THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 2 JR]

BETWEEN

R.

APPLICANT

AND

CHILD AND FAMILY AGENCY AND DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice MacGrath delivered on the 31st day of July, 2018.

1. By application made on 2nd January, 2017, the applicant seeks:-

> (i) An order by way of judicial review, vacating all District Court emergency care orders, interim care orders, and care orders created between 18th November, 2016 to 28th November, 2017.
>
> (ii) An order to return her three daughters to her care.
>
> (iii) Orders and injunctions preventing the respondents from further harassment.

2. The grounds upon which the relief is sought are that:-

> (a) the care orders were erroneous and based on details known to be inaccurate;
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> (b) due process was not followed by the respondents and the acting judges;
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> (c) the detention of the applicant's daughters by the respondents' collusion was unlawful and amounted to false imprisonment;
>
> (d) affidavits sworn on behalf of the respondents contained details known to be untrue;
>
> (e) it is paramount that judicial review be lodged to consider the lawfulness of the detention of the applicant's three children and to prevent further miscarriage of justice;
>
> (f) the applicant is fully competent to care for her children, and that her daughters wish to return home, that they are being detained against their will, that the applicant as the mother of the children is the most suitable person to look after them; and their best interests are served by being cared for by their mother.

3. While the above sets out the reliefs sought in the notice of motion and in the statement of grounds and while it is alleged that the District Court judge when making certain orders erred in law in making ex parte orders and in appointing a social worker, in fact, in the grounding affidavit, it is averred that the relief which is sought is against the decision of the Circuit Court judge on appeal and in respect of the orders made by him on 26th September, 2017. All District Court orders were appealed to the Circuit Court. There is also an allegation that there was collusion between the respondent and the gardaí.

4. In her first affidavit, sworn on 21st December, 2017, the applicant makes numerous complaints against the respondents, including that the Circuit Court judge, on hearing appeals in the proceedings which were brought by the Child and Family Agency, struck out her appeals and affirmed the orders of the District Court judge, made on 29th August, 2017. Two orders of a similar nature were made in respect of two of the children, the third child having reached full age, and no longer being the subject of a care order.

5. The basis upon which the applicant contends that she is entitled to apply for judicial review is that it is contended, *inter alia*, that the Circuit Court orders were erroneous as no matter had been "*adequately considered*". At para. 15 of her affidavit, the applicant avers that she did not receive a fair hearing in the Circuit Court and that the Circuit Court judge affirmed all District Court orders after she had asked him to recuse himself, in the light of what she contends was an unfair Circuit Court hearing in respect of previous appeals in respect of which orders were made on 7th March, 2017. She avers that she was not given the opportunity of ensuring that ten witnesses were present and that in consequence her daughters have been unlawfully detained. As against judges in both courts she asserts that they erred in law in their failure to base their orders on considered facts rather than dubious opinion. No further detail is averred to in that affidavit.

6. An *ex parte* application was made by the applicant on 2nd January, 2018, seeking leave to apply for judicial review. While the application was not brought within the time limit set forth in O. 84, r. 21(1) of the Rules of the Superior Courts, the applicant emphasises that the final date for lodging the claim fell during the Christmas vacation. An order was made by Haughton J. directing that the respondent should be put on notice to address the court, *inter alia*, on the question of whether an extension of time should be granted to bring the application for judicial review.

7. By further affidavit sworn on 11th January, 2018, the applicant outlines a history of her dealings with the respondents extending back to 2013 and specifically confirms at para. 2 that this application for judicial review relates to the Circuit Court orders. She makes various allegations regarding the actions and conduct of An Garda Síochána in June and July, 2017, including that five gardaí surrounded her car during the course of a school pick up. She videotaped the actions of the gardaí on that occasion. She alleges that her daughters were then abducted and falsely imprisoned by gardaí. The applicant also alleges that on 29th July, 2017 and 30th July, 2017, certain items of her property were unlawfully taken on foot of what she describes as erroneous warrants. She avers to investigations being conducted in a number of locations and being used as erroneous grounds to detain her daughters.

