Neutral Citation Number: [2012] IEHC 255

THE HIGH COURT

[2011 No. 919 JR]

BETWEEN

H.H.

APPLICANT

AND

HER HONOUR JUDGE McDONNELL

FIRST NAMED RESPONDENT

AND

THE HEALTH SERVICE EXECUTIVE

SECOND NAMED RESPONDENT

JUDGMENT of Mr. Justice Birmingham delivered the 19th day of June 2012

1. In this case the applicant, who was granted leave by Hedigan J. on the 3rd October 2011 to seek orders by way of judicial review, seeks an order of certiorari quashing the decision of the first named respondent directing the release of files relating to her childhood, held by the second named respondent, to a nominated expert for the purpose of assisting him carry out a risk assessment in the course of on-going child care proceedings to which the applicant is not a direct party.

2. The factual background to the matter now before the Court is that the applicant was born in October 1972 and when she was approximately fourteen years of age, was admitted to the voluntary care of the Health Service Executive (HSE) where she remained for approximately three years. Her placement in voluntary care was against a background of concerns that she was being subjected to sexual assaults by a number of male members of her family.

3. The next matter of relevance is that in 2010, the HSE initiated childcare proceedings in which the respondents were a brother of the applicant, P.H., and his wife, T.H. The question of sexual abuse of the children of P.H. and T. H. by a number of individuals was central to the childcare proceedings. An appropriately qualified expert, Dr. Patrick Randall, was appointed to carry out a risk assessment. He sought access to the records maintained by the respondent in relation to the applicant. This was in a situation where the applicant during her time in care had disclosed that she had been sexually abused by her brother P.H., the respondent in the current childcare proceedings, by another brother, J.J.H., and by a brother-in-law, W.P. These three individuals are central to the current childcare proceedings. P.H. and T.H.'s children range in age from five to seventeen. Of some note is that in August 2010, the applicant sought to foster the children of P.H. and T.H. That application has not, to date, been approved by the HSE.

4. On foot of the desire of Dr. Randall to have access to the records of the applicant, consent was sought from H.H. but she refused to furnish this. In these circumstances the second named respondent applied to Judge Desmond Zaidan in the District Court for an order dispensing with the necessity for the consent of the applicant to the furnishing of information from her historical HSE file. Judge Zaidan refused to make the order sought because he doubted whether he had the power to do so. The HSE appealed to the Circuit Court and the matter came before her Honour Judge Petria McDonnell who, following a hearing, ordered that a copy of the file of the HSE on the applicant be released to Dr. Randall for the purpose of assisting him with the carrying out of a risk assessment in relation to P.H. and an assessment of the capacity to protect the children in the case of T.H. Judge McDonnell imposed restrictions on this order requiring that Dr. Randall return his copy of the file to the solicitors for the HSE upon the completion of the assessment and that no direct reference to or extract from the file be contained within his assessment. Judge McDonnell also ordered that the children's *guardian ad litem* be allowed sight of the file and that no copies were to be taken or extracts used by the guardian in his reports.

5. The orders of Judge McDonnell were made after a hearing during which the HSE was represented by a solicitor and the applicant by solicitor and counsel. It seems that the application was dealt with on the basis of submissions and that a social work report and a *guardian ad litem* report were handed into court. There was no formal sworn evidence as such.

6. I have referred to the fact that the applicant sought to foster her brother's children. The relevance of this is that when the HSE commenced a background check on her as it was obliged to do, the historical file on the applicant came to light. This showed that when the applicant was fourteen years of age she had made allegations against two of her brothers, J.J.H. and P.H., and a brother-in-law, W.P. The question then was what if anything should or could be done with the file.

7. The emergence alongside current childcare proceedings of the fact that in 1986, the applicant, as a fourteen year old, had allegedly made complaints against the same individuals who are now the subjects of allegations that were central to the present proceedings, had the capacity to create a dilemma for the HSE. If one was to have regard to the information dating from H.H.'s childhood, then this had obvious implications for the applicant's right to privacy. On the other hand, failing to have regard to the information that was readily available would mean that the assessment would be less than comprehensive and the outcome might, in consequence of this, be less reliable.

8. The order of Judge McDonnell was complied with very shortly after it was made. In a situation where the order of the Circuit Court had been complied with, the question has been raised whether the proceedings are a moot. The concept of mootness has been considered in a number of recent cases including: *O'Brien v. P.I.A.B.* [2007] 1 I.R. 328, in the context of the initial refusal of the respondent to engage with the applicant's solicitor but where an authorisation had issued before the appeal came on; the case of *Goold v. Collins* (Unreported, Supreme Court, 12th July 2004) in the context of a discharged protection order; and the case of *P. V (A Minor) v. The Courts Service* (Unreported, High Court, Clarke J., 2nd July 2009) in a context where a permanent injunction had been granted restraining the removal of a minor from the jurisdiction by his father and the surrender of the minor's passport to the mother had been ordered so that no practical advantage could be achieved by proceeding with an intended District Court application. In a number of these cases our courts have had regard to U.S. and Canadian jurisprudence on the issue of mootness.

