

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 721 J.R.]

BETWEEN

L.C.

APPLICANT

AND

DIRECTOR OF OBERSTOWN

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 9th day of December, 2016

1. This is an application of the Irish Human Rights and Equality Commission, made pursuant to s. 10(2)(e) of the Irish Human Rights and Equality Act, 2014, to appear in these proceedings as *amicus curiae*. This application is made on the affidavit evidence of Emily Logan, Chief Commissioner of the Irish Human Rights and Equality Commission (herein 'IHREC').

2. Section 10(2)(e) sets out that the function of the IHREC includes the following:

"[...] to apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as *amicus curiae* in proceedings before that court that involve or are concerned with the human rights or equality rights of any person and to appear as such an *amicus curiae* on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion) [...]"

3. This Court finds itself in a somewhat invidious position, where the Respondent has not clearly set out whether they are objecting or consenting to the present application, to join IHREC as *amicus curiae* to the proceedings. Counsel for the Respondent advised the Court that he simply wished to address the Court on the principles the courts must consider in deciding whether or not a party should be joined as *amicus curiae* to proceedings. Counsel for the Respondent notes that the IHREC asserts the proceedings involve a matter of public interest. He states that whilst he does not believe the IHREC have made an uninformed decision to apply to appear as *amicus*, little information is before the Court as to the reasons why the IHREC came to this decision - he believes that the Court is being asked to grant this application on an uninformed basis.

4. The following inter-related issues emerge from a review of the jurisprudence in this area, and will be considered by this Court in turn:

1. Whether or not the applicant has a bona fide interest in the proceedings
2. The public importance of the proceedings
3. Whether or not a great number of persons are affected by the outcome of the case
4. Whether or not the applicant can bring 'added value' to the proceedings that the parties may be unable to provide
5. The impartiality of the applicant to the proceedings
6. Whether or not the proceedings are taking place in a trial court or at an appellate court level
7. The costs of appointing the applicant as *amicus curiae* to the proceedings

Lastly, as an over-arching point, the Court before granting such an application should have a view to the proposed role of the applicant in the proceedings.

5. In *O'Brien v. Personal Injuries Assessment Board (No. 1)* [2005] 3 I.R. 328, Finnegan P. set out that a court ought consider whether or not the applicant has a bona fide interest in the case, and "is not just acting as a meddlesome busybody." The affidavit of Ms. Logan sets out that the IHREC sought to apply to appear as *amicus curiae* in these proceedings following consideration of the issues arising in the case. Exhibited on affidavit are 'Amicus Curiae Guidelines', which Ms. Logan states were adhered to by the IHREC in making the decision to apply to appear as *amicus curiae*. She sets out, in summary form, that having regard to the age of the children involved in the proceedings, the IHREC considers the case to raise 'important human rights issues'. As set out above, s. 10(2)(e) of the Irish Human Rights and Equality Act, 2014, provides a legislative basis for the IHREC to apply to the Superior Courts to appear as *amicus*. The IHREC was established post the Good Friday Agreement, and its remit involves the protection and promotion of human rights generally. Whilst the affidavit does exhibit the 'Amicus Curiae Guidelines', no information has been furnished to the Court as to the process that the IHREC engaged in, before arriving at the decision to apply to appear as *amicus curiae* in the proceedings.

6. In *Fitzpatrick v. F.K* [2007] 2 I.R. 406, Clarke J. set out that a court ought consider the following in applications involving the joining of parties as *amicus curiae*:

"the extent to which it may be reasonable to assume that the addition of the party concerned as an *amicus curiae* might be said to bring to bear on the legal debate before the courts on an issue of significant public importance, a perspective which might not otherwise be placed before the court. In a similar vein it seems to me appropriate for the court to consider whether there is a risk that an issue of significant public importance might be debated in circumstances where there may not be an equality of arms."

Ms. Logan states on affidavit that human rights issues appear to be central to the determination of the case, that the determination

of these issues could significantly affect the human rights of persons not party to the proceedings, and that the issues in the case concern the interpretation of rights guaranteed under the Constitution and the ECHR.

7. The Court must also consider whether or not the applicant can bring added value to the proceedings, or whether or not the applicant has a particular expertise on the subject matter of the proceedings, which the parties may be unable to provide. As was stated in *H.I. v. Minister for Justice* [2003] 3 I.R. 197 by Keane C.J.:

"It is an unavoidable disadvantage of the adversarial system of litigation in common law jurisdictions that the courts are, almost invariably, confined in their consideration of the case to the submissions and other materials, such as relevant authorities, which the parties elect to place before the court. Since the resources of the court itself in this context are necessarily limited, there may be cases in which it would be advantageous to have the written and oral submissions of a party with a bona fide interest in the issue before the court which cannot be characterised as a meddlesome busy body."

8. The Court notes that Ms. Logan stated on affidavit that the IHREC, in deciding to bring the present application, had regard to Article 40.3 of the Constitution, Article 3 of the European Convention of Human Rights 1950, the provisions of the European Convention of Human Rights Act 2003, the Council of Europe Rules for Juvenile Offenders with respect to Separation, and the United Nations Standard Minimum Rules for the Treatment of Prisoners.

