THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 948 J.R.]

BETWEEN

S.O.T.A. SUING

THROUGH HIS MOTHER AND NEXT FRIEND

O.A. AND

O.A.

APPLICANTS

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

AND

L.A.

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered on the 27th day of November, 2018

Introduction

1. In these judicial review proceedings, the applicants seek to quash two care orders of the District Court made in respect of the first named applicant. The first applicant ("Baby A") is the child of the second applicant ("Mrs. A") and the notice party ("Mr. A"). The facts of this case are sad and at times distressing but it is necessary to refer to them in some detail to gain an understanding of the issues that confronted the District Court in making the impugned orders.

Factual Background

2. Mr. A and Mrs. A came to Ireland some sixteen years ago and have lived here ever since. Apart from Baby A who was born on 6th November, 2018, they have nine other children ranging in ages from sixteen to two. All of these children are the subject of care orders made by the District Court. The general background to the matter is given in two detailed reports of the 7th and 8th November, 2018 respectively compiled by Amelia Marley, a social worker employed by the respondent ("the CFA").

3. The family first came to the attention of the CFA on 4th June, 2014 when Mr. and Mrs. A were involved in a car accident with three of their seven children. They were driving from the Midlands, where they lived, to Cork. It emerged that Mr. and Mrs. A left the remaining four children then aged twelve, eight, six and four, behind unsupervised for a significant period of time. On the day following the car accident, the eldest child, SA, telephoned the Gardaí to report a long history of physical and emotional abuse by his father. Arising from this report, an emergency care order was made by the District Court. This was followed up by an interim care order. Some days later, the eldest child returned home of his own accord threatening to self-harm if he was removed. In July, 2014 a supervision order was granted.

4. In August, 2014, the family relocated to another county without notifying the CFA.

5. In January, 2015 a neighbour expressed concern for Mrs. A's behaviour. She was reported to be regularly found shouting at the front door of her house at night but not at any one or thing. In August, 2015, Mrs. A presented to a local medical centre with three of her children, two of whom had evidence of serious burns. The attending doctor felt that one of the children, then three months of age, had a burn of sufficient severity that he could not be treated at the clinic and required hospital admission. The doctor accordingly called an ambulance and when it arrived, it was found that the family had absconded. The Gardaí had to search for them and when found, arrange for their transport to A&E by ambulance. It was felt that the burns were not consistent with the explanation given by the parents.

6. Later in August, 2015, a supervision order was granted to remain in place for a further year. In January, 2016, the CFA convened a meeting to consider the family situation in consultation with other parties including the schools attended by the children. In February, 2016, Mrs. A reported to CFA social workers that angels, spirits and demons were molesting her children at night time resulting in Mrs. A being unable to sleep. Later in February, 2016, CFA social workers observed during a home visit a large gap in the bannisters of the stairs which posed a risk to the children. They asked Mrs. A for the landlord's number to have it repaired and she refused to disclose it but said she would fix it as a matter of urgency.

7. Five days later, the paediatric department of a hospital in the Midlands reported that one of the children suffered a serious head injury as a result of falling through the bannisters. During visits to the hospital by Mrs. A, she was observed by medical staff to be talking to invisible spirits, ghosts and aliens all night long. She was observed putting nail polish on the child's forehead and claiming there was sugar on the bed when there was none. On the same date, three of the children were admitted to care under voluntary consent.

8. In March, 2016, a report was received from a local pre-school where one of the children had commenced two months earlier that the child was arriving into school with obvious signs of neglect and having no socks, underwear and minimal clothing and no lunch. He appeared to be wearing pyjamas under his trousers. Later the same month, during a home visit by CFA social workers, it emerged that the eldest child had been missing for four days without any notification to the Gardaí or the CFA. During this visit, Mrs. A was observed attempting to assault one of her children. On the same day, five of the children were admitted to care. Following that admission, the children exhibited behaviour consistent with abuse and neglect.

9. In June, 2016, Mrs. A was expecting and the CFA held a child protection case conference at which it was decided that the baby should be admitted to care following her birth. Mrs. A attended this conference and indicated that she would like the baby to enter into care as demons and aliens may take her and that the same demons were responsible for pushing the other child through the bannisters in February. The baby was born on 24th June, 2016 and entered into care three days later.

10. Ultimately care orders were made in respect of all nine children by the District Court on 13th March, 2017. These orders were made unopposed by Mr. and Mrs. A. They have not sought to exercise their right of access to any of the children in the past eight months, the only contact of any description being telephone calls by Mrs. A to her eldest child.

11. It would appear that in the early part of 2018, Mrs. A became pregnant. She was attending a Dublin maternity hospital for ante-natal care and her booking visit took place on 30th April, 2018. On that occasion, she disclosed to the attending health care worker that she had nine other children currently in foster care. She agreed to a referral to the medical social work department of the hospital. She was telephoned by a medical social worker, Ms. CN who made two appointments to meet her, neither of which Mrs. A attended. Ms. CN first met Ms. A on 26th July, 2018 when she requested assistance to separate from her husband. She told Ms. CN that she was the spirit of a human heart and that when her husband tries to get close to her this leads to "reduction" and allows bad spirits to enter her. She claimed to have suffered physical and verbal abuse at the hands of her husband for many years.

12. Ms. CN explained the need for her to refer Mrs. A's unborn baby to Tusla for assessment and she agreed to this but declined to be referred to the specialist mental health support team. On the next day, 27th July, 2018, Ms. CN received a telephone call from Dr. O'L, Consultant Psychiatrist in a Dublin General Hospital. Dr. O'L's report dated 8th November, 2018 discloses that Mrs. A was admitted as an involuntary patient to a Dublin General Hospital under the provisions of the Mental Health Act, 2001 having been detained by the Gardaí following a call to Mrs. A's home where she was alleged to be acting erratically.

13. Dr. O'L noted that Mrs. A had a previous involuntary admission to a psychiatric hospital in the Midlands approximately two years earlier. When examined by Dr. O'L, Mrs. A had symptoms which were mainly paranoid in nature, stating her belief that she had special powers from God to speak on his behalf. She had founded a church and was a pastor for her faith. She refused to accept any medication. Mr. A confirmed that she was a pastor. She was discharged three days later on 30th July, 2018 and hence the contact between Dr. O'L and the Dublin maternity hospital to arrange follow up by the psychiatric team there.

14. Following this contact, Mrs. A was given an appointment with a consultant psychiatrist at the Dublin maternity hospital on 17th August, 2018. She did not attend. Ms. CN notes that Mrs. A had twelve emergency room attendances at the Dublin maternity hospital since July, 2018 and since September, 2018, she missed five ante-natal appointments.

