THE HIGH COURT

[2018 No. 1376 SS]

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND 1937

AND IN THE MATTER OF Q.F., A MINOR BORN IN OCTOBER 2018

AND IN THE MATTER OF THE CHILD CARE ACTS 1991 TO 2015

BETWEEN

W.F.

FIRST NAMED APPLICANT

Q.F. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND W.F.)

SECOND NAMED APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice MacGrath delivered on the 8th day of November, 2018.

1. This is an application pursuant to Article 40.4 of the Constitution in respect of the alleged unlawful detention of a child, Q.F., who was born in October, 2018 and who is the subject of an emergency care order made in the District Court on 1st November, 2018 made under s. 13 of the Child Care Act 1991 ("*the Act of 1991*").

2. This application is brought by the first named applicant, the child's mother, and on behalf of her son, the second named applicant. The application is grounded on the affidavit of applicant's solicitor, Mr. Iain Robertson, sworn on 6th November, 2018. He has therein set out the factual background, none of which facts are challenged on this application.

3. The first named applicant has two older children, both of whom are in care. The first child who was born in 2014 is the subject of a care order made under s. 18 of the Act of 1991. The order is operative until the child reaches the age of 18. It was made on consent in circumstances where the child is to remain in the care of relatives. The first named applicant's second child was born in 2016 and is the subject of a care order made pursuant to s. 18 of the Act of 1991, to be reviewed on 28th November, 2018. These orders were made in April, 2018. The order in respect of the second child was made on consent in circumstances where the child is being cared for by another relative. When making the order, the Court specified various steps to be taken prior to a review on 28th November, 2018.

4. In April, 2018, the first named applicant confirmed to a social worker to the two older children ("*Social Worker A*"), that she was pregnant. Social Worker A advised that the Child and Family Agency, would apply for a care order when the baby was born. In June, 2018, Social Worker A confirmed to the first named applicant that a care order would be sought in respect of the child.

5. On 23rd October, 2018, the Child and Family Agency convened a child protection case conference which recommended that an emergency care order be sought when the baby was born "*due to the history with the previous two children and the risk posed to the child".*

6. On the day the mother and child were discharged from hospital, the respondent applied to the District Court for an emergency care order pursuant to s. 13 of the Act of 1991.

7. Section 13 of the Act of 1991 provides:-

> *"(1) If a justice of the District Court is of opinion on the application of the Child and Family Agency that there is reasonable cause to believe that–*
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> > *(a) there is an immediate and serious risk to the health or welfare of a child which necessitates his being placed in the care of the Child and Family Agency, or*
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> > *(b) there is likely to be such a risk if the child is removed from the place where he is for the time being,*
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> *the justice may make an order to be known and in this Act referred to as an 'emergency care order'."*

An emergency care order subsists for a maximum period of eight days, and may be made for a shorter period. When such an order is made the District Judge has ancillary powers in relation to the protection of a child. Section 13(4)(c) provides that an application for such order may be made *ex parte*, if the judge is satisfied that the urgency of the matter so requires.

8. An appeal from an emergency care order does not stay the operation of the order (see s. 13(5)).

9. What is evident from the wording of the section is that to exercise jurisdiction to make an emergency care order, the District Judge must be satisfied that there is an immediate and serious risk to the health or welfare of the child. On such application the best interests and welfare of the child is the paramount consideration.

10. On the morning of the application Mr. Robertson was served with notice of the application. It was grounded upon the affidavit of Social Worker A in which she outlined the concerns of the Child and Family Agency regarding the "*immediate health and welfare of the child*". These concerns included:-

> (a) the child's mother was not in a position to provide care for the child because of the absence of a suitable and stable support network;
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> (b) the mother's two other children had been placed at risk, neglected and/or ill treated while in her custody and care, and those children had been placed in care pursuant to court orders;

(c) the child's mother lacked insight into the reasons why the two other children were in the care of the Child and Family Agency; and

(d) the age of the child, and that further, he would be totally dependent on his mother to meet his basic care needs.

Social Worker A averred that there was reasonable cause to believe that the threshold criteria specified in s. 13 had been met; and that was in the best interests of the child to have him placed in care of the Child and Family Agency. She was of opinion that without the protection of an emergency care order there would be an immediate and serious risk to the health or welfare of the child.

