THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 113 J.R.]

BETWEEN

P.H. AND L.H.T. (A MINOR SUING THROUGH HER

MOTHER AND NEXT FRIEND P.H.)

APPLICANTS

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of February, 2016

1. In November, 2015, social services in England indicated to the first named applicant, who was then pregnant and resident in that jurisdiction, that it was intended to take her (as then unborn) child into care on birth. In the same month, she relocated from England to this country.

2. On 13th January, 2016, the second named applicant was born. On 15th January, 2016, the respondent applied *ex parte* to the District Court for an emergency care order under s. 13 of the Child Care Act 1991. An eight-day order was made by that court. An issue has arisen as to whether the order dated from the date it was made or when it was implemented, which was not for a further 7 days. On the face of the order it would appear to be the former.

3. On the 22nd January, 2016 the second named applicant was removed by Gardaí under the order and delivered into the custody of the respondent.

4. On 28th January, 2016 an application for an interim care order under s. 17 of the 1991 Act was made to Judge Browne by the agency. The learned judge made an "interim" care order without having been apparently able to hear complete evidence on that date.

5. On 2nd February, 2016 following a more full hearing the care order was extended for 29 days until 1st March, 2016. The applicants submit that this further order is invalid because there is an absence of compliance with statutory prerequisites under s. 3 of the Child Care Act, 1991 and because a s. 17 order can only be made when a s. 18 application has been or is about to be made which was not the case. Furthermore it is submitted that the reasons given were insufficient and there were errors on the face of the order.

6. While it is not stated in the order, I am told and accept that the learned judge nominated 1st March, 2016 as the date for the matter to be re-listed. Mr. Paul Anthony McDermott S.C. who appears (with Ms. Sarah McKechnie B.L.) for the respondent did not seriously dispute that this direction was given. This is the current order in force as of today's date.

7. Mr. McDermott suggested that unless restrained by intervention of the District Court, the first named applicant might move on to some third country. However, there is no evidence that the first named applicant is in a position to move on to a third country, let alone has a contingency plan to do so. In the absence of any such evidence or indication, it is not especially helpful for the agency to proffer such scenarios.

8. The scene then shifted to the High Court. On the applicants' motion, McDermott J. directed an inquiry under Article 40 of the Constitution on 10th February, 2016. On that date, the respondent put before the court a document entitled "Certificate of Detention" in answer to the inquiry, relying on the order of 2nd February, 2016. That is the current certificate in the Art. 40 proceedings and there has been no application to any court for leave to vary, amend or supplement it.

9. On 12th February, 2016 the substantive Art. 40 application was refused by O'Regan J. I am told by Mr. McDermott that the learned judge suggested (although this was not part of her *ex tempore* ruling) that the agency should go back to the District Court to clarify when the 29 days ran from, because there could be an ambiguity as to whether it ran from 28th January or 2nd February, 2016. As it was explained to me, it was not immediately apparent how to interpret this suggested comment, because there is no ambiguity apparent on the face of the order. The order clearly specifies that the 29 days runs from 2nd February, 2016. Oddly enough, the agency denied in the hearing before me that there was any such ambiguity, and did not seek to stand over the suggestion of ambiguity as such. The applicants state in supplementary written submissions that "*The Applicants do not believe that the position/issue regarding time can be read into the Orders as they are presented, and are somewhat confused by the logic.*" Thus the curious position arises that neither side appears to be adopting the suggestion that there is an ambiguity in the existing order which inferentially could warrant some form of application to the District Court whether under the slip rule or otherwise. However, despite its denial of any infirmity or even ambiguity in the order in question, the agency appears to be relying on this suggested comment as a basis for what it did next.

10. Before coming to that, the first named applicant's next step following refusal of relief under Art. 40 was to file notice of appeal to the Court of Appeal on 15th January, 2016. Ms. Berenice McKeever B.L. (with Mr. Fergal Kavanagh S.C.) for the applicants says that on that date she sought without success to contact the respondent's lawyers, and then went into court (Irvine, Hogan and McDermott JJ.) to mention the matter, at which point it was put into the directions list on 18th February, 2016.

