THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 749 J.R.]

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

BETWEEN

M.M.

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 17th day of January, 2017

Issues

1. The within matter was heard on 30th November, 2016 and concerned an application on the part of the applicant to quash the order of the District Court made on 28th September, 2015 which order refused the applicant her costs of certain District Court proceedings culminating in an order of the District Court on 25th May, 2015. Various additional declaratory reliefs were sought by the applicant in the context of the within judicial review application, however, arguments to ground same were not developed, either in oral submissions or ultimately in two sets of written submissions received from the applicant, save in the context that the District Court judge erred in his assessment and understanding of the decision in the case of the *Child and Family Agency v. O.A.* [2015] IESC 52 being a judgment of the Supreme Court delivered on 23rd June, 2015.

Brief background

2. The applicant is the mother of two infant children who are the subject matter of a prior District Court order of 30th April, 2013 made under s. 18 of the Childcare Act 1991. The respondents subsequently, by application of the 14th April, 2014, sought directions under s. 47 of the 1991 Act as to whether or not suspension of access would be in the best interests of the infant, M., born in April, 2010.

3. An order for directions was made by the District Court on 30th April, 2014 and following the implementation of such directions it appears that the access status as between the applicant and the infant, M., improved so that the respondents indicated they were not pursuing the possibility of suspension of access. On or about 16th December, 2014 the respondent clarified that the variation in access sought was to reduce same to one hour every three or four weeks from one and a half hours per week.

4. Throughout it appears that the applicant did not accede to any reduction in access and in fact is seeking the reunification of her family.

5. An application for costs was processed in that the matter was adjourned further from the 25th May, 2015, the applicant tendered submissions on the issue for costs and ultimately an order in respect of costs was made by the District Court on 28th September, 2015 in a lengthy written judgment.

The parties' respective submissions

6. As indicated above I have two sets of submissions on behalf of the applicant, both of which are undated.

7. The applicant's arguments might be summarised as follows:-

i. The District Court is required to make an order for costs in favour of the applicant if otherwise an injustice would be created.

ii. The only manner in which to assess whether or not the applicant should obtain costs from the respondent would be by assessing the means of the applicant and measuring that against the extent of the costs incurred.

iii. The applicant argues that the respondents were precipitous in instituting the proceedings before the District Court and continuing such proceedings and therefore the respondents had acted capriciously, arbitrarily or unreasonably in commencing and/or maintaining the proceedings.

iv. Because the applicant is dependent upon social welfare and has certain indebtedness it would be an injustice to require the applicant to discharge her own costs.

v. The applicant argues that when reviewing Item no. 3 at para. 49 of the Supreme Court judgment in *O.A.* aforesaid reference therein to length and complexity of proceedings is by way of effectively a yard stick to enable the Court to generally assess the rough level of costs.

vi. The applicant argues that in reviewing para. 49, item no. 4, the content thereof cannot refer back to items 1 to 3 or any one of them as this would negate the effect of items 1 to 3. By way of example the applicant asserts that if the burden of establishing truly exceptional was applied to Item no. 1, this would have the effect of negating the import of Item no. 1.

vii. The applicant argues that looking at the totality of para.49 of the Supreme Court judgment, 5 categories are identified, namely, categories 1 to 3. Thereafter in Item no. 4 two further categories are identified being (4) some clear feature and (5) an issue or issues which render(s) the case truly exceptional.

viii. The applicant argues that applying the foregoing to the issue of costs would be the only manner in which the applicant's right to instruct private solicitors would be vindicated.

ix. Part of the complaint of the applicant in respect of the order of 28th September, 2015 is that it took into account extraneous irrelevant matters. That order was dealing with two issues – costs and consideration of comments *vis a vis* plaintiff counsel.

