THE HIGH COURT

JUDICIAL REVIEW

[2019/106. J.R.]

IN THE MATTER OF

A.F. A MINOR BORN ON 13TH MARCH, 2003

AND IN THE MATTER OF

ARTICLES 40.3, 41, 42 & 42(a) OF THE CONSTITUTION

AND IN THE MATTER OF

THE CHILD CARE ACT 1991 (AS AMENDED) AND THE INHERRENT RESTRICTION OF THE HIGH COURT

BETWEEN

A.F. (A MINOR), SUING BY HIS GUARDIAN AD LITEM

(D.K.)

APPLICANT

AND

CHILD AND FAMILY AGENCY

RESPONDENT

AND

S.F.

NOTICE PARTY

AND

D.B.

NOTICE PARTY

AND

THE MINISTER FOR CHILDREN AND YOUTH AFFAIRS

NOTICE PARTY

JUDGMENT of Ms. Justice O'Regan delivered on the 20th day of June, 2019

Introduction

1. The applicant herein was born . . . in 2003 and is now 16 years old. He has been in the care of the Child and Family Agency (C.F.A.) since 18th of December, 2017 on foot of an interim Care Order pursuant to s.17 of the Child Care Act 1991. The order has been extended from time to time currently in being until 14th June, 2019. The applicant is presently residing in . . . since May, 2018.

2. From September 2018 there had been a deterioration in the behaviour of the applicant leading to an application for directions in the District Court in December, 2018. On the 10th December, 2018 by decision of the National Special Care Committee of the Respondent, pursuant to s.23F of 1991 Act as amended (this section came into force on 31st December, 2017 and prior to same there was a secure care regime operated pursuant to the inherent jurisdiction of the High Court) a determination was made that it was satisfied that there was reasonable cause to believe that the applicant requires special care (namely that there was reasonable cause to believe that the applicant's behaviour poses a real and substantial risk of harm to his life, health, safety, development or welfare and provision of continued care to the applicant other than special care, or treatment and mental health services will not adequately address that behaviour).

3. Subsequently the Service Director of the C.F.A. refused to make a formal determination under s.23F(7) because there was no place available in any secure unit for the applicant following which judicial review proceedings were instituted complaining of the failure of the C.F.A. to abide by its statutory obligation.

4. The matter was heard by Ms. Justice Faherty over the Christmas vacation 2018/2019 and ultimately the court issued a written judgment bearing date 28th January, 2019 on foot of which an order was made on 5th February, 2019 to the effect that the refusal of the Service Director to make a determination in accordance with s.23(f)(7) was unlawful.

5. On 6th February, 2019 the Service Director made a formal determination in accordance with s.23F(7) of the 1991 Act, which was the relevant statutory provision under consideration by the court at that time. Notwithstanding the making of that formal determination an application was not made to the High Court under subs.8. In a letter of 11th February, 2019 the C.F.A. indicated that an application would not be made as there were no vacancies available in secure accommodation for the applicant.

6. Leave was afforded on 25th February, 2019.

Issue before the Court

7. The Statement of Ground before the court is dated 25th February, 2019. At para. (d) the relief sought is set out incorporating nine sub-paragraphs. At the opening of the matter it was indicated that the judicial review was proceeding on the basis of sub-para (4) which states: -

> *"A declaration that the decision and/or policy of the respondent to defer the making of an application for a Special Care Order in the High Court in respect of the applicant, as required pursuant to s.23F(8) of the Child Care Act 1991 as amended, until a place is available, despite having made a determination pursuant to s.23F(1) and (7) that the applicant requires special care, is unlawful".*

8. The grounds upon which the relief is sought is set forth in para.(e) of the Statement of Grounds and sub-para 10 thereof provides:-

> *"Despite the passage of nineteen days, and the fact that AF has been assessed as at 'immediate' risk, the respondent has not applied for a Special Care Order for AF and has failed to give any indication to AF's guardian ad litem as to when it will do so. It appears to be the respondent's position that, despite the mandatory wording of s.23F(8), it does not have to make such an application until it believes that it is ready to do so. It is said that it has no placement available for AF at present an is unable to give any indication as to when a placement will be available, despite the ongoing immediate risk to AF."*

9. The respondent acknowledges that there is a mandatory obligation comprised within s.23F(8) however submits that in the absence of a timeline provided for in that subsection the obligation on the respondent is to make the application as soon as is practicable.