9. On the face of it, once the order of the Circuit Court judge was complied with the issue was, in common parlance, moot. The parties permitted access by the Circuit Court had exercised that option and the information acquired could not be unlearned. Conversely, they had no need or reason to access the information a second time.

10. On behalf of the applicant it is argued that there is a risk of repetition which means that the issue remains live and not moot. Moreover, it is said that different considerations apply in the case of childcare proceedings and that the doctrine of mootness does not apply in the ordinary way. The applicant refers to the judgment of *MF. v. Superintendent Ballymun Garda Station* [1991] 1 I.R. 189 and draws attention to the observations of O'Flaherty J. who, at page 200, commented as follows:-

> "In a ruling at the commencement of the hearing the Court re-affirmed the strictness of the rule against giving a decision on a moot point but recognised that cases concerning the care and custody of children and the protection of their rights are in a special and, possibly unique category. Certainly they are special because they concern children and are possibly unique in that the fundamental rights of persons are in issue in litigation in which they are not represented. The absence of provision for such representation has been the subject of comment in this Court in the past but there is no provision, financial or otherwise, for it. In those circumstances, in my judgment, it is proper that this Court should give a decision which will be as helpful as possible to all those concerned with the welfare of children, including parents, social workers, gardai other members of the judiciary and the legal profession in general."

In my view, the case of *MF. v. Superintendent of Ballymun Garda Station* is not at all analogous. In that case the family concerned had been known to, and had been supported by, the Eastern Health Board for some time. In so far as that case concerned the interaction of ss. 20 and 24 of the Children's Act 1908, the "place of safety" provisions, there had to be a possibility that the sections would be invoked in relation to them in the future. Moreover, even if the applicant was not going to be involved in the operation of the sections in the future, the Eastern Health Board most certainly was. Here, in contrast, the order had been complied with; the genie was already out of the bottle. In my view the case is indeed a moot and it is so in the true sense of the word. Somewhat linked to the question of mootness is the question of delay. The order of the Circuit Court was made on the 6th April 2011 and the application for judicial review was made on 3rd October 2011.

11. The applicant was represented in the Circuit Court and again in the proceedings before this Court by the Legal Aid Board. I recognise that the procedures under which the Legal Aid Board operate, and indeed are required to operate with the necessity for seeking an opinion if a certificate is to be obtained, can give rise to delays and I would always want to make every allowance for this. However, particular urgency attaches to childcare proceedings. It seems to me that if the applicant and her advisors were so dissatisfied with the outcome of the proceedings in the Circuit Court that they were considering the possibility of judicial review, a stay should have been sought on the order of the Circuit Court which would have avoided the issue that they wished to raise being overtaken by events and rendered moot. This would in all likelihood have had the effect of telescoping the timetable.

12. Having regard to the view that I have formed that the proceedings are a moot, it would not be appropriate to express any detailed view on the issues that the applicant has sought to raise. One of the justifications for the doctrine of mootness is that it supports judicial restraint. Furthermore, one of the rationales for the doctrine identified by the Supreme Court of Canada in *Borowski v. Canada* [1989] 1 SCR 342 was a concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolving the moot issue. However, in a situation where the applicant appears to have been deeply distressed at the outcome in the Circuit Court and where it has been averred that there has been an adverse impact on her relationship with other family members following the court ruling, I will permit myself some very brief observations. First of all, it would be noted that the HSE is not making enquiries of third parties nor is it engaged in delving into the applicant's past. While the contents of the file in question relate to the applicant, it is the file of the HSE. Accordingly, the HSE has a choice to make, to suppress it, or make use of it. In a situation where, as I have been told, the HSE concluded that an assessment undertaken without considering the entire file would be incomplete and would not reflect the risk posed by P.H. in particular to his children and other children, the conclusion that they arrived at is hardly surprising. The interests of the children, the subject matter of the current care proceedings, were and had to be paramount. In that regard it is necessary to appreciate the very limited nature of the application that was being made to the Court. This was not a case where the HSE was seeking orders directed to any third parties, whether by way of third party discovery or anything of the sort. The HSE was in possession of information that was *prima facie* potentially relevant and a decision had to be made whether use could be made of the material or whether its contents should be completely suppressed. The HSE sought to obtain the view of the Court. It seems to me that the decision to do so was a responsible one. The restricted terms of the order made by the Court and the controls in relation to access imposed by it show that, as one would expect, the Court was fully alive to the sensitivities of the situation and sought to balance the conflicting considerations. In those circumstances, even if there were no issue in relation to mootness, the applicant would experience difficulty in seeking to judicially review a decision carefully and conscientiously made. However, having regard to the view I have formed that the matter is in reality moot, it is neither necessary nor appropriate to go further. Accordingly, in all the circumstances. I must refuse the reliefs sought.