Neutral Citation [2016] IEHC 449

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 490 JR]

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

BETWEEN

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

APPLICANTS

AND

THE RELEVANT CIRCUIT COURT JUDGE

(As substituted)

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

RESPONDENTS

AND

(By order)

MIRIAM LYNE

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 29th day of July, 2016.

1. This judgment is given in the first of three applications for judicial review brought by the first applicant, and one or more of her minor children each of whom have been placed in the care of the State under the Child Care Act 1991 ("the Act of 1991").

2. In the present case the applicants seek a declaration that the Circuit Court is obliged to provide a written record of its judgments, and/or that as a matter of law a digital audio recording ("DAR") or other form of recording must be available in respect of all hearings before that Court. The application is made specifically by reference to a hearing that occurred in the Cork Circuit Court, before Judge Riordan of that Court on 24th October, 2013.

Facts

3. The facts may briefly be stated. The first applicant is the mother of the second and third named applicants, but it is in regard to her ongoing relationship with the third applicant, a young boy born on 8th April, 2010, who suffers from an intellectual or developmental incapacity, that most of her concerns arise. Until the matters giving rise to the care order, the mother was the sole carer of the children and their father has played no role in their upbringing, nor has he sought to appear in these proceedings.

4. By order of the District Court made on 15th July, 2011 the child and his two siblings were taken into the care of the HSE pursuant to s. 18 of the Act of 1991, and have continued in the care of the successor in title of that body, the Child and Family Agency ("CFA").

5. The District Judge Constantine O'Leary made full care orders in regard to the children on 24th April 2013, after a hearing which lasted approximately 60 days, and having reserved his decision, delivered a long and considered judgment in which he made findings of fact, including specific findings with regard to the welfare and well-being of the children and in which he carefully considered the legal principles applicable. His judgment contains a detailed analysis of the expert evidence and the literature.

6. This decision was appealed to the Circuit Court. On 24th October, 2013, following eight days of hearing, an *ex tempore* and unwritten reserved judgment was given by Judge Riordan at Fermoy Circuit Court affirming the order of the District Court. All parties were legally represented.

7. The applicant argues that the absence of a written record of the Circuit Court judgment is sufficient to quash the decision of the Circuit Judge made on 24th October, 2013, and to justify an order of *mandamus* compelling a fresh hearing of the appeal. There is no suggestion that Judge Riordan failed to give reasons, rather the suggestion is that his reasons were not documented by him, and the only record of the reasons is the note taken by counsel and the solicitors for the parties.

8. On 25th August, 2015 leave was granted by Faherty J. to apply by way of judicial review for the following reliefs:

> a. A declaration that in a matter as serious as an order placing children in State custody up to the age of majority or otherwise, that the parent(s) and children affected thereby are entitled to a written or audio record of the judgment setting out the reasons therefor and the rationale/reasoning applied.
>
> b. A declaration that where an order is made placing children in State custody where the parties cannot agree as to what the findings and rationale/reasoning of the trial judge were, and where no DAR exists and where the trial judge is unable to provide a written judgment, that the applicants' rights to fair procedure and respect for their family rights require that they be entitled to a full rehearing of their case and to a written or audio recording of the judgment subsequently given.

c. An order of *certiorari* quashing an order of Judge Riordan made on 24th October, 2013 by which the second and third applicants were placed in the care of the respondents until the age of eighteen.

d. If necessary, an order of *mandamus* compelling a fresh hearing of an appeal under s. 18 of the care orders in respect of the second and third applicants.

9. An order was made by me joining as notice party to the application for judicial review Miriam Lyne, the guardian *ad litem* appointed by order of the District Court on 27th October, 2011 to represent the child for the purposes of the care proceedings.

10. On the same day, 4th December, 2015 I made an order substituting the first respondent for Judge Riordan who was initially named as first respondent in the proceedings.

11. Following the making of the order of the Circuit Court on 24th October, 2013 no further step was taken by the first named applicant in respect of the judgment or order until separate proceedings under the Act of 1991 relating to the issue of access to the younger child came before the District Court in May, 2015.

