Neutral Citation [2016] IEHC 756

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 490 JR]

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

BETWEEN

MM, MM (A MINOR SUING THROUGH HIS PARENT / NEXT FRIEND MM) AND MM (A MINOR SUING THROUGH HIS PARENT / NEXT FRIEND MM)

APPLICANTS

AND

THE RELEVANT CIRCUIT COURT JUDGE

(AS SUBSTITUTED)

THE CHILD AND FAMILY AGENCY (FORMERLY THE HEALTH SERVICE EXECUTIVE)

RESPONDENTS

AND

(BY ORDER)

MIRIAM LYNE

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 30th day of November, 2016.

1. This judgment is given in an application for costs by the applicants and the notice party in this and two other applications for judicial review brought by the first applicant and two of her children, both of whom are in the care of the State under the Child Care Act 1991 ("the Act of 1991").

2. Briefly, the applications for judicial review were as follows:

3. In proceedings bearing record no. 2015/490 JR in which I gave judgment on 29th July, 2016 [2016] IEHC 449, the applicants sought judicial review by way of a declaration that the Circuit Court is obliged to provide a written record of its judgments in circumstances where the DAR recording of the child care proceedings in the Circuit Court was not available.

4. The relief was refused on a number of grounds and in the concluding paragraph I said as follows:

> *"49. For all of these reasons I propose to refuse the relief sought on the grounds that the application is out of time, that the relief sought is futile, would not benefit the applicants and one which in my discretion I consider to be pointless, and because I consider that the interests of justice do not otherwise require me to make the order."*

5. In the second proceedings bearing record number 2015/497 JR, an order was sought quashing a decision of the District Court made on 25th May, 2015 that the guardian *ad litem* appointed by that court some four years previously be entitled to "act as a party" in the care proceedings. The grounds on which relief was sought are identified at paragraphs 7 – 12 of my judgment [2016] IEHC 450.

6. That application for judicial review was refused partly because the applicants were well out of time to seek an order of *certiorari* quashing the appointment of a guardian *ad litem* on 27th October, 2011, nearly four years before the proceedings were commenced.

7. Concluded my judgment as follows:

> "50. I consider that the relief sought by the applicant in these proceedings in regards to the appointment of the guardian *ad litem* are a collateral attack on the conduct of the hearing before the District and Circuit Courts, and on the judgments of each of those courts, and I do not propose making orders in those circumstances."

8. I adjourned the delivery of judgment for a period with regards to one issue that arose in those proceedings, namely:

> "(a) A declaration that there is no lawful authority for the jointure of a guardian *ad litem* as a party to proceedings under the Act of 1991.
>
> (b) A declaration that as a guardian *ad litem* is merely a potential witness, that there is no lawful basis for permitting him/her to either examine or cross-examine witnesses which make legal submissions to the court, and that the sole permitted role is to convey to the court what she or he believes to be the views of the child, or matters that are in that child's best interest."

9. I adjourned for further consideration the delivery of judgment on the precise role the guardian *ad litem* was entitled to play in the proceedings under the Act of 1991, because I was concerned that future participation of the guardian *ad litem* in the District Court case was vulnerable to challenge. I explained the reason for this as the "enthusiastic" legal representation by junior and senior counsel in a very large number of District Court hearings in the child care proceedings and that a more detailed consideration of the single question regarding the nature of the role to be played by the guardian *ad litem* might "obviate the need for future application for judicial review and/or appeal with regard to that point alone", because the interests of the children required that there be an end to the lengthy and contentious litigation regarding their care.

10. I then delivered my judgment on that point alone by way of supplemental *ex tempore* ruling on 14th October, 2016, the same day I delivered judgment in another case to which I made reference, namely *A.O'D v. Judge O'Leary* [2016] IEHC 555.

11. The declaration was for the reasons therein set out.

12. In the third application bearing record number 2015/526 JR the applicants sought judicial review in relation to an issue of the access to be exercised by the mother to her son, the second named applicant. That was an application for leave to bring judicial review which was refused in a written judgement [2016] IEHC 451 for the following reason:

> "22. … [I]t is outside my jurisdiction to make any order directed to the CFA with regard to the management of access as I have no evidence before me, nor could I have, on an application where the jurisdiction invoked is judicial review, on which I could coherently make a finding of fact with regard to how access must best be regulated in the interest of the rights of the child.