11. The respondent's next move, apparently inspired by the comment of O'Regan J., was that on 16th February, 2016 despite the ongoing existence of a care order, for which a further hearing date of 1st March 2016 had already been fixed by the District Court,

notice of an application for a further care order, returnable for 25th February, 2016 was served by Mr. Padhraic Harris of Padhraic Harris & Co., Solicitors, Galway, solicitors for the agency, on the first named applicant personally (and a copy sent to solicitors acting on her behalf informing them that their client had been served directly). This was in the context where the applicants had solicitors previously nominated and acting in the District Court.

12. Mr. McDermott submits that this further application has nothing to do with the Art. 40 proceedings. I would reject that suggestion. It seems to me that in its context, the inference that the further application to the District Court is designed to improve the position of the respondent in the context of the Art. 40 proceedings is virtually irresistible.

13. On 17th February, 2016, the Court of Appeal delivered judgment in *McDonagh v. Governor of Mountjoy Prison (No. 2)* [2016] IECA 32, in which it was decided that a respondent to an Art. 40 application who wished to supplement or amend his or her certificate must first apply to the High Court for leave to do so (although the reference to application to the High Court was in the context where the appeal was being allowed and the matter remitted to that court).

14. On 18th February, 2016, Ryan P., taking the directions list in the Court of Appeal, was informed of the proposed District Court application by counsel for the agency, and the hearing date of Friday 26th February, 2016, was fixed in the knowledge that the District Court would be dealing with this matter on Thursday 25th February, 2016. Mr. McDermott submits that this shows that the court was happy with the notion that the hearing on the 25th February would go ahead, and that for me to grant relief in this application would be to cut across the Court of Appeal – something which obviously I would not wish to do.

15. Mr. McDermott does accept that the *McDonagh* decision was not referred to in the discussions before Ryan P.

16. Ms. McKeever gave what might seem to be a slightly different account of proceedings before Ryan P., but the slight difference is significant for present purposes. She stated that she canvassed with Ryan P. the fact that she wanted to restrain the hearing on 25th February and indicated that as he did not (sitting alone) have jurisdiction to do so, she would have to seek a remedy elsewhere; the upshot of that account being that by so seeking a remedy in the present application, the applicants are not doing anything that was not within the contemplation of the Court of Appeal last Thursday. Mr. McDermott says he does not recall any such exchange and says that receipt of the judicial review papers was therefore a surprise.

17. While it would not in any way be my practice or wish to have recourse to the Digital Audio Recording (DAR) in relation to business before an appellate court, the present situation is highly exceptional in that not only am I confronted with a "he said, she said" situation about what happened in the Court of Appeal, but also I do not have any other effective way of ensuring that I do not cut across a course of action that was directed or envisaged by that court, as alleged by Mr. McDermott.

18. In a spirit of deference to that court, I have therefore had recourse to the DAR of the directions hearing, which clearly confirms Ms. McKeever's account of what she told Ryan P. As appears from the DAR, the question of the court's jurisdiction to provide the appropriate relief was canvassed and it was suggested that the court did not have such jurisdiction. Following this (and therefore, apparently, in that context), Ryan P. said that the Thursday hearing would go ahead in the District Court and the matter would be back before the Court of Appeal on Friday. Crucially, it was only after that statement that Ms. McKeever said that she "*may have to seek relief elsewhere"*. Not only was this not met with firm rejection by Ryan P., it was not met with rejection at all. Indeed the learned President indicated that he understood the situation. There was no demurral even from Mr. McDermott for the agency, who did not comment on this but instead engaged with the court on a separate matter related to written submissions.

19. This sequence of events not only confirms Ms. McKeever's version over Mr. McDermott's, but it also blows a hole below the waterline in the central submission made by Mr. McDermott on behalf of the agency to me, namely that to grant leave and a stay in this application would be some sort of slight upon arrangements which had been settled by the Court of Appeal. It is unfortunate, to put it at its most neutral, that no-one on behalf of the agency present in that court was able to give me an accurate account of what happened last Thursday.

