THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 11 J.R.]

BETWEEN

F.G.

APPLICANT

AND

THE CHILD AND FAMILY AGENCY, THE OMBUDSMAN FOR CHILDREN, JUDGE GEOFFREY BROWNE AND HER HONOUR JUDGE DOIRBHILE FLANAGAN

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18th day of March, 2016

1. On 7th October, 2014, Judge Geoffrey Browne sitting in Roscommon District Court made care orders under s. 18(1) of the Child Care Act 1991 in respect of each of three children of the applicant. Each order provided that the care would be long-term and the applicant would have such access as would be determined by the Child and Family Agency.

2. These orders were appealed to the Circuit Court. On 19th February, 2015, Her Honour Judge Doirbhile Flanagan made an order affirming the three District Court orders.

3. The access actually afforded to the applicant by the Child and Family Agency is minimal in the extreme and amounts to four hours' supervised access per year. In addition, the children do not appear to have any access with their older siblings, or any telephone or correspondence access with the applicant outside of the designated four hours.

4. On 29th April, 2015, the applicant says that she received legal advice as to the options to challenge the Circuit Court order. She has exhibited a redacted version of what purports to be an email from Mr. Hugh J. Murphy, B.L. to a person who appears to have been a legal executive in the firm of solicitors then acting for the applicant, which was either copied or forwarded to the applicant. The email, taken at face value, purported to state that the limitation period for judicial review was six months. In fact, more than three years beforehand, with effect from 1st January, 2012, the limitation period had been reduced to three months by the Rules of the Superior Courts (Judicial Review) 2011. Of course in this application I have not heard from Mr. Murphy, and perhaps there is some explanation for this email of which I have not been made aware, but for the purposes of the present proceedings I am accepting that this document is what it purports to be, namely (incorrect) legal advice as to the limitation period applicable to judicial review to challenge the order of the Circuit Court of which the applicant has sought to complain.

5. Within what she appears to have been told was the appropriate limitation period, she applied to Noonan J. on 27th July, 2015 for leave to seek certiorari of the Circuit Court decision (2015 JR. No. 385). This application was refused, apparently on the basis that it was out of time. The applicant does not appear to have sought an extension of time in that application.

6. A meeting with the agency then appears to have taken place on 12th October, 2015, in which the applicant expressed her dissatisfaction with current arrangements and made a number of proposals, none of which appear (from what I have been told) to have been responded to positively or possibly at all.

7. On 20th January, 2016, the applicant having initially opened the present leave application, and having discussed with me her wish to pursue the question of further access, the matter was adjourned and the applicant wrote to the agency seeking an increase in the permitted access and making specific suggestions in that regard.

8. The agency replied to this request by letter dated 27th January, 2016, signed by Ms. Helen Buckley, Complaints Officer. The reasons given for declining increased access were, in full, as follows:

> *"I am aware that you would like increased access with your three children. The children's social worker, Ms. [Lillian] Laheen, regularly reviews the access arrangements which includes the children's views about access. Her most recent visit with the children was on 11th January last.*
>
> *At present the children are clearly stating that they will attend access with you for their birthdays, Christmas and Easter and ask that two staff supervise these visits. The children have also expressed the wish that access is for one hour.*
>
> *In order to encourage the children to attend access we need to listen to their wishes in respect of the length and frequency of access."*

9. Thus the sole stated reason for refusing more access was that such access was contrary to the wishes of the children. At this point, the children are aged 4, 8 and 10.

10. The applicant now seeks leave to challenge by way of judicial review the care orders and the agency's letter of 27th January, 2016, as well as seeking mandatory orders in relation to care. An extension of time is now expressly sought in relation to the challenge to the care orders.

11. The challenge to the Ombudsman for Children was not pursued. Naming the learned judges as respondents is not appropriate in the light of O. 84, r. 22(2A)(a) as inserted by the Rules of the Superior Courts (Judicial Review) 2015.