12. The Circuit Judge took no part in these proceedings but both the CFA and the notice party, having been joined to the proceedings, sought to defend the application for judicial review.

13. The first ground of defence is that the application is time barred. A period of almost two years has elapsed since the Circuit Judge delivered his *ex tempore* reasoned judgment on 24th October, 2013. Leave was granted on 25th August, 2015, 22 months later.

Time issue and extension of time

14. The first named applicant argues that it was not until 25th May, 2015 that she realised that she required a "verbatim record" of the judgment. She brought an *exparte* application on 16th June, 2015 before the Circuit Court seeking a written record of the judgment and/or a digital audio recording, and was directed to proceed on notice. The matter was returned for hearing to 2nd July, 2015 when the Circuit Judge confirmed that he had no notes and that there was no DAR. The first named applicant argues that the entitlement to seek judicial review only crystallised on 2nd July, 2015.

15. The time limits in judicial review are established by O. 84, r. 21 and an application for judicial review must be brought within 3 months of the date when the matter in respect of which the impugned decision occurred or when the harm in respect of which relief is sought first occurred. The court hearing an application for judicial review has power to extend this time. The time limits in the Rules have the force of law and a claim by a respondent to an application for judicial review that a matter is time barred is not one that the court should treat as a plea or defence which is merely procedural. It is established too that while the court does have a power to extend time, the discretion must be exercised only if the court is satisfied that there is an explanation and a justifiable excuse, and if it is in the interest of justice so to do. This has been made clear in a number of decisions which I briefly mention.

16. In *M.P. v. Director of Public Prosecutions* [2015] IEHC 40, Kearns P. construed the time limits narrowly. The application was approximately two weeks out of time, but Kearns P. was not persuaded to use his discretion to grant an extension despite the relatively short delay and the seriousness of the charges.

17. In *Shell E & P Ireland Limited v. McGrath & Ors*. [2013] IESC 1, [2013] 1 I.R. 247 the Supreme Court allowed an appeal against a High Court finding that the defendants were not barred on the grounds of time. In giving the judgment of the Court Clarke J. said the following at para. 48:

> *"The underlying reason why the Rules of Court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe. At least at the level of broad generality there is a significant public interest advantage in early certainty as to the validity or otherwise of such public law measures. People are entitled to order their affairs on the basis that a measure, apparently valid on its face, can be relied on."*

18. It is difficult to envisage circumstances where certainty could be regarded as more desirable than the present case. Final care orders were made on 24th October, 2013. Arrangements have been put in place in relation to foster carers for the young boy. There have been regular and ongoing reviews in relation to access and his educational and other needs have been ordered on the basis that he is in full time care to the age of eighteen.

19. I consider also that I must deal with the question of delay by reference to the provisions of s. 31(5) of the Guardianship of Infants Act 1964 as amended which provides:

> "In any proceedings to which section 3(1)(a) applies, the court shall have regard to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child."

20. That section relates directly to applications in relation to guardianship, custody and access to children and governs such private law applications, but the principle therein identified, namely that expedition is one procedural means by which the best interests of a child may be protected must guide my thinking.

21. The evidence is that on 16th June, 2015, the applicant sought a copy of the DAR and/or of the personal notes of the Circuit Judge. The Circuit Judge indicated when the matter came on before him for mention on 2nd July, 2015, that he had no notes and "little recollection" of the matter. The solicitors for the parties thereafter attempted to agree that the notes taken by counsel adequately represented the judgment, but no agreement was reached between them.

22. Counsel for the applicants argues that time began to run only when it became clear on 2nd July, 2015, that the Circuit Judge had no notes. I do not agree, and it is quite clear that most of the relief sought by the applicants relates to the failure of the Circuit Judge to deliver a written judgment in October, 2013, and not to his decision, if it be a decision, on 2nd July, 2015, that he could not produce his personal notes at the hearing, not because he was unwilling or unable to produce notes but because there were no notes.