8. The respondent supports the judgment of the District Court of 28th September, 2015, although the respondent suggests that reference to a win, lose or a draw is not relevant. In addition, the respondents raise the following submissions:-

i. The respondents are mandated by virtue of the order in the case of *M.Q. v. Gleeson & Ors.* [1998] 4 I.R. 85 to be proactive in the community, ensuring insofar as possible the protection of children's welfare.

ii. The within proceedings are effectively non-adversarial proceedings with the Court having an investigative power (for example the commissioning of the s. 47 Report) and therefore general rules with regard to costs in civil cases would not apply.

iii. It cannot be said that the respondents failed in the proceedings before the District Court.

iv. The starting point in the assessment of costs is to the effect that there should be no order for costs, generally.

v. Insofar as the applicant asserts that the proceedings were lengthy, this was because of the manner in which the applicant approached the proceedings before the District Court and in any event there was a finding by the District Court judge that the proceedings were neither lengthy nor complex.

vi. The respondents rely on the decision in the case of *Re T.* [2012] 1 W.L.R. 2281 (Supreme Court) in England to the effect that it would only be if the respondents acted irresponsibly in the conduct of the proceedings that an order for costs might be awarded against them.

vii. The applicant is effectively looking for public funding and this is not a matter for the courts but rather for the legislature.

viii. There was a full and detailed consideration and analysis of the issues raised and therefore any reference to the judgment being irrational as per the jurisprudence found in the case of *Meadows v. Minister for Justice* [2010] 2 I.R. 701 cannot be supported.

The Supreme Court judgment in O.A.

9. As aforesaid this judgment was delivered on 23rd June, 2015 having been heard by five members of the Supreme Court. The query posed of the Supreme Court is identified in para. 1 of the judgment, namely in what circumstances may a District Court judge award costs against *inter alia* the respondent to a parent's privately retained lawyer consequent on hearing childcare proceedings.

10. In para. 3 of the judgment the Court identifies a number of constitutional rights arising in childcare proceedings being:-

a. The child's right to have decisions made with his or her welfare being paramount.

b. The rights of both parents and the children to be properly represented.

c. The right of the parents to choose their own lawyer.

11. At para. 13 it is noted that the 1991 Act does not outline any general legislative policy on legal costs in childcare matters.

12. At para. 16 it is stated that the conduct of a case and its outcome are two relevant factors in any costs award.

13. At para. 24 the Court noted the previous *O.A.* judgment of O'Malley J., then sitting in the High Court, of 2013 where she found that the applicants were entitled to apply for their costs without expressing a view on the merits.

14. At para. 39 it is noted that in civil cases, costs generally follow the event, however this was not a very satisfactory position in childcare issues.

15. At para. 40 it is stated that the case raises the question as to when, if it all, it would be appropriate to award costs to a party for whom the outcome had been largely unsuccessful.

16. At para. 42 the Supreme Court noted the undesirability of having different approaches in different district courts.

17. In para. 43 the Supreme Court recognised that the judicial role in childcare matters is in part at least inquisitorial.

18. In para. 44 the Supreme Court found it unhelpful that the attitude of a lawyer should impact on costs and also found it undesirable that costs would be dependent to some degree on whether the parents co-operated in the process.

19. In para. 47 the Supreme Court indicated that it would not be in keeping with the welfare of the children if the respondents were effectively deterred from acting because of a possible exposure to costs — if costs were routinely awarded. The decision should not be a resource allocation decision.

20. All of the foregoing, in my view, leads in to para. 49 being the answer to the query posed in para. 1 of the judgment — in what circumstances may a District Court judge award costs against the CFA to a parent's privately retained lawyer, consequent on hearing childcare proceedings? The approach devised by the Supreme Court is as follows:-

The District Court judge asks, in the first instance, was it proper to commence the proceedings.

It was noted that there are cases where it might be proper to order the costs of unsuccessful parents where proceedings were continued in circumstances where they were futile or where the costs might place an inordinate burden on the parents.