8. At para. 30 of the affidavit, Ms R avers that on 26th September, 2017 the Circuit Court affirmed the District Court orders despite

the Circuit Court judge not considering the facts and not hearing evidence. She was present at the hearing and requested the judge to recuse himself. He refused. She also reiterates that the course of justice was perverted by the judge's failure to "*ensure attendance of ten witnesses".* She informed the Circuit Court judge that she had "*no option but to abandon this appeal hearing and will use DAR recordings in Judicial Review hearing in the High Court".*

9. In addition, she contends that she was required to take this course of action because the first respondent had arranged a second court hearing at a District Court venue some significant distance away. That hearing had been arranged for the purpose of extending interim care orders in respect of two of her daughters. It is not averred that she informed the Circuit Court judge of the conflicting hearings. In any event, she was present at least for the commencement of the hearing where the orders the subject of this application for leave for judicial review were subsequently made.

10. The second named respondent, the Director of Public Prosecutions ("*the DPP*"), was placed on notice of this application in accordance with the order of Haughton J. A replying affidavit has not been filed. On the hearing of this application, counsel for the DPP submitted that the DPP had been incorrectly joined as a respondent and that there was no legal basis for such joinder. It is submitted that in the notice of motion no particular order has been sought as against the DPP such as one might seek by way of judicial review.

11. While the applicant seeks an order vacating all District Court emergency care orders, interim care orders and care orders created between 18th November, 2016 and 28th November, 2017, as stated above, the specific relief which she refers to in her grounding affidavit concerns three orders of Judge Ó Donnabháin made on 26th September, 2017, proceedings bearing record numbers FA00137/2017, FA00138/2017 and FA00072/2017 whereby he dismissed the plaintiff's appeals from eighteen District Court orders to which those appeals related. These were emergency care orders made in respect of two of the applicant's daughters on 16th June, 2017; interim care orders made in respect of both of the children dated 20th June, 2017; orders for the appointment of a *guardian ad litem* in respect of both of the children dated 20th June, 2017; an interim care order extension in respect of both children dated 23rd June, 2017; a further interim care order extension in respect of both of the children dated 21st July, 2017; an interim care order extension in respect of both of the children dated 8th August, 2017; an interim care order extension made in respect of both of the children dated 29th August, 2017; orders appointing a *guardian ad litem* in respect of both of the children dated 12th April, 2017 and directions orders in respect of both of the children dated 12th April, 2017. The orders were granted pursuant to the Child Care Act 1991, as amended.

Replying affidavit of the first respondent

12. In a replying affidavit sworn on 8th February, 2018, Ms. Lydia Looney, social worker with the first respondent, raises as a preliminary issue that the application for leave to seek judicial review is out of time. She avers that the applicant has failed to outline a good and sufficient reason for extending the time to seek leave or that her failure to do so was because of circumstances beyond her control or that could not reasonably have been anticipated.

13. Ms. Looney also avers that at the commencement of the hearing of the appeals in the Circuit Court on 26th September, 2017, the applicant applied to the Circuit Court judge to recuse himself, which application was not acceded to. The applicant then walked out of the hearing and the Circuit Court judge proceeded to affirm the District Court orders and to dismiss her three appeals in her absence. Ms. Looney avers that there can not be any question of a want of fair procedures at hearing and in the court's determination, and that, in any event, the applicant has not raised same as an issue in the within proceedings. Ms. Looney states that the applicant has failed to establish an arguable case in law for the relief sought. She further avers that on 9th October, 2017, the applicant also served on the respondent a plenary summons, and that it appears from the general indorsement of claim that that the applicant is seeking damages for alleged negligence on the part of the respondent and also the return of her daughters. A statement of claim has yet to be delivered.

14. Order 84, rule 21(3) of the Rules of the Superior Courts deals with extensions of time. It provides that notwithstanding rule 21(1), the court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made:

> "*...but the Court shall only extend such period if it is satisfied that:–*
>
> *(a) there is good and sufficient reason for doing so, and*
>
> *(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either–*
>
> *(i) were outside the control of, or*
>
> *(ii) could not reasonably have been anticipated by the applicant for such extension."*

15. In her affidavit sworn on 11th January, 2018, the applicant recounts attempts made by her to lodge the application after her affidavit was sworn on 21st December, 2017. She avers that this was the first opportunity she had to lodge the application, in view of "*continuing trauma, abuse and neglect*". I am satisfied that the fact that the applicant had sworn an affidavit to ground her application for judicial review within the three month period is evidence of intention to bring the review within that period. While it is questionable as to whether all of the circumstances regarding the timing of the making of the application were outside the control of the applicant, nevertheless, on balance and taking into account that the Christmas period intervened, I propose to make an order extending the time within which to bring these judicial review proceedings, but only in so far as they concern a challenge to the orders of the Circuit Court judge made on 26th September, 2017.

