THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 385

[2018 No. 377]

The President

Edwards J.

McCarthy J.

BETWEEN

L.S.M.

(A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND K.M.)

APPELLANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of the Court delivered on the 5th day of December 2018 by Birmingham P.

1. This is an appeal from the judgment of Humphreys J. delivered on 11th September 2018 which dealt with an unsuccessful application under Article 40.4 of Bunreacht na hÉireann for the release of LSM from the custody of the Child and Family Agency ('CFA').

2. The applicant child was born on 5th June 2018 to KM, a young woman of twenty years. From 11th June 2018 and 29th August 2018, both infant and mother resided in a parent and child unit. LSM was initially taken into care on foot of an Emergency Care Order under s. 13(1) of the Child Care Act 1991 made by Judge King on 29th August 2018. This order was to last for an eight-day period. Subsequently, on 5th September 2018, an Interim Care Order was granted by Judge Ní Chondúin in the District Court. On the following day, the appellant, through her mother, sought an inquiry into the validity of her being taken into care.

Background to the Proceedings

3. The CFA had what are said to be "very serious and significant concerns" about KM's mental health and welfare. The mother had herself been in the care of the CFA between the ages of thirteen and eighteen due to risk-associated behaviours. During that time, she was subject to secure care orders on a number of occasions. It was noted that KM was a vulnerable individual and prone to putting herself in risky situations. KM was also the beneficiary of an aftercare program in which she moved to what is known as 'Intensive Community Programme Care' and received a community support package.

4. In May 2018, KM took part in a pre-birth Child Protection Case Conference where it was agreed that the then unborn LSM was at risk in utero and would be subject to an ongoing risk of significant harm upon birth unless a child protection plan was put in place. The then unborn LSM was registered on the Child Protection Notification System. The CFA arranged for KM to attend for residential assessment at the aforementioned parent and child unit so as to assess her capacity to adequately provide for and protect her child. Although this was agreed by all present, it was said that if KM did not agree that the CFA would take steps to obtain a care order with respect to the unborn LSM.

5. There appear to have been a number of issues during KM and LSM's time in the Parent and Child Unit which is outlined in the CFA Social Work Court Report dated 3rd September 2018. These included problems with other residents as well as periods of absence away from the unit. All of this culminated on 28th August 2018 when KM is said to have had an adverse reaction to negative feedback from staff which resulted in staff forcing entrance into her room in order to confirm the safety of the child. She is said to have threatened to leave her child in care and leave the unit. At one point, KM did, in fact, leave the unit without her daughter only to return at a later stage that same evening. On 29th August 2018, the parent and child unit indicated to the Social Work Department that KM and LSM's placement was no longer viable in circumstances where the mother had failed to engage meaningfully with staff. The decision was then made to seek an Emergency Care Order in respect of the infant and terminate the assessment eleven months into the sixteen-month period that had been agreed.

6. The substantive application for an Interim Care Order came before Judge Ní Chondúin on 5th September 2018. The Emergency Care Order which had been made by Judge King was to expire at midnight on that day. From the District Court transcript, it appears that the proceedings there ran late into the evening with the Judge becoming concerned that she and the parties to the proceedings would be locked into the courtroom, it seems that something of that nature had happened on a previous occasion. At the point at which these concerns were expressed and the order made, the application and KM's response to same had only been partially heard. It was suggested by Counsel for KM that LMS might be released into the custody of her maternal grandparents on a consent basis, but this was not considered appropriate by the Court. Counsel for the mother suggested that there might be an issue as to whether Judge Ní Chondúin had jurisdiction to make the order she was considering when the proceedings had not concluded. Judge Ní

Chondúin, nevertheless, issued an Interim Care Order and made the matter returnable for 17th September 2018, commenting "[the CFA] are concerned. I am going to grant the order and if you feel I have exceeded my jurisdiction, you know where the High Court is".

7. On 17th September 2018, the matter resumed before Judge Ní Chondúin when the remaining evidence of the CFA was heard. On this occasion, too, the proceedings did not come to a natural conclusion. The proceedings were interrupted before there was an opportunity to cross-examine the CFA's last witness, a social worker, as time ran out once more. Judge Ní Chondúin stated that she was satisfied with the evidence that she had heard and that it was such that she should extend the Interim Care Order until 24th September 2018. She had initially proposed putting the matter back for three days, but this suggestion did not find favour with Counsel for the mother as what was being proposed was inconvenient for him. Following this, another Article 40.4 application was made before Barnivlle J. on 19th September and refused.