23. The applicants give no explanation for the delay of almost two years in seeking judicial review, although it is said, albeit not on affidavit, that it was only when issues relating to the welfare of the children came to be dealt with in subsequent hearings in the District Court that the first applicant, the mother of the children, became "aware" that she needed a transcript of the judgment of Judge Riordan. In that regard it cannot be ignored that at all material times the applicant has had the benefit of legal advice and

assistance and has been represented by solicitor and counsel, including senior counsel, at various hearings. I consider in the circumstances that the delay in bringing the proceedings has not been explained, and no factors have been identified to me which might assist me in exercising my discretion.

Different test if applicant is a minor?
24. The applicants argue that the fact that two of the applicants are young children, that their mother has been seeking in the course of lengthy litigation to assert her right to custody and access to them, and the constitutional and statutory protection of the role in the life of a child of the mother, form a basis on which I might depart from the well established principles regarding the extension of time. No authority has been advanced for this proposition and no specific interest of the child has been identified which might suggest that it is proper to depart from established jurisprudence.

25. Counsel does make a broad argument from first principles, that the children have a right to know the reasons which guided the Circuit Judge in making a final order by which they were taken into the care of the State. He says it will be in their interests when they are older, and if they wish to review the records from their childhood, that they have a written note of the full judgment given by Judge Riordan. That argument omits to take account of the fact that counsel and solicitor represented the mother and were present in court when the judgment was delivered. It also omits to have regard to the fact that a guardian *ad litem* had been appointed with the express duty to protect the interests of the children, and *ipso facto* to be sufficiently familiar with the result of the appeal and the reasons articulated by the Circuit Judge.

26. I do not in those circumstances propose to address this argument further.

27. I turn now to consider if the interests of justice might otherwise suggest that the time should be extended.

Futility of making order
28. It seems to me that as the Circuit Judge has made it clear he has no notes, the declaration sought is merely hypothetical and it would be futile to make an order for the relief sought. Judge Riordan delivered an *ex tempore* judgment, and the solicitors who represented the parties, and presumably counsel, although this is not said on affidavit, have their own notes of what he said. It appears, although again this is somewhat unclear from the affidavit evidence, that there is a difference of opinion as to what precisely was said by Judge Riordan. Whatever the position, there is no lack of clarity as to the decision of Judge Riordan, and that he rejected the appeal and affirmed the order of the District Court.

29. When Judge Riordan was subsequently approached for a copy of his notes, or to ascertain whether he was in a position to generate a note of his judgment from his own personal notes, he indicated to the parties that he had no notes which might assist, and that he had relatively little memory of the matter. At this juncture it is impossible for Judge Riordan to produce a note, and an order that I might make that would direct him to do so is one which cannot be performed by him.

30. It seems also that the DAR recording system was not in operation at the courthouse in Fermoy when Judge Riordan delivered his judgment. Order 67. A of the Rules of the Circuit Court, inserted by S.I. 100 of 2013, permits a party or person who seeks access to any part of a record of proceedings held by or for the Courts Service to apply by motion in the proceedings, and the court may, if it considers it necessary in the interest of justice so to do, permit the applicant to have such access to all or such part of the relevant record as may be specified by such means and under such terms and conditions as the court may direct.

31. Certain matters are to be noted with regard to the provisions of that Rule. The power to permit access to some or all of the record of proceedings is vested in the relevant court in which the proceedings were litigated. It would be absurd to now direct the Circuit Judge to permit access to the DAR record, as it is already known that no record exists or can be generated of the proceedings in the Circuit Court for the relevant days.