10. Section 23F(8) of the 1991 Act as amended provides: -

> *"Where the Child and Family Agency determines that there is reasonable cause to believe that for the purposes of protecting the life, health, safety, development or welfare of the child, the child requires special care the Child and Family Agency shall apply to the High Court for a Special Care Order."*

11. From the outset the respondent asserts that the within proceedings are moot because of a decision bearing date 5th March, 2019 wherein the National Special Care Committee determined that the applicant no longer required special care. This decision of 5th March, 2019 is the subject matter of judicial review proceedings (record no. 2019/131 JR) although during the currency of the hearing of the within proceedings the court was advised that the parties agreed that the proceedings record 2019/131 J.R. did not require to be considered by the court and an issue of costs only remains outstanding between the parties.

Are the proceedings moot?
12. The C.F.A. argues that:-

> a) because of the decision of 5th March, 2019;
>
> b) the guardian *ad litem's* most recent report of 29th April, 2019 where it is acknowledged that the applicant's risk taking behaviours have diminished significantly and that he continues to manage himself well in the community and at . . .,

it is now manifest that the applicant could not be placed in special care.

13. The applicant argues that because the behaviour could be considered volatile that there may well be need for special care in the future for the applicant and indeed for young vulnerable children in the same position as the applicant had been in clarification to the true meaning and effect of s.23(f)(8) of the 1991 Act is required. Because of the current circumstances of the applicant the applicant seeks to proceed with the claim in respect of the declaration herein before identified and the further claims within the Statement of Ground are not now sought to be litigated on behalf of the applicant.

14. In arguing that the proceedings are not moot the second named notice party refers to the Supreme Court decision in *SMcG. & JC v. Child and Family Agency* [2017] 1 I.R. 1 where MacMenamin J. rejected the respondent's argument that the appeal was moot on the basis that a procedural flaw of a fundamental nature at the outset of a custody case may have ongoing effects which necessarily have continuity and the issues arising bear not only on the case then before the Supreme Court but may also have consequences in other cases. MacMenamin J. in those circumstances was of the view that the court should determine the appeal in the interests of the proper administration of justice. The second named notice party also quotes from the judgment of Charleton J. in that decision where it was acknowledged that a discretion exists to hear a moot appeal in particular where the situation is capable of repetition.

15. The respondent refers to several cases in the Supreme Court such as *Murphy v. Roche* [1987] I.R.106, *Borowski v. Canada* [1989] 1 S.C.R. 342, *G. v. Collins* [2005] 1 I.L.R.M.1, *Lofinmakin v. Minister for Justice* [2013] 4 I.R.274 and *W. v. Health Service Executive* [2014] I.E.S.C.8. The Respondent also refers to *AX v. The Mental Health Tribunal* [2014] I.E.H.C. 592 and *McDonagh v. Governor of Mountjoy Prison* [2015] I.E.C.A.71. All of the foregoing are to the effect that proceedings before the court are rooted in an adversarial system with the parties having a full stake in the outcome and therefore the court does not decide hypothetical or moot points of law unless there is a special jurisdiction or in exceptional cases for compelling reasons.

16. The C.F.A. argues that if a legal dispute has been resolved the litigants no longer have any proper interest and the public interests generally requires that the judicial branch should refrain from deciding such questions. As per Lofinmakin an appeal is moot when a decision could have no practical impact or effect on the resolution of some live controversy between the parties.