16. In considering the test which the court must apply in determining whether to grant leave to apply for judicial review, the court must be satisfied that the facts relied upon establish, on a *prima facie* basis, an arguable case at law. In this regard the applicant's case should be taken at its height. In *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374, Finlay C.J. stated, *inter alia*, at p. 377:-

> *"It is, I am satisfied, desirable before considering the specific issues in this case to set out in short form what appears to be the necessary ingredients which an applicant must satisfy in order to obtain liberty of the court to issue judicial review proceedings. An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters: —*
>
> *(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).*

(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.

(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks."

Denham J. observed at p. 381 that: -

> *"The burden of proof on an applicant to obtain liberty to apply for judicial review under the Rules of the Superior Courts O. 84, r. 20 is light. The applicant is required to establish that he has made out a statable case, an arguable case in law."*

Denham J. quoted with approval *dicta* of Lord Diplock in *R. v. Inland Revenue Commissioners*, *Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617 at pp. 643 and 644:-

> *"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."*

Denham J. described this as a preliminary filtering process for which the applicant is required to establish a *prima facie* case.

17. Another principle which must be considered is that an application such as this must be based on precise, particular grounds which must not be vague or based on assertions made in general terms. Order 84, rule 20(3) provides that:-

> *"It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule 2(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."*

18. With regard to the specificity or particularity with which a claim ought to be made, in *A.P. v. Director of Public Prosecutions* [2011] 1 I.R. 729 Murray C.J. stated:-

> *"5. In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought.*
>
> *6. It is not uncommon in many such applications that some grounds, and in particular the ultimate ground, upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted, particularly when such a ground is invariably accompanied by a list of more specific grounds."*

19. In *Malone v. Mayo County Council* [2017] IEHC 300 it was held by Cregan J. that the grounds pleaded in that case were vague and did not provide clarity to allow the parties or the court to understand the nature of the case being made.

The claim against the second respondent

20. Applying the above principles to the case made by the applicant against the second respondent, it is to be observed that the acts and omissions relied upon to maintain a claim for judicial review against the DPP concern, in my view, operational activities of An Garda Síochána. These include the alleged joint action of five gardaí during a school pick up on 16th June, 2017, the alleged deliberate blocking of the applicant's car in order to detain her and her two daughters in full view of her daughters' friends and family and the failure on the part of members of An Garda Síochána to console her daughters. Certain of these incidents which have been videotaped have been exhibited on this application and viewed by the Court. It is further alleged that the gardaí unlawfully took property including a computer and telephones. The applicant contends that the DPP attempted to criminalise and defame her and her daughters "*by creating further false allegations to rob Applicant's … property on 29 July 2017*" when gardaí returned the applicant's daughter to the first respondent's care.

21. Thus the factual basis which the applicant relies upon relates primarily and significantly to operational matters concerning individual members of An Garda Síochána, rather than to the role of the DPP in the prosecution of an offence.

22. In my view the actions relied upon as against the DPP to ground the application can not, on the facts averred to, as a matter of law, be laid against the Director of Public Prosecutions who is not responsible, vicariously or otherwise, for the operational actions of An Garda Síochána in circumstances such as this; and in any event cannot found an application such as this. No authority has been cited to the contrary and no factual basis has been averred to in support such proposition in this case. If there is a liability for the actions of An Garda Síochána, and the Court expresses no opinion on this, it does not lie against the DPP and in the circumstances I am not satisfied that the applicant has made out a *prima facie* stateable case or has discharged the burden of proof which is imposed upon her in an application such as this, as against the second respondent.

