

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 37 J.R.]

BETWEEN

LINDA GILL

T.G. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND LINDA GILL)

E.M. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND LINDA GILL)

APPLICANTS

AND

KILDARE COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 11th day of January, 2017

1. In this case the judicial review proceedings were solved amicably and the only issue that this Court has to deal with is the issue of costs.

2. On 25th January, 2016 counsel for the applicants made an ex parte application to Murphy J. for leave to apply by way of an application for judicial review. Murphy J. on that date made an order granting the applicant leave to apply by way of judicial review for:—

i. An order of *certiorari* quashing the respondent's decision of 8th January, 2016 refusing the first named applicant's application, made on her own behalf and on behalf of the second and third named applicants, seeking emergency homeless accommodation pursuant to s. 10 of the Housing Act, 1988 (hereinafter referred to as "the decision of the respondent of 8th January");

ii. an order of *mandamus* directing the respondent to reconsider the first named applicant's application for emergency homeless accommodation for herself and her family pursuant to s. 10 of the Housing Act, 1988.

3. Murphy J. also granted leave for the relief of the costs of these proceedings on that date. The application for leave was grounded on the affidavit of Linda Gill, the first named applicant. She described that she was a 24 year old mother of two and had ordinarily resided in Kildare for all her life. She is the mother of T,G, who was then aged two years and nine months and E.M. (the third named respondent herein) who was 11 months at the time of the application. She described that she had been in a committed relationship with the third named respondent's father for over a year and lived together as co-habitees for a period of 8 months. She described that from March, 2015 to October, 2015 she resided at private rented accommodation at Apartment 1, Kildare House, Clare Gate Street, Kildare Town, Co. Kildare.

4. She described that the relationship with the father of the third named respondent broke down and she left the apartment at Kildare Town with both their children in or about October, 2015. She stated that the three respondents had been homeless since leaving the Kildare House apartment. For a period of approximately 3 months she stated that they were able to stay on a temporary basis with Yvonne Maguire in Grange, Co. Meath.

5. At the time Ms. Maguire was in a relationship with the first named applicant's father. She had hoped that she would be able to secure private rented accommodation for herself and her two small children but over the course of the last three months of 2015 she was unsuccessful despite repeated attempts. She was eligible for rent supplement and only 3 properties in Co. Kildare were within the price range allowable for rent supplement. She described that her current weekly income is €245.60 as she is in receipt of supplementary welfare allowance while she awaits her one-parent family payment. She is also in receipt of €280 a month child benefit.

6. She describes that in early January, 2016 she agreed to leave Ms. Maguire's home in circumstances where the continued presence of herself and her young children in her home was no longer sustainable. She agreed that they would move out on 7th January and she presented herself at the offices of Kildare County Council seeking emergency homeless accommodation on 6th January, 2016. She presented again on 7th January, 2016 and on both of these occasions she was refused emergency accommodation. On the night of 7th January, 2016 Ms. Yvonne Maguire, her friend, agreed to allow her to stay for one final night with her children.

7. On 8th January, 2016 she again presented at Kildare County Council's offices seeking emergency homeless accommodation for herself and her two small children. She was again refused. She then sought the assistance of Sinead Kieran, a solicitor of the Mercy Law Resource Centre Solicitors, a firm of solicitors who provide legal advice and representation in an accessible way, to people who are homeless or at the risk of homelessness in the areas of social housing and social welfare law. Her solicitor contacted Kildare County Council by telephone but she was told that they would not speak to her for reasons of data protection.

8. On 8th January, 2016 she received a letter from Mark McLoughlin, Administrative Officer of Kildare County Council, who confirmed that the first named applicant had presented to Kildare County Council Homeless Services, that she had been assessed by the Homeless Team based on information that she had provided. The letter concluded:—

"Accordingly Kildare County Council are of the opinion that it would not be appropriate to provide emergency accommodation at this time."

9. It is relevant for the purposes of this judgment that Mr. McLoughlin did not refer in that correspondence to the Housing Assistance Programme (hereinafter referred to as the "HAP") as this is a matter which counsel for the respondent relies upon to resist this application for costs.

10. The first named applicant in her affidavit stated that on 8th January, 2016, having been refused emergency accommodation by the defendant, travelled to Dublin with her young children and Dublin City Council agreed to provide her with three nights of emergency homeless accommodation for the nights of the 8th, 9th and 10th January, 2016.

