THE HIGH COURT
JUDICIAL REVIEW

2018 No. 752 J.R.

BETWEEN

A FOSTER MOTHER

APPLICANT

AND
THE CHILD AND FAMILY AGENCY

RESPONDENT

THE BIRTH MOTHER
THE PROSPECTIVE ADOPTIVE PARENTS

NOTICE PARTIES

JUDGMENT of Mr Justice Garrett Simons delivered on 18 January 2019.

INTRODUCTION

1. This judgment is given in respect of the costs of the substantive hearing of the within judicial review proceedings. The proceedings were heard over six days in December 2018, and a written judgment was delivered on 21 December 2018 (*A Foster Mother v. Child and Family Agency* [2018] IEHC 762). I will refer to this earlier judgment as the "*principal judgment*".

2. As appears from the principal judgment, the application for judicial review was dismissed in its entirety. Notwithstanding this, the unsuccessful applicant now applies for an order directing that at least some of her costs should be paid by the respondent, namely the Child and Family Agency ("*CFA*").

3. This application is resisted by the CFA, which argues that an order for costs should be made in its favour against the applicant. I propose to address these two competing applications for costs under separate headings below.

4. Before turning to that task, I should note that the CFA confirmed that it was consenting to costs orders in favour of (i) the birth mother, and (ii) the *guardian ad litem*. This was done in circumstances where those parties had been joined to the proceedings upon the application of the CFA.

(1) APPLICANT'S APPLICATION FOR COSTS

5. Counsel on behalf of the applicant, Mr John Rogers, SC, advances the application for costs by reference to the judgment of the Supreme Court in *Dunne v. Minister for Environment (No. 2)* [2008] 2 I.R. 775. Express reliance was placed on the following passages of the judgment.

> "25 As previously indicated, these elements are relevant factors which may be taken into account in the circumstances of a case as a whole. Because these elements are found to be present it does not necessarily follow that an award of costs must invariably be made in favour of an unsuccessful plaintiff or applicant. Equally, the absence of those elements does not, for that reason alone, exclude a court exercising its discretion to award an unsuccessful applicant his or her costs if, in all the circumstances of the case, the court is satisfied that there are other special circumstances that justify a departure from the normal rule.
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> 26 The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs.
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> 27 Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue."

6. Counsel sought to apply these principles to the facts of the present case as follows. First, it was submitted that the applicant in instituting the proceedings had not sought any private personal advantage. Rather, the applicant was seeking to vindicate the rights of the child, and was said to be acting in *locus parentis* by virtue of her (former) role as foster mother. It was also said that the taking of the case was necessitated by deficits identified by the applicant in the assessment carried out by the CFA in respect of the child.

7. Secondly, it was submitted that the proceedings raised issues of special and general public importance. In particular, it was said that the proceedings were *sui generis* having regard to the confluence of Article 42A of the Constitution; the Adoption Act 2010; and the place of foster parents and the duty of foster parents to vindicate the rights of the children in their care.

8. Thirdly, counsel sought to characterise the decision of this court—in the principal judgment—not to embark on the exercise of reviewing the events of March and April 2018 on the basis that it would not be in the best interests of the child to do so as "*very unusual*", "*new and possibly ground breaking*", and as "*entirely novel*".

9. In order to understand this third argument, it is necessary to rehearse briefly the history of the proceedings. As appears from the principal judgment, the application for judicial review involved a challenge to the manner in which the child was transferred from the care of their foster mother and placed with their prospective adoptive parents. This occurred in April 2018. The principal argument advanced by the applicant in the judicial review proceedings was that there had been a failure to carry out the requisite assessment as mandated by section 19 of the Adoption Act 2010 and/or articles 16 and 17 of the Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption ("*the Hague Convention*").

10. For the reasons set out in detail in the principal judgment, in particular at paragraphs [64] to [80] thereof, I declined to make findings of fact in respect of these arguments because to do so would not have been in the best interests of the child. This was done in circumstances where all of the parties, including the applicant, were in agreement that nothing should be done which might undermine the legitimacy of the child's placement with their prospective adoptive parents.

(2). THE CFA'S APPLICATION FOR COSTS
11. Counsel for the CFA, Mr Barry O'Donnell, SC, contended that the ordinary rule should apply, i.e. costs should follow the event. Counsel submitted that there were no special circumstances of the type discussed in Dunne (No. 2) which would justify a departure from the ordinary rule. The proceedings did not raise any fundamental issue of law or any issue of conspicuous novelty. It was also submitted that insofar as the applicant had originally sought to bring about a position whereby she could be considered as an adoptive parent, she had a personal interest in the proceedings.