15. When Mrs. A presented to the ER on 2nd August, 2018, she was complaining of abdominal pain and was talking about demons and spirits pulling from her head, abdomen and vagina when she tried to sleep. She was seen by the mental health support midwife who knew her from her previous pregnancy at the Dublin maternity hospital in 2016. The midwife noted "ongoing delusional belief re religious preoccupations, consistent with previous presentation. No psychotic symptoms. Poor insight into preoccupations". On 2nd October, 2018, Mrs. A again presented at the ER complaining of abdominal pain and it was noted that she had been fasting for four days without any food or fluids due to religious beliefs. On 13th October, 2018, she again attended the ER complaining of headache and reduced foetal movement reporting that her flesh was coming out of her.

16. She again attended the ER on 23rd October, 2018 with reduced foetal movements and was assessed as fit for discharge but she refused to leave the hospital. She stayed overnight and the following morning she was medically fit for discharge and was asked to remain to see the mental health support midwife and medical social worker. She left without being seen. On 26th October, 2018, she did not attend for an ante-natal appointment but self-referred to the outpatients' department on 30th October, 2018 when she was seen by Ms. CN and a doctor.

17. When seen, she was very hostile and aggressive and said that she wanted the baby "out" today. She said that the demons, spirits and angels were coming for her, dragging out of her and pulling at her flesh at all times. She said that she had been unable to sleep because if she is near any pane of glass the spirits will come through the glass and pull the baby from her. She said that the following Monday would be "too late" for the baby and she wanted to save the baby. The doctor explained the risks of premature induction but Mrs. A said she was trying to save the baby from the spirits. It was finally agreed that she could present for induction on 1st November, 2018, which appeared to have had a calming effect on Mrs. A.

18. She did not in fact present for induction as arranged on Thursday 1st November, 2018. Attempts were made by the staff in the hospital to contact her by phone. Eventually a doctor spoke to her on Friday 2nd November when Mrs. A said she was too tired to come in and would come in on Monday the 5th November, 2018.

19. Mrs. A duly presented on 5th November, and was induced on the following morning, Tuesday 6th. Baby A was born between 6 pm and 7pm that day. During the course of her labour, Mrs. A informed the attending midwife that the baby was her "third immaculate conception" which God had given her. Of note, Mrs. A advised staff in the hospital that she was staying with her husband Mr. A but she declined to disclose the address.

20. In both of her reports to the court, Ms. Marley dealt with Mrs. A's current presentation. Mrs. A has reported in the presence of her children that angels have molested the children at night and that evil spirits had entered her body when she feels the pressure of the angels pulling her down. She believes that the angels speak with her and tell her what to do. She noted during one meeting with CFA social workers that there were angels present in the room in the form of jig-saw pieces. She was unable to clearly articulate how she would protect her baby from the angels and said she would look the angel Michael in the eye and tell him not to dare hurt this child.

21. She said that a "a shield of glass" would keep her baby safe. At one meeting with social workers on 11th October, 2018, Mrs. A was asked whether she would be able to protect her baby should the angels suggest that she should harm it. She said that she felt she could take authority and control over the angels. On 19th October, 2018, Ms. Marley received a call from the accommodation manager in Mrs. A's residence in Clanbrassil Street. She apparently left in an ambulance on 15th October, 2018 and did not return so that the accommodation manager assumed she had gone into labour. He checked her room where he found evidence of vomit and noted that eggs had been thrown around the bedroom and bathroom. When he questioned Mrs. A on her return about this, she reported that she was throwing the eggs to "keep the prostitutes away" advising that prostitutes had been entering her room and were lining up outside. The manager explained that he could no longer provide accommodation to Mrs. A in circumstances where he could not manage or respond to her behaviour.

22. Ms. Marley's lengthy and detailed reports set out the recent history of engagement, or perhaps more accurately, lack of it, with

Mr. and Mrs. A since they were alerted in July 2018 by Ms. CN of Mrs. A's presentation to the Dublin maternity hospital. There appears to be a lengthy history of, at best, intermittent engagement, failure to turn up for appointments, refusing to answer telephone calls and particularly a refusal to disclose their address at any given time.

23. Based on the extensive history of involvement of the CFA with the A family, Ms. Marley formed the opinion that it was unlikely that the pattern of ongoing disengagement would change following the birth of Baby A. In the days leading up to Baby A's birth, the CFA social work department were unaware of Mrs. A's whereabouts. She reported that she was currently staying with her husband in accommodation that had no bathroom. She informed Ms. Marley that if, following the birth of her baby, Dublin City Council offered her hotel accommodation or other accommodation she did not consider adequate, she would flee the country with her baby. Ms. Marley was of the view that it was clear that Mr. and Mrs. A are unable to maintain stable accommodation and such accommodation as they have been in was unsuitable for a baby.

24. Arising from all of these matters, the CFA determined to have a pre-birth case conference on the 5th November, 2018. Mr. and Mrs. A were invited to attend but did not. In her first report of the 7th November, 2018, Ms. Marley concluded that there was an immediate and serious risk to the health and welfare of Baby A. In particular Ms. Marley referred in her report to legal advice received to the effect that two days' notice is required for an application for an emergency care order ("ECO") under s. 13 of the Act. She also noted the advice that an application for an ECO could be made ex parte.

25. She was of the view that the immediate and serious risk to Baby A would be triggered as soon as Mr. and Mrs. A learned of court proceedings. There was felt in particular to be a risk that Mrs. A could harm Baby A while acting under a delusional belief that angels had directed her to do so. Ms. Marley also referred to the fact that Mrs. A had recently alluded to leaving the country as soon as the child was born. Both Mr. and Mrs. A had made it clear that they would not be engaging with the Social Work department and were actively seeking to conceal their whereabouts. Her view was that if Mr. and Mrs. A were informed of court proceedings, it was likely that they would abscond from the hospital to an unknown location.

26. As previously indicated, Baby A was born between 6 pm and 7 pm on Tuesday the 6th November, 2018. At approximately 3 pm the next day, the 7th November, 2018, a solicitor acting on behalf of the CFA, Ms. Orla Crowe, applied to Judge Toale of the District Court indicating that the CFA wished to move an application for an ECO. As Judge Toale was then dealing with other business, he transferred the matter to his colleague, Judge Owens. The matter was then moved before Judge Owens at approximately 3.15pm when a number of witnesses were called by Ms. Crowe to give oral evidence.

27. The first witness was Mr KA, a CFA social worker from the Midlands who gave evidence as to the family's history broadly as I have outlined it above. Ms. Marley was called to give evidence and did so in accordance with the terms of her report of the 7th November. Ms. Marley also informed the court that Dublin City Council had advised her that there they would not be making any further offers of accommodation to Mrs. A. The court was also told that Mrs. A would be medically fit for discharge at 5.30pm that afternoon.

28. In response to a question from the judge, Ms. Marley said she was seeking an ECO for a period of eight days, the maximum permissible under the Act and it was intended that Baby A would be immediately moved to emergency foster care if the order was granted. The judge was obviously concerned about the order immediately affecting the attachment of the child to the mother and Ms. Marley indicated that it was intended to facilitate a high level of access on a daily basis. Ms. CN then gave evidence again broadly in line with the above summary. Ms. CN informed the judge that she believed that there was a risk to the child if Mrs. A was permitted to leave the hospital with the baby that evening.

