologist, to prepare an expert report regarding the credibility of the allegations made against the applicant by her infant niece and nephew, and to give evidence at the interim care hearing scheduled for 15th April, 2016, by video link or, if necessary, in person.

6. The applicant had initially been referred to Mr. Ó Murchú by Ms. Fiona Murray, Social Worker, EPIC (Empowering People in Care). Following it having been intimated by the respondent, in a letter dated 17th February, 2016 to the applicant, that child protection concerns arose in respect of the applicant's expected child, Mr. Ó Murchú wrote to the respondent on 24th March, 2016, seeking full details of the respondent's child protection concerns and seeking copies of the social work report which was being prepared for a child protection case conference scheduled for 30th March, 2016, together with copies of all other documents upon which the respondent intended to rely at the case conference. The applicant attended a child protection conference on 30th March, 2016. What transpired at that meeting is a matter of some dispute between the parties and this is referred to in more detail hereunder.

7. Mr. Ó Murchú wrote again on 11th April, 2016, seeking a full response to his letter of 24th March, 2016, and again seeking details of the allegations being made against the applicant. He also sought details of the case conference which was held on 30th March, 2016.

8. On 15th April, 2016, Mr. Ó Murchú, who is on the panel for the Civil Legal Aid Private Practitioner's Scheme, applied for legal aid on behalf of the applicant. This application was not successful. In his affidavit, sworn 14th July, 2016, verifying the statement of grounds in the within proceedings, Mr. Ó Murchú avers as follows:-

> "I say however that I was informed that the monthly quota of legal aid certificates under the Private Practitioner's scheme for April had been exceeded and that the Legal Aid Board would not be in a position to provide legal aid to the Applicant in respect of the matter before the Court that day. I say and believe that the Applicant is a person of extremely limited means, being wholly dependent on social welfare, who would be in no position to pay your deponent, or any other solicitor, to represent her but that in light of the seriousness of the potential consequences of the Interim Care Order, mainly the distinct possibility that the applicant's newly born child would be removed from her care, that both I and Counsel felt that we had no option but to continue to act for her."

9. On 15th April, 2016, there were discussions between the applicant's counsel and the respondent's solicitor, following which it was agreed, subject to the District Court, that the interim care order application would be adjourned to Tuesday 19th April, 2016, and that the applicant would remain in Holles Street Hospital with her baby, while a sister of the applicant, R.G., was assessed by the respondent as someone with whom the applicant and her child could reside. Additionally, it was agreed that the applicant would accept short service of an application for a supervision order to be heard on 19th April, 2016. Mr. Ó Murchú avers that it was understood by both parties that if the respondent was not objecting to the applicant going to live with R.G., the care proceedings would be withdrawn and a supervision order made on consent.

10. It appears that prior to the negotiations between the applicant's legal representatives and the respondent in respect of the respondent's application for an interim care order, the respondent had indicated an intention to make an application before the District Judge having seisin of the childcare proceedings involving the applicant's niece and nephew to lift the *in camera* rule in regard to those proceedings, with a view to seeking to have evidence adduced in those proceedings used in the childcare proceedings being brought against the applicant. According to Mr. Ó Murchú, the respondent made such an application on 14th April, 2014, but it was refused on the basis that the District Judge was not sitting in the relevant District Court District. Mr. Ó Murchú avers that notwithstanding his understanding as of noon on 15th October, 2016, that the respondent would not be proceeding with any further application to lift the *in camera* rule in the other care proceedings, he was informed by the applicant on the evening of 15th April,

2016, after the applicant's childcare proceedings had been adjourned to 19th April, 2016, that the respondent intended to renew its application with regard to the other childcare proceedings on 18th April, 2016. He avers that, in those circumstances, the applicant's legal representatives had no option but to continue to prepare for a fully contested care order application on 19th April, 2016.