The costs of the three applications

13. Counsel for the applicants seeks the costs of each of the three judicial reviews against the Child and Family Agency (the "CFA"). This is notwithstanding that the applicants were not successful in obtaining any of the reliefs sought.

14. It is argued that the first applicant, the mother, is impecunious, although no evidence was adduced, either at the hearing of the substantive case or at the hearing of the costs issue, that this was so. As I have already noted, the applicants were represented by senior and junior counsel in very many of the over 40 hearings in the District Court, and at the hearings in the High Court. No evidence was adduced that the first applicant had sought and been refused legal aid, that she might not have qualified for legal aid for some reason, or that she otherwise found herself in a position that she had no option but to instruct private solicitors and counsel. I do not consider the impecuniosity of the applicants is a reason to award costs.

15. The primary argument made by the applicants is that the litigation is "*sui generis*" and was one in which the rights of a parent and child regarding their ongoing relationship was sought to be established.

16. It can scarcely be doubted that child care proceedings are to an extent *sui generis* and uniquely different, as is clear from the judgment of O'Malley J. in *HSE v. O.A.* [2013] IEHC 172, [2013] 3 I.R. 287 and the Supreme Court decision in *Child and Family Agency v. O.A.* [2015] IESC 52, where MacMenamin J. identified the difficulty in assisting and representing clients in child care cases, and the high degree of "skill, sensitivity and patience" required. Both O'Malley J. and MacMenamin J. noted the somewhat inquisitorial role played by the judge. Nonetheless, both also noted that the proceedings in the District Court under the Act of 1991 had to be conducted in accordance with established principles, and that they were not wholly inquisitorial, nor so different as to fall outside the range of proceedings that normally come before a court.

17. That child care proceedings are difficult and require a degree of skill, and that they take a form which is somewhat different from that engaged in normal civil or even public law litigation, does not mean that an application for judicial review relating to child care proceedings must be treated in any different way from an application for judicial review in any other matter of public law. The applicants in each of these cases sought judicial review of various orders and directions given by the District and Circuit Courts in the course of this very long and unfortunate child care matter. In all respects the applicants were unsuccessful.

18. No rule or authority has been identified which suggests that all litigation in which the rights of parties arising from the constitutional protection of the family, of children or of the bond between mother and child is entitled to be funded by the State, irrespective of the nature of the litigation or of the points raised. There is an obvious reason why the courts could not consider that such a rule could be found at common law, and the proposition advanced by counsel for the applicants is one of such broad policy as would involve a court engaging in a matter of policy and the allocation of resources that would, as suggested by MacMenamin J. in *Child and Family Agency v. O.A.*, call into question the principle of separation of powers (para. 45 of his judgment).

19. I consider it relevant to the exercise of my discretion, too, that the applicants failed to obtain judicial review on any of the grounds sought because in the first of the cases, 2015/490 JR the applicants were several years out of time. In the second and third judicial reviews the applications were misconceived and required me to engage in matters outside the range of matters which could be considered by a judge hearing an application for judicial review and the quotation at paragraph 12 above highlights the degree to which the applicants had sought that the High Court would by way of judicial review engage in questions regarding access to children, a matter quintessentially one where evidence is required.

20. The applicants argue that part of the litigation, specifically the question of the role of the guardian *ad litem* in child care proceedings generally, did raise a question of general and special legal importance. I have considered this question in my judgment on costs in *A. O'D. v. Judge O'Leary* delivered today, and my observations with regard to this submission are to be read in the context of that judgment.

21. I consider that one of the seven issues raised in 2015/487JR was similar to that raised in *A. O'D. v. Judge O'Leary* and was an issue of general public and legal importance. The application in *A. O'D. v. Judge O'Leary* however was framed in a focused manner and concerned the nature and extent of the legal representation that could be allowed to a guardian *ad litem* in child care proceedings. While it did raise the general question of whether the guardian *ad litem* could be properly characterised as a "party" in such proceedings, it did not do so in the general and generic way in which the issue was framed in the present proceedings.

