Neutral Citation [2016] IEHC 451

THE HIGH COURT

[2015 No. 526 JR]

BETWEEN

MM AND MAM (A MINOR SUING BY HIS PARENT/NEXT FRIEND MM)

APPLICANTS

AND

THE CHILD AND FAMILY AGENCY AND

THE RELEVANT DISTRICT COURT JUDGE

RESPONDENTS

AND

MIRIAM LYNE

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 29th day of July, 2016.

1. This is third of three applications for judicial review brought by the applicants relating to the care of, access to, and custody of the second named applicant, a young boy born on 8th April, 2010. The first named applicant is the mother of the young boy who is the subject of a care order made under s. 18 of the Childcare Act 1991 ("the Act of 1991") on 15th July, 2011.

2. The judicial review seeks relief in ten matters relating to the ongoing management of the access of the mother to her son pursuant to various orders made by the District Court exercising its jurisdiction under s. 47 of the Act of 1991 to give directions as to matters affecting the welfare of the child.

3. The application for judicial review is very broadly framed, and seeks declaratory relief in respect of a number of broadly stated, and in many cases scarcely controversial, principles of law arising from the constitutional and legal protection and primacy of the interests of a minor child, and of the rights of the mother of that child.

4. Certain reliefs sought are not controversial, or may be said to be unnecessary, in particular the following orders:

> (a) That "a state body" is charged with ensuring that constitutional rights and the rule of law are not undermined or disregarded.
>
> (c) Any orders limiting the right of access of the mother to her child should be "proportionate and justified", and sufficient reason must exist before access is limited or restricted in total.
>
> (d) That "insurmountable obstacles" ought not to be placed between mother and child with regard to their right to associate and communicate with one another.
>
> (f) That a parent must be provided with an opportunity to see and speak to his or her child and the child to the parent.
>
> (g) That Articles 40.3 and 42 of the Constitution, Article 8 of the European Convention on Human Rights, and Article 9(3) of the International Convention on the Rights of the Child mean that children have a right to be raised by their parents and remain in their custody, and that such rights should be interfered with to the least degree necessary to protect the children, and any measures taken must be supported.
>
> (h) That reunification of parent and child is desirable where a child and parent are separated for whatever reason, including by court order.
>
> (i) That the State has a positive duty to find practical solutions to difficulties experienced in carrying out any court order for access.

5. Many of the grounds on which relief is claimed are also uncontroversial and include a proposition that a child of a young age is incapable of making decisions in his or her best interests, and that the onus exists on the adults to ensure necessary steps are taken to protect the interests of the child. Other reasons are pleaded that the failure of the court to ensure that its orders are obeyed interferes with the rights of the applicant where injunctive relief is sought.

6. This application must be seen in the context of the first two applications for judicial review brought by these applicants and which were heard together. It must also be seen in the context of what has been by any measure, lengthy and careful hearings before both the District and Circuit Courts on the application taking the child into care. Approximately 60 days of court time have been engaged by the District Court in regard to the care and custody of the infant child, and access arrangements put in place for him to maintain contact with his mother.

7. The Circuit Court on appeal after a hearing of eight days confirmed the primary order by which the child was taken into care, and the second judicial review, 2015/497 JR, relates to that order.

8. Leave to seek judicial review was granted by Faherty J. on 25th August, 2015 in somewhat unusual terms and by which she "deemed" the order to be made and gave the applicant liberty to bring the application in the judicial review *ex parte* list.

9. When the matter came on before me, the second respondent and the notice party accepted that the matter could be heard by me as a telescoped hearing and although there may be some argument that the application is out of time, I do not intend to deal with the matter on that basis.

10. No notice of opposition has been filed but the guardian *ad litem*, Miriam Lyne swore an affidavit on 23rd October, 2015 and counsel appeared for her and on behalf of the Child and Family Agency ("CFA").

11. The affidavit grounding the application runs to thirteen pages and forty-four paragraphs of substance, and to which there are substantial exhibits, including a thirty page undated submission of senior counsel submitted to the District Court in September, 2015.

12. Furthermore, it is not the function of the High Court hearing an application for judicial review to give a judgment on a hypothetical basis, or to state the law in circumstances where the application of those legal principles is not before the court. The application for judicial review as pleaded seeks declarations with regard to what I have described above as broadly, mostly uncontroversial propositions of law, and it is not my function, sitting as a judge of the High Court hearing an application for judicial review, to pronounce upon, or to clarify that law, save and insofar as that is necessary in order to determine an application by way of review of the process and procedures adopted by the District Court in regard to an identified application or applications.