8. The application for a further extension of the interim care order came before Judge Ní Chondúin on 24th September 2018. The social worker was cross-examined on this date. KM did not go into evidence, but made legal submissions that the threshold for the making of a care order had not been meet. Judge Ní Chondúin found that the threshold had been met, extending the Interim Care Order until 22nd October 2018 and listing the substantive care order matter for hearing on 4th and 5th October 2018.

Judgment of the High Court
9. The High Court was faced with two key issues. First, there was the allegation that there had been a fundamental denial of justice due to the late delivery of the materials being relied upon by the CFA. Under O. 84, r. 9 of the District Court Rules (as amended), the grounding affidavits and any associated exhibits must be served at least two days prior to the date fixed for hearing the s. 17 application. KM stated that the two reports relied upon by the CFA in this case were not so served. The first report, authored by a social worker and which extended to some thirty pages, was not served until 4th September 2018, just a day before the hearing was set to take place. The second report, nine pages in length, was not served until the morning of 5th September 2018 i.e. the day of the hearing itself. It was submitted that this amounted not only to a breach of the District Courts Rules, but also KM's right to fair procedures in dealing with the application in line with S. McG v. Child and Family Agency [2017] 1 IR 1. Humphreys J. highlighted that this claim to a breach of fair procedures was a novel one and had not been raised before the District Court. Although the fact of non-compliance with time limits was brought to the attention of the District Court, it was for the purpose of seeking a dismissal of the proceedings rather than for the purpose of seeking an adjournment so as to allow the necessary time to prepare for a full hearing. As such, it was held that the objection was legalistic in nature and was not of the kind envisaged in the S.McG case.

10. Second, KM submitted that there had been a breach of fair procedures or a want of jurisdiction as Judge Ní Chondúin issued an order without hearing all of the evidence. Humphreys J. considered that s.17 of the 1991 Act allows for the making of an Interim Care Order where the court in question is satisfied of certain matters. This satisfaction must emerge from a process that respects fair procedures. The question then became whether it was in accordance with fair procedures to make an order in circumstances where time had run out before all the evidence had been heard. Humphreys J. found, in line with the decision of O'Higgins CJ. in The State (Lynch) v. Cooney [1982] IR 337, that a "practical and pragmatic" solution where time was of the essence which resulted in the modification of fair procedures was not a breach of the principle per se. This, he concluded, was what had occurred here. The test was one of proportionality. It was held that fair procedures were not breached in a case such as this where time necessitated a truncated process.

Grounds of Appeal
11. KM has advanced a number of Grounds of Appeal which may be categorised as follows:

> (i) That the failure to furnish evidence to the applicant within the required timeframe constituted a breach of fair procedures (Grounds 1-3);
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> (ii) That the High Court erred in ruling that the District Court judge had run out of time to hear the case and that it was not possible for her to continue hearing the case (Ground 4);
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> (iii) That there had been a breach of fair procedures in failing to abide by the principle of audi alterem partem (Grounds 5-10, 12-14);
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> (iv) That the High Court erred in finding that the decision of the District Court judge was proportionate in the circumstances (Ground 11);
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> (v) That the High Court erred in refusing to grant KM her costs (Ground 15).

Failure to Furnish Evidence within the required Timeframe (Grounds 1-3)
12. Counsel for KM emphasised that the nature of the case is of the upmost importance as it concerns the removal of a new-born infant from her natural mother. As such, it was submitted that this was a case that demanded strict adherence to the District Court Rules. The reports should have been furnished to KM two days prior to the hearing so as to allow her in absorb the details therein. The necessity for same is further highlighted by the inclusion in the reports of evidence which the mother describes as being hearsay.

13. The appellant relies on the S. McG case which dealt with a District Court judge's refusal to adjourn the hearing of a s.17 application, on consent, in circumstances where the parents had limited time to prepare their case. MacMenamin J. held:

> "[f]air procedures…required that both parents be legally represented, and time given to take instructions, and comply with other procedural steppes necessary…The effective representation of parents is not only a vindication of parents rights, but of the children's rights." [at p.21]

14. Reference was also made to the European Court of Human Rights decision of McMichael v. the United Kingdom (1995) 20 EHRR 205, para.80. In that case it was held that the failure to disclose social reports, described as "vital documents", amounted to a breach of the right to a fair hearing under Article 6.1 of the ECHR as it not only affected the initial hearing, but the ability to assess the prospects of making an appeal.

