THE HIGH COURT

SPECIAL CARE

[Record No.: 2018/1972 P.]

IN THE MATTER OF A. B., A MINOR

AND IN THE MATTER OF THE CHILD CARE ACT 1991 (AS AMENDED)

BETWEEN

THE CHILD AND FAMILY AGENCY

APPLICANT

AND

T. N.

RESPONDENT

AND

N. R.

GUARDIAN AD LITEM

JUDGMENT of Ms. Justice Reynolds delivered on the 4th of October, 2018

1. In the within proceedings, an application is brought by the Child Care Law Reporting Project (hereinafter referred to as "CCLRP") and an academic researcher accredited by a University to permit their attendance in court for applications brought under Part IVA of the Child Care Act, 1991 (hereinafter referred to as "the 1991 Act").

2. Both parties are seeking to have the in-camera rule lifted to facilitate research into proceedings under Part IVA of the 1991 Act and specifically seeks orders as follows:-

> "(i) to attend proceedings under Part IVA;
>
> (ii) to access court documents for proceedings under Part IVA;
>
> (iii) to produce case histories of the proceedings and include details of such proceedings in its periodic reports and/or academic research, subject to a prohibition on any reporting which would tend to identify any child who is the subject of proceedings under Part IVA."

Background

3. Prior to the enactment of Part IVA of the 1991 Act on the 1st January, 2018, secure care proceedings were conducted under the High Court's inherent jurisdiction to vindicate the rights of children at risk.

4. Such proceedings were subject to reporting restrictions prohibiting the publication or broadcast of any matter which might identify the minor, the subject matter of the proceedings. This ensured that the privacy rights of the minor were protected, whilst also ensuring that the public interest in understanding how a public body discharged its functions was served by allowing for the attendance of non-parties at the hearing.

5. The commencement of Part IVA of the Act of 1991 provided a statutory basis for the making of special care orders. The new provisions of Part IVA confer statutory power on the High Court to detain children in special care and make ancillary orders.

6. The CCLRP was established in 2012 under the auspices of the Free Legal Advice Centres ("FLAC") to undertake research on the operation of childcare law in Ireland. Dr. Carol Coulter was employed by FLAC as director of the project and she nominated a panel of researchers who attend court for the purpose of reporting on childcare proceedings. It initially conducted research in the District Court exclusively. In 2014, the CCLRP also commenced researching cases in the High Court Minor's List.

7. The academic researcher on whose behalf this application is also brought, is a practising barrister who is engaged in research which is funded by the Irish Research Council.

The In-Camera Rule

8. The in-camera rule in respect of ordinary childcare proceedings is set out in s. 29(1) of the 1991 Act which provides as follows:-

> "Proceedings under Part III, IV or VI shall be heard otherwise than in public."

The relevant statutory provisions

Reporting of District Court Proceedings

9. There is a specific statutory mechanism for the attendance of researchers to report on District Court proceedings under the 1991 Act.

10. Section 29(1) of the 1991 Act provides:-

> "Proceedings under Part III, IV or VI shall be heard otherwise than in public".

11. Part III of the 1991 Act concerns emergency applications in the District Court. Part IV concerns applications for care orders and

supervision orders and Part VI concerns *inter alia* ancillary applications for directions for children who are in care.

12. Section 3 of the Child Care (Amendment) Act 2007 inserted subsections 29(5) as follows:-

> "(5) Nothing contained in this section shall operate to prohibit—
>
> (a) the preparation of a report of proceedings under Part III, IV or VI by—
> (i) a barrister or a solicitor,
>
> (ii) [deleted by s. 46(2)(a)(i) of the 2011 Act]
>
> (iii) a person falling within any other class of persons specified in regulations made under subsection (7) for the purposes of this subsection,
>
> (b) the publication of a report prepared in accordance with paragraph (a), or
>
> (c) the publication of the decision of any court in such proceedings,
>
> in accordance with rules of court, provided that the report or decision does not contain any information which would enable the parties to the proceedings or any child to which the proceedings relate to be identified and, accordingly, unless in the special circumstances of the matter the court, for reasons which shall be specified in the direction, otherwise directs, a person referred to in paragraph (a) may, for the purposes of preparing such a report —
>
> (i) attend the proceedings, and
>
> (ii) have access to any relevant court documents,
>
> subject to any directions the court may give in that behalf." (emphasis added)