Does the previous judicial review application inhibit grant of leave on this application?

12. At one level, the fact that the applicant previously applied to Noonan J. and was refused could in principle be a factor to which regard should be had in deciding on leave the second time around. However, as the Supreme Court did in a different context in *Sivsivadze v. Minister for Justice, Equality and Law Reform* [2015] IESC 53 (23rd June, 2015) per Murray J. (Hardiman, O'Donnell, Clarke and MacMenamin JJ. concurring) at para. 31, I must have regard to the objective interests involved rather than automatically and mechanically exercising a discretion against the applicant. All of the circumstances must be taken into account, including in particular the fact that the applicant is seeking new additional reliefs in her present application, and is bringing significant new evidence to bear in relation to the reliefs that were refused *ex parte* on a previous occasion.

13. There are a number of factors as a matter of law to significantly distinguish the present application from that before Noonan J. Firstly, in the original application, the applicant appears not to have sought an extension of time. Such an application was, therefore, not refused, because it was not made. The fact that a particular application may be out of time does not, at the level of principle, absolutely preclude in all circumstances a subsequent application for an order extending time.

14. Furthermore, the interests of justice are of significance in this context. The applicant not only states that she was misadvised by her legal advisers as to the limitation period, but has produced documentary evidence to that effect. She has, in fact, shown the entire, unredacted email from her counsel to me prior to my directing that the agency be put on notice, although only a redacted version is exhibited. I considered that it would not be fair or appropriate for the agency to have access to the remaining content of the email, which amounts to privileged legal advice on the substance of the Circuit Court order. However, what purports to be legal advice as to the limitation period as set out in the redacted version is a separate matter and is clear and unambiguous. Assuming that the document exhibited by the applicant is a true copy of the email containing the advice given to her, and for the purposes of these proceedings I have no reason to think it is not, that advice was incorrect. It must have, therefore, been something of a surprise to her that her original application was rejected as out of time. Under those circumstances, it would not have been reasonable to expect an unrepresented applicant in particular to deal with such a situation on her feet on the day she was before Noonan J. I consider that the interests of justice should militate in favour of permitting the applicant to renew the ex parte application based on additional information and in the context of a new and express application for an order extending time.

15. Furthermore, certain elements of the relief sought are not subject to the time issue and did not arise before Noonan J., in any event. Her challenge to the letter of 27th January, 2016 and the relief flowing from it comes within that category.

16. For the foregoing reasons, I do not consider that the present application is precluded by reason of her having previously unsuccessfully applied to Noonan J. Having said that, I can only arrive at that conclusion having regard to the facts of the present case. As a matter of generality, it would be inappropriate for an applicant, having been refused an *ex parte* order, to then go before a different judge at a later stage in the hope of getting a more favourable order. However, I do not consider that this applicant is engaged in an abuse of process of that kind and indeed, she herself expressly volunteered the fact of having made the previous application before Noonan J. in the course of her *ex parte* application to me. To that extent, the present application, with its particularly unusual features, has more in common with the type of application entertained by Hogan J. in *Joyce v. Governor of the Dóchas Centre* [2012] IEHC 326 (11th July, 2012), being a case where an ex parte order had previously been refused by Hedigan J. (paras. 27 and 28) and was re-applied for, successfully, before Hogan J. (albeit that that case was in the Art. 40 context where the normal approach to such matters is applied with particular flexibility).

Is an extension of time required or appropriate?

17. Insofar as the present application challenges the decision of 27th January, 2016, or seeks relief arising from that decision, it is within time.

18. Insofar as the applicant seeks to challenge the order of the District Court of 7th October, 2014, that challenge appears to be unnecessary and inappropriate having regard to the fact that she appealed the District Court orders to the Circuit Court. The appropriate decision to challenge is now that of the Circuit Court (see *Cafferky v. Kennedy* (Unreported, Supreme Court, Murray J., ex tempore, 9th March, 2015 at para. 2)).