13. No order of the District Judge that is challenged is identified in the pleadings, and this application does not seek to challenge the process or procedure engaged by that Court in the making of any identified order.

14. I consider it difficult to properly characterise the application before me, but it seems to seek that I would engage upon an academic or hypothetical exercise and that I would state and explain the constitutional principles governing the relationship between mother and child, and the extent to which constitutional and statutory principles must be the primary consideration and guiding principles for any court hearing an application where the welfare of a child is in issue.

15. I do not propose to consider the matter on the hypothetical basis by which it is pleaded. However, certain detailed factual matters were presented in the affidavit regarding access arrangements and orders made in regard to the young boy, and I turn now to deal with these.

Access arrangements to the child

16. The grounding affidavit deals in some detail with access arrangements that took place following the order made by the District Judge regulating the access between mother and child made on the 25th May, 2015, and with applications to that Court arising from difficulties that the mother perceived in the following months. Those factual matters are not pleaded in the Statement of Grounds and cannot readily be linked to the reliefs sought or to the grounds pleaded. I already delivered a secondary ruling in this matter in an application by the first applicant that I would make directions as to access on a particular day. As I stated then, it is not the function of the High Court in the exercise of its jurisdiction in judicial review to make directions regulating access to a child, nor indeed, as is well established in the authorities, is it the function of the court to deal with the merits of the case.

17. It is self evident that the High Court cannot on an application for judicial review, make any orders as to access to a young child as it does not hear evidence, whether affidavit or oral evidence, that would enable it to determine how best to protect the interests of the child. The jurisdiction to make orders with regard to the interests of the child who is in the care of the State under the Act of 1991 is vested in the District Court under s. 47 of that Act, and an appeal lies as a matter of a full rehearing to the Circuit Court. The first applicant well knows this, and indeed she has herself triggered applications under s. 47 for directions, and she appealed the order of the District Court to the Circuit Court, which determined the matter on the evidence.

18. The grounding affidavit identifies a number of events that occurred since the making of an order of the District Court regulating access made on 11th May, 2015. It describes a telephone call on 20th May, 2015 with the solicitor for the CFA, matters that occurred on 22nd May, 2015 at an access visit, and correspondence that occurred thereafter. It seems from para. 25 of the grounding affidavit that the matter was "raised" in the District Court on the 6th July, 2015 by counsel when the District Judge was told that "the access order was being flagrantly breached" and it seems that the District Judge indicted that he "wouldn't order a child to be brought to access kicking and screaming".

19. Further, it seems that counsel on 6th July, 2015 requested an audio recording be taken of the child in the period before access was to commence and that the District Court refused to make such an order. It is not clear to me if what is sought is that I would make an order for the taking of such visual or audio visual recording, and as no prayer for such relief is made in the statement of grounds, I do not propose dealing with the matter any further.

20. The substance of the affidavit seems to be a "legal issue" (the term used in the affidavit) as to whether a child may "say no to a social worker" or "can override a court order directing access", but there is no specific plea that relief should be granted in those terms, and insofar as it might be suggested there is a general plea, that a party to a court order is legally required to comply therewith, I am unable to construe that ground as highlighting the "legal issue" regarding the ability, whether legal or factual, of a child to decline to enjoy access to his mother or to otherwise disobey a court order. The child is the second applicant in these proceedings, and I consider such construction could not be intended, and he could not reasonably be seeking an order that he would comply with the court order.

21. Insofar as what is sought in this judicial review is an order that the CFA should support the access arrangements between mother and child, again that proposition stated in general terms can scarcely be controversial, and it is futile to make an order or declaration on a hypothetical basis because there is no link made to any particular example of an instance where the CFA failed, without reason or without explanation or due process, to tender the child for access. I consider that this is not a matter properly before the High Court on a judicial review, and is a matter to be dealt with by the District Court who has a power to compel performance of its own orders, or to make directions under s. 47.

22. I also consider that it is outside my jurisdiction to make any order directed to the CFA with regard to the management of access as I have no evidence before me, nor could I have, on an application where the jurisdiction invoked is judicial review, on which I could coherently make a finding of fact with regard to how access must best be regulated in the interest of the rights of the child.

23. I propose to refuse to make an order for judicial review in this matter. I make an order both refusing leave and refusing an order for judicial review. I do this because the effect of the order of Faherty J. is not clear to me, and counsel for the applicants who seems to have made the application before Faherty J. on 25th August, 2015 is not in a position to enlighten me.