13. Section 3 of the 2007 Act also inserted s. 29(7) which addresses the qualifications required for such researchers:-

> "(7) The Minister may, after consultation with the Minister for Justice, Equality and Law Reform, make regulations specifying a class of persons for the purposes of subsection (5) if the Minister is satisfied that the publication of reports prepared in accordance with subsection (5)(a) by persons falling within that class is likely to provide information which will assist in the better operation of this Act, in particular in relation to the care and protection of children."

14. The Minister has made Regulations pursuant to s. 29(7) which allow him to approve nominees of a number of different bodies, including the Free Legal Aid Centres Ltd. and the Economic and Social Research Institute, to report as envisaged pursuant to section 29(5). Free Legal Aid Centres Ltd. nominated the members of the CCLRP, including Dr. Carol Coulter, and the Minister has appointed those persons.

15. It is clear, therefore, that for District Court proceedings there is a statutory presumption in favour of allowing the CCLRP to attend court, inspect court documents and produce reports.

16. Further changes to the system of court reporting were introduced by s. 8 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, which inserts a new s. 29(5A) into the 1991 Act. It applies to proceedings referred to in s. 29(1) and allows for bona fide members of the press to attend such proceedings with the court having the power to make directions regarding same.

Reporting of High Court Proceedings under the Inherent Jurisdiction

17. Section 16 of the Children Act 2001 (hereinafter referred to as "the 2001 Act") introduced a statutory system for the detention of children in special care by the District Court. This was done by inserting a new Part IVA into the 1991 Act. Whilst these provisions were commenced, they were never operative in practice as the Minister never approved any special care units for the purposes of the then Part IVA. As a result, secure care proceedings were conducted under the High Court's inherent jurisdiction to vindicate the rights of children at risk.

18. As there was no formal statutory mechanism in respect of such proceedings, the ordinary constitutional rules applied. Article 34(1) of Bunreacht na hÉireann provides:-

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

19. However, various statutory provisions allowed the courts discretion to make an exception to the general constitutional rule. In applications for special care under the inherent jurisdiction, a practice developed whereby the court made orders prohibiting the publication of any material which would tend to identify a minor in respect of whom secure care proceedings were brought. This was ordinarily done pursuant to s. 45 of the Courts (Supplemental Provisions) Act 1961 (for lunacy and minor matters) and s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008 (for medical conditions) or more recently, pursuant to common law subsequent to the decision of the *Supreme Court in Sunday Newspapers v. Gilchrist* [2017] IESC 18, [2017] 2 I.R. 284.

20. In addition, s. 45 of the Courts (Supplemental Provisions) Act, 1961 enacted a discretionary power in the court to hear *inter alia* minor matters otherwise than in public:-

> "Justice maybe administered otherwise than in public in any of following cases …"

In practice, however, this discretion was rarely invoked, and a simple reporting restriction prohibiting the publication or broadcast of any matter which might identify the minor was made.

21. The nature of the orders made in the inherent jurisdiction proceedings was such that proceedings were, in effect, heard in open court subject to reporting restrictions. As the CCLRP protocol requires anonymised reporting, there was no difficulty with the CCLRP complying with the reporting restrictions order.

Reporting of High Court Proceedings under Part IVA of the 1991 Act

22. As already stated, the Child Care (Amendment) Act 2011 introduced a system for detention in special care by the High Court. The Act not only provided for a statutory system of detention in special care but also made many reforms to other aspects of the 1991 Act (not all of which have been commenced).

23. Section 10 of the 2011 Act substituted a new Part IVA for the one inserted by s. 16 of the 2011 Act.

24. The new Part IVA of the Act contains s. 23NH, which provides:-

> "Proceedings under this Part shall be heard otherwise than in public."

However, there is no equivalent provision in the new Part IVA to the provisions of s. 29(5) allowing for law reporting. Thus, there is no presumptive entitlement of the CCLRP to attend court for proceedings under the new statutory regime or to report on same.

