THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 366 J.R.]

BETWEEN

AMC

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 27th day of January, 2017

1. In these proceedings, the applicants seek to quash the order of the Circuit Court (Her Honour Judge McDonnell) made on the 9th of March, 2016, whereby that court overturned on appeal an order of the District Court awarding the costs of certain childcare proceedings to the applicant.

Background Facts

2. The underlying proceedings concerned a number of interim care orders made in the District Court in relation to the applicant's children between the 4th of March, 2014, and the 8th of October, 2015. During that nineteen month period, the matter came before the District Court on some fifteen different occasions. On the vast majority of these occasions, consent orders were made but on other occasions, matters were fully contested. The hearings were presided over at various junctures by seven different judges of the District Court, although the District Judge who made the orders that are the subject matter of these proceedings heard the matter on eight occasions. The latter judge made three costs orders in favour of the applicant. The respondent ("the CFA") brought appeals to the Circuit Court in respect of the costs orders and the Circuit Judge allowed the appeals in part and set aside the costs orders made in the District Court, substituting instead an order awarding the applicant the costs of the first hearing only.

***Child and Family Agency v. O.A.* [2015] IESC 52**

3. This case concerned the correct approach to awards of costs in childcare proceedings in the District Court. The parents were represented by lawyers during the course of the childcare proceedings in the District Court. On their application at the conclusion of the proceedings, the District Judge awarded costs to the parents against the CFA. This order was appealed to the Circuit Court which stated a case for the opinion of the Supreme Court which was in effect a test case intended to rule a significant number of childcare matters pending determination as to costs. The unanimous judgment of the Supreme Court was delivered by McMenamin J. In dealing with the criteria which may appropriately be adopted by the District Court in dealing with costs applications, he said (at p. 15):

> "[49.] I take the view that the approach to be adopted by the District Court, in dealing with statutory child care proceedings, should normally be predicated on whether, in the first instance, it was proper to commence the proceedings. While "*the event*" is normally a starting point, there are, however, cases in which, it must be recognised, that it might be proper to order the costs of unsuccessful parents to be paid by the CFA, if, for example, proceedings were continued in circumstances where they were futile, or where the costs might place an inordinate burden on the parents. The interests of the child, and the interests of justice, should be ensured in accordance with the following general principles in District Court proceedings.
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> I think the starting point should be that there should be no order for costs in favour of parent respondents in District Court care proceedings unless there are distinct features to the case which might include:
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> (i) A conclusion that the CFA had acted capriciously, arbitrarily or unreasonably in commencing or maintaining the proceedings;
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> (ii) Where the outcome of the case was particularly clear and compelling;
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> (iii) Where a particular injustice would be visited on the parents, or another party, if they were left to bear the costs, having regard to the length and complexity of the proceedings;
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> (iv) In any case in which a District Court seeks to depart from the general default position, and to award costs, it is necessary to give reasons. These reasons must identify some clear feature or issue in the case which rendered the case truly exceptional. It is true all cases are distinct, but not all cases are exceptional. The reason for the distinction rendering a costs order justified must go to whether or not there was some unusual or unprecedented issue, or issues, which required determination or whether the case properly, and within jurisdiction, determined a point that had application to a range of other cases.

Were a District Court to adopt this approach, a Circuit Court Judge on appeal should be slow to interfere with a decision of the District Court, especially when the Circuit Court Judge has not engaged in a full hearing."

4. McMenamin J. went on to reformulate the question raised by the Circuit Court in the case stated:

> "[50.] In the circumstances, therefore, I would reformulate the question posed by the learned Circuit Court judge, so as to read:
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> *'In what circumstances is it appropriate for the Circuit Court, on appeal, in child care proceedings, to interfere with, or reverse, the order of a District Court judge granting costs to the parents against the Child & Family Agency?'*
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> [51.] I would then answer the question:
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> *'If there is a departure from the principles and criteria identified in this judgment .' "*

5. The Supreme Court accordingly determined that the default position in childcare proceedings in the District Court is that there should be no order as to costs in favour of parents. That position ought only be departed from where an unusual or unprecedented issue or a point that applies to a range of cases arises for determination in a case which is truly exceptional. Three examples of such circumstances were given by the court, the most relevant to the facts of the instant case being where a particular injustice would be visited on the applicant if she were left to bear her costs having regard to the length and complexity of the proceedings. Where the District Court proposes to make a costs order in favour of the parents, it must give reasons for doing so.

The District Court Decision
6. The District Judge gave the following reasons for making an award of costs in favour of the applicant:

- There were exceptional features in the case, which justified an award of costs - *these do not appear to have been identified by the District Judge save as hereinafter appears*.
- It was far from a straightforward case – *no further reasons were given for this conclusion.*
- The proceedings were quite long.
- The number of fathers added to the complexity of the matter *(there were four) – again how this added to the complexity was not explained by the court.*
- He was satisfied on the balance that an order for costs should be made.

The Circuit Court Decision
7. The CFA appealed to the Circuit Court on the issue of costs only. They argued, in reliance on *O.A.*, that the District Judge should have made no order as to costs as the features identified in *O.A.* as a prerequisite for such an order were absent. No oral evidence was heard by the Circuit Court, without objection from either side. The court directed that written submissions be filed and when that was done, further oral argument was heard and the court reserved judgment. The judgment was delivered ex tempore by Judge McDonnell. She first dealt with whether the District Judge had correctly applied the criteria in *O.A.* and she reached the following conclusions:

- The District Judge's reasons did not fall within the criteria.
- The number of fathers did not add to the complexity.
- It was not a complex case for the mother, but it was for the CFA.
- That the District Judge was 'satisfied on the balance' was not in the Supreme Court judgment.
- That the proceedings were quite long was not a feature.
- On the issue of the outcome, there were multiple extended care orders and the CFA had not acted capriciously.
- There was no complexity and it was straightforward.
- Having regard to the basis on which the District Judge awarded costs, she would not accept them.