11. This was not the only evidence which was called on the hearing of the application. Mr. Robertson avers while that he was served with the affidavit and notice of the application on the morning of the hearing, at 2.00 p.m. the solicitor representing the Child and Family Agency informed him that a previous social worker who had been involved in the care of the two older children ("*Social Worker B*") would also be called to give evidence. He protested that he was not on notice and had not been provided with a report from Social Worker B providing an outline of her evidence.

12. The case commenced at 2.30 p.m. Counsel on behalf of the child's mother raised a preliminary objection to the proposed calling of Social Worker B as a witness. The first reason was that received adequate notice of her evidence had not been received and in this regard, the a report from Social Worker B had not been provided. The second was that her evidence was not relevant to the application for an emergency care order. Such application required the Child and Family Agency to establish that there was an immediate and serious risk to the health and welfare of the particular child. Social Worker B was not the social worker who had been allocated to the child and had not had any contact with the child's mother since April, 2018. It was therefore submitted to the District Judge that Social Worker B's evidence was not relevant to the application before the court.

13. There was also a discussion regarding the applicable law with counsel for the child's mother placing particular emphasis on the requirement of a present risk to the child's health or welfare. The District Judge stated that she would hear the evidence of Social Worker A and thereafter determine whether she would hear the evidence of Social Worker B.

14. The hearing continued for some considerable time, the District Judge and the parties' representatives working late into the evening with the judge ultimately delivering judgment just before 10.00 p.m. She heard not only the evidence of Social Worker A but also that of Social Worker B. In addition, she heard the evidence of the first named applicant, the child's mother.

15. The evidence indicated that the child's mother had behaved appropriately with the child since its birth in October, 2018 and there were no concerns in relation to drugs, alcohol misuse, or domestic violence. Counsel for the child's mother submitted that the Child and Family Agency had not explored alternative options to an application for a care order. While it was not the preference of the child's mother to attend a mother and baby home, she stated that she would do so if it meant that she would not be separated from her baby. There was also a discussion as to when such a place might become available.

16. According to Mr. Robertson, Social Worker A in evidence accepted that all was going well at the present time and had she not known of the previous concerns from her own knowledge and experience of the first named applicant since April, 2018, she would not have brought the s. 13 application. She accepted that the child's mother had cooperated fully with the social work department since April, 2018 and that she had attended all medical appointments and furthermore that she had been appropriate in caring for the child since he was born. The social worker also accepted that there were no current concerns in respect of drugs, alcohol misuse and or domestic violence.

17. The District Judge decided to hear the evidence of Social Worker B with particular regard to the alleged neglect by the child's mother of the two older children. Social Worker B accepted that she was not the current social worker and that she had no contact with the child's mother since April, 2018. Mr. Robertson avers that the District Judge queried Social Worker B on whether, based on the mother's care of the two other children, she believed that there was an immediate and serious risk to the health and welfare of the child. It seems that her original answer was somewhat equivocal but when pressed, she responded in the affirmative. At para. 14 of his affidavit, Mr. Robertson avers that the District Judge queried whether the first named applicant lacked the ability to parent, or the capacity to parent in the long term, to which Social Worker B replied "*she had the ability to parent in the short term but lacked the capacity to parent in the long term*".

18. The child's mother, in evidence, informed the court that she had made all necessary arrangements with regard to the baby. She produced an inventory of items required for the baby's care which had been approved by the public health nurse. She gave evidence that accommodation had been made ready for the baby and produced photographs of this accommodation to the District Judge. She told the District Judge that she had bonded with the baby, had cared for and nurtured the baby since birth. She produced records of each feed and the amount consumed on each feed together with evidence of nappy changes and care. The cross-examination of the child's mother included questioning in respect of the alleged neglect of the two older children.

19. A legal argument thereafter ensued. It was submitted on behalf of the Child and Family Agency that the threshold for an order pursuant to s. 13 had been met. This was contested by counsel for the child's mother on the basis that the Child and Family Agency had failed to adduce evidence of an immediate and serious risk. Mr. Robertson avers that the evidence adduced by the Child and Family Agency related to past concerns in respect of the two other children. Counsel for the mother relied on *K. and T. v. Finland* (2003) 36 EHRR 18, a decision which emphasised the bond between the mother and her new born child. Counsel also referred to the constitutional presumption of it being in the best interests of the child for it to be with his or her natural mother.