20. On 22nd February, 2016 the present application for leave was made to me *ex parte* seeking reliefs restraining further hearing of the application returnable for the 25th February, 2016. It is submitted by the applicants that because this application falls to be decided prior to the Court of Appeal hearing and prior to the expiry of the existing order and the existing assigned returned date, being 1st March, 2016 that an abuse of process or a denial of an effective remedy applies, or that such application has the effect of requiring the applicants to bring multiple applications for the same relief thereby obstructing the availability of the relief.

21. As will be apparent from the foregoing, on 22nd February 2016 I directed that the application should be made on notice to the agency and have now heard from both sides. I should record that a great deal of information relevant to the proceedings was not included in the meagre papers filed, and I received a quantity of material from the parties including papers in the Art. 40 proceedings and other information from counsel. If the present matter is to proceed to a full hearing it would be necessary to have all of these papers formally put on affidavit.

22. Before dealing with the leave application proper there are a number of issues that require mention.

Alleged infirmity in grounding papers

23. Mr. Ken Smyth, Solicitor, who swore the grounding affidavit in circumstances of some urgency, appears to have accidentally omitted the averment that he did so on behalf of the applicants and with their authority. Those familiar with Professor C. Northcote Parkinson's Law of Triviality would perhaps not be surprised at the great deal of storm and stress injected by Mr. McDermott into this insignificant point. It is a matter of form only and readily rectified. This drafting slip is not a reason to refuse relief. It can be rectified by the first named applicant swearing a confirmatory affidavit.

Alleged lack of disclosure

24. Mr. McDermott submits that the grounding papers did not disclose material relating to the UK history of the first named applicant, O'Regan J.'s suggestion that the agency revert to the District Court, or the discussion before Ryan P., and that relief should therefore be refused.

25. At its most basic, it is inevitable that some omissions of points of detail can be criticised in virtually any application. The relevance of these omissions, if such they were, is contestable in the present case. The present application is a world away from other cases where really central matters have not been disclosed, such as *Agrama v. Minister for Justice and Equality* [2016] IEHC 55. In addition, the claim of non-disclosure rings somewhat hollow given the fact that it was Ms. McKeever's version of what she said to Ryan P. rather than Mr. McDermott's version that is confirmed by the DAR. Furthermore, Ms. McKeever had not fully completed her application when I curtailed the *ex parte* hearing and directed that the agency be put on notice. I can find no fault with Ms.

McKeever's presentation of the issues at the ex parte stage. In any event, a party that makes a decision to launch criticisms of this nature against the propriety of the other party's conduct of the proceedings is thereby putting all of its own conduct firmly on the table for debate and scrutiny, and in that context, even if there was material non-disclosure by the applicants, which I do not for a moment accept, the conduct of the respondent has not been such as to warrant any discretion thereby arising being exercised in its favour. It is to that conduct of the respondent that I must therefore now turn.

Service of motion directly on first named applicant
26. The Law Society of Ireland publication*, A Guide to Good Professional Conduct for Solicitors* (3rd ed.) (Dublin, 2013) at p. 56 clearly states that *"A solicitor should neither interview nor otherwise communicate with any party on the other side of a matter who, to the solicitor's knowledge, has retained another solicitor to act in the matter about which the first solicitor wishes to communicate, except with that solicitor's consent. However, in exceptional circumstances the general rule may not apply."* This clearly must cover correspondence by way of service as well as otherwise, at least where the solicitor accepts such service. Such a situation includes a situation where solicitors have dealt in court with an initial order which is now proposed to be extended by the new notice of application which now falls to be served.