15. The appellant argued that the failure to properly furnish the reports in line with the District Court Rules is not only a breach of fair procedures, but the principle of equality of arms. The breach is compounded by the unsatisfactory nature of the proceedings in failing to hear all the evidence before making an order. The objection was not purely legalistic in nature, but was instead based on the fact that delayed service of the reports impacted KM's ability to instruct her legal team due to the historic nature of many of the

allegations therein. Given the constitutional implications of a s.17 application, counsel for KM submits that the legislator must have intended for there to be practical consequences for failure to comply with the timeframes imposed upon the parties.

16. In response, counsel for the CFA accepted that there had been a procedural irregularity in their failure to ensure that the reports were served upon KM two days prior to the hearing. It was submitted, however, that this does by itself amount to a breach of constitutional fair procedures or invalidate the subsequent order itself as per O.39, R.2 of the District Court Rules. It was suggested that the S. McG case was distinguishable given the extreme nature of the denial of fair procedures i.e. refusal of an adjournment despite it being on consent. Further, the application in S. McG was not urgent given the lack of an Emergency Care Order prior to same. While it was admitted that the service of documents was less-than-optimal, there was no suggestion that KM was prevented from substantively challenging the evidence. Moreover, no application was made by KM seeking additional time or an adjournment to take instructions which would have been more in line with S. McG.

17. Further, the respondent submitted that the McMichael case can be distinguished on the basis that it involved the total withholding of "vital documents". In comparison, this case involved a mere delay in serving KM with the social reports and not the total denial seen in McMichael. As such, there could be no fundamental denial of fair procedures.

The District Court Judge's Ruling that time had run out (Ground 4)
18. Counsel for KM submitted that it is unclear that it was impossible for the Judge Ní Chondúin to continue with the hearing on 5th September 2018. While references were made to potentially being "locked in", no inquiries were made as to the flexibility of security in the Courthouse.

19. The respondent argued that the circumstances that Judge Ní Chondúin found herself in are relevant. A risk of serious inconvenience or exceeding normal Court hours because further hearings are impractical or impossible can provide a basis for modifying optimal fair procedures.

Failure to abide by the Principle of *Audi Alterem Partem* (Grounds 5-10, 12-14)
20. The appellant submitted that the constitutional right to be heard, as part of the right to fair procedures as discussed extensively in cases such as *Re Haughey* [1971] IR 217 and *State (Murphy) v. Kielt* [1984] IR 458, cannot be disregarded simply where "time has run out" for the hearing of the application. The case of *C.A. and R.A (Minors) KA. v. The Health Service Executive* [2012] IEHC 288 involved two children being taken into care on foot of Emergency Care Orders with subsequent Interim Care Orders being granted. A number of extensions were granted with the most recent ones being given without an oral hearing and without the consent of the children's mother. O'Malley J. held at para.21 of the judgment that while there needed to be a degree of flexibility in child care cases, that the normal rules that "courts act on evidence and that applying for an order must establish the grounds for making an order" still apply.

21. Counsel for KM highlighted that the constitutional presumption that the best interests of the child is served by being with his or her family can only be displaced by compelling evidence. Further reliance was placed on the European Court of Human Rights case of *Haase v. Germany* [2004] 2 FLR 39 which concerned an infant baby being taken into care immediately after its birth (along with six other older children). The Court held at para.91:

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

Counsel for KM accepted that LSM was not removed from her mother's care immediately after birth, but argued it was nonetheless analogous given that it was done when she was only three months old.

22. The appellant submitted that her right to fair procedures, as outlined in *Re Haughey*, had been breached because first, she had not been given the evidence that would be relied upon in accordance with the timetable provided for in the District Court Rules. Second, KM did not have an opportunity to cross-examine all the witnesses proffered by the CFA on 5th September 2018. Third, she was never given the opportunity to give evidence on 5th September 2018. Fourth, Counsel for KM was not given the opportunity to make substantial legal submissions in relation to the Interim Care Order.