11. It is common case that on 19th April, 2016, the respondent withdrew its application for an interim care order in respect of the applicant's child. The applicant consented to a supervision order, which was duly made, and a safety plan was agreed.

12. The issue of the costs of the proceedings came on for hearing on 27th May, 2016 before the District Court. The applicant's application for costs was opposed by the respondent.

13. On 27th May, 2016, the District Judge had the benefit of written submissions prepared by the applicant's counsel. The submissions referred, *inter alia*, to serious questions which would have had to have been addressed had the care proceedings gone on, including the applicant's arguments as to the frailties which attached to the statements given by her niece and nephew in the other District Court care proceedings. It was submitted to the District Judge that because of the applicant's legal representative's awareness that the respondent intended to make an application in the other childcare proceedings to lift the *in camera* rule, this meant that the applicant's counsel had to consider a large body of case law dealing with the issue of hearsay and, accordingly, counsel for both sides had exchanged case law on this issue prior to the initial District Court hearing on 15th April, 2015. Counsel also advised that although the respondent had withdrawn the application for the *in camera* rule to be lifted in respect of the other childcare proceedings at approximately noon on Friday 15th April, 2016, the requirement to prepare for the possibility of a full hearing for an interim care order on 19th April, 2016 had nevertheless remained, given that the applicant's family had been informed late on 15th April, 2016, that the respondent intended to make a further application to lift the *in camera* rule on 18th April, 2016. Counsel contended that the admissibility into the childcare proceedings instituted against the applicant of evidence adduced in the other District Court proceedings, when the applicant was not a party to those proceedings, was a distinct and exceptional feature of the applicant's case. The submissions also made reference to the discussions which had taken place between the parties which led ultimately to the application for a care order being withdrawn and the making of a supervision order, as outlined above. It was further submitted that, at all material times, the applicant had agreed to cooperate in all respects with the respondent so that she could continue to parent her newborn child. The District Judge was advised that this had been indicated to the respondent by the applicant's legal representatives at the earliest opportunity. The written submissions pointed to complexity of the issues in the case which, it was submitted, made it a distinct and exceptional case where it would be in the interests of justice to award the applicant her costs.

14. For the purposes of the within proceedings, the Court was presented with a transcript from the digital audio recording (DAR) of the proceedings before the District Judge on 27th May, 2016. It is accepted that the transcript is an incomplete record of the proceedings but it contains the respondent's oral submissions on the issue of costs, the applicant's counsel's response thereto and the ruling of the District Judge.

15. The submissions made on behalf of the respondent were to the following effect: the application for a care order was made within the respondent's statutory function where concerns had arisen in respect of the applicant's child; the application was brought at the earliest point it could be brought; the factual matrix *vis a vis* the application for a care order had changed when the applicant's sister had come forward to offer to care for both the applicant and the baby; this offer was facilitated by the respondent carrying out an assessment of the applicant's sister between 15th April, 2016 and 18th April, 2016, which was positive and which led to the withdrawal of the interim care order application and the making of a supervision order by consent.

16. It was also submitted by the respondent that the case had not been opened in any extensive detail in relation to the interim care order application. The respondent also argued that the application in the other District Court proceedings for the lifting of the *in camera* rule was not an exceptional feature of cases that come before the District Court. Furthermore, for the purpose of the care order application, the onus was on the respondent to produce to the District Court the documentation which included the disclosures sought to be relied on by the respondent in aid of the application for an interim care order. It was further contended that the respondent's withdrawal of the care order application was not so much a success for the applicant; rather, the factual matrix had changed when the offer to accommodate the applicant and her baby had come from the applicant's sister.

17. Counsel for the applicant replied to the respondent's submissions by reiterating her arguments that issues surrounding credibility and hearsay would have arisen for determination had the application for an interim care order gone ahead.