27. The direct communication by Mr. Padhraic Harris of Padhraic Harris & Co., Solicitors, Galway, solicitors for the agency, with the first named applicant by way of service of notice of the currently pending application to the District Court was clearly in breach of this requirement. Knowledge of her having instructed solicitors is demonstrated, if such be in doubt, by those solicitors being copied with the correspondence. The fact that the first named applicant's solicitors were so corresponded with does not in any way mitigate, still less absolve, this breach. The suggestion offered by Mr. McDermott that earlier difficulties in establishing the first named applicant's whereabouts justified this course is unacceptable and irrelevant, as she has nominated solicitors subsequent to that point, and it does not in any way constitute the sort of exceptional circumstance which could justify a departure from the agency's solicitors' obligation in this respect. While the crudest and most literal reading of the Rules of the District Court 1997, O. 84, in isolation from any other provision, would suggest that any proceedings must be served on a respondent, this is subject to the general rule that service on a solicitor who has accepted service is to be deemed good (O. 41 r. 11). It is also to assume that each application to renew an order is effectively a new initiating document, the equivalent of a new plenary summons each time, which has to be served directly on the party on each occasion. This would be a mischaracterisation of the process.

28. Given that the first named applicant was already represented by solicitors in the District Court proceedings, which were already in being, it was unprofessional, improper and unacceptable for her to have been directly served with papers in relation to the proposed application on 25th February, 2016. Solicitors for the agency, discourteously, made no reply when this was pointed out by the applicants in correspondence. It is unfortunate that it seems to require the intervention of the court to have the respondent own up to the unacceptable and unethical nature of this conduct which can only have had the effect of causing upset and confusion to the first named applicant during a time of enormous stress.

Presence of Mr. Tony Comiskey during access
29. The applicant's solicitor by letter dated 17th February, 2016 set out a series of complaints in relation to the agency's handling of this matter. This letter was not replied to. Mr. McDermott's explanation that the letter was not replied to because the matter had been back in court in the meantime is a lame excuse in the circumstances, which he now acknowledges by having offered a submissive apology on behalf of the agency to the applicants for what he calls the oversight involved. Included in the letter was the allegation that a Mr. Tony Comiskey, a male social worker, remained in the access room while the applicants were having access and commented to the first named applicant as to whether his presence would have the effect of making her feel uncomfortable while breast-feeding. The applicants complained that Mr. Comiskey should not have been present in the room at all, and object to the alleged comments. Mr. McDermott, having initially on 23rd February, 2016, conveyed instructions from his client that this incident never happened, now accepts that Mr. Comiskey was in the room and that a discussion about breast-feeding did happen. He characterises it as the first named applicant being told that if she wanted to breast feed, a female social worker would be organised to supervise. To the extent that there is a dispute about what happened, he accepts that the District Court is the forum to resolve the matter. But it is instructive to note that the agency's position has moved from one of ignoring the complaint, to bald denial, to now a version of events being given which in principle is not entirely incompatible with aspects of the complaint made.

Alleged instruction not to breast-feed
30. The letter of 17th February, 2016 alleged that the first named applicant was directed not to breast-feed or feed the second named applicant with breast milk on the alleged ground that such breast milk would "*damage*" the infant. The agency's position appears at least open to debate, in the absence of some medical evidence that mixing breast and bottled milk, or even expressed breast milk, could be harmful in the circumstances, or that it would not be possible to structure breast-feeding in a manner that would not be harmful as alleged.

Alleged direction that the applicant was not to record interactions with the agency
31. The letter of 17th February, 2016 alleges that the agency directed the first named applicant that she was not entitled to record interactions between herself and the agency. That this is clearly an issue for the agency is demonstrated by its inclusion in a purported agreement with the first named applicant which I will address shortly. While I am sure that agency staff do not welcome being recorded, I do not consider it proper for the agency to attempt to direct the first named applicant not to do so. The reality of the situation is that there is a huge imbalance of power as between the first named applicant, a 23-year old young woman alone in a new country and separated from her new-born child, on the one hand, and a State agency that has succeeded in removing that child with the benefit of a number of court orders and has clearly signalled that it intends to consider returning the child to the U.K., whose authorities have already indicated an intention to take that child into care, on the other. That the agency is denying certain of the claims of the first named applicant while, it is said, trying to prevent her from making a record which would support her account, can only rub salt in the wound of her powerlessness in this situation. Permitting persons the subject of the agency's attentions to record interactions with the agency is the least that can be done as a first step to attempt to redress the imbalance as between parties in such a situation. The agency should cease to object to recording by persons in such situations. The practical importance of this issue is perhaps best illustrated by the analogous fact that, but for having access to a recording in the form of the DAR, the court might have been misled by the confidently presented but tendentious version of events in the Court of Appeal last week as put before it by the agency.