23. In relation to the High Court's reliance on the decision in Cooney, counsel for KM submitted that it could be distinguished on the grounds that it involved an administrative rather than a judicial function. The case itself involved s. 31(1) of the Broadcasting Authority Act 1960 which gave the Minister for Posts and Telegraphs the power to prohibit the broadcasting of matters which would be likely to promote crime or undermine the authority of the State. On 9th February 1982, the Minister utilised this power in respect of a party political broadcast to be delivered by Sinn Fein on 10th and 11th February 1982. O'Higgins CJ. noted that the Minister's opinion in this regard was bona fide and the urgency in which action was required. Accordingly, he held:

> "[t]here was no opportunity for debate or parley. Indeed, in the circumstances to permit or seek such opportunity might have defeated the very object and purpose of the section. There may be cases in which justice requires that those to be affected by action of this kind should receive notice and be heard. I am quite satisfied that this was not one of such cases." [at p.364]

24. The appellant argued that administrative functions, such as those exercised by the Minister in Cooney, are not considered contentious matters for the purposes of fair procedures and the right to be heard. It is an executive action on foot of statutory authority. As such, the constitutional protections and safeguards inherent to a fair hearing do not arise. In contrast, this was a contested, adversarial judicial hearing which entitled KM to minimum protections under Bunreacht na hÉireann and the ECHR. As such, the High Court's application of Cooney to the facts of this case was erroneous.

25. Counsel for the CFA submitted that the case of K.A. can be distinguished as the District Court heard direct evidence for two hours and cross-examination of the first witness before time ran out. As such, there was sworn evidence upon which Judge Ní Chondúin could be satisfied so as to make the Interim Care Order. In contrast, the issue in K.A. was the absence of any oral hearing and any such evidence. Further, the respondent argued that the case before this Court is completely different to that of Haase as LSM resided with KM at the parent and child unit for a number of months. They did so for the purpose of ascertaining KM's capacity to care for her child. This was something which the mother was acutely aware of and had agreed to. It was a collaborative endeavour and not done for the purposes of obtaining care orders. The immediacy of Haase is simply not present.

26. The respondent suggested that Cooney was a wholly appropriate case for the High Court to rely on. Where examining if there has been a breach of the principle of audi alteram partem, O'Higgins CJ held that a Court must consider the practical realities facing the

decision maker, the strength of the evidence taken into consideration, and the extent to which the opportunity to be heard would be likely to change the supporting evidence.

27. Counsel for the CFA suggested that there is considerable factual overlap between the two cases. First, both required the decision maker to act quickly due to the urgency of the matter. Second, there was ample evidence to justify the decisions that were made. Third, the failure to hear the other side was not fatal in circumstances where Sinn Fein did not dispute the facts upon which the decision-maker relied. Similarly, the evidence upon which Judge Ní Chondúin relied was largely uncontradicted by KM.

28. The respondent also highlighted that child care proceedings under the 1991 Act are inquisitorial and not adversarial in nature. O'Flaherty J. in Southern Health Board v. CH [1996] 1 IR 219 at p.237 noted that they are not "lis inter-partes". The chief concern is for the welfare of the child.

Doctrine of Proportionality (Ground 11)
29. The appellant submitted that when assessing the proportionality of Judge Ní Chondúin's action, the Court must do so through the lens of Article 41 of Bunreacht na hÉireann and the high constitutional protection afforded to the family. This cannot be said to have occurred where the application for an Interim Care Order contravened the District Court Rules, where KM was not afforded the opportunity to cross-examine witnesses, where no opportunity was given to allow counsel for the mother to make legal submissions, and where the District Court did not ascertain whether she wished to give evidence. The accumulated departures from the standards of fair procedures were not proportionate in the circumstances. Further, the protections afforded to children under Article 40.3.3 and 42A have not been vindicated where a lack of judicial resources prevented the case from being fully disposed of on 5th September 2018. Counsel for KM note that a more proportionate act, and one which was open to the District Court, would have been to issue another Emergency Care Order if she was satisfied that there was an immediate risk to the life or health of LSM.

Threshold for an Article 40 Application
30. The respondent submitted that even if KM is right in her criticisms of both the District and High Courts that it fails to meet the criteria of a successful Article 40 application. In the S. McG case, O'Donnell J. noted that courts should be very cautious when approaching child care cases with the "formidable remedy" of Article 40.4. MacMenamin J. held that what is required is that:

> "The detention might be said to be 'wanting in due process of law'… [and not just] a situation where there had been a mere legal error, or slight procedural impropriety or where the jurisdiction of the court had been inadvertently exceeded." [a p.22]

No complaint was raised in the District Court or the High Court that counsel for KM had not been able to take proper instructions or that they did not have time to read the reports given to them by the CFA. Prior the making its Interim Care Order, Judge Ní Chondúin had the benefit of a significant amount of direct evidence and cross-examination as well as the verifying affidavit and notice of application.