11. On 11th January, 2016 her solicitor wrote to Kildare County Council asking that they reconsider her application for emergency homelessness accommodation and/or that they otherwise provide the first named applicant and her children with housing. The letter set out the statutory, constitutional and human rights framework within which Kildare County Council's powers operate in considerable detail. It also stated that judicial review would issue without further notice to them if no satisfactory response was received within seven days of the letter and on that basis the application was made to the Court. She stated that since 11th January, 2016 she has stayed for a few nights at a time with friends and family. Her father's partner has a 16 year old child who is severely autistic and was greatly distressed by the presence of her two small children in the home. She also refers to accommodation with her sister where she and her two children stayed in a couch area. She presented to Kildare County Council on 19th January, 2016 and was again refused emergency homelessness accommodation. She was given a letter confirming that she was on the Kildare County Council housing list as of 21st September, 2010. She says in her affidavit she is now in a desperate situation and her family is at crisis point. She is a 24 year old mother of two children and she has nowhere to sleep with her children and she has exhausted the assistance and goodwill of family and friends. She says that within a matter of days she would be forced to sleep rough with two extremely young children and she applied for the relief. Exhibited to her affidavit is the letter written by her solicitor, Sinead Kieran, dated 11th January, 2016.

12. Counsel on behalf of the respondent opposed the application for costs on behalf of the applicant. She states that the "proceedings had been rendered moot and were struck out on 18th February, 2016. The mootness was as a result of the unilateral actions of the first named applicant in obtaining private rented accommodation through the HAP. Prior to the institution of the proceedings she submits that the HAP Scheme had been made available by the respondent for the first named applicant and for these reasons the applicants should not be entitled to their costs of the within proceedings. She referred in particular to correspondence dated 16th May, 2016 in relation to the applicants' application for their costs as follows:—

"Proceedings were struck out after your clients secured private rental accommodation through the HAP Scheme. As you are aware, the HAP Scheme is a new social housing support. It has replaced rent supplement for those with a long term housing need. Once approved for housing, the applicant sources his or her own private rented accommodation within specific rent caps. HAP had become operational in Co. Kildare on 2nd November, 2015 [the Court notes that this was about two months before the issues that led to the application by the first named applicant]. Your client was advised of the opportunity to avail of the HAP Scheme on several occasions prior to making her application for leave to seek judicial review on 25th January, 2015. In particular, availing of the HAP Scheme was recommended to her on specific dates as follows:—

1. By Ms. Nicky Reid, support worker of Focus Ireland contracted by Focus to the Homeless Support Team within Kildare County Council on 6th January.
2. By Niamh Dunne, support worker of Dublin Simon contracted by Dublin Simon to the Homeless Support Team within Kildare County Council on 7th January, 2016.
3. By Ms. Michelle Sheridan, support worker of the Peter McVerry Trust contracted by the Peter McVerry Trust to the Homeless Support Team within Kildare County Council on 8th January, 2016.
4. By Margaret Dwyer, Staff Officer in the Housing Department of Kildare County Council to Nuala, Secretary to Catherine Murphy, T.D. on 7th January.
5. By letter from Kildare County Council to Mercy Law dated 22nd January, 2016.
6. Notwithstanding the numerous recommendations to seek private rental accommodation through the HAP Scheme, your client, for reasons better known to herself initially decided not to take up private rented accommodation.
7. Instead, she issued proceedings against our client seeking judicial review of a decision made by Kildare County Council refusing to provide emergency homelessness accommodation to your client and family."

13. By way of response the applicants' solicitors stated it was only as a result of the respondent's intervention that the applicants were able to secure private rented accommodation, that this intervention could and should have occurred in advance of the issuing of the within proceedings, and as such the applicants were entitled to their costs. The respondents, by letter replied, dated 27th July, 2016, to the applicants' solicitors pointing out that the only "intervention", as described by the applicants' solicitors which the respondent was involved in was the reiteration of the previous advice given to the applicant to obtain private rented accommodation and to point out those with private rented accommodations which were available. Counsel on behalf of the respondent referred to the following cases: *Cunningham v. President of the Circuit Court and the Director of Public Prosecutions* [2012] IESC 38— this related to an application to prohibit a criminal trial. The relief had been refused by McKechnie J. in the High Court in 2007 but while the appeal was pending to the Supreme Court the Director of Public Prosecutions entered *nolle prosequi* in proceedings, rendering moot the question of whether it should have been appropriate to prohibit the criminal trial. The reason why the Director of Public Prosecutions had entered a *nolle prosequi* was because of the death of a vital witness. Clarke J. in giving the judgment of the Supreme Court in relation to the costs principles said as follows:—