29. Evidence was then given by a midwife, Ms. Nagle who knew Mrs. A from her previous pregnancy in 2016. She told the judge that Dr. Sheehan, a psychiatrist at the hospital was of opinion that Mrs. A had a delusional disorder. Mrs. A had previously spoken about being possessed by the devil. Her presentation in 2018 was similar to that in 2016. She believed Mrs. A had no insight into her delusions. She became heightened if challenged on them. Ms. Nagle also expressed the view that she would have concerns if the baby was released from hospital in Mrs. A's care. She recounted that Mrs. A had talked about demons being extracted from her vagina during the pregnancy and that there were things inside her body. Ms. Nagle was very concerned as to what Mrs. A might do if she thought that the baby was possessed. That concluded the oral evidence to the court.

30. Ms. Crow then made submissions to the court and her attendance note records some of these as follows:

> "1. Careful assessment of impact of the proposed effect: I stated that my client appreciated that this was an extremely harsh order to be seeking but have done a careful assessment of the impact. I stated that we have looked at other ways which this could be done in that we tried to engage the parents in the planning/decision making process but they did not show for meetings and they are not meaningfully engaged with the social work department.
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> 2. I stated that engagement with the social work department could have led to a less intrusive measure but, due to the lack of engagement and the other immediate risks that have been outlined by the witnesses, this is not now possible at this immediate time.
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> 3. I stated that the social worker is of the view that there is a clear lack of planning for accommodation and the baby's other needs when released from hospital by the respondent parents.
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> 4. I stated that my client believes that there is an immediate and serious risk, in light of the concerns outlined in the report.
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> 5. I stated that we believe that the best balance to be struck in this case is the granting an ECO but with a high level of daily access, particularly when one looks at the risk outlined in court of the alternative of allowing the baby to leave the hospital in the mother's care today."

31. The judge then rose for fifteen to twenty minutes and returned to give her decision. She indicated that in addition to hearing the oral evidence, she had read the reports of Ms. Marley and Ms. CN. She described the evidence as being extraordinary but consistent as between all the witnesses regarding Mrs. A's delusional ideas. The judge noted the concerns about the parents fleeing the jurisdiction and the absence of a clear plan regarding accommodation. Given that the application was being made ex parte, the judge was of the view that she would grant an ECO but it should be for a short period.

32. She had regard to the judgment of the European Court of Human Rights in *K and T v. Finland* and taking all matters into account felt that an ECO for a period of two days was appropriate. Ms. Crowe drew to the judge's attention that this meant there would not be two clear days for service of an application for an interim care order ("ICO") and the judge indicated that she would abridge the

time to allow service for Friday the 9th November, 2018. Service of notice by text message was permitted on both parents. The judge was concerned that making an order for eight days might not be proportionate. On Ms. Crowe's application, the judge also granted a warrant in the event that Mrs. A. tried to leave the hospital with the baby.

33. Evidence subsequently given at the ICO hearing indicates that on the evening of the 7th November, 2018, Ms. Marley and another social worker together with three members of An Garda Síochána attended at the Dublin maternity hospital at approximately 19.35. Mrs. A was seen walking in a corridor with Baby A in one arm and a bible in the other. She returned to the ward and put the bible down. One of the attendant Gardaí, Garda Aoife Moroney, noted that the baby's head was not being supported and pointed this out to Mrs. A who said she knew how to hold a baby.

34. Garda Moroney explained the reason for the visit and that they were obliged to execute the warrant and take the baby. She explained the concerns that had given rise to the ECO and that they would have to take the baby into care. The order was until Friday. Initially Mrs. A appeared calm but then things changed. She said that God had given her this child through immaculate conception and that they could not take it. She became aggressive and intimidating without any regard for the baby on her lap. Garda Moroney asked Mrs. A to mind the baby's head and Mrs. A said it was not delicate. She picked up the bible and began to carry it. The bible fell on the ground and Garda Moroney was concerned for the baby's safety.

35. Mrs. A continued to raise her voice and become difficult to understand. She spoke about God and archangels. Garda Moroney became increasingly concerned that the baby would fall on the ground. Mrs. A told Garda Moroney that she had put a curse on her and that she would hit her. This went on for approximately 45 minutes and a decision was taken that they would have to remove the baby for its own safety. The baby was difficult to remove because Mrs. A was strong and gripping the baby tightly. When they tried to serve the order on Mrs. A, she refused to accept it. They removed the baby using minimal force.

The ICO Application

36. The application for the interim care order came on for hearing before Judge Toale in the District Court on Friday the 9th November, 2018. On that occasion, the CFA were represented by Mr. Diego Gallagher, solicitor. When the case was called at 10.30 am, Mr. A identified himself. The judge advised Mr. A to get legal representation. The judge referred Mr. A to the Legal Aid Board Office in the same building as the court. The judge allowed the matter to stand and Mr. Gallagher brought Mr. A to the Legal Aid Office where he secured representation by Mr. Stephen Cahill, solicitor. Mr. Gallagher furnished Mr. Cahill with the documents in his possession. Mr. Cahill's affidavit discloses that he met Mr. A and was served with the documents around midday.

37. Mrs. A arrived at about 11.40 am and Mr. Gallagher brought her to the Legal Aid Office as well. They were unable to represent her given that they were already representing Mr. A and referred her to Clondalkin Law Centre. A call to the latter established that they could not attend court at short notice that day. The case was called again at 1 pm and the judge was advised regarding the fact that Mrs. A had not yet got representation. Mr. Gallagher advised that the CFA had given authorisation for a private solicitor to be retained for Mrs. A at the CFA's expense and Mr. Gallagher identified Mr. Pól O'Murchú to whom he introduced Mrs. A.

38. Mr. Cahill's affidavit indicates that the case was called at approximately 4.30 pm. At that stage Mr. Cahill on behalf of Mr. A applied for an adjournment on the basis that the social work report referred to historical matters and documents he had not yet seen. He further indicated that he had not had the opportunity of taking detailed instructions. As a result, he was not in a position to cross examine regarding the historical matters and had not had sufficient time to prepare the case. He referred the judge to the decision of the Supreme Court in *S. McG. v The CFA* [2017] 1 I.R. 1. Mr. Cahill submitted that *S. McG.* affirmed parental rights to effective legal representation.

39. Mr. Cahill sought an adjournment for seven days and Mr. O'Murchú supported this application. It was opposed by Mr. Gallagher who made the point that the ECO would expire that day and the court could make an ICO for a short period of time. The judge rose to consider the adjournment application for about thirty minutes and gave a reasoned decision to refuse it. He distinguished *S. McG.* on a number of grounds but most particularly that the children in that case were not in care, were not at immediate risk and there was no urgency. In the present case, the learned judge considered that there was already an ECO in existence on the basis of an immediate and serious risk. He noted that the welfare of the child was the paramount consideration and referred to other authority in that regard. Accordingly, he refused the adjournment application and the matter proceeded.