18. The District Judge then ruled on the costs issue. She commenced by stating that she found that the applicant's counsel's written submissions to be very helpful, as were the oral submissions which were advanced by both parties. She stated that she had listened to all the submissions and that she had considered the material which had been furnished to her. She stated that she had considered the principles set out by the Supreme Court in *Child and Family Agency v. O.A*. [2015] 2 I.R. 718. She went on to rule, as follows:-

> •The proceedings commenced by the CFA were not unusual proceedings.
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> • There was a statutory duty on the CFA pursuant to s. 16 of the Child Care Act, 1991 to make an application for a care order or a supervision order as it sees fit, where the CFA forms the view that it appears to the CFA that the child requires care or protection which they are unlikely to receive unless a care order or a supervision order is made by the District Court.
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> • She was satisfied that the framework within which the CFA operates is a peculiar statutory framework as set out in law and in the context of s. 16 of the 1991 Act.
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> • She believed that legal representation of respondent parents was essential and vital and she took the view that the legal representation the applicant had in the particular facts of the care proceedings in issue contributed to a successful outcome of the matter for the parties including, in particular, the subject child.

19. The District Judge then went on to state:

> "It is noteworthy the proceedings concluded in a supervision order for a period of six months by consent but it is also noteworthy, and I refer to the first page of the submissions on behalf of [the applicant], that [the applicant's solicitor] Mr. Ó Murchú, who is well known to these courts is a professional with an expertise and a dedication in these particular matters, applied for legal aid on behalf of [the applicant] to the Legal Aid Board…, but was informed that the quota for April had been exceeded and they would not be in a position to provide legal aid. I am of the view that I cannot visit upon the agency the failure of a legal aid to be available. Furthermore, in light of the particular facts of this case and the

submissions that have been advanced to me I do not believe that it would be just and/or appropriate to award costs against the agency on the fact of this particular case and I have considered all material including the submissions here today in reaching my decision."

20. On 20th July, 2016, leave was granted by Humphreys J. in respect of the decision of 27th May, 2016.

21. The grounds upon which relief is sought are that the District Judge:

- Erred in law in refusing the applicant her costs.

- Erred in law in refusing the applicant her costs on the basis that, as the applicant was refused legal aid because the monthly quota of certificates for the Private Practitioners Legal Aid Scheme had been exceeded, the inadequacies of the Legal Aid Scheme should not be visited upon the respondent.

- Took irrelevant considerations into account in refusing the applicant her costs on the aforesaid basis

- Acted irrationally in holding that the failure of the State to provide legal aid to the applicant, where the respondent was applying to have her new born baby taken into care, was a reason to refuse the applicant her costs.

- Acted irrationally and in breach of fair procedures and natural justice in refusing the applicant her costs where the District Judge expressly held that the applicant having legal representation in the case was vital and essential and contributed to the successful outcome in the case.

- Acted irrationally and in breach of fair procedures and natural justice in refusing the applicant her costs where the respondent withdrew its application for a care order and where accordingly costs should have followed the event.

- Acted irrationally and in breach of fair procedures and natural justice in penalising the applicant for the inadequacies of the legal aid scheme where the applicant did not have the means to pay for legal representation.

- Acted irrationally and in breach of fair procedures and natural justice in failing to consider adequately or at all the merits of the costs application.

22. In its statement of opposition, the respondent denies the applicant's claims and asserts that if the applicant was dissatisfied with the order made on 27th May, 2016, the appropriate remedy was to appeal the order to the Circuit Court, as provided for under s. 28 of the Childcare Act, 1991.

The principles to be applied in awarding costs in childcare proceedings in the District Court

23. It is apposite at this juncture to set out the decision of the Supreme Court in *Child and Family Agency v. O.A.* [2015] IESC 52 as to the correct approach to awards of costs in childcare proceedings in the District Court.