DISCUSSION

(i) *Overview*
12. The ordinary rule is that costs follow the event, i.e. an order for costs is usually made in favour of the successful party as against the unsuccessful party. Were this rule to be applied to the facts of the current case, then the CFA would undoubtedly be entitled to an order for costs as against the applicant. This is because the application for judicial review was dismissed in its entirety.

13. Of course, a court retains *discretion* to make a different order in respect of costs. This is expressly provided for under Order 99, rule 1 of the Rules of the Superior Courts 1986 (as amended) as follows.

> "(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
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> […]
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> (4) Subject to sub-rule (4A), the costs of every issue of fact or law raised upon a claim or counterclaim shall, *unless otherwise ordered*, follow the event."
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> *Emphasis (italics) not in original.

14. As confirmed by the judgment of the Supreme Court in *Dunne v. Minister for Environment (No. 2)* [2008] 2 I.R. 775, [27], where a court departs from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. The judgment in *Dunne (No. 2)* also confirms at [18] that factors such as (i) whether the proceedings were seeking a private personal advantage, and (ii) whether the legal issues raised were of special and general public importance are potentially relevant but are not necessarily determinative.

15. In exercising my discretion in respect of costs, I must seek to reconcile (i) the objective of ensuring that individuals are not deterred by the risk of exposure to legal costs from pursuing litigation of a type which—although ultimately unsuccessful—nevertheless serves a public interest, with (ii) the objective of ensuring that unmeritorious litigation is not inadvertently encouraged by an overly generous costs regime.

16. I must also respect the ruling of the Supreme Court in *Dunne (No. 2)* to the effect that—absent express legislative provision such as, for example, that applicable to environmental litigation under section 50B of the Planning and Development Act 2000—there is no *predetermined* category of cases which fall outside the full ambit of the discretionary costs jurisdiction. It would not be appropriate, therefore, to apply some sort of "bright line" rule to the costs of cases involving the interests of a child. Whereas there will undoubtedly be some such cases where a departure from the usual costs rules will be justified in the case of an unsuccessful applicant, sight must not be lost of the fact that the pursuit of legal proceedings has financial and other costs. The respondent public authority is put to the time and expense of defending the proceedings, and this diverts resources away from its principal activities. The rights of third parties may be potentially affected by the proceedings, and the third parties be put to the expense and stress of having to participate in the proceedings. (On the facts of the present case, the birth mother and the prospective adoptive parents were joined as notice parties to the proceedings). Litigation also expends limited judicial resources, and an increase in unmeritorious litigation would result in the hearing of other litigants' cases being delayed.

17. A court determining an application for costs must endeavour to reconcile these various competing objectives, and seek to make an order which best serves the justice of the particular case. In this regard, there is a spectrum spanning from the usual order, i.e. costs follow the event, to an order directing that an unsuccessful applicant recover all of their costs. There are various points between these two extremes, and a court could, for example, decide to make no order for costs, or to direct that only a specified portion of the costs of one side be paid.

(ii) *Time-limit and conduct of the proceedings*
18. In order to properly evaluate the competing arguments of the applicant and the CFA in relation to costs, it is necessary to recall the precise basis upon which the judicial review proceedings were actually decided.

19. As appears from the substantive judgement, I ruled that the application for judicial review had been made outside the three month time-limit prescribed under Order 84, rule 21, and I refused to grant an extension of time in this regard.

> "125. The proceedings are inadmissible by reason of delay. The application was made outside the three month period allowed under Order 84, rule 21. I refuse an application for an extension of time. The fact of the matter is that the foster mother has had, at all material times, the benefit of legal advice from an experienced solicitor. She had legal advice throughout the events of March and April 2018. Her solicitor was actively engaged in correspondence on her behalf with the CFA at that time. The foster mother had all the relevant information, and had legal advice available to her in April 2018. She had an intimate knowledge of the events, having been a key participant. Any application for judicial review should have been moved within three months of the date upon which the child was removed from her foster care. The legal grounds of challenge had crystallised at that time."

20. This finding, on its own, would have been sufficient to dispose of the proceedings in their entirety. However, for the reasons explained at paragraphs [106] and [107] of the principal judgment, I decided not to determine the case on this narrow basis alone.

> "106. I have deliberately postponed to this point of the judgment any consideration of the objection that the proceedings

are inadmissible by reason of delay. I have done this because I wished to avoid a situation whereby the proceedings were resolved on the narrow ground of delay, without any consideration of any of the other issues in the proceedings. The case ran before me for some five and a half days, and it seems appropriate that, having heard full argument, I attempt to address the substantive issues raised in the proceedings. This is especially so where the case involves a child. To have decided the case solely on the issue of delay would have run the risk that that finding might be subsequently set aside on appeal, and the parties would then have to rerun the entire case before the High Court, with all the attendant cost and stress to the participants.

