Neutral Citation [2015] IEHC 637

THE HIGH COURT

[2013 No. 89 MCA]

IN THE MATTER OF THE ADOPTION ACT 2010 AND IN THE MATTER OF A.O.B. (FORMALLY T.) A CHILD

BETWEEN:

M.O'C. AND B.O'C.

APPLICANTS

AND

ÚDARÁS UCHTÁLA NA hÉIREANN

RESPONDENT

JUDGMENT of Mr. Justice Abbott, delivered on the 16th day of October, 2015.

1. This judgment relates to the reasons for the grant of an order for the costs of the applicants against the respondent, in respect of the claim of the applicants to have the child A.O.B. registered in the register of Inter-Country Adoptions maintained by the respondent pursuant to the Adoption Act 2010. Judgment was given in the case in relation to the plaintiff's claim for relief, under the Act of 2010, for the registration of the child on the register of adoptions on the 30th May, 2014. Subsequently to this judgment, following the submissions of the parties, the Court made an order for costs in favour of the applicants against the respondent. The following are the matters considered by the Court and the reasons for the said judgment.

2. Counsel for the respondent submitted that costs should, following the ordinary practice, follow the outcome of the event claimed in the proceedings, unless the Court in its discretion should decide otherwise. The event claimed by the respondents was the registration of the child and this was not effected without the intervention of the proceedings. Counsel for the respondents submitted that the event in this case did not consist of the registration of the adoption in the register, but of a consideration by the Court pursuant to the provisions of s.92 of the Act of 2010, entitling the applicants to apply to the High Court for directions in this regard. As an alternative, counsel for the respondent submitted that even if the order of the Court in relation to the entry into the register of inter-country adoptions was considered an "event" or an outcome of the applicants' application, the success of same was not due to the events or arguments of the applicants before the Court but rather was the result of arguments made on the part of counsel for the Attorney General, who had being put on notice of the proceedings pursuant to the Act of 2010. These arguments related to the possibility of the applicants having vested rights under legislation which had been repealed by the Act of 2010. He referred to the numerous arguments made by counsel for the applicants outside of the main area of argument upon which the claim ultimately succeeded, and, submitted that the case was, at least one to which the principles of *Veolia Water UK Plc. v. Fingal County Council (No.2)* [2007] 2 I.R. 81, set out at p84, applied.

3. He submitted that the principle identified in the judgment of Clarke J. in that case that when a Court was considering how to award costs it was incumbent on the Court, at least (in complex cases), to give consideration as to whether it was necessary to engage in a more detailed analysis of the precise circumstances giving rise to such costs, having incurred before awarding costs and that it was incumbent on the Court to fashion orders for costs which did more than simply award costs to the winning side. On this basis he submitted that even if it was held that the applicants succeeded, and hence, were entitled to some costs, they were not entitled to all costs.

4. The Court suggested to counsel for the respondents that the history of the Court awarding costs in favour of applicants against respondents, whether they be Adoption Associations or Health Board, was a matter to be considered and ss.22, 54 and 56 of the Act of 2010 were considered. It was agreed that these sections specifically refer to the situations envisaged therein and not to the instant case.

5. The debate on costs also ventured into the consideration as to whether costs ought to be giving against the respondent or against the Attorney General (who was represented by senior counsel in the proceedings). Counsel for the Attorney General submitted that the basis upon which costs would be awarded to an unsuccessful party in the public interest arose only were there was a point of major public importance and were the parties seeking costs had no personal interest in the outcome. Counsel for the applicant submitted that the applicant could be entitled to costs on the basis of reasonable litigation of a public interest point, or points. This was accepted in the case of *M.R. v. T.R., Anthony Walsh, David Walsh and Sims Clinic Limited* [2010] 2 I.R. 321, [Hereafter; *M.R. v. T.R.]* that although the Attorney was only a notice party that from the point of view of dealing with the issues of costs that he should be considered a full party and that notwithstanding the procedure by which he was joined he now also acknowledged that the High Court and the Court of Appeal's jurisdiction to award costs in favour or against him as it had in respect of the other parties. In *M.R. v. T.R.* the Court found, in awarding costs, that "the unique features of this case and all the special circumstances... it would be equitable and just to depart from the normal rule that costs follow the event". Although the parties had personal or private interest in the issues, including the contractual consent which the appellant claimed to have being given by the respondent. It is clear, however, the issues in that case surpassed exceptional private interests of the two parties.

6. Counsel for the applicant referred to the legal basis upon which the Attorney General could participate in the proceedings as provided by s.92(7) as follows:

> "The Attorney General –
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> (a) of his or her own motion, or
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> (b) if so requested by the High Court, make submissions to the High Court in relation to the application, without being added as a party to the application proceedings."

7. She submitted that if the Attorney General hypothetically was to participate under s.92(7) and made unhelpful and wasteful submissions at least hypothetically under the authorities the Attorney General could be made liable for costs on a public interest basis. She stated that in *N. v. H.S.E.* [2006] 4I.R. 374, [hereafter; the *Baby Ann* case] costs were dealt with on the basis of an undertaking by the Minister for Health to ensure that no adoptive parent would have to discharge the costs of this type of application. She stated that the natural mother in the Baby Anne case was legally aided, and did not seek to rely on the undertaking given in that case. In case of *W.S. v. Adoption Board, N.L., P.L.* [2010] 1 I.L.R.M. 417., which the judgment of O'Neill J. referred there was an order for costs made against the Adoption Authority.