19. Insofar as the challenge relates to *certiorari* of the Circuit Court order of 19th February, 2015, that challenge is out of time but given that her failure to act within time was on foot of what she has exhibited as being incorrect written legal advices which have been produced to the court, this case satisfies the requirements in O. 84, r. 21(3) that there be good and sufficient reason for extending time and the circumstances that resulted in failure to make the application within time were either outside the control of the applicant or could not reasonably have been anticipated by the applicant.

20. Furthermore, the thrust of the complaints made by the applicant is that the agency has sole power to determine her access and is doing so unreasonably. That situation only arises because the Circuit Court effectively left it up to the agency to determine all access. If this is arguably an impermissible delegation or abdication of the judicial function, then that is a jurisdictional issue with continuing effect of the kind which Hardiman J. (Fennelly and Finnegan JJ. concurring) in *O'Keefe v. Connellan* [2009] 3 I.R. 643 considered should be capable of challenge despite discretionary reasons to the contrary. To give effect to that doctrine in the present case would require extending the time for the proposed challenge.

21. I will therefore make an order extending time for the bringing of the application up to the date on which it was made. Having heard Mr. Jim Benson, B.L., for the respondent, following a direction I made that the leave application should be sought on notice, this order extending time is one made following an *inter partes* hearing and is thus fundamentally different from an order extending time made in an *ex parte* application. It is not clear to me what the jurisprudential basis for saying that an *inter partes* order at the leave stage can be revisited at the substantive stage. It would be my view in general, and my intention in relation to this order in particular, that an inter partes order (and in particular an order extending time) is normally not something that is up for renegotiation at the substantive hearing. Such an order is intended to be a final order. The interests of justice (both for these litigants, who have now had an opportunity to address the court and if they had wanted to, to submit affidavit evidence on the issue, and for others who require the time of the court) are not conspicuously served by permitting such matters to be re-ventilated at the substantive hearing stage. I should also add that having dealt with this matter at this point and having made an order extending time, it is neither necessary nor appropriate to give leave for such an order, because to do so implies that the applicant has not yet obtained that relief. The fact that a respondent, having been put on notice of a leave application, might choose not to put in an affidavit or even make any submission, having been given the opportunity to do so, does not mean that the court has to indulge such party's presumption that they can reserve their position for "later" or allow such a party subsequently to contest an order extending time that they could have contested, or unsuccessfully contested, even if faintly, at the leave stage. Just because a party thinks there is going to be a "later" does not mean that there has to be.

Are there arguable grounds to challenge the Circuit Court order on the basis pleaded, such as interference with family rights?

22. The applicant has sought to challenge the Circuit Court order on a number of grounds, including interference with her rights and those of her children and a lack of disclosure of reports to her in order to enable her to prosecute the appeal. A number of her complaints call for particular note. The enumeration of particular points does not detract from the arguability of the general thrust of the grounds as set out by the applicant in her Amended Statement of Grounds filed on 9th February, 2016.

23. She has complained that *"at the access on December 21st 2015 the social worker sat between [one of the children] and his mother".* It is not hard to see how a social worker sitting between the parent and child could destroy any meaningful access and could create such tension and anxiety as to subvert the purpose of the access, so that allegation in particular appears to me to be arguable. This complaint, it seems to me, should be supported by a specific relief challenging the manner in which the agency is implementing access, and I would grant liberty to the applicant to amend her pleadings in that respect.

24. She also complains that *"reports"* (unspecified) were not handed over to her because *"the Guardian Ad Litem's solicitor and Tusla's solicitor refused to allow [the applicant] to have access to those reports citing the In-Camera rue as the reason for non-compliance with the disclosure of evidence."* I have not been given the respondent's version of this event but if any reliance was placed on the in camera rule in declining to give information to the applicant, it is clearly arguable that this would be misconceived in law.