24. In cases involving childcare proceedings, an award of costs is not dependant on the "event" in the sense that "costs follow the event", but rather on the outcome of the proceedings. In *O.A.*, MacMenamin J. put it as follows:

> *"[51] Having regard to the complexity of the issues in such cases, a rule that costs follow the outcome may therefore be a useful starting point in District Court child law proceedings. These costs are, of course in proceedings seeking court determinations, and bear certain similarities to orders in other civil proceedings. But the fact that it is not suggested that costs could be awarded in favour of the CFA when a care order or supervision order is granted, or some other successful application is made, shows that one is not dealing here with the normal or established rules. For example, if the traditional approach was taken in this case, then either the CFA would be said to be "successful" (and entitled to its costs because it obtained supervision orders), or, if a more nuanced approach were taken, it might be said that no order for costs should be made because the CFA succeeded in part, but did not obtain the care order it sought initially. Hypothetically, an order for costs in the discontinued full care order proceedings might have been set off against an order for costs in the supervision order proceedings. But this situation might result in a serious financial detriment to the respondent, as well as other complexities in measuring and balancing costs.*
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> *[52] I take the view that the approach to be adopted by the District Court, in dealing with statutory child care proceedings, should normally be predicated on whether, in the first instance, it was proper to commence the proceedings. While "the event" is normally a starting point, there are, however, cases in which, it must be recognised, that it might be proper to order the costs of unsuccessful parents to be paid by the CFA, if, for example, proceedings were continued in circumstances where they were futile, or where the costs might place an inordinate burden on the parents. The interests of the child, and the interests of justice, should be ensured in accordance with the following general principles in District Court proceedings. I think the starting point should be that there should be no order for costs in favour of parent respondents in District Court care proceedings unless there are distinct features to the case which might include:-*
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> *(i) a conclusion that the CFA had acted capriciously, arbitrarily or unreasonably in commencing or maintaining the proceedings;*
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> *(ii) where the outcome of the case was particularly clear and compelling;*
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> *(iii) where a particular injustice would be visited on the parents, or another party, if they were left to bear the costs, having regard to the length and complexity of the proceedings; and*
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> *(iv) in any case in which a District Court seeks to depart from the general default position, and to award costs, it is necessary to give reasons. These reasons must identify some clear feature or issue in the case which rendered the case truly exceptional. It is true all cases are distinct, but not all cases are exceptional. The reason for the distinction rendering a costs order justified must go to whether or not there was some unusual or unprecedented issue, or issues, which required determination or whether the case properly, and within jurisdiction, determined a point that had application to a range of other cases.*
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> *Were a District Court to adopt this approach, a Circuit Court Judge on appeal should be slow to interfere with a decision*

of the District Court, especially when the Circuit Court Judge has not engaged in a full hearing. The effect of these general guidelines would be to accord, perhaps, greater leeway for the exercise of the District Court's discretion, but within jurisdiction. Different considerations often apply in relation to child care proceedings in the High Court where the court is exercising its inherent jurisdiction. Very frequently the cases in that category address situations where there is no direct precedent, where the same statutory considerations do not come into play; and where, frequently, the CFA acknowledges that due to the nature and complexity of the case it would be unduly burdensome for parents or other parties to bear their own costs."

Discussion

25. Counsel for the applicant submits that the District Judge erred in law in ruling as she did, and by not finding that applicant's case met the threshold for costs, as set out in *O.A.* It is submitted that the applicant's circumstances merited an award of costs given the exceptional nature of the case. It is asserted that this was particularly so given that the respondent itself, via the affidavit of Ms. McCaffrey, Social Worker, made the case that the application for a care order was an "exceptional case", in circumstances where it was alleged that the applicant had failed in her duty towards her child. Counsel submits that the respondent cannot now contend that the case was not "truly exceptional", which is the basis upon which the District Court may depart from the default position as set out in *O.A.* that there should be no order for costs in favour of parents in District Court care proceedings.