17. In *O'Sullivan v. The Sea Fisheries Protection Authority & Ors*. [2017] 3 I.R. 751 at para.26 Mr. Justice O'Donnell in the Supreme Court consider the mootness issue which arose in that case and quoted from the earlier Supreme Court decision of *Irwin v. Deasy* [2010] I.E.S.C. 35 to the effect: -

> *"The mootness doctrine is applied by the courts to restrain parties from seeking advisory opinion on abstract, hypothetical or academic questions of law by requiring the existence of a live controversy between the parties to the case in order for the issue to be justiciable."*

Mr. Justice O'Donnell also referred to the Borowski case aforesaid to the effect that: -

> *"An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it."*

18. In the instance circumstances child care proceedings are ongoing in respect of the applicant in the District Court.

19. The issue as to whether or not the proceedings are moot was raised at the outset and a ruling was given to the effect that the declaratory relief as to the import and effect of s.23F(8) was not moot. In this regard the court was alert to the fact that there is a discretion vested in the court notwithstanding that the issue might be considered moot and furthermore in accordance with the judgment of MacMenamin J. in *Mc G*. aforesaid if the understanding of the relevant section by the CFA is incorrect this would result in a procedural flaw having ongoing affects not only potentially on the within applicant who is currently aged 16 but also on other cases and therefore a determination on the issue is in the interests of the proper administration of justice. Furthermore because of the volatile behaviour of the within applicant I am satisfied that an application for secure care is capable of repetition and accordingly the section should be considered in the best interests of the child.

Is the respondent's understanding of Section 23F(8) of the 1991 Act correct?
20. It is common case between the parties that after the Service Director making a formal determination on 6th February, 2019 all requirements specified under s.23F subs.1 to subs.7 were complied with.

21. It is acknowledged that subs. 8 is framed in mandatory terms as opposed to permissive or discretionary terms.

22. The respondent argues that notwithstanding that in the judgment of Ms. Justice Faherty of 28th of January, 2019 and the subsequent declaration made by her on 5th February, 2019 to the effect that in the circumstances the refusal of the Service Director to make a formal determination under subs.7 was unlawful given that all requirements under subs. 1 to subs. 6 were then complied with (the Service Director had refused to make a formal determination until such time as facilities were available to the respondent to take the applicant into special care) and notwithstanding that the terms of subss.7 and 8 are similar nevertheless courts should interpret the wording in subs.8 differently from the same wording in subs.7.

23. Subsection 7 provides *inter alia* where the Child and Family Agency is satisfied that there is reasonable cause to believe that the child requires special care it shall make a determination as to whether the child requires special care.

Subsection 8 provides that where the Child and Family Agency determines that there is reasonable cause to believe that the child requires special care the Child and Family Agency shall apply to the High Court for a Special Care Order.

24. The respondent had argued before Ms. Justice Faherty that the Oireachtas was aware when implementing s.23F of significant difficulties encountered by the C.F.A. in recruiting staff for the purposes of providing special care facilities. Placements for children are in fact available subject only to the provision of adequate staffing which is not available. The respondent had argued that because of this knowledge a purposeful meaning of s.7 was to the effect that the Service Director's decision was not required until such time as a placement with adequate staffing was available and the C.F.A. had prioritised the applicant as the child most in need of special care, from a selection of children then deemed to require special care but awaiting facilities.

25. The argument aforesaid was unsuccessful before Ms. Justice Faherty and that order has not been appealed. Nevertheless, the same arguments are made before this Court in respect of subs.8. Added to the foregoing arguments the C.F.A. suggests that all steps required to be taken under subs. 1 to subs.7 are internal to the C.F.A. whereas subs.8 is external namely by requiring an application to the High Court and therefore this distinction should guide the court to interpret subs. 8 as meaning the application to the High Court will be made as soon as is practicable which in turn requires the C.F.A. to have available to it a placement with adequate staffing and the applicant to be then prioritised by the C.F.A. as most in need of the special care facility of the children then deemed in need of such special care. In addition, the respondent suggests that the case which the respondent has to meet is one where the applicant is suggesting that the application to the High Court should be made immediately after the Service Director makes a formal determination.