25. Based on the material furnished to me I regard the thrust of the applicant's complaints in relation to the Circuit Court order and the nature of the access provided as arguable, albeit that in the case of pleadings drafted by a lay litigant, the grant of leave is an endorsement of the thrust of the point made rather than necessarily a finding that such point has been fully or even entirely correctly captured by the precise words used. I should state expressly that I would not grant leave to challenge the District Court orders (for reasons explained in this judgment), or insofar as complaint is made against the Ombudsman for Children (which was not pursued but in any event has not been made out), or on the ground that places direct reliance on the UN Convention on the Rights of the Child (because it is not part of Irish law, although the applicant can rely on it as persuasive authority or if and to the extent that it is indirectly incorporated through the ECHR). For that reason as well as in order to properly phrase the gist of the applicant's complaints (having regard to the caselaw mentioned below) I would however permit her to add reliance on the ECHR and in particular art. 8, as an additional ground. I would not give leave on the ground at (e)6(2) of the statement which complains that the Circuit Court received fresh evidence. That court engages in a de novo re-hearing and so is free to receive fresh evidence.

26. In *Hall v. Stepstone Mortgage Funding Ltd.* (No. 2) [2016] IEHC 110 (15th February, 2016), an application on pleadings drafted by a personal litigant, I referred to the comment by the Supreme Court that "[w]here a lay litigant is involved, pleadings may be confused. Traditionally, in every court, judges have done all that they can constitutionally do to assist" (see *Talbot v. Hermitage Golf Club* [2014] IESC 57 per Charleton J. (Denham C.J. and Hardiman J. concurring), at para. 48). As long as the other party is not unfairly penalised, a court will usually go to considerable lengths to assist lay litigants and will allow considerable latitude to them in stating their case (*Flynn v. Desmond* [2015] IECA 34 per Mahon J. (Hogan and Peart JJ. concurring), at para. 19). The U.S. Supreme Court has likewise held that papers drafted by lay litigants should be held to "less stringent standards than formal pleadings drafted by lawyers" (*Haines v. Kerner* 404 U.S. 519, 520 (1972) (*per curiam*) (see also *Rowe v Gibson* (No. 14-3316, U.S. Court of Appeals for the 7th Circuit, 19th August, 2015, (Posner J.)) for a recent example of how far courts can permissibly go to assist a lay litigant who has a legitimate complaint but has failed to make it in the legally correct manner.) Having regard to this jurisprudence, the court must be open to whatever approach to the pleadings serves the interests of justice, including giving what could be extensive liberty for a re-phrasing a lay litigant's pleadings so that the real matters in dispute and the legal issues arising therefrom are identified.

Are there arguable grounds to challenge the Circuit Court order on the grounds that it improperly abdicates or delegates to the agency the function of determining access?

27. Considerations such as those in the caselaw just referred to militate in favour of the court teasing out with a lay litigant what the substance of her complaint in fact is, and giving reasonable liberty to amend pleadings to a lay litigant where the court is of the view that her complaints raise issues that are not adequately included or particularised in the specific reliefs and grounds as originally sought.

28. In addition to the specific points set out in her pleadings, I have noted above that it appears to me that the situation in which the applicant now finds herself, namely to be entirely at the mercy of the agency as to access, is caused or contributed to by the fact that the Circuit Court order leaves the question of access entirely at the discretion of the agency. It seems to me that as well as the arguable points specifically pleaded, it would also be desirable, in the interests of ensuring that the complaints made by the applicant are sufficiently clearly and fully presented for the benefit of the court hearing the substantive hearing, that the applicant should be given leave to expressly add as an additional ground the contention that the Circuit Court order should be quashed by reason of wholly delegating or abdicating the function to determine access to the agency itself. I would, therefore, give the applicant liberty to add that specific plea, as well as leave to pursue the challenge to the Circuit Court order.

Is the letter of the agency refusing additional access amenable to judicial review?