Alleged requirement to sign an agreement with social workers
32. The matter has taken on a further dimension, suggestive of a general linkage with the other issues of direct contact with the first named applicant and a failure to reply to correspondence from her solicitors. The applicants now state as follows in supplementary submissions dated 24th February, 2016: *"Mr. Smyth has just learnt from Ms. H. that instead of a reply being made to Mr. Smyth to his letter, the social workers, instead, required Ms. H. to write out on a piece of paper, at access, that she was in agreement that bottle-feeding was 'better' as the baby was being sick due to the mixing of 'breast and bottle'; that she is willing to have an assessment as she wants to get her daughter back and that she has agreed there will be no recordings of meetings, and required*

Ms. H. to write this out and sign it at an access; meanwhile directing Ms. H. not to write down the issue regarding Mr. Comiskey being present/the breastfeeding comments."

33. A copy of this agreement dated 18th February, 2016, which appears to be between the first named applicant and Ms. Avril Mannion on behalf of the agency, has been produced to me. It clearly includes an agreement not to pursue the breast-feeding and recording issues, two matters the subject of the ignored solicitors' correspondence from the day before. The agency has not given any response to me to the suggestion that there was a direction not to include a complaint about Mr. Comiskey being present, or to the suggestion that she was "*required*" to sign this agreement as opposed to being part of an informed and voluntary process of engagement, taken with the benefit of legal advice.

34. If the latter undenied allegations are correct, it would be an abuse of power to direct the first named applicant to sign an agreement or to be silent as to complaints regarding Mr. Comiskey. Apart from that, the manner of the execution of this agreement behind the back of the first named applicant's nominated solicitor is clearly a breach of her constitutional right to be legally advised, in circumstances where these issues had already been raised in legal correspondence and were now being effectively shut down in some form of direct agreement with the first named applicant. That breach is particularly acute in the context of an agreement which records her position as essentially one of vulnerability *vis a vis* the agency, being that "*I want to get my daughter home"*. This is an egregious abuse of power by the agency. In such situations, the signature of such documents or agreements could convey the illusion that the agency is seeking to promote structured co-operation; but in reality there is little in it for the parent involved, with the possible exception of the agreement to an assessment. Accordingly it is to be inferred in such circumstances that it is much more likely that such documents are signed for the benefit and protection of the agency rather than the parent concerned. Even if the "agreement" was not in its contents abusive of the first named applicant, this is a case where she has nominated a solicitor to act. Where a party is legally advised, it is an abuse to ask that party to sign such an agreement, especially one trenching on complaints made in solicitors' correspondence, without that party's solicitor being involved. Such a disregard of the rights of the first named applicant should not be without consequences. One immediate such consequence is that she should not be held to the agreement, but there may be others.

Is the effect of the Court of Appeal decision on 18th February, 2016 such as to preclude relief?
35. While he expressly accepts that I have "*complete freedom*" to deal with this application in accordance with the arguable grounds standard as set out in *G. v. D.P.P.* [1994] 1 I.R. 374, and is "*not suggesting otherwise*" by reason of the fact that Ryan P. set this coming Friday as a hearing date in the knowledge of the proposed District Court hearing this Thursday, Mr. McDermott suggests firstly that this fact should lessen any basis for granting leave if such was to be motivated by a concern for the processes of the Court of Appeal, and secondly that that court "*may be surprised*" in the circumstances if I restrain the District Court hearing. I have already dealt with the second contention. As regards the first, it seems to me as a matter of first principles that I cannot construe the mere fact of the fixing of a hearing date this Friday as a basis to decide on the present leave application one way or the other. Unless (which is not the case) some basis were to exist on which I should refuse leave independently of there being an arguable case, the arguability of the point is the issue which I now have to address.