40. Evidence was then given on behalf of the CFA by Mr. KA, Garda Moroney, Ms. CN and Ms. Marley. Each was cross examined by Mr. O'Murchú and Mr. Cahill. Mrs. A gave evidence but Mr. A did not. The judge asked her for her address and she appears to have been unwilling to give it. She said she was not prepared to engage with the CFA's Social Work department. It would appear that the hearing concluded sometime approaching 8.30 pm when the court rose to consider its judgment. The judgment was delivered at approximately 9.10 pm resulting in an ICO being made for a period of 21 days returnable to the 30th November, 2018. The hearing concluded around 9.30 pm.

The Judicial Review Proceedings

41. The applicants applied for leave to seek judicial review on Monday the 12th November and in view of the urgency of the case, I granted an abridged return date of the 14th November, 2018. On that date, I gave directions for abridged times in respect of the exchange of pleadings and submissions and fixed the trial for the 21st November. The hearing took place over three days between the 21st and 23rd November.

The Legislation

42. Section 13 of the Act, as amended, provides in relative part as follows:

> "13.—(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 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' ".

Under subs. (2), an ECO can be made for a maximum period of eight days. Section 4 (c) provides that an application for an ECO may be made *ex parte* if the judge is satisfied that the urgency of the matter so requires.

43. Care orders are provided for in s. 18 which states:

> "18.—(1) Where, on the application of the Child and Family Agency with respect to a child who resides or is found in its area, the court is satisfied that—
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> (a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or
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> (b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or
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> (c) the child's health, development or welfare is likely to be avoidably impaired or neglected,
>
> and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section, the court may make an order (in this Act referred to as a 'care order') in respect of the child."

44. Section 17 makes provision for ICO's and it provides:

> "17.—(1) Where a justice of the District Court is satisfied on the application of the Child and Family Agency that—
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> (a) an application for a care order in respect of the child has been or is about to be made (whether or not an emergency care order is in force), and
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> (b) there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or (c) of section 18 (1) exists or has existed with respect to the child and that it is necessary for the protection of the child's health or welfare that he be placed or maintained in the care of the Agency pending the determination of the application for the care order,
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> the justice may make an order to be known and in this Act referred to as an 'interim care order' ".

45. The maximum period of an interim care order is 29 days or for a longer period if there is consent. Section 17 specifically provides for an extension or extensions of the period of an ICO to be granted subject to the same temporal limitations as the original ICO.

The Arguments

46. As indicated at the outset of this judgment, the applicants seek orders quashing both the ECO and ICO but on different grounds. The applicants submit that the application for the ECO ought not have been made *ex parte* as there was no evidence before the District Court that the matter was so urgent that it could not proceed on notice to Mrs. A. On the contrary, it is said that Ms. Marley's evidence showed that there was nothing to suggest that the baby had been ill-treated since its birth and the risk of immediate and serious harm would only be triggered when Mr. and Mr. A learned of the court proceedings. The applicants contend that this could not amount to "urgency" and is irrational.

47. Nor do the facts in this case satisfy the test of urgency posited in judgments of the European Court of Human Rights in cases such as *Haase v. Germany* [2005] 40 EHRR 19. Moreover, it was submitted that what had occurred in this case in pursuit of the ECO was disproportionate both in the context of the Constitution and Article 8 of the European Convention on Human Rights.

48. It was further submitted that the CFA had failed to comply with the requirements of O.84 r.6 (2) of the District Court Rules which require that the ECO must be served with a copy of the affidavit which grounded the application and a note of the oral evidence given, neither of which had occurred in this case. The applicants also submit that the European jurisprudence requires that for such a draconian remedy as the separation of a new born baby from its mother to be contemplated, the court must hear evidence of what less extreme alternatives were considered by the CFA and outruled before the application was brought. It was in particular suggested that there was no good reason why no consideration was given to the possibility of retaining Baby A in the hospital after Mrs. A's discharge pending the hearing of the ICO application.

49. With respect to the ICO, the primary challenge was based on the refusal to grant an adjournment which it was said left Mr. and Mrs. A's lawyers in the position of not being able to provide effective representation for their clients. This amounted to a denial of fair procedures in circumstances where reliance was placed by the CFA on the historical events relating to the other nine children of the family being taken into care without the reports that grounded those applications being made available and thus permit effective cross examination.

50. A procedural point was also taken that two clear days' notice was required under the District Court Rules and the order did not provide for any abridgment of the time stipulated by the rules. It was also said that the refusal of the District Judge to grant an adjournment was not based on any actual evidence of urgency but rather merely on the fact that the ECO had been made *ex parte* and this implied urgency despite the fact that Mr. and Mrs. A were unrepresented at that hearing. *S. McG.* was relied upon in this regard by the applicants.

51. In reply, counsel for the CFA in dealing with the ECO submitted that as it was now spent, the issue was entirely moot and the court ought not embark upon a consideration of it. It was further suggested that the applicants had not exhausted their remedies in that an appeal to the Circuit Court was available to them. It was said that there was ample evidence of the necessity to hear the matter *ex parte* before the District Judge.

52. The Act itself expressly provides for this and the fact that the relevant subsection was available meant that the mere fact that the hearing took place *ex parte* could not of itself amount to a denial of fair procedures in that event. On the proportionality issue, counsel argued that it was clear that there was no real alternative to taking Baby A into care immediately. With regard to the suggestion that the baby be retained in the hospital, it was submitted that there was no medical indication for this and no reason to think that the hospital would have agreed in such circumstances. In any event, even if the baby was retained in hospital, it would still have to be taken into care so that ultimately the only issue was where the access took place, whether in the hospital or elsewhere.

53. On the issue of the ICO, counsel said that the facts of this case were entirely distinguishable from *S. McG.* where there was no evident urgency, the children were not already in care and there was consent to the adjournment. The situation here was quite different where the judge was faced with the very real prospect that if he adjourned the matter, the baby would have to be returned

to Mrs. A and even if it could be said that there was any procedural shortcoming from the parents' point of view, the paramount consideration always had to be the interests of the child. In response to the applicants' argument that if this was a concern, the CFA could have applied for another ECO, it was argued that there was an air of unreality about this because there was no power under the Act to extend an ECO and almost by definition, a second one could not be applied for. Even if it was, it would be open to precisely the same attack as the ICO, namely that the parents had insufficient time to prepare for it. The District Judge was therefore correct to proceed.