Thereafter the Court sets out how to ensure that the interests of the child and the interests of justice are achieved, namely, that there should be no order for costs in favour of parent respondents in District Court care proceedings unless there are distinct features in the case. The Court goes on then to identify a number of such distinct features, namely:-

i. Where there is a conclusion that the respondent CFA has acted capriciously, arbitrarily or unreasonably in the commencement or maintenance of the proceedings;

ii. Where the outcome of the case was particularly clear and compelling;

iii. Where a particular injustice would be visited on the parents having regard to the length and complexity of the proceedings;

21. The following paragraph which is identified as (iv) — incorporating the fourth of the identified distinct features which would enable the District Judge to award costs in favour of a parent respondent is as follows:-

"(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."

22. I am satisfied that the sentence

"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",

must apply in any case where the District Court is going to award costs and therefore does apply to the first three enumerated distinct features identified by the Supreme Court.

23. The next sentence, namely,

"These reasons must identify some clear feature or issue in the case which rendered the case truly exceptional"

goes to the reasons for awarding costs and as such reasons have to be stated in every case where costs are so awarded. This sentence relates to every possible case where costs are awarded.

24. The sentence,

"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" (Emphasis added)

comprises the fourth distinct feature giving rise to a possible order for costs, namely some unusual or unprecedented issue(s) or point.

25. In my view, para. 49 of the judgment has to be read in conjunction with para. 1 of the judgment, which does not distinguish between successful or unsuccessful parents. I take the view that the Supreme Court recognises that all cases are distinct and some of these are exceptional. Within the distinct and exceptional bracket are subparas. 1, 2. and 3 and the fourth distinct and exceptional type of matter would be a case which involved an unusual or unprecedented issue or issues which required determination or which might raise a point with application to a range of other cases.

26. The District Court judge made the following findings of fact:-

a. The thrust of the conduct of the applicant in her case was to promote the argument for an order increasing the length and frequency of access and permitting it to be taken away from B… and away from supervision.

b. The balance of access was tilted against inter alia the applicant rather than towards her.

c. There was no element of capriciousness, impulsivity or fickleness in the position of the Agency.

d. There was no arbitrary, random, erratic or inconsistent element in the Agency's bringing or management of the application.

e. The Court needed assistance (the Court ordered a s. 47 report) in order to rule, both parties called expert witnesses and the district judge relied on this thereby removing the matter from the classification of being clear and compelling.

f. The proceedings were not in fact very long.

g. Much time was wasted in cross examining.

h. The District Court judge did not see any great complexity in dealing with the evidence.

i. The truly exceptional feature of the case was the personality of the applicant.

j. The District Court judge could not identify any distinct feature which would entitle him to exercise his discretion to

make an order at variance with the default position that costs follow the outcome.

27. Having regard to the foregoing findings of fact, therefore, it is clear:-

a. That the Agency did not act capriciously, arbitrarily or unreasonably.

b. This was not a case of a clear and compelling outcome.

c. The proceedings were not considered lengthy and the only complexity involved was that introduced effectively by the applicant.

d. There was nothing exceptional, unusual or unprecedented in relation to the issue or issues involved nor had the issues involved any application to a range of other cases.

28. The constitutional entitlement of the applicant, both as a parent and as an individual, to a choice of representation was duly considered and clearly taken into account by the Supreme Court in its judgment in *O.A.* prior to formulating the manner in which the district judge should approach the issue of costs in care proceedings (see para. 3 of the judgment aforesaid).

Conclusion

29. I am satisfied that, by reason of all of the foregoing, the entitlement of the district judge to make an order for costs in favour of the applicant parent was not triggered in the circumstances of this case. Although I take a different view from the District Court judge as to the meaning and interpretation of para. 49 of *O.A.,* nevertheless in my view it is not appropriate to quash the judgment on that basis given the foregoing.

30. In these circumstances it appears to me inappropriate to make any other declaratory order as sought by the applicant. I believe that the applicant's submissions that the reference to "a particular injustice" does not have the meaning contended for by the applicant, namely that this assessment is made on the basis of a consideration of the resources of the applicant and the ultimate costs incurred by the applicant in the proceedings, but, rather, the "particular injustice" has to arise based upon a consideration of the length and complexity of the proceedings.

31. The reliefs sought by the applicant are therefore refused.