32. The court will refuse to grant *certiorari* where to do so would be futile. This arises from the discretionary nature of the remedy. It also arises form the public interest in ensuring that court resources are not wasted. As Peart J. said in *Talbot v. An Bord Pleanála & Ors.* [2005] IEHC 215:

> *"the Court should be ever watchful that cases which ought not to be permitted to take up the time of the Court in vain, should be excluded from entry into the arena at the start, where no ultimate or worthwhile benefit can result to the applicant, even if successful. There is a public interest, particularly these days when the resources of courts and court time are pushed to their limit, in ensuring that those resources are appropriately, justly and fairly preserved for worthy causes."*

33. O'Higgins C.J. explained the discretionary nature of the remedy in *The State (Abenglen Properties Ltd.) v. Dublin Corporation* [1984] I.R. 381 at p. 393:

> *"In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded certiorari ex debito justiciae if he can establish any of the recognised grounds for quashing; but the court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights. For the court to act otherwise, almost as of course, once an irregularity or defect is established in the impugned proceedings, would be to debase this great remedy".*

34. In the *State (Polymark (Ireland) Ltd.) v. The Labour Court and the Irish Transport and General Workers' Union* [1987] I.L.R.M. 357 Blayney J. quoted that passage with approval and refused in the exercise of his discretion to grant the relief :

> *"My principal reason is that the granting of an order of certiorari is not necessary for the protection of the prosecutor's legal rights in the sense that it could not in any way protect them…*
>
> *As well as being pointless, an absolute order would, for the reason I have already given, be of no benefit to the prosecutor, and this is a relevant consideration to be taken into account in exercising my discretion"* at pp. 362-366.

35. This is also clear from the dicta of Finlay P. in *State (Shannon Atlantic Fisheries Ltd.) v. Minister for Transport and Power & Anor.* [1976] I.R. 93 at p. 100:

> *"I would be prepared to accept the general principle that the Court should in its discretion refuse to make an order of certiorari in a case where it is clear that the applicant can derive no benefit from it;"*

36. It may come to be the wish of the minor children to have a written record of everything that occurred in the course of the lengthy litigation surrounding the care orders in this case, but that desire cannot in my view be the basis of an imperative that a written judgment be directed to be produced by the Circuit Judge, when he has already made it quite clear that he is not in a position to do so.

Obligation to produce a written judgment

37. Further, the applicants have established no authority or argument by way of analogy from existing authority that would suggest that a court of local and limited jurisdiction, or indeed any court, is obliged to deliver a written judgment. That a court must give reasons for its decision is not the issue, but no legal basis, whether from the authorities or from first principles, has been established in the hearing before me which would suggest that the record of those reasons when pronounced must be provided in writing.

38. This is particularly so in cases such as the present where the applicants were in the Circuit Court with counsel and solicitors when the Circuit Court delivered its judgment. It has long been the practice of lawyers to take a note of a judgment, and indeed that practice is one which is well rooted in good professional practice and must be seen as part of the way in which counsel and solicitors represent the interests of his or her client, and they can be presumed to have had sufficient knowledge of the factual and legal context in which he or she represented a client to capture the essence of the decision of a judge and to take a note, or at least be in a position after the delivery of the judgment to recall and document the matters in respect of which the court made a determination. It must be presumed that the first named applicant's legal representatives have a note of the hearing and of the judgment.

39. It is clear that the Circuit Judge did verbally articulate the reasons for his decision, the findings of fact made by him, and his reasoning.

40. The judgments relied on by the applicants, in particular two judgments of Eager J. in judicial reviews of decisions of the *Refugee Appeals Tribunal, B.L. (Nepal) v. The Refugee Appeals Tribunal* [2015] IEHC 489, and *A.O.K. v. The Refugee Appeals Tribunal* [2015] IEHC 507 deal with circumstances where the Court was dealing with issues of credibility and Eager J. pointed out in *A.O.K. v. The Refugee Appeals Tribunal* that the failure to have a recording of an interview conducted by the Tribunal member "*must result in issues of credibility being ignored as the Court is required to rely on the report of the person whose decision is being challenged*". Eager J. emphasised that a formal record of the recommendation of the RAT and the details of the relevant interview were required as a matter of law for the purposes of the judicial review jurisdiction exercised by the High Court in regard to appeals from that Tribunal.