"[4.1] *There can be little doubt but that the normal rule is that costs follow the event. This stems from O. 99, (Rule 4) of the Rules of the Superior Courts and has been the subject of many judicial comments such as that of Denham J. in Grimes v. Punchestown Developments Co. Ltd [2002] 4 I.R. 515. It also appears clear that the rule is equally applicable to the costs of appeal. See for example S.P.U.C. v. Coogan (No. 2) [1991] 1 I.R. 273.*

[4.2] It is, of course, the case that there are exceptions to that general rule. A somewhat different approach is sometimes taken in cases involving points of law of exceptional public importance or test cases or the like. There also may be difficult cases where the question of who has won the "event" may not be as clear cut as might arise in more straightforward proceedings. However, none of those issues seem to me to have any application to the facts of this case."

At para. 4.5:—

"[4.5] *The problem in dealing with the costs of proceedings which have become moot is that there will, in reality, be no*

event which those costs have to follow.”

At para. 4.8 he states:—

"[4.8] It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In particular there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors."

At para. 4.9 :—

"[4.9] In that context it is, of course, important to note that statutory officers and bodies have an obligation to exercise their powers in a proper manner. If circumstances change then it is, of course, not only reasonable but necessary for such officers and bodies to reflect the new circumstances by adopting a position (even if different) which takes into account the circumstances as they have come to be. The mere fact, therefore, that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one party."

[4.10] If there were no change in underlying circumstances and if the statutory officer or body had simply changed his or its mind or adopted a new and different view, then such a characterisation might be appropriate. Where, however, there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot by reason of the unilateral act of one party, on the one hand or, in reality have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand."

14. He also referred to *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation & ors* [2011] IEHC 380. It is noted that in relation to this case, the plaintiffs, the respondents and the notice parties were all either statutory bodies or companies.

15. Counsel on behalf of the applicants referred the Court to a case, *U.MCE v. The Child and Family Agency & ors* [2014] IEHC 697, a decision of O’Hanlon J. delivered on 18th December, 2014. These proceedings concerned the plaintiff’s application for costs arising from childcare proceedings against the Child and Family Agency and the HSE. At para. 21 of the judgment O’Hanlon J. states:—

"This Court has considered the submissions of both the plaintiff and the defendant extensively. On the 29th August 2014, the plaintiff brought an emergency application to the High Court, seeking orders compelling the defendants to provide a bed for "C" in an approved therapeutic centre, as stipulated under the Mental Health Act 2001. This Court is of the view that the plaintiff’s actions, in seeking the aforementioned orders, were necessitated by "C’s" deteriorating behaviour at The Orchard Residential Care Facility. . Ultimately, the plaintiff was successful in their application to the High Court."

At para. 24 she says:—

"Under Order 99 rule 1(4) of the Rules of the Superior Courts 1986, this Court holds a discretion to award cost as it sees fit. This discretion is guided by the general procedural principle that "costs follow the event" as prescribed under Order 99 rule 1(4) of the aforesaid rules."

16. The situation facing the applicant in this case was that a number of events had taken place:—

- i. She was the mother of two very young children.
- ii. Her relationship with the father of the second named respondent had ended and she was obliged to leave the rented accommodation.
- iii. She then resided with the partner of her father who had a severely autistic child. She agreed to leave that accommodation.
- iv. She had sought to obtain accommodation from private landlords but had not been successful.
- v. She would not have been unaware of the initiation by the defendants of the HAP Scheme which appears to have been administered not by the council but by charitable agencies involved in homelessness. Clearly, having regard to the time of year and the circumstances of the age of the children, it was incumbent on Kildare County Council to assist her, perhaps even through the private agencies to locate accommodation in the early weeks of January, 2016.
- vi. The applicant took advice from a firm of solicitors who are specialised in the area of housing and welfare law which was not replied to in time. The references to the Article 42A of the Constitution of Ireland requires the Council to vindicate the rights of the children in the exercise of its statutory powers pursuant to the Housing Act 1988.

17. I accept that the council were prepared to contest this matter and that they had seven affidavits and a statement of opposition. However, that being said, it did not mean that they would have been successful in resisting the proceedings, particularly having regard to Article 42A of the Constitution of Ireland.

18. In the particular circumstances of this case, despite the mootness of the issues involved in the judicial review proceedings, having regard to the difficult situation of persons who are facing homelessness and in particular the circumstances of the three applicants, the Court will make an order granting the costs of the ex parte application to the applicants in this case.