9. Other factors the Court must consider in these applications include the partisan nature of the applicant, and the limited circumstances in which an *amicus* may be appointed in a court of trial as opposed to an appellate court. In *Fitzpatrick v. F.K* [2007] 2 I.R. 406, Clarke J. stated:

"It is obvious, therefore, that an amicus should not be permitted to involve itself in the specific facts of an individual case. It is only after those facts have been determined that the extent to which issues of general importance may remain for decision will be clear. That is far more likely to be the case at the appellate rather than the trial level. [...] It certainly could not be said that this case is a "pure test case" in which it is highly unlikely that any issues concerning the facts of the individual case would be relevant. While I am not persuaded that there is an absolute bar to parties being joined as amicus curiae at trial level, I believe that the circumstances in which it would be appropriate to do so should, ordinarily, be confined to cases where there is no significant likelihood that the facts of an individual case are likely to be controversial or to have a significant effect on determining what issues of general importance may require to be determined."

10. Ms. Logan sets out on affidavit that

"If given liberty to appear as amicus curiae herein, the Commission will endeavour not to duplicate the arguments of the parties unnecessarily or to entrench upon matters of factual dispute and in addition will make every effort to be as brief as possible in its submissions and argument consistent with its role and duty to the Court".

Further, in relation to whether or not significant costs will be incurred as a result of joining the applicant as *amicus* to the proceedings, this Court notes that Ms. Logan states that

"The Commission will carefully abide by such directions as this Honourable Court may make in relation to the appropriate scope and manner of its submissions, whether written or oral, as the Court deems appropriate in light of developments in the case. The Commission also hereby undertakes to bear its own costs."

11. This Court agrees with the submissions of Counsel for the Respondent, in that the Court is being asked to grant this application on an uninformed basis. This Court finds the affidavit of Ms. Logan lacking, in that there is no clarity as to the proposed role of the IHREC in the proceedings, if it is to be joined as *amicus curiae* by this Court.

12. The affidavit of Ms. Logan sets out that the Commission analysed the proceedings in accordance with the 'Amicus Curiae Guidelines' provided to the Court, and considered that the proceedings raised a 'number of important issues of principle, including the human rights principles engaged for juveniles [...]'. This does not satisfy the Court that the IHREC can bring a new perspective or added value to the proceedings, or assist the Court in any way. As stated by Denham J. in *Meadows v. Minister for Justice* [2010] IESC 3, it is inherent in the duty and jurisdiction of the courts to protect constitutional rights, and the applicant has not indicated to the Court any particular expertise they may offer to the Court in considering the human rights issues at stake in this case.

13. McGovern J. noted in *Data Protection Commissioner v. Facebook Ireland Limited and Maximilian Schrems* [2016] IEHC 414 that "it is important to recognise that an amicus curiae is there to assist the court and has not become a party to the action". This Court believes that due to the present proceedings taking place at trial level, there was a particularly high onus on the applicant to furnish information to the Court as to their precise role in the proceedings, to assure the Court that they would remain as neutral possible. It is not enough to state on affidavit that "the Commission considers itself to be a non-partisan friend of the Court whose primary role is to be of assistance in relation to human rights issues."

14. Further, this Court has regard to the 'Amicus Curiae Guidelines' that were attached to the affidavit of Ms. Logan. At para. 22, it is stated that decisions by the IHREC to apply to appear as *amicus* will normally follow from recommendations made by the 'casework committee'. The recommendations would have greatly assisted the Court, in assessing whether or not the applicant has a significant and bona fide interest in the proceedings. Further, if the IHREC had engaged with either of the parties to the action, evidence of this engagement would assist the Court. Prior engagement with the parties could go some way to proving that if the applicant were to appear as *amicus*, there would be little/no duplication in the submissions made by the applicant, or if in fact they intended to make submissions at all.

15. This Court having reviewed the affidavit of Simon Fleming, solicitor for the applicant in the main proceedings, is of the opinion that these proceedings do raise significant issues involving the human rights of juveniles. The IHREC could potentially offer a distinctive, human rights focused perspective to the Court that might not be offered by the parties, in the context of an adversarial dispute. This Court also notes that whilst the proceedings take place at trial level, the case will have wider implications for a greater number of persons than solely the parties to the action. One contentious issue in the case for example, as set out in the statement of opposition, appears to be whether or not the Prison Rules 2007, or part 10 of the Children's Act 2001 govern the administration of Oberstown. The Case may have implications for the administration of detention centres for children in Ireland generally. Human rights focused submissions may be of particular relevance in this context. However, this Court finds itself in the dark as to the precise role of the IHREC if it is to appear as *amicus* in the case. If the Court is to grant this application, more information must be furnished to

the Court as to the proposed role of the applicant in the proceedings.

16. The following information would be of assistance to the Court in considering whether or not to grant the application:

1. The precise role of the applicant in the proceedings – for example, whether or not the applicant proposes to make oral or legal submissions
2. Expertise in the area of the human rights engaged in the case – further elaboration for example on the regard the IHREC had to the following documents, mentioned on affidavit – “the provisions of the European Convention of Human Rights Act 2003, the Council of Europe Rules for Juvenile Offenders with respect to Separation, and the United Nations Standard Minimum Rules for the Treatment of Prisoners”
3. How the applicant will seek to avoid adding to the costs of the proceedings – for example - sight of any correspondence sent to the parties to the action by the applicant, or any interactions with the parties to the action if such has occurred, to ensure that submissions will not be duplicated
4. Generally, more light needs to be shed on the decision-making process that caused the IHREC to decide to apply to appear as amicus.