Application for care order to commence during currency of existing care order
36. It is difficult, if not bordering upon the impossible, to understand why the agency would apply for a care order during the currency of an existing care order, other than out of a concern of the validity of the existing care order. To that extent, it is highly likely, and certainly arguable for leave purposes, that the purpose of the proposed proceedings on 25th February, 2016 is to reinforce or supplement the defence to the appeal in the Art. 40 proceedings, next before the Court of Appeal on 26th February, 2016.

37. The question of supplementing the defence of Art. 40 proceedings in the course of the currency of those proceedings has been raised in a number of cases including my own decisions in *Grant v. Governor of Cloverhill Prison* [2015] IEHC 768 (High Court, 27th November, 2015) and *Knowles v. Governor of Limerick Prison* [2016] IEHC 33 (High Court, 25th January, 2016). It most recently came before the Court of Appeal in *McDonagh v. Governor of Mountjoy Prison (No. 2)* [2016] IECA 32 (Court of Appeal, 17th February, 2016) where that court decided that if a respondent intended to supplement or amend its certification of the grounds of detention, it should first apply for leave to do so from the High Court "*during the currency of the Article 40.4.2 proceedings"* (paras. 20 to 21).

38. Given that the Court of Appeal has fixed the 26th February, 2016 for hearing or at least the next processing of this matter, it seems to me that the appropriate way to apply the *McDonagh* decision in this context is that the agency should not be permitted to take steps to replace the currently live order on which it has relied in its certificate, during the lifetime of that order, without prior leave of an appropriate court. *McDonagh* suggests that such leave should be sought from the High Court in the first instance, although that is predicated on there being a live proceeding before the High Court, which could only happen if the current appeal were allowed and the matter remitted back, a development which has not as of yet happened. I do not construe the events occurring at the directions hearing last Thursday as amounting to such prior leave, particularly in the light of the somewhat more formal process envisaged by the court in *McDonagh*. Whether or not the Court of Appeal could simply receive the amended certificate itself and decide an appeal on that basis, a course of action that perhaps I could very respectfully suggest might seem more appropriate in the context of a moving target such as interim care orders which can change regularly (but there are other such contexts, such as committal warrants for remand prisoners), is something that will no doubt be clarified in subsequent jurisprudence of that court.

39. If it wants to supplement its certificate dated 12th February, 2016, the agency should first obtain leave to do so. On the face of the *McDonagh* decision, and subject to the possible qualification I have referred to, it would seem that the way to get such leave is to accept that the appeal should be allowed and the matter remitted to the High Court for the purpose. That is what happened to the benefit of the State appellants in that case so (unless the jurisprudence is developed further to allow alternative options) it would seem that the State should also have to operate under a corresponding liability to submit to an appeal being allowed and remitted if they are the respondents. Alternatively, the agency can seek to persuade the Court of Appeal to develop its jurisprudence so as to give such leave itself. In the absence of such leave it is at least arguable that it is inappropriate for it to take steps now which can only be intended to supplement its defence of the Art. 40 application. I should clarify of course that in setting out this analysis I am not to be taken as expressing any view on what should happen in the context of the Art. 40 proceedings. Rather, the application made to me requires me to consider whether it arguably amounts to an impermissible attempt to supplement the defence of those proceedings without leave to do so having been obtained. To consider and resolve that argument, it is necessary to analyse what the proper procedure to obtain such leave would appear to be. It is only in that context that I am considering the issue, and I am therefore not attempting to be in any way prescriptive about what should happen in the Art. 40 proceedings.