Discussion
31. It is interesting to note that the appellant, in both written and oral submissions, has indicated that if Article 40 is not considered the appropriate remedy in the circumstances that she is prepared to issue judicial review proceedings and instructions have been given accordingly.

32. It is convenient to deal with the fair procedures points and then to consider the issues that arise from the fact that the Court hearing the case ran out of time. When the Court took up the issue on 5th September 2018, counsel on behalf of the mother indicated that he had a brief submission to make, the submission was that the Care Order had not been correctly brought before the Court. He submitted that while a notice, as contemplated by SI No. 143/2015, the District Court (Child Care) Rules, had been served, that there was no grounding affidavit. He accepted that there was a verifying affidavit, but said that it did not deal with factual grounds on which the order was sought. He then referred to the fact that one report on which the Child and Family Agency sought to rely had been furnished only a 11am that day, that was a 9-page report, and another report, one of 28 pages, was furnished only the day before the hearing. It is clear from a reading of the transcript of the District Court that counsel was not complaining that he had insufficient time to prepare for the hearing and there was no request for an adjournment to afford additional time. Rather, the stance taken by counsel was that there had been a failure to observe the rules and he was contending that the consequence for the failure to observe the rules was that the application should be dismissed.

33. On behalf of the respondent Child and Family Agency, it was pointed out that the District Court Rules themselves provide:

> "[s]ubject to any provision of an enactment, a failure to comply with these Rules is an irregularity and does not render a civil proceeding or a step taken or any document or order in the proceeding void."

34. In my view, the Judge in the District Court was quite entitled to take the view that an issue as important as the making or not of an Interim Care Order should be decided on its merits, and the fact that time limits prescribed had not been adhered to would not justify the dismissal of proceedings. The current proceedings are in sharp contrast to the case of SMcG. There, the first-named applicant, the mother, had obtained legal aid on the morning of the hearing, but the solicitor instructed did not have sufficient time to take instruction. The second-named applicant, the father, was functionally illiterate and had no legal representation at all. The parties agreed that the matter should be adjourned for a week, but the Judge decided to proceed with the hearing. What occurred is identified by the majority in the Supreme Court as a default in the fundamental requirements of justice. I have no doubt that the fact that the timeframe set out in the District Court Rules was not adhered to would not of itself provide a basis for an order under Article 40 of Bunreacht na hÉireann.

35. I found the situation in relation to the Court running out of time more unusual and more difficult. In the High Court, Humphreys J. placed considerable reliance on the Supreme Court decision in *State (Lynch) v. Cooney*, the Sinn Fein Party political broadcast case, but for my part, I find that the context of that case and the present case is so different that I derive little assistance from it.

36. Recalling what occurred in the District Court, the first witness to give evidence was Ms. Marie O'Riordan, the manager of the Parent and Infant Unit. In her direct evidence, Ms. O'Riordan described the experience that Ms. KM had had with her baby in the Parent and Infant Unit, referring to periods during which progress was made and periods during which difficulties were encountered. She expressed the professional opinion that LSM would be at risk if returned to the care of her mother, both around her basic care needs being met and also in terms of what she would experience. In cross-examination, Ms. O'Riordan said that she was a social care worker and accepted that she was not a qualified psychologist or psychiatrist. A reading of the transcript of Ms. Riordan's direct evidence and cross-examination aroused a serious concern about the capacity of KM to care for her baby. Ms. Riordan was followed into the witness box by Dr. Clem de Burca, a senior psychologist and Clinical Director at the centre. While Dr. de Burca was giving his

direct evidence, the Judge indicated that she was going to take a break for five minutes. The intervention by the Judge came at an early stage in the evidence of Dr. de Burca, after he had made certain preliminary remarks which had not really advanced the case for or against an Interim Care Order to any significant extent. When the Court sat again, the solicitor for the HSE said:

> "I will wrap it up fairly quickly and I won't call my social worker. I think I have enough evidence."

Counsel for the mother indicated that he did not think that they would be going into evidence. The Judge commented that there was quite a bit to be heard and that it would merit another day. The Judge indicated that she was going to give the case the earliest possible date and was adjourning the matter. The Judge then posed a question as follows:

> "[n]ow, in the meantime, I have concerns, what is going to happen the child? Anyone care to address me on that at this point in time?"

Counsel for the mother indicated that there would be no difficulty with the child being placed with the grandparents who were present in Court, but that he understood that this would have to be done on a voluntary basis and that there would not be any order. The Judge intervened to say:

> "I have concerns, but I've only heard one part of the story and I feel I have no choice but to issue an Interim Care Order to the earliest possible date.
>
> In other words, I will be jeopardising or scuppering Family Law lists or any other lists which I am happy to do. I wouldn't do it otherwise, but these are decisions to be made quickly."