26. It is further submitted that, unlike the position of the parent in *O.A.*, the applicant was the successful party in the care order proceedings since the respondent withdrew its application for a care order on 19th April, 2016, and in circumstances where only a supervision order was made on consent, to which, counsel argues, the applicant had intimated her agreement prior to 19th April, 2016. Counsel submits that this is significant given that O.99 of the Rules of the Superior Courts provides that costs should follow the event.

27. Insofar as it is argued that the District Judge erred in law in failing to apply Order 99 RSC, the Court finds no merit in that particular argument, in light of the guidelines provided by MacMenamin J. in *O.A.* and the manner in which an application for costs is to be approached in cases such as the present.

28. In reliance on the first of principles outlined in *O.A.*, counsel for the applicant contends that the respondent acted unreasonably in commencing childcare proceedings given that they were discontinued after R.G.'s suitability as someone with whom the applicant and baby could reside was determined. This was against a backdrop whereby the offer for the applicant and her baby to reside with the applicant's sister had been made prior to the commencement of the care proceedings. In this regard, counsel for the applicant takes issue with the replying affidavit of the respondent's solicitor, Eoghan Wallace, wherein he avers, *inter alia*, that it was only on 15th April, 2016, the day the application for an interim care order was listed or hearing, that R.G. had come forward and offered to provide a home for the applicant and her child and that it was on this basis that the interim care application had been adjourned to 19th April, 2016 so that the respondent could assess R.G.

29. Counsel contends that Mr. Wallace's contention is contradicted by the affidavit of Fiona Murray, Social Worker, who attended the case conference on 30th March, 2016. It is submitted that it is clear from Ms. Murray's evidence that R.G. had offered on 30th March, 2016 that the applicant and her baby could come to live with her until the applicant found suitable accommodation.

30. Counsel for the applicant also argues that what was discussed on 30th March, 2016 vis-à-vis the applicant and her baby going to live with R.G. was relevant to the question of whether it was appropriate or necessary at all for the respondent to have commenced care order proceedings.

31. The point which counsel for the applicant makes in this regard is that had the respondent done on 30th March, 2016 what it ultimately did over the period 15th to 18th April, 2016, namely assess R.G.'s circumstances with a view to her accommodating the applicant and her baby, the respondent would have had the necessary information to ensure that no interim case application was necessary. It is submitted that this is especially so given that the applicant had expressed her willingness to abide by a supervision order. Counsel contends that it was only when it was made clear to the respondent on 15th April, 2016 that the applicant was opposing the interim care order application that the respondent had embarked on its assessment of R.G.

32. Counsel further contends that, notwithstanding the applicant's solicitor's correspondence to the respondent on 24th March, 2016 and 11th April, 2016, the respondent did not engage at all with this correspondence, rather it served the interim care order application directly on the applicant on the day of the child's birth while the applicant was in hospital. It is submitted that all of the foregoing matters should have been taken account of by the District Judge when considering the issue of costs.

33. With regard to the second principle outlined in *O.A.*, it is submitted that the outcome in the applicant's case was clear and compelling – the applicant succeeded in that the respondent did not go on to apply for an interim care order.

34. With regard to the third principle as set out in *O.A.*, counsel contends that an injustice will be visited on the applicant if she is left to bear her costs. This is so because the proceedings were complex, as advised in the submissions which the applicant's counsel made to the District Judge.

35. Counsel further submits that proper representation for the applicant in the District Court proceedings was particularly important as the application concerned her new born child. In this regard counsel refers to *P.C. and S v. U.K.* [2002] 35 EHRR 31 where, in a case where a child was removed from its mother at birth, and where orders were subsequently made taking the child into care and freeing it for adoption, the European Court of Human Rights held that the assistance of a lawyer during the hearing of such applications was an indispensable requirement and that the parents had not had fair and effective access to court. The European Court of Human Rights found a breach of the parents Article 6 rights to a fair trial and a breach of their Article 8 rights to respect for family life as the lack of legal representation of the mother during the care proceedings deprived her of a fair and effective hearing in court. Counsel also cited *K and T v. Finland* [2001] 31 EHRR 18.