Rules of the Superior Courts
25. The relevant Rules of the Superior Courts were amended with effect from 21st March, 2018 by the insertion of a new Order 65A entitled "Special Care of Children". Order 65A, rule 2 appears to provide for a judicial discretion as to attendance at hearings of special care proceedings (emphasis added):-

> 2.(1) Only officers of the Court, the parties and their legal representatives, witnesses and such other persons as the Court may allow shall be permitted to be present at the hearing of special care proceedings.
>
> (2) The Court may, if it thinks it proper to do so, order any witness who is not a party to the special care proceedings to leave the Court either until his or her evidence is required or after his or her evidence has been given."

26. Order 65A, rule 13(1) further provides as follows:-

> "A person referred to in section 29(5) of the 1991 Act intending to attend any special care proceedings in the Court to which the 1991 Act applies or to seek access to any relevant court documents, for the purpose of the preparation of a report of such proceedings, the publication of a report prepared in accordance with section 29(5)(a) and, where relevant, section 29(5A), of the 1991 Act or the publication of a decision of the Court in any such proceedings in accordance with section 29(5) and, where relevant, section 29(5A), shall, prior to or at the commencement of the hearing of any special care proceedings at which such person wishes to attend, identify himself or herself to the Court and apply for such directions as the Court may give under section 29(5) or section 29(5A) of the 1991 Act."

27. Order 65A, rule 13(1) purports to make provision for members of the press and researchers to apply to the court as if s. 29(5) of the 1991 Act applied. However, these provisions clearly do not apply and the relevant rule appears to be drafted on the basis of a legal error.

Issue to be Determined
28. The issue to be resolved in the within proceedings is whether as a matter of statutory construction s. 23NH of the 1991 Act, as amended, imposes a mandatory obligation that the proceedings be held in-camera, or whether the Court retains a residual discretion to permit the attendance of non-parties.

Position of the Parties to the Proceedings
29. The Child and Family Agency, the applicant in the within proceedings, does not object to the attendance at special care hearings by non-parties such as researchers, *bona fide* members of the press and reporting legal practitioners. However, it raises the issue as to whether or not the Court has jurisdiction to admit them in light of the new provisions which it contends significantly curtails the discretion of the court in this regard.

30. The respondent, who is the mother of the child the subject matter of the within proceedings and represented by the Legal Aid Board, agrees with and adopts the legal position of the Board in respect of the application of the in-camera rule under the new Part IVA regime.

31. The Legal Aid Board's position is that, whilst the new Part IVA regime contains a statutory requirement that secure care hearings be "otherwise than in public" (s. 23NH), this does not prevent the High Court from exercising its discretion to allow certain persons to be present at such a hearing. It posits that the discretion may be one to be used sparingly and in circumstances where the primary consideration must be to ensure that the privacy rights of the parties are protected.

32. The guardian ad litem is supportive of the application and submits that s. 23NH ought to be interpreted in a constitutional and ECHR compliant manner.

Relevant Authorities
33. Given that the amendments to s. 29 of the 1991 Act (which have the effect of relaxing the in-camera rule) do not apply to High Court special care proceedings, it is necessary to turn to the jurisprudence of the Superior Courts in assessing the scope of the power of the courts to relax the in-camera rule.

34. There are two leading Irish authorities on the in-camera rule in childcare proceedings. Both adopt an interpretative approach which is strongly in favour of the existence of a power to lift the in-camera rule.

35. In *Eastern Health Board v. Fitness to Practice Committee* [1998] 3 I.R. 399, Barr J. confirmed unambiguously that the District Court had the power to lift the in-camera rule and set out the considerations which should be taken into account in so doing. That case concerned disciplinary proceedings taken by the Fitness to Practice Committee against a doctor who had assessed a number of children who were the subject of in-camera proceedings in the District Court and the High Court and who were in the care of the Eastern Health Board. The Eastern Health Board judicially reviewed orders for discovery made by the Fitness to Practice Committee against the Board seeking discovery of certain in-camera documentation.

36. Barr J. directed the lifting of the rule to provide in-camera documentation to the Medical Council on condition that its proceedings were heard in-camera and other measures were taken to protect the identities of the children and their parents.