20. The District Judge delivered her decision and found that the respondent had adduced evidence of neglect in respect of the two older children and, according to Mr. Robertson's affidavit, she determined that the allegations of neglect in respect of the two older children had been proven and that the test regarding the threshold as set out in caselaw had been satisfied. The District Judge concluded that the interests of the child dictated that he be taken into care. This was proportionate because there was reasonable cause to believe that there was an immediate and serious risk to his health and welfare on the basis of the evidence adduced. Mr. Robertson avers at para. 18 of his affidavit, as I understand it, that the District Judge stated that this was a temporary emergency care order and other options ought to have been explored but that the court found that there was a reasonable cause to believe that there was an immediate and serious risk to the health and welfare of the child. The care order was made for the eight day period and the baby was taken into the care of the Child and Family Agency.

21. A fundamental part of the case made by the child's mother on this application is that the child has been unlawfully detained in the custody of the Child and Family Agency and has been separated from her at a crucial stage in the bonding process between mother and baby.

22. There are two other matters that ought to be addressed. An application for an interim care order is due to be heard today, Thursday, 8th November, 2018, a day after this case was heard and two days after the initial application for an inquiry under Article 40 was first moved. Second, it became evident during the course of the case that in addition to the interim care order hearing, an appeal has been brought by the child's mother against the emergency care order and this is also listed for hearing today, on Thursday, 8th November, 2018, before the Circuit Court.

23. The first named applicant makes a number of complaints in respect of the hearing in the District Court and the manner in which the District Judge arrived at her conclusion. The first named applicant on her own behalf and the behalf of the second named applicant, claims entitlement to bring Article 40.4 proceedings on the following grounds:-

> (i) The District Court judge applied an incorrect test to determine that the threshold under s. 13 had been met. That test required that the court be satisfied that there was an immediate and serious risk to the health and welfare of the child in this case. The District Court judge determined that there were allegations of neglect in respect of the two other children which were proven and she failed to consider adequately or at all, the evidence that the child's mother, at all times during the pregnancy and post pregnancy, had been appropriate in caring for the child. It is contended that in so doing the District Court judge failed to have appropriate regard for the constitutional rights of the child to be cared for and nurtured by his natural mother. It is also contended that the applicant's rights under s. 3 of the European Convention on Human Rights Act 2003 and in particular, Article 8 of the European Convention on Human Rights regarding the right to family life, have been breached.
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> (ii) The emergency care order was brought without adequate notice – two days' notice ought to have been given but this had not been done. The respondent had failed to adduce evidence of the urgency of the case or that any such urgency required that the application be made without appropriate notice.
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> (iii) There was a fundamental breach of the rules of natural and constitutional justice in that the applicants had not been given adequate notice that Social Worker B would give evidence or of the nature of the evidence that she might give. There had been a failure to produce a social work report detailing the evidence upon which the application would be based and the affidavit accompanying the application contained only scant details of the grounds upon which reliance would be placed. In this regard, Ms. Blake S.C. places particular emphasis on the fact that this was not an unexpected or unforeseen application and that the respondent was aware from about April or May, 2018 that such an application would be made. Therefore, the Child and Family Agency had ample time to give appropriate notice and provide full details of the evidence that they might adduce. It is therefore contended that there has been a fundamental breach of the constitutional rights of the applicants and that in the circumstances the continued detention of the child cannot be said to be in accordance with law.
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> (iv) The applicants therefore seek to challenge the lawfulness of the detention of the child on the basis that the hearing before the District Court proceeded in breach of constitutional rights and that there were fundamental errors of law in the reasoning of the District Judge. Counsel for the applicants emphasises that no evidence was adduced before the District Judge of an immediate and serious risk to the child, and that on the evidence there was no basis upon which the District Judge could have come to such a conclusion. She highlights that the best interests and welfare of the child were the paramount consideration in an application such as this.
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> (v) Ms. Blake S.C. argues that the s. 13 order is a nullity and should be declared as such so that when the s. 17 application comes before the court, there is effectively a clean slate without the potential influence of a pre-existing emergency care order on the proceedings. She emphasised that such an order may have a continuing and lasting effect in the child care proceedings in their entirety. She referred to the necessity to turn back the clock in this regard.