107. Notwithstanding my finding in relation to the time-limit (set out below), I have also addressed the merits of the case on a de bene esse basis. I do this in the hope of expediting matters in case there is an appeal. The appellate court will have the benefit, for what it is worth, of my conclusions not only on the issue of delay but also on some of the others issue raised in the proceedings."

21. Notwithstanding this approach, the ruling in relation to the time-limit is nevertheless relevant to the issue of legal costs. The ruling amounts to a finding that the proceedings should not have been brought. As explained in the ruling, the requirement for compliance with the time-limit has a particular importance in proceedings involving a child.

22. Whereas a court does, of course, have a discretion to depart from the normal costs rules in cases which raise legal issues of general public importance, this discretion is subject to an implied limitation that the proceedings must be properly before the court. If, for example, a particular applicant did not have *locus standi* to maintain proceedings and the proceedings were dismissed on this basis, then the applicant would not be entitled to an order for costs no matter how important the legal issues which it was sought to raise in the proceedings might have been. Put shortly, an applicant who fails on a threshold issue, such as a time-limit or *locus standi* requirement, cannot expect to have their costs paid. To do so would undermine the entire purpose of rules in relation to time-limits and *locus standi.*

23. Applying this approach to the facts of the present case, I have decided that—irrespective of whether the legal issues were of general public importance or not—this particular applicant is not entitled to an order for costs in her favour. It is well established that the imposition of strict time-limits in judicial review proceedings is intended to serve the public interest by ensuring that the proper functioning of public authorities is not impeded by stale claims. This is especially important in cases involving children. The proceedings in this case were—as explained in more detail in the principal judgment—instituted some five months after the grounds of challenge had crystallised. This delay is unacceptable in circumstances where the applicant had the benefit of legal advice at all material times. It would undermine the effectiveness of the three month time-limit were a court to make an order for costs in the favour of an applicant who had brought proceedings out-of-time. The making of such costs orders would run the risk of encouraging others to institute proceedings notwithstanding that same were clearly out-of-time. This would negate the very purpose of the time-limit and would be contrary to legal certainty.

24. The legal position in this regard is not affected by the fact that—notwithstanding my ruling on the time-limit point—I went on in the principal judgment to consider other aspects of the case. This was done in the ease of the parties lest there be an appeal to the Court of Appeal. The applicant cannot piggyback on this so as to seek an order for costs in her favour.

25. I am also entitled to have regard to the manner in which the applicant conducted the proceedings. Up until the opening day of the hearing before me, the applicant maintained the position of claiming reliefs (including orders of *certiorari*) which could clearly impact on the legality of the continued placement of the child with their prospective adoptive parents.

26. In his opening of the case, counsel for the applicant, quite properly, indicated that those reliefs were not now being pursued. Thereafter, on the second day of the hearing, the applicant entered into a written agreement with the prospective adoptive parents whereby she agreed, in particular, not to seek to delay or in any way interfere with the adoption process. All of this is very much to the credit of the applicant in that it made it unnecessary for the adoptive parents to participate further in the proceedings. It must also have relieved them of significant personal worry and stress in that any risk of the child being removed from their care was eliminated. To an extent, however, the making of these concessions was almost unavoidable in circumstances where the guardian ad litem in her report to the court of 7 December 2018 had expressly stated (i) that it had been in the child's best interest to move to the care of the prospective adoptive parents, and (ii) that it was in the child's best interest that they be adopted by the prospective adoptive parents. I cannot ignore the fact that the foster mother continued to pursue the proceedings to full hearing notwithstanding that the principal purpose of the proceedings had fallen away. A six day hearing could have been avoided had the case simply been withdrawn on the first day.

27. In summary, I would be prepared to refuse the applicant's application for costs by reference solely to the time-limit point and to her conduct of the proceedings. However, lest I am incorrect in this approach, I will go on in any event to consider the argument that the proceedings raised novel and important issues of law.

(iii) *No point of law of general public importance*

28. For the purposes of this judgment on costs, I have carefully reconsidered the statement of grounds filed in these proceedings. There is nothing therein which discloses a novel point of law of such importance as might justify making a costs order in favour of the applicant. The principal legal issue raised in the proceedings concerned compliance with section 19 of the Adoption Act 2010, when read in conjunction with Article 42A of the Constitution. The grounds which the applicant sought to advance were specific to the facts of this case. In effect, the applicant invited the court to consider the materials submitted to the Adoption Authority by the CFA in March 2018 with a view to the court adjudicating on the *adequacy* of the assessment of the child's medical and psychological condition contained therein. The applicant did not advance any detailed legal argument before me as to the interpretation of section 19, other than to say that same had to be read in the light of Article 42A of the Constitution. Tellingly, the applicant did not refer to any specific case law in relation to this aspect of its case and, in particular, did not refer me to the judgment of the Supreme Court in *In the matter of JB (A minor)* [2018] IESC 30. This judgment was ultimately opened to me by counsel on behalf of the guardian ad litem, Mr Gerard Durcan, SC.