26. The applicant argues that the term "immediately" arises in the context of a submission made by the applicant quoting from the respondent's own guidelines entitled "*Criteria for Admission to Special Care*" which were drawn up in July, 2014 and subsequently amended in April, 2018, following the implementation of s.23F, wherein it refers to the risk of harm being determined as immediate.

27. Furthermore, the reality of the within proceedings is that as provided by para. (e) (10) of the Statement of Ground the application for judicial review is made to the court following the passage of nineteen days between the making of the Service Director's formal determination and the application for leave in respect of the within proceedings. In the intervening period the applicant did enter into correspondence with the respondent prior to the application for judicial review, both before and after a letter of 11th February, 2019 where the respondent indicated it would not make such an application because there were no vacancies in the special care system at that time (the issue of priority of the child amongst the children awaiting special care was not addressed in that letter however had been addressed in the affidavit which was before Ms. Justice Faherty on behalf of the respondent and was also addressed in the affidavit which is before this Court).

28. During the course of submissions counsel on behalf of the respondent did admit that the purposeful meaning of subs.8 (see the Interpretation Act 2005) as contended for by him may in certain circumstances result in no application being made to the court for a special care order notwithstanding compliance with all steps outlined in subs.1 to subs.7 and notwithstanding that the relevant child might have a continued need for special care – a child may not reach the priority status within the list of the children requiring special care notwithstanding the availability of a fully staffed placement for such care. The reality therefore of this contended for understanding of subs.8 is not only that an application to the High Court might never be made but until such time as a fully staffed placement is available with the applicant child being prioritised could the respondent afford any timeframe within which the application would be made to the High Court.

29. Such an understanding of subs.8 in the context of the steps which would have been taken under subs.1 to subs.7 and indeed in the context of the 1991 Act as a whole (the long title whereof provides for the care and protection of children) would amount to an absurdity and it cannot be accepted that same could be considered consistent with the plain and ordinary reading of s.23F as a whole, or ss.8, or the intended purpose of the 1991 Act or part 4(a) thereof. Rather, I am of the view that in accordance with the respondent's own guidelines the subsection requires some element of expedition in making the application to the High Court and any delay in the making of such application should be referable to the process of proceeding with the application before the High Court (for example some delay in the swearing of the requisite affidavit) and should not be referable to circumstances entirely unrelated to the Applicant or the determination that a need for special care exists as made by the C.F.A., namely, the availability of a fully staffed placement and prioritisation of an individual applicant for such placement.

30. The fact that it may be in ease of a High Court list system not to make such application until a fully staffed placement is available and an applicant will be afforded priority in respect of that placement is not in my view a relevant consideration in or about an understanding of the true meaning and intent of subs.8 (see the Interpretation Act 2005).

31. I am satisfied that there is nothing intrinsically erroneous about an interpretation of subs.8 requiring an application to be made as soon as is practicable provided, as aforesaid, such contingency relates to the process of the application to the court as opposed to any other external factor.

32. The fact that ss.8 comprises an obligation external to the C.F.A. does not alter the foregoing.

Conclusion
33. In conclusion in all of the circumstances I am satisfied that the deliberate and intentional policy of the respondent not to take any steps to apply to the court as per the mandate incorporated within subs.8 at a time when the requirements of subs.1 to subs.7 of s.23F have been fulfilled (based on available placement and priority status) is inconsistent with the meaning of subs. 8. Further in circumstances where there has been a full compliance with subs.1 to subs.7 with a failure to take any step whatsoever in fulfilment of the mandated requirement of subs.8, for a period of nineteen days, without any timescale or explanation connected to the process of such application proffered for the making of the application to the High Court, is unlawful.