24. The application was initially moved before this Court on the afternoon of Tuesday, 6th November, 2018 and the Court directed that an inquiry should be undertaken into the legality of the child's detention pursuant to the care order. The Child and Family Agency was placed on notice of the application and the inquiry proceeded before the Court on Wednesday, 7th November, 2018.

25. Mr. Costelloe S.C. on behalf of the respondent contends that not alone is there no invalidity on the face of the order itself but that the circumstances pertaining here are far removed from those which were considered in *S.McG. v. Child and Family Agency* [2017] 1 I.R. 1. He referred to the practicalities of the case; the order will soon expire and any such order will be superceded by an interim care order if one is made. He questions why it took a number of days for this application to be brought – although it must be acknowledged that counsel for the applicants advised that this was due to procedures in place and the obtaining of appropriate opinions before legally aided representation can be confirmed. He also submitted that an important factor in the determination of whether an order under Article 40 ought to be made is that an appeal has been lodged and is listed to be heard in the Circuit Court on the same day that the interim care order application is scheduled for hearing in the District Court.

26. The respondent does not accept that there is evidence that the obtaining of the order under s. 13 might give rise to a prejudice in the s. 17 proceedings.

27. Counsel for the respondent also submits that an application for an adjournment was not made and that the level of breach of procedures, alleged or proven, is not as significant as existed in *S.McG*. Further, the application in this case concerned a care order which, by definition, was an emergency one. He submits that there was no fundamental denial of justice or fundamental breach of fair procedures such as this Court should intervene on an application for an inquiry under Article 40. While, without necessarily conceding that such is the case, if there are infirmities and frailties in the ruling of the District Judge, any such matter may more properly be dealt with by way of judicial review or appeal. The respondent contends there was no egregious breach of rights.

28. It is not alleged that there is an invalidity on the face of the order.

29. Significant reliance is placed on the decision of the Supreme Court in *S.McG. v. Child and Family Agency* [2017] 1 I.R. 1. In that case, it was argued by the Child and Family Agency that Article 40.4 inquiries were inappropriate in child care matters and that the transfer of custody on foot of an impugned order did not constitute a detention. There was also debate concerning the application of s. 23 of the Act of 1991 and in particular as to whether the court could of its own motion make a care order under that section. The decision of the majority of the Supreme Court was that where there is default in the fundamental requirements of justice to the extent that a detention is wanting in due process of law, Article 40.4 procedure is permissible. An Article 40.4 order might be made where there has been a fundamental denial of justice, but the court also stated that the procedure should rarely be utilised in disputes as to the care and custody of children.

30. The facts of *S.McG.* are instructive. There, the order under scrutiny was an interim care order made under s. 17 of the Act of 1991. The fundamental denial of justice contended in that case arose in circumstances where the District Judge proceeded with the hearing of the interim care order application despite the absence of objection of the Child and Family Agency to an adjournment of the case. One parent had obtained legal aid on the morning of the hearing and the other parent, who was functionally illiterate, had no legal representation. The Child and Family Agency had agreed with the parties that a one week adjournment would be appropriate to facilitate the unrepresented parent to seek and obtain legal aid, and for the other parent's solicitor to adequately prepare for the case. The District Judge, however, refused to grant the adjournment and the application proceeded. An interim care order of 29 days' duration was made and the children were placed in the care of the Child and Family Agency.

31. MacMenamin J., with whom the majority of the Supreme Court concurred, referred to two decisions of the High Court where the court noted the undesirability of the utilisation of Article 40 procedure in child care matters – *W. v. Health Service Executive* [2014] IEHC 8 and *Courier v. Health Service Executive* (Unreported, High Court, Birmingham J., 8th November, 2013). However, he felt that the facts of those cases were very different from the facts of the case which the Supreme Court had to deal with. He observed at para. 36:-

> *"While I would share the reservations expressed in these judgments as to the use of the Article 40 procedure in child care cases, these reservations do not arise when there has been such a denial of fair procedures as to render the proceedings effectively a nullity."*

32. The judgments of the court in *S.McG*. illustrate the considerable debate surrounding the extent to which Article 40.4 procedures might be utilised in child care proceedings where it is not contended that the order is bad on its face but where it is alleged that there has been a fundamental unfairness. It seems to me that whether that point has been reached is essentially a matter of degree and that each case must be determined on its own facts.