Counsel then said that he had a submission, a very quick one, whether it was within the Court's jurisdiction to issue an Interim Care Order in respect of proceedings that had not been concluded, "I am not aware of any legal vehicle that allows for such a cause of action". At that point, the Judge intervened, saying:

> "[w]ell, if there isn't, there is always a first time. This is about a child. I am not concerned about anybody else. The well-being of a child."

37. The situation in which Judge Ní Chondúin found herself was a very difficult one, but her response was a very conscientious and responsible one. She made clear that she would have to adjourn the matter, but that the case would go back to the earliest possible day. She indicated that she would have to jeopardise or scupper a Family Law list or other lists which she was happy to do. She said she would not do it otherwise, but that these were decisions to be made quickly. In the case of SMcG, one matter that concerned the Court was the limitation inherent in a further hearing. At p. 13 of the judgment, O'Donnell J. commented:

> "[a]s was set out in the grounding affidavit, in ongoing interim care proceedings, it would not be open to the parties to seek to re-litigate matters that had already been dealt with in previous hearings, and in those circumstances, the possibility of a fully contested application for an extension of the Interim Care Orders would not cure the institutional procedural defects in the hearing on the first Interim Care Order."

O'Donnell J. went on to quote the solicitor for the applicant as having said:

> "[h]is experience of interim care proceedings was such that he had 'every reason to anticipate that this had started a series of events which will lead to the children remaining in the custody of the Child and Family Agency for months, if not years, before there is a final determination of the issue of whether the children should remain in the custody of the Child and Family Agency on a long-term basis'."

38. The manner in which the District Court judge conducted herself can also being contrasted with that seen in *Bedford Bourough Council v. M & anor; A & ors v. Child and Family Agency* [2017] IEHC 583. The High Court was quite critical of the manner in which the District Court proceedings were conducted. The current proceedings are starkly different in that Judge Ní Chondúin was at pains to be fair, to maintain the status quo, and not disadvantage any party.

39. It does seem to me that the factual background in the present case is quite different to those I have mentioned. This was not a case of what might be described as an ordinary Interim Care Order being made in proceedings that were, for one reason or another, unsatisfactory. In this case, the Judge was making the order because she felt that she had no real alternative. She referred to the fact that she had heard only one side of the story, albeit that she was being told that it was unlikely that the mother would be giving evidence during the course of the proceedings and she was putting the matter back for hearing to the earliest possible date. It seems to me that in those circumstances, the Judge in the District Court was doing everything in her power to avoid injustice.

40. It must be said that the situation in which she found herself was an entirely unsatisfactory one. One would like to think that what occurred was highly unusual, perhaps bordering on the unique, but it appears that was not in fact the case What is very disturbing indeed is that something not very different occurred again on 17th September 2018. All too often judges when dealing with sensitive and urgent matters that demand late sittings are met with incredibly difficult practical hurdles to surmount. Again, it is greatly to the credit of Judge Ní Chondúin that she was prepared to put the case back only for the shortest possible time; she had a three-day adjournment in mind.

41. In my view, the difficulties that arose were not of Judge Ní Chondúin's making. It is apparent from the transcript that she had a very heavy Childcare List that day which she was attempting to deal with in a manner that can fairly be said to have been above and beyond the call of duty. At this remove, it is suggested that Judge Ní Chondúin might have considered whether the situation could be dealt with by making a further Emergency Care Order if satisfied that the threshold for the making of such an order had been crossed. It was not a suggestion that was canvassed with the Judge by the appellant's legal team, or indeed canvassed by anybody else.

42. The Judge found herself in a position where evidence had been put before the Court which meant that the child's interest would not have been served by taking the view that the clock had run down and that the Emergency Care Order would simply expire with no replacement structure in place. Faced with the situation that she was, her decision to make an Interim Care Order, but one which was to last for the shortest possible time with the case coming back before her to be dealt with further, was an appropriate and responsible one.

43. In the circumstances, I do not believe that this is a case for making an order under Article 40. So, while I would approach the case on a somewhat different basis than did the learned High Court Judge, in particular, I would not place the reliance that he did on

the case of *State (Lynch) v. Cooney*, I am in agreement with him as to the outcome and, in the circumstances, would dismiss the appeal.