29. It occurs to me, therefore, that even if I had acceded to the applicant's request to carry out an adjudication in relation to the adequacy of the section 19 assessment, any judgment emerging from this exercise could not be said to involve novel or important points of law. Rather, the judgment would turn on findings of facts.

30. Finally, I cannot accept that the approach taken to the issue of the best interests of the child was "*very unusual*", "*new and possibly ground breaking*" or "*entirely novel*". For reasons similar to those set out above in relation to the three month time-limit, it is a regular feature of our jurisprudence that cases are decided by reference to threshold issues. There is nothing unusual in a case being disposed of without the court having to reach a conclusion on *all* of the substantive issues raised. Here, I declined to make

findings of fact in relation to the adequacy of the section 19 assessment for two principal reasons as follows. First, in circumstances where none of the parties wished me to do anything which might imperil the continued placement of the child with the prospective adoptive parents, and where all the evidence confirms that the child is thriving, the making of such declarations would not only serve no useful purpose, it might actually be detrimental to the best interests of the child. Secondly, the proceedings were, in any event, inadmissible by reason of delay, and certain necessary parties, i.e. the Adoption Agency and the prospective adoptive parents, were not before the court.

(iv) *Should costs be awarded against the applicant*?

31. I now turn to consider the counter-application by the CFA for an order of costs in its favour as against the applicant. As noted earlier, there is a spectrum of costs orders which might be made. Thus the fact that I have concluded that an order should not be made *in favour* of the applicant does not necessarily mean that the ordinary costs rule must apply. The justice of the case might lie at a different point on the spectrum.

32. With some slight hesitation, I have decided that the appropriate order in this case is that the applicant and the CFA should each bear their own costs. I think that the proceedings were motivated by a genuine concern on the part of the applicant for the welfare of the child. The applicant was not seeking any "private personal advantage" from the proceedings in the sense in which that term is employed by the Supreme Court in *Dunne (No. 2).* Whereas it is true that, until the opening day of the hearing on 11 December 2018, the applicant appeared to be seeking the return of the child to her own care, I do not think that this constitutes a "private personal advantage". The applicant was not seeking the return of the child for her own benefit. Rather, the return of the child was only sought out of a genuine concern for the child's welfare. (In the event, this concern was shown to be misplaced, and all parties accepted at the hearing before me in December 2018 that it was in the best interests of the child that they remain in the care of the prospective adoptive parents).

33. A requirement to pay the other side's costs of a six day High Court case would be financially ruinous for all but the most wealthy of individuals. To apply the usual costs rule, and to make an order against the applicant, would undoubtedly discourage *other* foster parents from having recourse to the courts to seek to vindicate the rights of children in their care. I do not think that it would be in the public interest to create such a deterrent. There may well be exceptional cases where it would be appropriate for a foster parent —having first exhausted all other remedies—to institute judicial review proceedings.

34. The present case is a borderline case. Any justification for the applicant's instituting and pursuing the judicial review proceedings to full hearing tends to be undermined by considerations such as the delay in instituting the proceedings, and the fact that by December 2018, at the very latest, all parties accepted that it was in the best interests of the child that they remain in the care of the prospective adoptive parents. On balance, however, I have concluded that the appropriate outcome in this case is that there should be no order as to costs as between the applicant and the CFA. In this regard, I attach some significance to the exemplary manner in which the applicant cared for the child for the thirteen months that the child was in her care. It would be disproportionate to make a costs order against the applicant in the circumstances.

35. I also think that whereas the legal issues raised do not reach the necessary threshold to justify a costs order *in her favour*, there was just about enough legal substance in the case to justify making no order as to costs against the applicant. In particular, I think that the principal judgment may be of some limited assistance in clarifying the interaction between section 19 of the Adoption Act 2010 and Article 42A of the Constitution.

CONCLUSION

36. As noted earlier, the CFA has agreed to an order of costs against it in favour of (i) the birth mother and (ii) the *guardian ad litem*, respectively (such costs to be taxed in default of agreement). I accordingly make that order.

37. Insofar as the costs of the CFA and the applicant are concerned, I have concluded—for the reasons set out in detail earlier—that the appropriate outcome in this case is that the applicant and the CFA should each bear their own costs. Accordingly, I make no order in respect of those parties' costs.