29. Given the nature of the Circuit Court order, leaving access up to the agency, the agency's letter of 27th January, 2016, declining the request for additional access, clearly has legal effect. The determination of the agency as to what access is to be afforded is intended to be legally binding by virtue of the Circuit Court order which confers discretion on the agency which is not expressly limited in any way by the terms of the order. For that reason, if no other, the agency's refusal to provide further access dated 27th January, 2016, is amenable to judicial review.

Is the refusal of additional access arguably invalid on the basis that it relies on the views of very young children?

30. The applicant has clearly made out an arguable case to challenge the legality of that letter, because of its reliance on the alleged views expressed by very young children as the sole basis for the decision to refuse additional access.

31. When questioned by me, Mr. Benson sought to retreat from this as a basis for the decision and sought to supplement the letter by reference to opinions of social workers as to the best interests of the children. As clearly appears from the letter, that element is not the one actually relied by the agency in its communication to the applicant. A number of issues arise from this mismatch between the letter and the submissions made by the agency.

32. Firstly, as noted above, it is clearly arguable that it is not proper for the agency to put forward the views of young children as a

basis to restrict the mother's access to 4 hours per year.

33. Secondly, the agency is now (when the arguable unsustainability of the reasons actually offered was raised with it) stating that it is relying on other grounds as to best interests which it did not see fit to communicate to the applicant in the letter actually sent to her by Ms. Helen Buckley, Complaints Officer, on 27th January, 2016, conveying the position adopted by Ms. Lillian Laheen, Social Worker. I think it can fairly be said that this second aspect goes somewhat beyond mere arguability, because as I have noted, in the course of resisting the leave application, the agency put forward to the court the best interests of the children as a rationale for the denial of further access, and no amount of further argument at the substantive hearing can make this reason appear on the face of a letter to the applicant which does not include it. Why the agency issued a letter withholding major reasons for its decision can be explored at the substantive hearing; but *the fact that* it has done so is a conclusion that it will not be possible to avoid, unless the agency disclaims reliance on any such uncommunicated reasons. I need only observe that the provision of reasons by public bodies must be carried out with integrity, a principle which would preclude a process whereby major and operative reasons which could (and therefore should) have been articulated are withheld from the statement of reasons furnished to an applicant.

Is the refusal of additional access arguably invalid on the basis that it fails to give effect to the intention of the court orders?

34. Separately from the foregoing, it is arguably implicit in the orders of the District and Circuit Courts that, insofar as they make reference to the need for the applicant to *"engage with intensive therapeutic supports"* and for the agency to *"undertake structured parenting work with [the applicant] focussing (sic) on the content of access sessions"*, and that *"an updated Parenting Capacity Assessment be undertaken in eighteen months"*, the intention was to extend her access as time went by. Otherwise there would be no need for her to develop parenting skills. If the applicant's version of events is ultimately upheld, the parenting course in which the applicant found herself was clearly unsuitable, and indeed on that premise, so much so that no reasonable person could have thought otherwise. It is arguable that the agency has not implemented the intention of the court orders in this respect, particularly given that the District Court orders put the onus on the agency to undertake parenting work with the applicant, and not on the applicant, as might be inferred from a comment of Deirdre Gallagher, Social Work Team Leader, as recorded in a minute of the meeting of 12th October, 2015 as prepared by or on behalf of, and furnished by, the applicant (I should in fairness emphasise that I have not been given the agency's response to this minute). It is further arguable that if and insofar as the agency has prohibited the applicant from discussing further access with the children that this also interferes with the rights of the applicant.

Is the refusal of sibling access arguably invalid?

35. Clearly very strong reasons in terms of the best interests of the child are required to limit a parent's access to 4 hours supervised access per year with no written or telephone contact in between, and to make no provision for older sibling access. To limit access in this matter without such very strong reasons would be a breach not only of the applicant's rights but of the rights of the children involved including, in relation to sibling access, the older children. As the applicant's papers make an arguable complaint about this aspect as well I will allow her liberty to add this issue as a specific ground for relief. At least on the information available to me at present, I consider that as the older children's mother and guardian she has an entitlement to assert family rights in this context on their behalf without formally having them joined as applicants.