33. The facts of *S.McG.* paint an extreme picture. The children's parents were effectively deprived of legal representation which had a fundamental impact on the quality and fairness of the trial such as rendered it a nullity. MacMenamin J., at para. 33 of his judgment, concluded that what occurred in the District Court was a fundamental denial of justice and of the constitutionally implied right to fair procedures. Fair procedures required that both parties be legally represented and that time would be given to take instructions and to comply with other necessary procedural steps. He also observed that"[t]*he effective representation of parents is not only a vindication of their own rights, but of the children's rights*".

34. The second matter of note relates to the nature of the order which was therein being considered which was an interim care order, unlike in this case which is concerned with an application for an emergency care order under s. 13. To be noted in this regard are the observations of Dunne J. at para. 57 of her judgment:-

> *"The point I wish to make however is that whilst this particular case arose in circumstances where there was a flawed hearing before the District Court given the lack of fair procedures in circumstances where the mother's legal representation was simply not able to deal with the matter in the time span available and the father had no legal representation and was not in a position to represent himself, the outcome of the proceedings might well have been different had the application before the court been an application for an emergency care order pursuant to s. 13 of the 1991 Act."*

35. Dunne J. later observed that such an order might be obtained on an ex parte basis and that, even if not made on an *ex parte* basis, the exigencies of the situation and the risk might be such that an order has to be made even though the parents may not have had the opportunity to be present, to be heard or to be represented. Dunne J. observed that in some instances the requirements to take steps to protect children might take precedence over the rights to fully participate in such hearings. It is for that reason that a s. 13 emergency care order subsists for a limited period of no more than eight days. She described such a situation as being far removed from the circumstances that prevailed in the case under review and at para. 58 stated:-

> *"What was before the court in this case was an application for an interim care order and it is clear that there was no immediate risk to the safety or welfare of the children. It is in those circumstances that a short adjournment would have ensured that the parents had appropriate representation before the District Court and a full opportunity to be heard by the District Court in respect of the application for an interim care order."*

36. It appears to me that in *S.McG*. the Supreme Court provided two central directions for the guidance of this Court when considering an application for an inquiry under Article 40 in the context of child care proceedings. First, resort to Article 40 procedure should be rare in such disputes. Second, where there is a fundamental denial of justice then the court should intervene.

37. It must be remembered that in such cases there is the potential for the making of errors by the court which cannot be said to amount to a fundamental denial of justice, although the procedures and findings of the court might be vulnerable to legal challenge. Thus, for example, an error of law made within jurisdiction may not be amenable to challenge by way of judicial review. *A fortiori*, it may not be open to an application under Article 40. Such errors may be corrected by an appeal. A judge might misapply the law or reject applications or objections or, in the view of others, simply get it wrong, but it does not necessarily follow that there has been a fundamental denial of justice. There is also the potential for the making of fundamental errors of law which may result in legal irrationality and thus give rise to grounds for judicial review. There is the potential for the making of procedural errors which, on the face of it, might render the hearing constitutionally or legally infirm and while potentially open to challenge in judicial review proceedings, nevertheless may not necessarily be open to an application under Article 40.4.

38. The observations of O'Donnell J. in his judgment in *S.McG*. are apposite in this regard. At para. 13 of his judgment he observed as follows:-

> *"As was set out in the grounding affidavit, in ongoing interim care proceedings it would not be open to the parties to seek to re-litigate matters that had already been dealt with in previous hearings, and in those circumstances the possibility of a fully contested application for an extension of the interim care orders would not cure the jurisdictional procedural defects in the hearing on the first interim care order. The solicitor also observed that his experience of interim care proceedings was such that he had 'every reason to anticipate that this had started a series of events which will lead to the children remaining in the custody of the Child and Family Agency for months, if not years, before there is a final determination of the issue of whether the children should remain in the custody of the Child and Family Agency on a long term basis'. I accept, therefore, that this meant that the order of 29 October 2015 had to be addressed, set aside, and the proceedings placed on a sound footing. However judicial review, whether by way of certiorari or a declaration, is the obviously appropriate method of doing so. Article 40.4 is ill-adapted for that purpose, since it does not*