37. In *Health Service Executive v. McAnaspie* [2012] 1 I.R. 548, it was held that there was no absolute embargo on the publication of information from in-camera proceedings and the court was ultimately bound by the concept that the paramount consideration is to do justice. In his judgment Birmingham J. quotes Barr J. in *Re: R. Ltd.*:-

> "In considering a conflict between the public interest or the interest of a person seeking disclosure on the one hand, and the interest of an individual in retaining the full benefit of the in-camera rule on the other hand, the court is bound by the concept that the paramount consideration is to do justice."

38. In *McAnaspie* the father of the child sought to lift the rule in order to instruct a firm of solicitors in relation to a negligence action against the HSE in circumstances where the child had been murdered whilst in the care of the State. The guardian ad litem had fears that if information was to be published it would greatly increase the chances of the child being identified. Further, the Irish Times sought to report on the application by the next of kin.

39. However, Birmingham J. was "… satisfied that in considering the welfare of the child as the first and paramount consideration, that the magnitude of the risk arising from the granting of the application is so low that to refuse it on that basis would be disproportionate and would not achieve justice."

40. Overall, the old statutory regime allowed for several ways for the in-camera rule to be lifted in relation to children, provided that not doing so would be contrary to the paramount consideration to do justice.

41. The difficulty in this case is that s. 23NH does not have the provisions similar to s. 29(5) of the 1991 Act. It is argued, therefore, on behalf of the Child and Family Agency, that by application of the *maxim expressio unius, exclusio alterius* that the Court should not or cannot lift the in-camera rule to the benefit of a researcher or a member of the press.

42. In *Gilchrist v. Sunday Newspapers Ltd*. [2017] 2 I.R. 284, O'Donnell J. at para. 313 outlined the approach to be adopted as follows:-

> "Where the Oireachtas has considered it appropriate to permit the possibility of a trial in private in respect of certain subject matters, that is an important legislative judgment on the importance of the subject matter."

43. Having regard to the foregoing, it is submitted on behalf of the Child and Family Agency that the Oireachtas has, in fact, enacted a provision providing for "mandatory privacy" in respect of special care hearings, and in view of the different regime enacted in respect of care hearings, it must be very questionable whether parties such as researchers, members of the press and legal practitioners are entitled to attend and report on the former category of hearings.

44. Whilst it is clear there remains a separate strand of case law where a more restrictive approach is taken as outlined in the authorities relied upon by the Child and Family Agency, that case law is concerned with private family law proceedings and not public law childcare proceedings and must therefore be distinguished on that basis.

45. A recent case in this regard is *AB v. CD* [2013] 3 I.R. 383, in which the High Court refused to permit the media to attend the hearing of a motion in judicial separation proceedings on the basis that it had no discretion to do so. It is of note that Keane J. expressly referred to the divergent *McAnaspie* line of case law (at para. 34) as follows:-

> "As already noted, while the present case involves minor children, the proceedings are brought under the Judicial Separation and Family Law Reform Act 1989 and the Family Law Act 1995, and family life and privacy interests are plainly directly engaged, beyond the obvious privacy interests of the minor children affected. Accordingly, in my view the present application is more properly governed by the approach adopted by Laffoy J. in *M.P. v. A.P. (Practice: in camera)* [1996] 1 I.R. 144 and reflected in the decisions of Murphy J. in *R.M. v. D.M. (Practice: in camera)* [2000] 3 I.R. 373 and Macken J. in *R.D. v. McGuinness* [1999] 2 I.R. 411, than by that adopted by Birmingham J. in *Health Service Executive v. McAnaspie* [2011] IEHC 477, [2012] 1 I.R. 548."