The claim against the first respondent

23. The applicant challenges the decision and actions of the Circuit and District Court judges. As against the Circuit Court judge she alleges bias – essentially because of a previous decision, he should have recused himself. The first named respondent relies upon the decision of the Supreme Court in *Orange Ltd v. Director of Telecommunications (No. 2)* [2000] 4 I.R. 159 that bias cannot be established from the nature of the decision made. In *Orange*, Keane C.J. stated at p. 186:-

> *"While the test for determining whether a decision must be set aside on the ground of objective bias has been stated in different ways from time to time by the courts in the United Kingdom, there is, in the light of the two authorities to which I have referred, (i.e. R. v. Sussex Justices, Ex. p. McCarthy [1924] 1 K.B. 256., Radio One Limerick Ltd. v. I.R.T.C. [1997] 2 I.R. 291.) no room for doubt as to the applicable test in this country: it is that the decision will be set aside on the ground of objective bias where there is a reasonable apprehension or suspicion that the decision maker might have*

been biased, i.e. where it is found that, although there was no actual bias, there is an appearance of bias."

24. The Supreme Court expressed the view that such bias could not be established from the nature of a decision made, as the allegation of bias had to be made on foot of circumstances outside the actual decisions made in the case itself. In this regard, Geoghegan J., addressing the matter at some length, observed at p. 251 *et seq*:-

> *"It seems clear from the case law in Ireland and England that an allegation of bias must be made on foot of circumstances outside the actual decisions made in the case itself. I would accept that in a situation where there was an arguable case of bias based on traditional proofs the added factor of cumulative wrong decisions all one way might be tantamount to corroboration of alleged bias and be a relevant factor in that restricted sense in the proving of bias. But of itself and by itself it can never be evidence of bias.*
>
> *What the authorities seem to have established is that there are in effect three different situations where bias may arise.*
>
> > *(1) The rare case of proved actual bias. For such bias to be established it would be necessary actually to prove that the judge or the tribunal or the adjudicator or whoever the person might be, was deliberately setting out to mark or hold against a particular party irrespective of the evidence.*
> >
> > *(2) A situation of apparent bias where the adjudicator has a proprietary or some other definite personal interest in the outcome of the proceeding competition or other matter on which he is adjudicating. In that case there is a presumption of bias without further proof.*
> >
> > *(3) Even in cases where there is no evidence of actual bias and no evidence of the adjudicator having any proprietary or other interest in the outcome of the matter, there will still be held to be apparent bias if a reasonable person might have apprehended that there might be bias because of some particular proven circumstance external to the matters to be decided in the case such as for instance a family relationship in circumstances where objection may be taken O'Reilly v. Cassidy [1995] 1 I.L.R.M. 306, or the judge having been involved in a different capacity in matters which were contentious in Dublin Well Woman Centre Limited v. Ireland [1995] 1 I.L.R.M. 408, or where there was evidence of prejudgment by a person adjudicating O'Neill v. Beaumont Hospital Board [1990] I.L.R.M. 419. The law of bias has been usefully reviewed by the English Court of Appeal in Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. [2000] 2. W.L.R. 870. The issue of bias was decided in five appeals heard together by a court consisting of Lord Bingham of Cornhill C.J., Lord Woolf M.R. and Sir Richard Scott V-C. In the judgment of the court delivered by Lord Bingham after dealing with the situation of proven actual bias and the cases where the presumption of bias arises by reason of a proprietary or other interest, the judgment goes on to observe at p. 883:-*
> >
> > > 'In practice, the most effective guarantee of the fundamental right recognised at the outset of this judgment is afforded not (for reasons already given) by the rules which provide for disqualification on grounds of actual bias, nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves, in advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes there was a real danger (or possibility) of bias.' "

Geoghegan J. continued at p. 254:-

> *"In every single instance Lord Bingham is talking about some outside fact which could conceivably be seen influencing the judge. There is not the slightest suggestion that bias could ever be established as a consequence simply of the decisions of the judge."*

25. On the application of these principles, it appears to me, as a matter of law, the fact that the Circuit Court judge made a certain adverse decision or decisions on a previous occasion is not, in and of itself, evidence of bias. As the gravamen of the applicant's complaint is one of bias allegedly established by virtue of a previous decision of the judge, in my view, on the basis of the authorities referred to above, such an allegation or complaint can not and does not establish or evidence bias sufficient to establish a *prima facie* arguable or stateable case.