36. I find no merit in the applicant's reliance on *P.C. and S v. U.K.* since the entire focus in *P.C. and S v. U.K.* was the absence of legal representation for the mother, which is not a complaint that can be made by the applicant in the present proceedings, whatever other complaint she may have.

37. The respondent's answer to the applicant's submissions is that it is clear from the entire of the history of the care order proceedings in this case that the respondent worked with the applicant to find a solution which was in the best interest of the applicant and her baby. While the question of the placement of the applicant and her baby with R.G. was raised on 30th March, 2016

at the case conference, counsel for the respondent submits that it is clear from the minutes of the meeting, and the chronology, that this offer only crystallised after the respondent instituted child care proceedings. Counsel further submits that the compromise reached by the parties, whereby the applicant and her baby would reside with R.G. and that there would be a supervision order, accords entirely with the "*less intrusive interference*" in family life contemplated by the European Court of Human Rights in *K. & T. v. Finland*. It is further submitted that insofar as counsel for the applicant points to the conduct of the case in the District Court, and to what is said to be exceptional circumstances, these submissions go to the correctness of the decision of the District Court and, therefore, are matters for an appeal and are not appropriate matters for judicial review.

38. The respondent also contends that it is clear that the District Judge did not find that the circumstances of the case met the exceptional basis threshold, which constitutes the basis upon which parents would be awarded their costs, as enunciated by MacMenamin J. *O.A.* It is submitted that that was an assessment for the District Judge to make, on the merits, and was within jurisdiction. It is the respondent's position that the District Judge, in applying the principles of *O.A.* to the applicant's case, clearly did not find that the respondent had acted capriciously, arbitrarily or unreasonably in commencing or maintaining the childcare proceedings. It is also contended that it is clear from her ruling that the District Judge did not find that the "*outcome was particularly clear and compelling*".

39. Furthermore, the case was not lengthy and there was nothing of particular complexity in the case that would not be found in many child care cases of this nature before the District Court. It is also clear that the District Judge did not "*identify some clear feature or issue in the case which rendered the case truly exceptional*".

It is further submitted that the District Judge followed fair procedures in that she applied the principles set out in O.A. to the applicant's case.

40. By way of an overarching submission, counsel for the respondent makes the point that many of the complaints articulated in the within application for judicial review are matters which were more appropriate for an appeal to Circuit Court on the merits and it is submitted that the applicant has lost sight of the distinction between an appeal on the merits and an application for judicial review.

41. I agree with the respondent's submission in this regard. To my mind, the arguments advanced on the applicant's behalf, as set out above, are more properly for an appeal to the Circuit Court on the merits.

42. In *A.M.C. v. The Child and Family Agency* [2017] IEHC 61, Noonan J. addressed the difference between an appeal and an application for judicial review in the following terms:-