Should leave be granted for mandatory orders?

36. Mr. Benson submits that the mandatory order sought to increase the level of access being provided is essentially a form of District Court application by the back door. He concedes that the applicant would have an entitlement to apply for additional access in the District Court and that court would have jurisdiction to grant that additional access. In the event that the applicant is successful, a mandatory order to reconsider access (addressed to the Circuit Court and/or the agency) is going to be a more appropriate outcome than a mandatory order for particular access to be granted, given that judicial review is not an apt mechanism to determine exactly what access should be provided. That would require oral evidence and cross-examination on the merits rather than the form of inquiry that is possible in the judicial review context. Therefore only the more limited form of mandatory order I have referred to would seem apt to be included in the grant of leave.

Order

37. For the foregoing reasons, I will order:-

(i) that (in lieu of the previous interim order) there be an order under s. 45 of the Courts Supplemental Provisions Act 1961 restraining identification of any non-professional persons referred to in the proceedings on a permanent basis;

(ii) that the Ombudsman for Children, Judge Browne and Judge Flanagan be struck out as respondents;

(iii) that there be an order extending time for the making of the application up to the date on which it was made;

(iv) that the applicant have liberty to amend her statement of grounds to replace the reliefs sought with the following:

(a) an order of *certiorari* removing for the purpose of being quashed the order of Her Honour Judge Doirbhile Flanagan dated 19th February, 2015,

(b) an order remitting the applicant's appeal to the Circuit Court for re-hearing in accordance with such judgment and order as the court may be pleased to give herein;

(c) an order of *certiorari* removing for the purpose of being quashed the letter of the respondent dated 27th January, 2016;

(d) a declaration that the extent of access and/or the manner in which it has been provided has wrongfully failed to have due regard to the rights of the applicant and the older siblings of the children to whom the order of the Circuit Court applies and/or has failed properly to implement the District Court orders as affirmed by the Circuit Court;

(e) an order remitting the question of access to the respondent for reconsideration in accordance with such judgment and order as the court may be pleased to give herein;

(f) further and other relief;

(g) costs;

(v) that the applicant have liberty to amend her statement of grounds by the deletion of the following grounds (leave for which is refused) and the making of any consequential amendments (including re-phrasing such grounds as a challenge to the Circuit Court order rather than the District Court orders):

(a) grounds relating to a challenge to the District Court orders (as opposed to the Circuit Court order affirming them)

(b) grounds placing direct reliance on the UN Convention on the Rights of the Child or

(c) the ground at (e)6(2);

(vi) that the applicant have liberty to amend her statement of grounds to add to the existing grounds the following additional grounds:

(a) that the Circuit Court order improperly delegated to the respondent or abdicated the judicial function of determining access;

(b) that the respondent has failed to implement adequately or at all the intention of the Circuit Court that parenting supports would be developed and access increased over time;

(c) that the manner of implementation of access by the respondent has been wrongful in particular by having a social worker sit between the applicant and her child;

(d) that the impugned order and/or extent to which or the manner in which the applicant has been afforded access contravenes her rights under the ECHR and in particular article 8 thereof;

(e) that the decision of 27th January, 2016, is unlawful and/or contrary to the applicant's constitutional and ECHR rights and in particular that the reasons set out therein are unlawful and/or inadequate having regard to the ages of the children;

(f) that the respondent has wrongly prohibited the applicant from discussing access with the children; and

(g) that the failure to afford sibling access is unreasonable and/or a breach of the constitutional, legal and/or ECHR rights of the children involved;

(vii) that leave be granted in accordance with the statement of grounds as so amended,

(viii) that the applicant have one week to issue and serve the amended statement of grounds and an originating notice of motion, returnable for a date to be fixed, such service to be effected on the solicitors for the agency and the County Registrar; and

(ix) that costs be reserved.