Conclusions

8. While there is no doubt that the applicants raised the question of vested rights being a basis upon which they would succeed in their case, the major development of that argument was subsequently pursued by counsel for the Attorney General in making submissions to the Court pursuant to s.92(7) of the Act of 2010. However, counsel for the applicant adopted these for their arguments. Paragraph 19 of the judgment of this Court, delivered on the 30th May, 2014, acknowledges the vested rights argument as having being relied upon by the applicants. It is clear from the judgment delivered that the applicant advanced many arguments other than those pertaining to vested rights. Counsel for the respondents have made great play of the fact that the further arguments of the appellants were not successful. However, looking at the reality of litigation inter-parties regarding a complex matter coming before the courts, for the first time it is extremely difficult to envisage how counsel for a party could realistically confine their arguments to what might ultimately be regarded as their best and only point, and ignore completely arguable issues which both contextualised and highlighted the best point for the consideration of the Court.

9. The fundamental aspect of this case was that despite the fact the respondents were most anxious to assist the applicants towards achieving a solution for the difficulty of having brought a child to this jurisdiction from M. who had gone through a form of adoption in M. which was found to be inadequate having regard to the Hague Convention and the provisions of the Act of 2010, the respondent became (on the admission of their counsel) perplexed when the third party notice arrived from the M. Embassy. The respondents were so perplexed as to be unable to provide any realistic solution to the applicants and this Court attaches little or no blame to the respondents for such a position, as there had being a background of impropriety (to say the least) suspected in relation to some other adoption activities in M. (not in this particular case), which heightened what might be regarded as a cautious state of indecision. Faced with this indecision the applicants had no option but to apply to the court, using such procedural mechanism as afforded them their best chance of success. The fact that they chose a procedure described in s.92 as an application for "directions", does not in any way detract from the fact that they came to court seeking that the court determine an event which was to have the adoption registered and that the procedure chosen for this event or outcome was an application for directions. To say that the application for directions resulted in directions having being given by the Court, is to confuse the procedure with the actual event being sought therein.

10. The process of submissions to the Court under this procedure consisted of the applicant laying out before the Court all possible arguments which might serve to allay concerns, which the Court might have and which had previously "perplexed" the respondent authority. The Court has being considerably assisted by the wide ranging and diverse submissions made on behalf of the applicants by their counsel as will be seen from the judgment delivered on the 30th May, 2014. To penalise the applicants by the award of only a portion of their costs, would be to unfairly ignore the fact that the submissions of counsel of the applicant, in fact, significantly assisted the Court. That is not to say that the submissions of counsel for the respondents and the Attorney General did not also assist by providing a counter point and springboard against which the Court could arrive at a decision, which was a solution to a problem that had perplexed the respondent and its skilled and experienced staff together with their advisors.

11. These arguments eventually provided the basis and context for the decision in relation to one outcome only which was the registration of the adoption and while the respondent argues that the *Veolia* case should apply, this case is one which might be applicable to multiple outcomes viewed as "horizontal" being separate and alternative reliefs, being run in the same action, or "vertical" reliefs insofar as they may be conditional upon each other or related in more complex ways. These types of outcomes do not arise in this case.

12. If the Court were incorrect in reaching the foregoing conclusions in relation to the costs on the "event basis" the Court will be inclined to the view that the applicants in the particular circumstance of this case should recover their costs on a public interest basis. It is a matter of major public importance to have the complexities of the practical application of the Hague Convention clarified to the extent of the judgment and to avoid multiple further applications under s.92, in cases where the terms of the Hague Convention have not being complied with and where no solution has being obtained by interaction of the sovereign authorities as envisaged by the convention itself.

Costs against the Attorney General

13. The Attorney General was joined in this case pursuant to s.92(7). Having regard to the fact that this subsection allows the Attorney General to make submissions to the High Court without being added as a party, it is clear that the Court should be most cautious in making an order against the Attorney General since its special position of being able to make submissions without being a party, indicates that one of the necessary ingredients for liability for costs that is to be actually a party to the proceedings is missing. While there are exceptional case where notice parties might be ultimately burdened with a costs order it would seem to me that if that unusual outcome was beckoning the Court, one of the parties to the proceedings should move to have the Attorney General actually joined as a party, so that issue could be properly argued and litigated.

14. Furthermore having regard to the fact that s.92 makes particular provision as to the payment of costs without linking them to subsection 7 the Court is reluctant to consider the awarding of costs against the Attorney General.

15. While the Attorney's counsel argued against costs being giving on a public interest or test case basis, in favour of the issue being determined between the applicants and the respondents on a party and party basis depending on the event which went in the applicants favour this Court does consider having regard to the foregoing considerations that if the case had to be resolved on the basis of a public importance or test case basis the, costs order, would be better made against the respondent as a public body more transparently liable to take up the burden, and, indeed the benefit of the decision underlying such costs order.

16. In addition to the foregoing considerations there is a further policy consideration for the Courts to consider relating to the need to ensure that where the Attorney General makes submission pursuant to s.92(7), or similar provisions, that the Court does not take unnecessary action against the Attorney General by way of a costs order so as to cause unnecessary inhibitions or complications facing those who may advise the Attorney General in relation to participating in important cases requiring their attention and the assistance of the Court through the massive legal resources of the office, and the public interest represented by the office.

Legal Aid Implications

17. The applicants in this case are legally aided. Section 33 of the Civil Legal Aid Act 1995 (which was opened to the Court by counsel for the applicants), provides that costs are recoverable by the applicants from the respondents in such situations. If the applicants had succeeded under their claim for relief using s.92 of the Act of 2010 as the jurisdiction for same, rather than on the vested rights argument the particular costs provisions of s.92 would allow for this outcome. However they succeeded on another ground and hence the costs provision of s.92 do not apply.

18. Accordingly the currents of legal aid for the applicants is not a factor for the Court to depart from its conclusion that the applicants recover their costs against the respondent. Of course this is on the understanding that the Legal Aid Board will be recouped under the Act.