26. The applicant also alleges unfairness because the respondent had arranged a District Court hearing some significant distance away on the same date. This hearing concerned the extension of interim orders in respect of two of her daughters. It is undoubtedly true that the applicant was required to attend two courts on the same day. However, Ms. Kelleher, solicitor, in an affidavit sworn on 18th June, 2018 makes it clear that she too was in both courts and had made arrangements with both the District and the Circuit Courts that the Circuit Court appeal would proceed first and that the District Court hearing would stand until the hearing of the Circuit Court appeal was completed. She confirmed that she wrote to the applicant in this regard. While the applicant disputes whether she received this letter in time, the fact of the matter is that arrangements had been made to ensure that both courts would not be sitting and dealing with the applicant's case at the same time.

27. There is nothing in the affidavits to suggest that any difficulty in this regard was explained to the court or that the applicant was denied the opportunity of so doing. The affidavit evidence points to the fact that the applicant was present in court but decided not to participate because of her perception of bias on the part of the judge. It was the decision of the applicant herself to abandon the proceedings. At para. 31 of her grounding affidavit she avers:-

> *"I informed him 'I have no option but to abandon this appeal hearing and will use DAR recordings in Judicial Review hearing in the High Court, whereby all twelve witnesses will be summoned to hearings'… ".*

28. Regarding the applicant's complaint that the judge failed to ensure the attendance of witnesses, in her affidavit sworn on 11th January, 2018, the applicant exhibits a letter written to the solicitors for the first respondent which is accepted by the applicant to be incorrectly type dated 14th September, 2017 but refers to a court hearing on "*tomorrow 26 September 2017",* requesting the attendance of ten witnesses. It also records that her daughters had been summoned to attend. At para. 13 of her first affidavit it is averred that the respondent obstructed their attendance. No further detail is provided in the grounding affidavit. It was not a ground particularly specified in the statement of grounds.

29. Nevertheless, on an adjourned hearing date the Court afforded the applicant an opportunity to explain and address this allegation. In an extensive affidavit sworn on 14th June, 2018 the applicant expanded on this issue. It must be said that this affidavit is very extensive, repeats many of the allegations previously made and recorded above and addresses new and fresh matters which are not, nor could they be the subject of this application. At para. 17 she avers that she informed the Circuit Court judge that ten Child and Family Agency witnesses did not appear to be in attendance at the Circuit Court hearing. This, she avers, is something which occurred not only on 7th March, 2017, but also on 26th September, 2017 at the hearing in respect of which this challenge has been brought.

30. This allegation is addressed in a replying affidavit of a Catherine Kelleher, solicitor, sworn on 18th June, 2018, where at para. 6 she avers that, at the callover, the applicant stated that she did not wish the appeal to proceed until such time as her twelve witnesses were present and she stated that just two of the people to whom she had issued subpoenas were in court. Ms. Kelleher advised the court that she would address those matters in camera, as the callover was taking place in open court. There were two garda witnesses present, one of whom had travelled from Mullingar, and Ms. Kelleher advised Judge Ó Donnabháin of this. At para. 7 of her affidavit, Ms. Kelleher avers that when the case was called the applicant advised Judge Ó Donnabháin that there were witnesses missing and that she wanted the witnesses brought into court for her appeals.

31. At that stage, the Circuit Court judge stated that he was going to hear an outline of the case and requested Ms. Kelleher to outline the circumstances. These were outlined briefly. The applicant took issue with the fact that Ms. Kelleher was requested to address the court first. It was at this stage that the applicant requested the judge to recuse himself, which he declined to do. Ms. Kelleher states that when it became clear that Judge Ó Donnabháin was not going to recuse himself and that he would proceed to hear the appeals, the applicant stated that she wished to have the appeal deferred and she left the court while the judge was speaking.

32. While there may be some minor differences of recall, in substance, the affidavit evidence of the applicant and the affidavit evidence of Ms. Kelleher do not materially diverge in relation to the issue of witness attendance and how that matter was aired in court.

33. It is important to record that on the adjourned and final day of hearing of this application, the applicant advised this Court that she made no application to the court in respect of the subpoenas or the alleged failure on the part of witnesses to answer them. In fact, it is clear from the affidavits that once the Circuit Court judge indicated that he would hear the appeals, despite the application to recuse himself, the applicant then left court. Even though the matter of witness was addressed in a general manner before the court, given the actions of the applicant in leaving the court, and, as she has admitted, in not making any application to the judge in respect of the subpoenas and in depriving herself of the opportunity to do so, I do not believe that on the facts she has made out an arguable case for judicial review under this heading.

34. In the circumstances, I must refuse the application for leave to apply for judicial review.