41. McMenamin J. in *P.P.A. & Ors. v. Refugee Appeals Tribunal & Ors*. [2005] IEHC 237 noted that "an application for refugee status was a matter of importance and consequence" and that an applicant for status should have sufficient information and that:

> *"But what is necessary is that the law must be adequately accessible, to an applicant no less than to a citizen. He or she must be able to have an indication, adequate in the circumstances, of the legal rules applicable to a given case."*

42. I consider that the applicants have not shown me any respect in which the applicants, who were represented by solicitor and junior and senior counsel, did not understand the legal rules applied by the Circuit Judge, and the legal principles formulated through eight days of hearing before him. I do not consider that the judgment of McMenamin J. assists the applicants in any way.

43. Equally the decision of Eager J. in *B.L. (Nepal) v. The Refugee Appeals Tribunal* was a case where the High Court was without an accurate note of what had occurred in the Tribunal. There is no evidence before me that would suggest that there is no accurate note of what Judge Riordan said in giving his judgment, rather it is the case that there is no agreed note. Evidence of any attempt to agree the note is not before me, and I am unable to ascertain from the evidence on affidavit the extent to which the record of the judgment delivered by Judge Riordan is said to be incomplete.

44. I do not consider that these judgments relied on by the applicants point to a requirement that a court must always provide a written record of the judgment, and the decisions of the High Court concerning the conduct of the RAT related to a large extent to questions of what occurred at an interview, a question quintessentially one of where issues of credibility, and differences in emphases, would form the basis of an argument on review.

Child care, access and custody matters are fluid

45. A further matter that is relevant is that the judgment of Judge Riordan was delivered and his findings made with regard to events that were relevant to the care and custody of the children in 2013. The argument of the applicants is that they needed the record of the judgment of Judge Riordan to be fully armed to argue a matter before Judge O'Leary in the District Court in 2015, and the matters then before Judge O'Leary related to the extent of supervision to be put in place during access in 2015 and thereafter. The District Judge was required both as a matter of law and logic to have regard to the facts pertaining at the time he heard the application and not the facts which guided the determination of the Circuit Judge in 2013. This is particularly so in the case of relatively young children whose needs and living arrangements can change significantly in a period of two years.

46. In matters where a care order has been made there is vested in the District Court jurisdiction under s. 47 of the Act of 1991 to "give such directions and make such order on any question affecting the welfare of the child as it thinks proper." In making directions under the section the court will have regard to the interests and welfare of that child in the light of circumstances prevailing at the time of the hearing. Historical findings may be relevant, but as a child grows to adulthood, and as its needs and interests change, the historical findings invariably bear less on the approach of the court to the factual matters before it. The mother and the CFA in the present case may return to the District Court and seek further directions, and should such be considered to be in the interest of the boy, the court will be obliged to deal with the matter in the light of the evidence and not to be constrained by previous decisions. To that extent the decision on appeal will lose its practical force with the passage of time.

47. Geoffrey Shannon in *Child Law* (2nd ed. Round Hall, 2010) at p. 744 explains that custody and access decisions are "interlocutory" by nature. A decision is open to variation should altered circumstances, new information or the welfare of the child so demand. He quotes from Denham J. in *C. v. B.* [1996] 1 I.L.R.M. 63, where giving the decision of the Supreme Court, she said:

> *"Thus, s. 34(1) of the 1991 Act is entirely consistent with article 12 of the Luxembourg Convention. There is no conflict or ambiguity. In view of the fact that the decision relating to custody of a child, especially a baby as in this case, is never final but evolves with the child,..."*

48. For that reason, any order that I might make directing a rehearing of the appeal from the order of Judge O'Leary would result in a waste of court time and the resources of all of the parties to this unfortunate matter. The mother's right to seek an order vacating the care order, or for directions regarding access or other matters regarding the welfare of her children would not be protected by an

order setting aside the order of Judge Riordan. Any application for variation or discharge would have to be made on a fresh application to the District Court under s. 18. I can see no basis to direct a rehearing of the appeal.

Conclusion

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