Discussion
The ECO of 7th November, 2018

54. The first issue that arises is whether any complaint concerning the making of the ECO is moot and ought not thus be entertained by the court. In *LO'G v. the Child and Family Agency* [2017] IEHC 58 (subsequently affirmed by the Court of Appeal on the 17th January, 2018), I reviewed the authorities on mootness in the context of an ECO. One such was *Lofinmackin v. the Minister for Justice, Equality & Law Reform* [2013] 4. I.R. 274 in which Denham C.J. said that:

> "It has long been the jurisprudence of this court that it will not give advisory opinions, except in exceptional circumstances".

55. In *O'Brien v. Personal Injuries Assessment Board* [2007] 1 I.R. 328, the applicant contended that the respondent had acted unlawfully in refusing to deal with his solicitor in relation to a claim for damages for personal injuries. The High Court found this to be unlawful and PIAB appealed but while the appeal was pending, an authorisation was issued which had the effect of rendering the issue between the parties moot. The Supreme Court nonetheless went to consider the issue which had wider implications beyond the confines of the litigation between the parties.

56. Murray C.J. (at p. 332) framed the question as to whether the case was moot in the sense of being "purely hypothetical or academic" noting that in that case, the respondent had a wider interest than the applicant and the court's decision affected the manner in which PIAB would deal with many other applications. In *P.V. v. the Courts Service* [2009] 4 I.R. 264, Clarke J. (as he then was) in dealing with a mootness issue recognised that the court has a discretion to depart from a strict application of the mootness rule. That discretion might be exercised for example where there was reason to believe that a similar issue concerning the parties might arise in the future as he felt that such possibility was no more than theoretical, he declined to exercise his discretion in favour of determining the issue. He said (at p. 20):

> "The starting point of any consideration of mootness had to be a determination as to whether the issue sought to be litigated was still alive in any meaningful sense such that it could not be said to be purely hypothetical or academic.
>
> The cases where the court should depart from the general rule should be limited and the discretion to entertain moot proceedings should be exercised sparingly having regard to the underlying rationale of the mootness rule in the first place.
>
> There might be circumstances where it might be appropriate to determine issues even though such issues might be moot, such as where the same issue was likely to arise for a respondent in very many cases, where a respondent was faced with an adverse judgment of the court from which it sought to appeal, and where, in practical terms, it might have been impossible to have a final determination on important legal issues unless the courts were prepared to relax a strict application of a mootness rule."

57. One of the issues that arose in *S. McG.* was whether the appeal was moot having regard to the fact that the High Court determined that the ICO under challenge was unlawful but directed pursuant to Article 40.4 of the Constitution that there be a phased release of the children into the custody of their parents to afford the CFA an opportunity to apply for further ICO, which they did successfully. MacMenamin J. dealt with the mootness argument as follows (at p. 28):

> "The respondents submitted that the appeal is moot. I would not accept that contention. As was pointed out *in K.A. v. Health Service Executive* [2012] IEHC 288, [2012] 1 I.R. 794, a procedural flaw of a fundamental nature, at the outset of a custody case, may have ongoing effects, which necessarily have continuity. Moreover, the issues arising bear not only on this case, but may have consequences in other cases. Thus, it seems to me that this case should be seen in the same light as those cases, such as *Condon v. Minister for Labour* [1981] I.R. 62, and *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2006] IESC 62, [2007] 1 I.R. 328, where the court should determine the appeal in the interests of the proper administration of justice (cf. *Lofinmakin v. Minister for Justice* [2013] IESC 49 [2013] 4 I.R. 274)."

58. One of the arguments advanced by the applicants and notice party here was based on the continuity of childcare proceedings referred to by a number of the judges, including MacMenamin J., in *S. McG.* While the continuity argument is certainly valid in the context of renewed ICOs, I am not so sure that it has application in the context of an ECO, particularly one made *ex parte.* The effects of such an order are not carried forward beyond its expiry and ought to have no bearing on the making of a subsequent ICO so to that extent, it seems to me difficult to envisage how the continuity argument arises.

59. In this case, it was put on the basis that the making of the ECO was relied upon by the District Judge hearing the ICO as an indication that the matter was sufficiently urgent for him to refuse an adjournment. That however is a somewhat different point because it goes to the validity of the ICO itself rather than any ongoing continuity effect of the ECO. Thus, that factor on its own would not in my view be sufficient for the court to exercise its discretion in favour of hearing a moot issue.

60. On the other hand, the applicant and notice party contended that if the issue was moot because the ECO has expired, and given the fact that the maximum duration of an ECO is eight days and it was in this case only two days, it was virtually impossible to see how an ECO could ever be reviewed by this Court, no matter how egregious the circumstances that led to its making. The fact that the order has expired ought not render it immune from judicial scrutiny.

61. The consequences of what happened in this case were so serious for both applicants that in my opinion, the court should exercise its discretion in favour of considering the issue. That is particularly so in circumstances where this issue may well arise again, from the CFA's perspective at least.

62. As regards the respondent's argument that there is an adequate alternative remedy available to Mr. and Mrs. A in the form of an appeal to the Circuit Court which is a full re-hearing *de novo*, it has often been stated that the availability of an appeal, without more, does not cure the shortcomings of a hearing at first instance that fails to conform with the requirements of natural and constitutional justice. The applicants are entitled to have a full and proper hearing at first instance and, armed with the benefit of

that and any advantages that may have accrued from cross examination, admissions and so forth, have their case fully reheard by the appellate court.

63. I reject the argument that because there was no evidence of mistreatment by Mrs. A of Baby A in hospital after its birth, the court was not entitled to come to the conclusion that the matter was urgent and such conclusion must be regarded as irrational. There was more than ample evidence before the court in my view of the potentially very serious risk to the baby if Mrs. A was permitted to leave the hospital with it. I also cannot accept the proposition that there was no proper legal basis for hearing the matter *ex parte*. There was credible evidence before the court that serving the proceeding in advance might well have prompted Mrs. A in her delusional state, to abscond with the baby to an unknown location. To run that risk by serving the papers in advance would have been irresponsible.

64. In *K. and T. v. Finland* [2003] 36 EHRR 18, the applicants were the parents of a new born baby. The mother had previously been diagnosed as suffering from schizophrenia and psychosis. Immediately upon the birth of baby J., an emergency order was obtained to take J. into care and subsequently a full care order was made. The ECtHR concluded that what had occurred breached the rights of the applicant under Article 8 of the Convention. At para. 166 of its judgment, the court said:

> "166. The court accepts that, when an emergency care order is to be made, it may not always be possible, because of the urgency of the situation, to associate in the decision-making process those having custody of the child. Nor, as the Government point out, may it even be desirable, even if possible, to do so if those having custody of the child are seen as the source of an immediate threat to the child, since giving them prior warning would be liable to deprive the measure of its effectiveness. The Court must however be satisfied that in the present case the national authorities were entitled to consider that in relation to both J. and M. [*an older child*], there existed circumstances justifying the abrupt removal of the children from the care of the applicants without any prior contact or consultation. In particular, it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the applicants and the children, as well as of the possible alternatives to taking the children into public care, was carried out prior to the implementation of such a measure.
>
> 167. The Court acknowledges that it was reasonable for the competent authorities to believe that if K. had been forewarned of the intention to take either M. or the expected child away from her care, this, in view of her fragile mental health, could most likely have had dangerous consequences both for herself and for her children.
>
> 168. However, the taking of a new-born baby into public care at the moment of its birth is an extremely harsh measure. There must be extraordinarily compelling reasons before a baby can be physically removed from the care of its mother, against her will, immediately after birth as a consequence of a procedure in which neither she nor her partner has been involved. The shock and distress felt by even a perfectly healthy mother are easy to imagine…
>
> The authorities had known about the forthcoming birth for months in advance and were well aware of K.'s mental problems, so that the situation was not an emergency in the sense of being unforeseen. The Government have not suggested that other possible ways of protecting the new-born baby J. from the risk of physical harm from the mother were even considered. It is not for the Court to take the place of the Finnish child welfare authorities and to speculate as to the best child care measures in the particular case. But when such a drastic measure for the mother, depriving her totally of her new-born child immediately on birth, was contemplated, it was incumbent on the competent national authorities to examine whether some less intrusive interference into family life, at such a critical point in the lives of the parents and child, was not possible.
>
> The reasons relied on by the national authorities were relevant but, in the Court's view, not sufficient to justify the serious intervention in the family life of the applicants. Even having regard to the national authorities' margin of appreciation, the Court considers that the making of the emergency care order in respect of J. and the methods used in implementing that decision were disproportionate in their effects on the applicants' potential for enjoying a family life with their new-born child as from her birth. This being so, whilst there may have been a 'necessity' to take some precautionary measures to protect the child J., the interference in the applicants' family life entailed in the emergency care order made in respect of J. cannot be regarded as having been 'necessary' in a democratic society."

65. These principles were again applied by the ECtHR in *P.C. and S. v. United Kingdom* [2002] 35 EHRR 31. This was another case where a new born baby was removed from the care of its mother who was suspected of suffering from Munchhausen's Syndrome by proxy and had a conviction for previously harming one of her children. The court referred to its earlier judgment in *K.* and *T.* and went on to state (at para. 116):

> "The margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. While the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, in particular where an emergency situation arises, the court must still be satisfied in the particular case that the existed circumstances justifying the removal of the child, and it is for the respondent State to establish that a careful assessment of the impact of the proposed care and measure on the parents and the child, as well as of the possible alternatives to taking the child into public care, was carried out prior to implementation of such a measure (see K. and *T. v. Finland* [GC], No. 25702/94 para. 116, ECHR 2001 – VII, and *Kutzner v. Germany* No. 46544/99 para. 67, ECHR 2002 – I).

However, the taking of a new born baby into public care at the moment of its birth is an extremely harsh measure. There must be extraordinarily compelling reasons before a baby can be physically removed from the care of its mother, against her will, immediately after birth as a consequence of a procedure in which neither she nor her partner has been involved."

66. The court went on to consider the particular circumstances of the case and whether the national authorities had established the necessity for the drastic step of removing the baby from the mother (at para. 131 et seq.):

> "131. [*The court*] has nonetheless given consideration to the manner of implementation of the Order, namely, the steps taken under the authority of the order. As stated above (see para. 116), the removal of a baby from its mother at birth requires exceptional justification. It is a step which is traumatic for the mother and places her own physical and mental health under a strain, and it deprives the new born baby of close contact with its natural mother and, as pointed out by the applicants, of the advantages of breast feeding. The removal also deprived the father, see, being close to his daughter at the birth.

> 132. The reasons put forward by the government for removing the baby from the hospital, rather than leaving her with her mother or father under supervision, are that the hospital staff stated that they could not ensure the child's safety and alleged detentions with the family. No details or documentary substantiation of this assertion are provided. P., who had undergone a caesarean section was suffering the after effects of blood loss and high blood pressure, was, at least in the stage after the birth, confined to bed. Once she had left the hospital, she was permitted to have supervised contact visits with S. It is apparent to the court why it was not at all possible for S. to remain in the hospital and to spend at least some time with the mother under supervision. Even on the assumption that P. might be a risk to the baby, her capacity and opportunity for causing harm immediately after the birth must be regarded as limited, considerably more limited than once she was discharged. Furthermore, on the information available to the authorities at that stage, the manifestation of P.'s syndrome, sometimes known as MSBP, was that she showed a tendency to exaggerate symptoms of ill health in her children and that she had gone so far as to use laxatives to induce diarrhoea. Although the harm with such conduct causes to a child, particularly continued over a long period of time, cannot be underestimated, there was in the presentation a suspicion of life threatening conduct. This made the risk to be regarded against more manageable and it is not being shown that supervision could not have provided adequate protection against this risk, as was the case in the many contact visits over the months leading up to the care proceeding, when those parents were allowed to feed the baby (see Dr. Bentovim's report at para. 54 above).
>
> 133. The court concludes that the draconian step of removing S. from her mother shortly after birth was not supported by relevant and sufficient reasons and that it cannot be regarded as having been necessary in a democratic society for the purpose of safeguarding S. There has therefore been, in that respect, a breach of the applicant's parents' rights under Article 8 of the Convention."

67. In the present case, the history of family A was well known to the CFA for a number of years. It knew that Mrs. A was a deeply troubled woman who appears to have suffered from delusions for a long time which continued up to and beyond the birth of Baby A. The agency was alerted to Mrs. A's pregnancy some months before the due date and interacted with her on a number of occasions. They were kept advised by staff at the Dublin maternity hospital of developments as they occurred and they knew that Mrs. A was being induced on the 5th November, 2018. They arranged a case management conference for that day to which Mr. and Mrs. A were invited.

68. It is evident that on that date, if not indeed earlier, the CFA had determined to apply for an ECO *ex parte*. Indeed, the prospect of making such an application was most likely on the cards from the time the agency was first notified of the pregnancy. The couple's previous child, born in June 2016, was taken into care, unopposed, when it was three days old. By any measure therefore, the application made here, as in *T* and *K*, was not an emergency in the sense of being unforeseen. There was plenty of time to prepare for it and most particularly, there was time to consider whether there was any realistic alternative to taking the baby by force from its mother.

69. On any view of the matter, this has to have been hugely traumatic for Mrs. A and her baby. The evidence given in the District Court shows that it was certainly traumatic for the Gardaí and social workers involved all of whom it must be said acted with great sensitivity and restraint, motivated solely by a desire to protect Baby A and limit the trauma as much as possible to Mrs. A. The Strasbourg jurisprudence makes clear that it is incumbent on State authorities in this situation to consider all possible alternatives to the removal of the child from its family. The action taken has to be proportionate. The Constitution demands no less. Article 42A.2.1 provides:

> "In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by *proportionate* means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child." (My emphasis)

70. Even prior to the insertion of Article 42A in the Constitution, the principle of proportionality in the context of litigation involving the family was well established in our law. For example, in *Child and Family Agency v. O.A.* [2015] 2 I.R. 718, McMenamin J., delivering the unanimous judgment of the Supreme Court, noted (at p. 7):

> "the nature of court orders, such as a full care order placing a child in care, is … long term, imposing continuing responsibility on the CFA, subject to the principle of proportionality both as to duration and conditions, and may sometimes govern the lives of children until they reach the age of majority."