8. Having therefore decided that the District Court had incorrectly applied *O.A.*, the Circuit Judge went on to make her own determination on the issue of costs and decided that the applicant was entitled to some award of costs, but for the first hearing in the District Court only, for the following reasons:

- The first time the interim care order was made, the applicant may have not been familiar with the process.
- Because of the applicant's mental health issues, her background of domestic violence and that she was in a women's refuge, the applicant may have needed some legal advice.
- On the 1st of April, 2014, the applicant was filled in as to what was happening and what the process was and what was likely to happen.

The Arguments
9. Counsel for the applicant submits that the District Judge correctly applied *O.A.* in reaching his decision. He did so having had the benefit of hearing the oral evidence of the parties extensively. The Circuit Judge did not have that advantage. He submitted that the Circuit Judge was wrong in law in determining that the District Judge had misapplied *O.A.* and was further wrong in law in interfering with the District Judge's order where the Supreme Court had enjoined the Circuit Court to be slow on appeal to interfere with a costs order made in the District Court after a full hearing.

10. It was further submitted that if, as the Circuit Judge appears to have concluded, there were no exceptional features in the case, then it was inherently irrational to award any costs to the applicant where such an award must have involved a determination by the Circuit Judge that the case had in fact been exceptional. It was said that this pointed to the Circuit Court decision being so unreasonable that no rational decision maker could have arrived at it. It was argued that there were clearly exceptional features to the case having regard to the applicant's mental health disability which would have rendered an injustice to her if she had not had the benefit of legal advice.

11. Counsel for the CFA contended that while this application purported to be one for judicial review, it was in effect an appeal on the merits. The applicant had demonstrated no error of law by the Circuit Judge. The applicant merely disagreed with the decision. Judicial review is concerned with the lawfulness of decisions, not their correctness. The Circuit Court had in fact correctly applied the *O.A.* principles and was entitled to reach the decision it did. There was nothing irrational or unreasonable about the decision and certainly

not to the extent where it could be said that no reasonable decision maker could have arrived at it.

Discussion
12. The distinction between an appeal on the merits and an application for judicial review is one that is frequently lost sight of. In *Sweeney v. District Judge Fahy* [2014] IESC 50, Clarke J., speaking for the Supreme Court, said of this issue (at para. 3.5):

> "[3.5] …the question arises as to what type of error actually renders a decision of a statutory court unlawful as opposed to being merely regarded as being in error. The so called 'error within jurisdiction' jurisprudence must be seen in that light. Some errors may be such as render the ultimate decision unlawful and thus capable of being quashed by way of judicial review. Some errors do not render the decision unlawful and are only capable of being corrected, if at all, by an available appeal. It should also, in that context, be recalled that there would be little point in making any distinction between a judicial review and an appeal if there were no difference in substance between the sort of issues which could be canvassed in the respective cases.
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> [3.6] It is important, therefore, to emphasise that judicial review is fundamentally concerned with the lawfulness of decisions taken affecting legal rights whether by persons, bodies, or courts having statutory jurisdiction. Judicial review is not concerned with the correctness of those decisions. There may be some legitimate debate as to the type of error which can lead to a decision being regarded as unlawful rather than simply incorrect. However, the fundamental distinction between unlawfulness, which can give rise to a decision being quashed on judicial review, and incorrectness, which can not, remains."

13. Accordingly, I am not concerned in these proceedings with the correctness of the decision of the Circuit Court, or indeed of the District Court for that matter. It is of course true to say that where an appeal is taken on the issue of costs only, the Circuit Court will not have the benefit of hearing all the evidence heard by the District Court. It is for that very reason that the Supreme Court in *O.A.* said that the Circuit Court should be slow to interfere. However, that cannot mean that the Circuit Judge can never interfere. That would render the aggrieved party's right of appeal from the District Court to the Circuit Court nugatory. Indeed the question posed in the case stated answered by the Supreme Court in *O.A.* makes clear that the Circuit Court should interfere where it concludes that there has been a departure from the principles and criteria identified in *O.A.*. That is what happened here. The Circuit Judge concluded, rightly or wrongly, that *O.A.* had been misapplied by the District Judge. As I have said, I am not concerned with whether that was correct, only whether it was lawful.

14. I can see nothing to indicate an error of law in the decision of the Circuit Court in this respect in what was, after all, a full de novo appeal on the costs issue and not merely an appeal on a point of law. Nor do I think it can be said to be irrational on the part of the Circuit Court to award some costs to the applicant but not others. The Circuit Court appears to have felt that, in the absence of costs being available to the applicant, a particular injustice may potentially arise in the context of the initial hearing in circumstances described in the decision. It is not for me to seek to go behind that unless it is so obviously irrational or unreasonable that no reasonable decision maker could have come to such conclusion. Nothing of that kind arises here.

Conclusion
15. It seems to me therefore that in substance, this application represents an attempt to appeal on the merits a decision of the Circuit Court with which the applicant disagrees. That is not the function of judicial review.

16. Accordingly I will refuse this application.