22. The applicants were out of time to bring the challenge for the reasons stated in the substantive judgment. The *ex tempore* ruling delivered by me in regard to the role of the guardian *ad litem* in the present proceedings was intended, and expressed by me to be intended, to avoid the possibility that further objections would be made to the engagement by the guardian *ad litem* in the litigation in the future. The issue was dealt with in that context and to avoid and unnecessary appeals or applications by way of judicial review relating to the engagement of that role.

23. I consider in the circumstances that while the issue raised was of general public and legal importance, that the applicants are not entitled to their costs because the application was so out of time, had engaged in what I described as a collateral attack on the decisions and hearings of the District and Circuit Courts, and had raised a general and generic issue as to the status of the guardian *ad litem* as a "party", such that the application had to fail.

24. For these reasons I consider that the applicants are not to be awarded the costs of any of the applications for judicial review.

The costs application by the guardian ad litem

25. The guardian *ad litem*, Miriam Lyne, was a notice party in each of the three applications for judicial review brought by the applicants. She was named as a notice party in 2015/497 JR, and joined as a notice party on her application to me on 16th March,

2006 in the proceedings 2015/490 JR (the "DAR" judgment).

26. The guardian *ad litem* seeks her costs in these proceedings against the CFA. Different considerations arise in each case.

27. In proceedings 2015/497 JR the guardian *ad litem* did not file a notice of opposition but did file an affidavit, sworn on 23rd October, 2015, in which the nature and extent of her participation in the child care proceedings before the District Court is set out in some considerable detail.

28. The guardian *ad litem* filed a replying affidavit dated 23rd October, 2015 in the access case, 2015/526 JR and dealt in detail with the access arrangements which were the subject matter of that application for judicial review and in which it was argued on her behalf that the District Court was the body best suited to determine questions of access, and that the High Court had no jurisdiction to do so in judicial review.

29. The guardian *ad litem* furnished very substantial legal submissions, served as consolidated legal submissions in respect of all three matters. The CFA did likewise.

30. The CFA in its legal submissions argued that it was desirable in an appropriate case that a guardian *ad litem* should have legal representation and adopted the submissions of the guardian *ad litem* on that issue. The submissions of the guardian *ad litem* dealt with a number of matters, including the time limits for bringing judicial review, the limitations on the Court's jurisdiction in judicial review, the treatment of the evidence of experts, and addressed the nature of the role of the guardian *ad litem* in child care proceedings generally.

31. In a judgment delivered in a different context in *Doyle v. Private Residential Tenancies Board.* [2016] IEHC 36, I was dealing with an application for costs by the notice party, a receiver appointed over the interests of a landlord in property let under a private residential letting, that he be awarded his costs against the applicant tenant in the statutory appeal in which the applicant was unsuccessful in setting aside the finding of the Private Residential Tenancies Board. I considered the correct approach to be that identified in the decision of Finlay Geoghegan J. in *Treasury Holdings & Ors. v. NAMA & Ors*. [2012] IEHC 518, namely whether the bank was a "necessary party" as a litigant in those proceedings. I also considered the judgment of Clarke J. in *Usk & District Residents Association Limited v. Environmental Protection Agency* [2007] IEHC 30, where he stated the general proposition that costs, including the costs of a notice party, will generally follow the event but raised the proposition whether it is necessary to participate, or at least participate fully, in judicial review proceedings. In giving judgment in *Doyle v. Private Residential Tenancies Board*, I said the following:

> "21. It seems to me that a notice party to a statutory appeal has a choice whether to instruct lawyers, and a separate choice whether to attend and participate in the hearing. A notice party could also instruct his lawyers to engage with the respondent to the appeal and this proposition seems to me to follow from the statement at para. 5.5 of the decision of Clarke J. in Usk and District Residents Association Ltd v. Environmental Protection Agency, that the issue is one of the reasonableness of the engagement.
>
> 22. In some cases the interest of the notice party lie wholly in supporting the decision of the statutory decision maker, and in arguing that the impugned decision is correct, unless of course the decision maker opts not to seek to uphold the impugned decision."