The relevant ECHR provisions

46. Article 6 of the European Convention on Human Rights protects the right to a fair trial. Its provisions relevant for the present purposes provide:-

> "In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing … Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial … where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

47. Two judgments of the ECHR have considered this provision's application to in-camera restrictions. In *B. and P. v. United Kingdom* (applications nos. 36337/97 and 35974/97, judgment of 24 April, 2001) the proceedings concerned two private law disputes under the UK Children Act 1989 regarding the residence of children. The Children Act 1989 had a presumption that proceedings under it would be in private, but afforded the court discretion to have matters heard publicly. The applicants submitted that the presumption should have been for a public hearing, with the exception being that the matters are heard in private. The ECHR rejected the applicants' claims and held as follows:-

> "The applicants submit that the presumption in favour of a private hearing in cases under the Children Act should be reversed. However, while the Court agrees that Article 6 § 1 states a general rule that civil proceedings, *inter alia*, should take place in public, it does not find it inconsistent with this provision for a State to designate an entire class of cases as an exception to the general rule where considered necessary in the interests of morals, public order or national security or where required by the interests of morals, public order or national security or where required by the interests of juveniles or the protection of the private life of the parties (see *Campbell and Fell v. the United Kingdom*, judgment of 28 June, 1984, Series A no. 80, p. 42, §§ 87-88), *although the need for such a measure must always be subject to the Court's control* (see, for example, *Riepan v. Austria*, no. 35115/97, § 34, ECHR 2000-XII). English procedural law can therefore be seen as a specific reflection of the general exceptions provided for in Article 6 § 1." [Emphasis added]

48. Thus, it is submitted that s. 29(1) of the 1991 Act laying down the in-camera rule will violate the ECHR, unless it is "always subject to the Court's control", that is to say that it can be lifted by the court in appropriate cases.

49. In *Moser v. Austria*, (Application No. 12643/02, judgment of 21 September, 2006), the court was concerned with a challenge to Austrian childcare proceedings in circumstances where Austrian law did not provide that the in-camera rule could be lifted. The ECHR held that it was:-

> "inconsistent with Article 6 § 1 for a State to designate an entire class of cases as an exception to the general rule of public hearings where considered necessary in the interests of morals, public order or national security or where required by the interests of juveniles or the protection of the private life of the parties."

50. It is clear therefore that the reasons for the imposition of the in-camera rule must be subject to particularly careful scrutiny in childcare cases.

51. Section 2 of the European Convention on Human Rights Act 2003 further states that:-

> "In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

52. It is therefore argued, on behalf of the guardian ad litem, that to deliver a Convention compliant interpretation, Irish in-camera restrictions – such as those in s. 23NH – should not be interpreted in a manner which displaces the power of the court to lift the in-camera rule.

Further Constitutional Considerations
53. Article 42A of the Constitution, ratified since the 28th April, 2015, recognises and affirms the natural and imprescriptible rights of all children. Article 42A.4.1 further provides as follows:-

> Provision shall be made by law that in the resolution of all proceedings—
>
> > i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
> >
> > ii concerning the adoption, guardianship or custody of, or access to, any child,
>
> the best interests of the child shall be the paramount consideration."

54. It is clear therefore that the best interests of the child must be the paramount consideration of the Court in all decisions affecting a child in care proceedings and child protection cases.

Conclusions
55. Having considered all of the evidence in this case and when everything is drawn together and weighed, the Court is satisfied that it retains discretion to lift the in-camera rule and that the provisions of s. 23NH of the 1991 Act, as amended, do not impose a mandatory obligation that such proceedings be held in-camera. In *HSE v. McAnaspie and Eastern Health Board v. Fitness to Practice Committee*, it was held that the wording "shall be heard otherwise than in public" did not oust the power of the court to lift the in-camera rule and I am satisfied that this is the correct approach to adopt.

56. Further, it is clear that the Court must have a power to lift the in-camera rule in childcare proceedings in order to deliver an ECHR compliant interpretation.

57. The final issue, therefore, the Court has to determine is whether it is in the best interests of the child to lift the in-camera rule to allow for reporting of the proceedings. Clearly the Court is anxious to ensure that the necessary privacy rights of the minor are protected whilst at the same time ensuring that the public interest in understanding how a public body discharges its function is served. The necessity for openness and transparency into how the Child and Family Agency discharges its functions is all the more pertinent having regard to the statutory duties that have now been imposed on it by virtue of the new legislative provisions. Clearly there is a public interest in the dissemination of relevant information concerning such proceedings and the rights of the children concerned. In all the circumstances, therefore, I am satisfied that the best interests of the child are met by acceding to the application of the CCLRP and the academic researcher, subject to the privacy rights of the child being protected by anonymising any reporting and publications.