71. It is clear therefore that there was an onus on the CFA to demonstrate that the proposed measure, in effect the nuclear option, was being resorted to only after all other less intrusive alternatives have been considered and eliminated for good reason. The applicant and notice party have canvassed the possibility that Baby A could have remained in the hospital as a temporary measure which would have been far less traumatic for Mrs. A. It is common case between the parties that the District Court could have made such an order, if it was sought.

72. It is evident from Ms. Crowe's attendance note of the ECO hearing before the District Court that not only was this potential alternative not considered but no evidence of any kind was given to the court that any other alternative was considered. The height of the evidence appears to have been that there was no option but to do what was done. But that could hardly be regarded as sufficient. Ms. Crowe made a submission to the judge that "we have looked at other ways which this could be done" but there was no evidence to support that contention.

73. Counsel for the CFA may well have been right in suggesting that there was no medical indication to retain the baby or the hospital might have been unwilling to do so. However, that is speculation in circumstances where there is no evidence to suggest that this was ever considered or that the hospital was consulted to ascertain its view. I cannot accept the proposition that even if this had been contemplated, the outcome would have been the same and the baby would still have had to be taken into care and lodged in a different part of the hospital for supervised access to take place. Therefore, the only issue was the location of the access.

74. It seems to me however there is a world of difference from the mother's perspective between the baby staying in hospital for a little longer and the baby being forcibly taken from her by members of An Garda Síochana and brought to an unknown location. Mrs. A may well have been happy for the baby to stay in the hospital nursery where she could come and go to feed it and be with it whenever she wished. The traumatic confrontation which occurred might well have been avoided. We shall never know but the important point is that the District Court had no evidence as to whether this or any alternative was even considered. To that extent therefore, it seems to me that the ECO could not be regarded as either constitutionally proportionate or Convention compliant and for that reason it must be quashed.

75. Although a number of technical points are raised by the applicants and the notice party regarding noncompliance with the rules, the fundamental objection to the ICO is based on a fair procedures argument. Put simply, the applicants and notice party did not have sufficient time or sufficient information to prepare the case properly and thus effectively participate in the hearing. Although as pointed out by the applicants, the ECO provides for no abridgment of time for the service of notice of the ICO application, the CFA solicitor's attendance note discloses that this was the court's intention although perhaps imperfectly carried through in the perfected order. More importantly, the ECO provided for Mr. and Mrs. A to be notified of the hearing by text message. This arose from the fact that Mr. and Mrs. A had on multiple occasions refused to disclose their whereabouts to the CFA and more often than not, refused to answer their telephones. There was accordingly no way of serving the actual papers on Mr. and Mrs. A until they presented at court. This was just as likely to happen if the ECO had been made for a longer period.

76. When Mr. and Mrs. A arrived at court, it is clear that every effort was made both by the learned District Judge and also by the CFA solicitor to ensure that Mr. and Mrs. A were legally represented. Those efforts included, in Mrs. A's case, the CFA paying for a private solicitor to act on her behalf. There is no doubting the fact that both Mr. O'Murchú and Mr. Cahill had a relatively short period of time to take instructions and prepare the case. In Mr. O'Murchú's case that seems to have been somewhere of the order of three hours and about four and a half hours for Mr. Cahill. Admittedly they had to read Ms. Marley's report running to some 25 pages and in that respect, there was little of consequence different between Ms. Marley's reports of the 7th and 8th November, 2018. That report in effect contained the substance of the evidence before the District Court when it made the ECO also. When Mr. Cahill applied for the adjournment, supported by Mr. O'Murchú, he did so on the primary basis that he had not enough time to prepare and also that he had not seen the historic reports that led to the making of the care orders in respect of the other nine children. It is of some significance to note that Mr. Gallagher on behalf of the CFA offered to consent to an adjournment for seven days with Baby A remaining in care but this offer was refused unless the baby was returned. Judge Toale considered this application carefully having risen for a period of time to do so.

77. One has to sympathise with the situation in which the learned District Judge found himself. He was put in a very difficult position because if he acceded to the application, the necessary implication was that Baby A would have to be returned to its mother. This potentially exposed the baby to risk. On the other hand, if he did not accede to the application, the inevitable complaints about procedural unfairness to the parents were likely to arise, as has indeed transpired.

78. The applicants and notice party argue that if the CFA had a concern about this prospect, it could have applied for a further ECO, it being common case that there is no power under the Act to extend an ECO under s. 13 in contrast to the express power provided for in that behalf by s. 17. I think there is an air of unreality about that submission. It is firstly unclear as to whether there is any basis under the Act for applying for a second or successive ECOs. The parties were not able to point to any instance where this had ever occurred and it is easy to see why. If an ECO is granted on the basis of an immediate and serious risk to the health and welfare of the child, the very purpose of the order is to remove that risk and so how a subsequent ECO could be applied for is hard if not impossible to envisage. It might theoretically be possible to argue that if the first ECO lapsed, the immediate and serious risk would be reinstated but of course in practical terms, the making of an ECO is invariably followed by an application for an ICO so that it is difficult to see how the issue could arise.

79. Perhaps of greater relevance is the fact that even if the application for the ICO was adjourned and this moved the CFA to instead apply for an ECO, it too would be open to precisely the same criticisms as are made of the ICO hearing. Most importantly, however, nobody suggested to Judge Toale that if he was minded to adjourn the ICO application, he could then embark on a fresh ECO hearing in the presence of all parties.

80. In moving the adjournment application, and in these judicial review proceedings, much reliance was placed by the applicants and the notice party on the judgments of the Supreme Court in *S. McG.* The applicants were the parents of a child in respect of whom an application was made to the District Court for an ICO by the CFA. The mother obtained legal aid on the morning of the hearing when she met her solicitor for the first time. The father, who was functionally illiterate, had no legal representation. The parties agreed to a one week adjournment to allow the father obtain legal aid and the mother's solicitor time to adequately prepare the case.

81. The District Judge however refused the application and the case proceeded, resulting in an ICO in respect of two of the applicants' children being made for 29 days. Importantly however, in that case the children were not already in care and there was no suggestion of any immediate risk to them arising. Against that background, the High Court (Baker J.) granted an order pursuant to Article 40.4 of the Constitution directing the release of the children on a phased basis to allow for a new application for an ICO to be made. Such an order was in fact made and not subsequently challenged.