32. I also pointed out that there would be certain cases where the interests of the notice party and the respondent, coincided to such an extent that they did not have a "particular and unique interest in the details of the result of the case" such as to bring them within the principles explained by Clarke J. in *Usk and District Residents Association Limited v. Environmental Protection Agency.* I suggested in that case that certain "pre-litigation engagement" between the receiver (the notice party) and the PRTB (the respondent) might have been useful and that the notice party receiver could have adequately dealt with his appeal by direct engagement with the solicitors for the PRTB: -

> "26. In those circumstances I consider that the notice party could adequately have dealt with this appeal by direct engagement with the solicitors for the PRTB, and a pre-hearing engagement could have had the effect of assisting in the preparation of, or adding to, the legal submissions. One set of legal submissions would have been sufficient, and the affidavit evidence furnished by the receiver was in truth before the High Court in the exhibits and affidavit evidence proffered by the PRTB."

33. That approach might have found favour with the parties in the present case. The circumstances are sufficiently analogous to those prevailing in *Doyle v. Private Residential Tenancies Board*, in that the interests of the CFA in the present case coincided with those of the guardian *ad litem*. The notice party or the CFA might, instead of engaging directly with the judicial review and providing submissions, have supported the submissions of the other or engaged with those submissions for the purposes of the litigation.

34. The approach of the respondent and the notice party to the conduct of this litigation raised precisely the issue noted by me in my judgment in *Doyle v. Private Residential Tenancies Board*, and where I identified the desirability of an engagement between a notice party and a respondent to proceedings where the interests of those parties coincided or largely coincided. There is no evidence that any engagement occurred between the solicitors for the guardian *ad litem* and the CFA in the way in which they dealt with this litigation. The result was that the guardian *ad litem* engaged senior and junior counsel to support an order which was made in the District Court and which was equally supported by the CFA. That the parties had some coincidence of interest is clear from the fact that the submissions of each counsel appropriately supported and adopted those of the other. This is most unsatisfactory when the relevant persons are a statutory body and a person appointed to represent the interest and welfare of a child in the care of the State who has no commercial or personal interest in the outcome of the litigation.

35. The CFA bears the primary responsibility and in my view ought to have corresponded, and had engagement, with the solicitors acting for the guardian *ad litem* and indicated in clear terms the approach it intended to adopt in the judicial review application. Had it done so and invited submissions or assistance from the solicitors who had acted for the guardian *ad litem* in the course of the District Court case, then the matters canvassed by the respondent and the notice party could usefully have been canvassed by one of them as they both supported the same approach to the impugned orders.

36. Because that did not occur, I consider that the guardian *ad litem* found herself in a difficult situation where she, a professional person who had been engaged for a number of years in representing and supporting the children the subject matter of these very lengthy District Court cases, considered herself obliged to engage in the judicial review, as she had no assurance that the emphasis or issues she wished to canvas would be canvassed on her behalf by the CFA.

37. Whilst the guardian *ad litem* prudently adopted the approach that she would not engage at all in some of the matters raised in 2015/490 JR or that relating to the DAR, I consider that her legal representatives ought to have made approaches to the solicitors for the CFA to discuss and agree if possible, a uniform or joint approach to those issues in regard to which the guardian *ad litem* had a particular interest or knowledge.

38. I consider therefore that the legal representatives for the guardian *ad litem* bear some degree of responsibility for the failure to so engage..

39. This leads me to a conclusion that the CFA must pay some of the costs of the guardian *ad litem* in the judicial review, but these costs should be limited as follows.

40. For these reasons the guardian is to be awarded one quarter of the costs of the applications, and to include the costs of the two replying affidavits sworn by the guardian *ad litem.* The three cases ran together, albeit different issues were raised at different times in the course of the hearing, and the costs are to be measured or taxed as the costs of one application for judicial review. The guardian did not need to engage with most of the matters raised, but properly did address the nature of the role she engaged in the District Court. Junior and senior counsel fees are allowed. The full costs of the affidavits are to be included in the measurement of costs.

41. I therefore make an order that the guardian *ad litem* be entitled to one quarter of her costs of the judicial review applications against the CFA on that basis.