> *"12. The distinction between an appeal on the merits and an application for judicial review is one that is frequently lost sight of. In Sweeney v. District Judge Fahy [2014] IESC 50, Clarke J., speaking for the Supreme Court, said of this issue (at para. 3.5):-*
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> > *'[3.5] … the question arises as to what type of error actually renders a decision of a statutory court unlawful as opposed to being merely regarded as being in error. The so called "error within jurisdiction" jurisprudence must be seen in that light. Some errors may be such as render the ultimate decision unlawful and thus capable of being quashed by way of judicial review. Some errors do not render the decision unlawful and are only capable of being corrected, if at all, by an available appeal. It should also, in that context, be recalled that there would be little point in making any distinction between a judicial review and an appeal if there were no difference in substance between the sort of issues which could be canvassed in the respective cases.*
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> > *[3.6] It is important, therefore, to emphasise that judicial review is fundamentally concerned with the lawfulness of decisions taken affecting legal rights whether by persons, bodies, or courts having statutory jurisdiction. Judicial review is not concerned with the correctness of those decisions. There may be some legitimate debate as to the type of error which can lead to a decision being regarded as unlawful rather than simply incorrect. However, the fundamental distinction between unlawfulness, which can give rise to a decision being quashed on judicial review, and incorrectness, which cannot, remains.'*
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> *13. Accordingly, I am not concerned in these proceedings with the correctness of the decision of the Circuit Court, or indeed of the District Court for that matter. It is of course true to say that where an appeal is taken on the issue of costs only, the Circuit Court will not have the benefit of hearing all the evidence heard by the District Court. It is for that very reason that the Supreme Court in O.A. said that the Circuit Court should be slow to interfere. However, that cannot mean that the Circuit Judge can never interfere. That would render the aggrieved party's right of appeal from the District Court to the Circuit Court nugatory. Indeed the question posed in the case stated answered by the Supreme Court in O.A. makes clear that the Circuit Court should interfere where it concludes that there has been a departure from the principles and criteria identified in O.A. That is what happened here. The Circuit Judge concluded, rightly or wrongly, that O.A. had been misapplied by the District Judge. As I have said, I am not concerned with whether that was correct, only whether it was lawful."*

43. Accordingly, I am not persuaded that the Court should intervene and disturb the District Judge's decision on costs solely on the basis that the applicant contends that insufficient regard was paid to the merits of the costs application as advocated before the District Judge on 27th May, 2016 on the applicant's behalf.

44. Furthermore, insofar as complaint is made that the District Judge erred in not taking account of the timing of the offer made by the applicant's sister to accommodate her, I note that in Mr. Wallace's replying affidavit on 20th March, 2017, he avers that R.G.'s offer on 30th March, 2016 was said by her to be subject to it being discussed with her partner. In his affidavit, Mr. Wallace exhibits the minutes of the meeting of 30th March, 2016. The minutes certainly disclose that the option of the applicant and the baby going to live with R.G. was discussed at the meeting. The minutes record, *inter alia*, that R.G. suggested that she would take care of the baby until a place became available for the applicant at a mother and baby unit. The minutes also record that Ms. Murray, Social Worker, asked if it would be an option to have both the applicant and the baby staying with R.G. What is recorded is that "it was agreed that given the concerns this would not be an option". The case made by counsel for the applicant to this Court is that the minutes of the meeting of 30th March, 2016 record that the option of the applicant and her baby going to live with R.G. had been discussed on 30th March, 2016, contrary to what Mr. Wallace deposed to in his first affidavit. However, I am of the view that that the minutes of the meeting document a more nuanced scenario than that canvassed by counsel for the applicant. What was being contemplated on 30th March, 2016, was that the applicant's baby might go to live with R.G., rather than the position put by counsel for the applicant in the course of his submissions to this Court, namely that there was a concrete offer by R.G. that both the

applicant and the baby would reside with her pending a more suitable arrangement becoming available.

45. I turn now to the principal plank of the challenge in these proceedings, namely that the District Judge factored into her refusal of the applicant's costs the fact that the applicant had not been given legal aid due to the quota for certificates having been exceeded in April, 2016 and the District Judge's conclusion that she "could not visit upon [the respondent] the failure of a legal aid to be available". Counsel for the applicant argues that in this regard, the District Judge acted unlawfully, and submits that on this basis alone the decision of 27th May, 2016 should be quashed.

46. Counsel for the applicant also canvasses the argument that, if as the Supreme Court in *O.A.* seems to recognise, it is the practice in the District Court not to award costs to parents who are legally aided, then it should also, as a matter of fairness, be possible to use a similar criterion to make an order for costs in the applicant's favour where the alternative is that the parent is not able to fund legal representation. Counsel submits that it is not consistent with fairness or the Constitution that someone, like the applicant, who cannot fund their own legal representation, would be faced with no legal representation or only with the hope of finding *pro bono* legal representation.