82. The Supreme Court unanimously upheld the decision of the High Court. Of particular relevance was the fact that the applicants were presented with a lengthy social work report which for obvious reasons, the father could not read or understand. In those particular circumstances, it is perhaps readily understandable that the Supreme Court came to the conclusion that to force the case on in the absence of any urgency or immediate risk to the children and in the presence of consent to an adjournment, amounted to a denial of justice that was so fundamental as to warrant the intervention of the High Court pursuant to Article 40.

83. Although this case has superficial similarities to the facts of *S. McG.*, in reality it seems to me that the circumstances were very significantly different. The most important difference was of course that Baby A was by then in care and might potentially be exposed to risk if the case was adjourned, a feature entirely absent from *S. McG.* Further both parties here were legally represented and had a fairly significant period of time, albeit relatively short, to take instructions and prepare the case. The judge fully appreciated the significance of the *S. McG.* case which he distinguished on its facts for the reasons I have identified. He was clearly conscious of the difficulties presented to the lawyers by the absence of the historical social work reports and that this, to some extent, could potentially inhibit their ability to cross examine effectively.

84. In that latter regard however, the main thrust of the CFA's application and the matter giving rise to concern was Mrs. A's behaviour and conduct in the months leading up to the birth of Baby A. To a lesser extent, insofar as the recent events were concerned at any rate, the conduct of Mr. A was perhaps not as seriously concerning but nonetheless significant in the context of his declared intention not to engage with the social work department.

85. It is certainly not the case that Mr. and Mrs. A's lawyers were left in the dark as to what the basis was for the nine other children being taken into care. There is a very detailed chronology of the history of all the relevant events, albeit in summary form, contained in Ms. Marley's report. It must also be said that although the lawyers are perfectly entitled to see and have regard to the earlier social work reports that led to the making of the care orders in respect of the nine children in 2017, there must be some doubt as to the extent to which Mr. and Mrs. A are entitled to reopen the matters dealt with in those reports which were previously made

available to them, which they did not challenge in any way and which resulted in orders of the court being made on an uncontested basis.

86. Seen in that context, one might reasonably conclude that the availability of these reports to Mr. and Mrs. A's lawyers was probably, at best, of marginal relevance. It would appear that in making the ICO for a period of 21 days rather than perhaps a shorter time frame in view of the arguments that had been advanced to him, the District Judge had in mind to give Mr. and Mrs. A's lawyers sufficient time to obtain these historic reports, analyse them and if necessary put any additional matters arising to the CFA witnesses on the next occasion.

87. Viewed as such, the District Judge was faced with having to balance the competing constitutional rights of the parties, in the baby's case the right to have its health and welfare protected and in the parents' case, the right to have fair procedures afforded to them. There could be no doubting that in circumstances such as these, the rights of the child are always paramount and insofar as they conflict with the rights of the parents, the child's rights must be given precedence in the constitutional hierarchy of rights.

88. In her concurring judgment in *S. McG*, with which the other members of the court concurred, Dunne J. referred to these factors (at p. 30):

> "[58] It is important to emphasise, as had been pointed out by McMenamin J. in his judgment, that childcare proceedings in the District Court and in all courts must have as their paramount concern the welfare of children. As can be seen an order pursuant to s. 13 of the 1991 Act may be made *ex parte*. Even if not made on an *ex parte* basis, it may be that the exigencies of the situation and the risk to the safety and welfare of the child or children may be such that an order has to be made there and then having regard to the welfare of the children in circumstances where the parents may not have an opportunity to be present, to be heard, or to be represented before the court.
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> *It is clear therefore that in some instances the requirement to take steps to protect children may take precedence over the rights of parents to fully participate in such hearings*. It is for precisely that reason that a s. 13 emergency care order subsists for a period of no more than eight days and may indeed be for a shorter period of time. Such a situation is far removed from the circumstances that prevailed in this case. 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.
>
> [59] In all the circumstances I think it is important to point out that there is a difference between an application for an order for an emergency care order and an application for an interim care order. In the latter case, the requirement to afford fair procedures to the parties before the Court may necessitate the adjournment of the proceedings for a short period of time. *It has to be emphasised that even in the context of an application for an interim care order, the circumstances may be such that that even a short adjournment may not be appropriate, having regards to the welfare of the child or children concerned*. However, on the facts of this case I am of the view that a short adjournment of one week would not have prejudiced the CFA (who were willing to agree to such an adjournment) and would have facilitated the Parents in ensuring that they were properly represented before the Court. *More to the point, such an adjournment would not have caused any risk to the children's safety and welfare*. In all the circumstances I would also dismiss the appeal." (My emphasis).

89. I am satisfied in all the circumstances that the learned District Judge came to the correct conclusion in declining to adjourn this case. He was faced with the extremely difficult task of balancing the competing constitutional rights of the parents and the child and he appropriately and correctly had regard to the primacy of the child's rights. It is also worth remembering that the reason why Mr. and Mrs. A's lawyers had a short period of time to deal with the matter was the parents' steadfast refusal consistently over the years to engage with the CFA or disclose details of their address or whereabouts at any given time. This meant that it was a practical impossibility to serve them with documents and the only way they could be notified that a hearing was to take place was by text message. To that extent it is clear that their own conduct was the cause of any shortcomings in the hearing of which they now complain.

90. A number of procedural points were taken by the applicants and the notice party concerning a failure to comply with certain aspects of the District Court rules. It is certainly true that there was not two clear days' notice as required by the rules and a failure to abridge the time in the perfected order but these really all come down to the same submission i.e. that inadequate notice was given and I have already dealt with this.

91. It is also correct to say, as the applicants contend, that the rules require that where an application for an ECO is made *ex parte*, the order must be served on the parent who has custody of the child together with copy of the affidavit which grounded the application, copies of any exhibits or a note of the oral evidence heard by the court. The CFA concede that this rule was not complied with but I do not think that can be said to deprive the District Judge of jurisdiction in circumstances where the constitutional imperative to take the child's rights as paramount applied.

92. There was also criticism of the District Judge on the basis that he prejudged the outcome of the ICO by refusing an application for an adjournment on the basis of a stated risk to the baby when he had at that stage heard no evidence. I do not think there is much merit in this submission. Adjournments are frequently sought and dealt with on the basis of an outline of the background given by the parties' lawyers and it would be surprising if the court was required to hear all the evidence before deciding whether a case should be adjourned or not. Of course if an adjournment is refused, the court is still free to come to a different conclusion having heard the evidence and I do not think it can reasonably be said that a decision to proceed with the case on the basis of there being a risk arising from the information at that stage available to the court amounts to a prejudgment of the final outcome.

93. Finally, and of considerable significance, it should be noted that in this judicial review application, neither Mr. nor Mrs. A have elected to swear an affidavit or dispute the contents of any of the affidavits with exhibited reports that have been put before the court by the CFA.

Conclusion

94. For all of these reasons therefore, I propose to grant an order of certiorari quashing the ECO. I will refuse the relief sought in respect of the ICO.