> *remove the order or proceedings from the landscape, and furthermore comes with the necessary consequence of an order for release, which is not necessarily wanted or, if sought, desirable. However, the solicitor contended that if there was to be proceeding by way of judicial review which is not determined prior to 26 November 2015, then he would anticipate that he would 'meet in argument that my application was moot'. It does not appear to me that these two propositions can stand together. If indeed the order of 29 October 2015 could continue to have an impact both practical and legal on the care hearings, then it could not be said that any proceedings to quash that hearing would be moot. However, that is perhaps more easily said in hindsight."*

39. Perhaps, of note, is the recent decision of Humphreys J. delivered on 11th September, 2018 in *L.S.M. (A Minor) v. Child and Family Agency* [2018] IEHC 500. There, an allegation had been made that there was a fundamental denial of justice within the meaning of the doctrine established in *S.McG.* because of the failure to furnish all reports two clear days in advance of a care order application hearing. It was alleged that this was in breach of the District Court Rules and was in breach of the applicant's right to fair procedures. In rejecting the application under Article 40.4, Humphreys J. observed, *inter alia,* at para. 6 as follows:-

> *"One factor in that regard is the fact that the applicant's counsel did not respond to this problem by seeking an adjournment to deal with the material; rather the application was to dismiss the proceedings. Therefore, the point that is now made in fact was not made to the District Court, namely that the applicant was so severely handicapped in defending the proceedings that that amounted to a fundamental denial of justice. In those circumstances in particular, the objection was something of a legalistic one and did not meet the fairly high benchmark of a fundamental denial of justice as set out in S. McG."*

40. It appears to me that the issue which requires to be addressed is whether the line between an alleged illegality and breach of constitutional right has been crossed to such a degree that a fundamental denial of justice has occurred.

41. Further, I do not think that it is inappropriate to consider the practical effect of the making of an Article 40.4 order. In this case, it is clear that there will be no "*production*" of the child in advance of the interim care proceedings. Such an order has not been sought. Both the appeal from the emergency care order and the interim care order proceedings are listed in different courts for hearing later today. If the appeal is successful then the entirety of the order made by the District Judge will be reversed and set at nought. There is no reason to believe that any alleged defect in procedures or alleged breaches of rights, be they constitutional or at law, cannot be set right in the context of a full appeal hearing. If the appeal is successful, then the clock will be set back and the slate wiped cleaned. Therefore, in so far as there may be a breach of the rights of the mother and indeed the child as addressed in *K. and T. v. Finland* or under the Constitution, it may be said that these can be immediately addressed in the context of the full *de novo* appeal hearing.

42. In so far as the interim care order is concerned, while certain observations in the Supreme Court in *S.McG.*, to which I have referred above, acknowledge the continuous nature of interim care order proceedings, and the potential continuing effect of interim care orders, it must be noted that such proceedings have a different statutory basis. The court on a s. 17 application must address the criteria outlined in s. 18 and determine whether it has reasonable cause to believe that the circumstances addressed in that section exist or have existed, and that it is necessary for the protection of the child's health and welfare that he be placed or maintained in care pending the determination of the application for the care order.

43. Taking into account all of the circumstances, including the nature of the s. 13 order, its limited duration, and in particular the nature of the illegality alleged (that the District Judge applied the wrong legal test and that evidence was called in respect of which inadequate notice was given), and also taking into account the fact that the applicants were fully represented throughout the hearing by able solicitor and counsel who were permitted to make applications, objections and observations on the legalities of the procedures employed, I find it difficult to come to the conclusion the line has been crossed to the extent that a fundamental denial of justice has been demonstrated which must be remedied by an order under Article 40.4. In coming to this conclusion, and bearing in mind that the Supreme Court has cautioned against the widespread use of Article 40.4 procedures in child care proceedings, it should not be taken from this decision or observations made herein that Article 40.4 procedure is impermissible as a matter of principle where an order has been made under s. 13 of the Act of 1991. Each case will be heavily fact dependent. For the reasons outlined above, I do not believe that the line has been crossed in this case such as to render the alleged illegality and unconstitutionality a fundamental denial of justice of a nature that requires the making of an order under Article 40.4 of the Constitution.

44. I must therefore refuse the application.