47. It is also submitted that it was not rational for the District Judge to rely on the fact that the applicant did not get legal aid as a reason not to make an order for costs in her favour.

48. Furthermore, counsel points to para. 55 of *O.A.,* where MacMenamin J. stated that he would:

> *"reserve for future argument in another case the hypothetical question whether the absence of a more comprehensive scheme legal aid (perhaps irrespective of means) in certain categories of care proceedings is a failure to secure the administration of justice, and/or a failure to vindicate the position of the family in its constitutional authority".*

49. It is counsel's contention that the applicant's case is the type of case that the learned MacMenamin J. had in mind. It is submitted that the applicant, as a person of impecunious means, had endeavoured to do what the respondent had argued for in *O.A.*, namely that a parent in childcare proceedings should seek legal aid. This the applicant did, unlike the position in *O.A.* where the parent was eligible for legal aid but elected not to avail of it. Although eligible, the applicant could not get legal aid because the quota for April, 2016 had been exceeded. Yet, despite this the applicant has been shut out from getting her costs. In the applicant's case, the District Judge stated that she would not visit the deficiencies of the legal aid system on the respondent. Counsel submits that this approach constitutes a failure to secure the administration of justice. It is argued that in determining as she did, the District Judge decided that rather than visit the vagaries of the Legal Aid Scheme on the respondent, she would visit them on the applicant. It is submitted that this cannot be in accordance with fairness under the Constitution.

50. Counsel for the respondent submits that the question for this Court is whether the District Judge acted within the parameters of the Supreme Court decision in *O.A.* in deciding to refuse the applicant her costs. Counsel contends that this question must be answered in the affirmative having regard to the transcript of the District Judge's ruling on costs. It is further contended that it is not appropriate for the applicant, *via* this application, to question the appropriateness of the failure of the Legal Aid Board to grant her a certificate of legal aid, particularly when the operation of the Legal Aid Scheme is not a matter within the power or control of the respondent.

51. Having considered the parties submissions on this issue, I am satisfied, in all the circumstances of this case, that the applicant's challenge to the costs ruling on the legal aid ground has been made out. In *Health Service Executive v. O.A.* [2013] 3 I.R. 287, O'Malley J. determined that the question of the potential eligibility for legal aid of a parent in proceedings under the Child Care Act 1991 was not a matter that had any bearing on their entitlement to apply for costs. O'Malley J. addressed the issue in the following terms:

> *"I conclude that the mother was entitled to choose her own representative, that she was not in any way obliged to apply for legal aid and that her eligibility for legal aid, whether established or presumed, has no bearing on her entitlement to apply for her costs." (at para. 69)*

52. It is axiomatic that, in the course of her consideration of the costs application, the learned District Judge took into account the fact that the applicant had applied for legal aid and had been refused a certificate. To my mind, this was not something the District Judge was entitled to do in the exercise of her jurisdiction, having regard to what was stated by O'Malley J. in *HSE v. O.A.* Thus, the fact that the District Judge factored into her consideration on costs a discussion of how the applicant fared in seeking legal aid invokes a reasonable apprehension that that the District Judge's considerations on the question of costs strayed outside the parameters set by MacMenamin J. in *O.A.* There is no way of ascertaining, from the face of the decision, just how prevalent a factor the District Judge's anxiety that the unavailability of legal aid for the applicant should not be visited on the respondent was in the ultimate ruling on the costs application, over and above the other factors considered by the learned Judge. Accordingly, the Court is satisfied that the frailty which attaches to the decision impacts upon its lawfulness such that the appropriate remedy is an order of *certiorari* and a remittal of the matter to the District Court for fresh consideration.

53. I should add that notwithstanding the applicant's counsel's submissions, the Court did not find it either necessary or appropriate to consider the wider argument canvassed on behalf of the applicant, namely whether the refusal of costs to the applicant amounted to a failure to secure the administration of justice.