40. More broadly, and independently of the foregoing, the agency submits that the current order is valid. The District Court has already fixed a hearing date on 1st March, 2016, for a possible extension of that order. The application made to that court is for a further 29 day extension, and not some form of correction of ambiguity under the slip rule as apparently might be thought to have been suggested by O'Regan J. It would be pointless and inappropriate to have two concurrent care orders. Therefore the only effect that the current application could have (in the absence of the existing order being set aside) would be on the expiry of the existing

order. Accordingly the respondent is not prejudiced by not being able to move the application prior to 1st March, 2016. If the respondent intends that any new order would commence earlier, then it is arguable that this is legally inappropriate having regard to the existing care order. The lack of clarity as to which is intended is also a reason to restrain the application from proceeding in its current form. The fact that Mr. McDermott has laid so much emphasis on the comment of O'Regan J. as the basis for the proposed application on 25th February, 2016, strongly indicates that the agency wants a new, immediately effective, care order to be made despite there being an ostensibly valid and currently in force care order already in place. While on the one hand claiming that he is simply bringing slightly forward the date on which he moves his application to extend, upon its expiry, the existing interim care order, he suggests on the other hand that the applicants are trying to keep a problem with the order alive, and wonders how the Court of Appeal will react to the "*good news*" that the problem thereby continues in being. The sarcasm is misplaced. These two postures are incompatible. The first presupposes that the existing order is to remain until it expires; the second indicates what I infer is the real reason for the application, the intention to obtain a fresh and immediately effective order. It is arguable that this approach is misconceived in law given the existing ostensibly valid order, even apart from the obvious duty of the respondent to clearly specify what precisely it thinks is doing.

41. The applicants respond in their written submission to the inference that the Court of Appeal will not exactly welcome the "*good news*" that the problem has been "*kept alive*" by saying that this "*by implication, suggests to this Honourable Court a type of implied threat that a Judge of the High Court, charged with vindicating rights and ensuring they are not breached or transgressed by the State, ought not vindicate those rights for fear of some sort of offence of, or reprisal by, the Court of Appeal*". It is not necessary to accept this submission or indeed to be wanting in deference to the Court of Appeal in order to find its sincerity of sentiment somewhat more attractive than the jaded attempt at legal realism proffered by the agency.

Next steps
42. It is an unfortunate feature of the nature of the present proceedings that they will in substance become moot on 1st March, 2016. However, that cannot be an absolute bar as a matter of principle to granting leave where, as here, the applicant has met the threshold of arguable grounds in accordance with *G. v. D.P.P*. Weighing all of the competing interests involved I consider that no real injustice will be done by granting leave and a stay in the circumstances. The agency will be free to apply for a further interim care order, and the District Court free to decide on it, subject to legal requirements, on the already-assigned date of 1st March, 2016. The Court of Appeal will also (obviously) be free to decide on the appeal, whether on the already-fixed date of this Friday 26th February, 2016, or on any other date as it sees fit, or to give directions in relation to any application for leave, if such is proposed to be made, to allow the Art. 40 certificate to be amended or supplemented (albeit that *McDonagh* suggests that such applications should first be made to the High Court, the course adopted in that case being to allow the appeal against the Art. 40 decision and remit the matter back to the High Court for further hearing). I do not see how it can be suggested that the Court of Appeal's freedom of action is impinged upon by the order I am making.

43. I would hope however that in further District Court proceedings, if they occur, there will be a focus on the level of current and prospective threat such as it is to the second named applicant rather than on some of the material which does not properly go to this issue but is relied on by the agency and indeed the English authorities. In particular, the fact that the applicant came to Ireland, sought to lie doggo, attempted to avoid official attention through the use of false names, checked herself out of hospital, may have been in pyjamas when doing so, moved address within Ireland, and so forth, is not so much suggestive of a propensity towards abuse and neglect as it is of a well-founded fear of the results of official attention. Such conduct by the applicant or, more generally, others so situated, is more properly understood as reflective of a wish to be permitted to parent one's child rather than of an incapacity to do so. That is not to say that there is not other material that does to go the question of such a threat, and it is not to say that the first named applicant should not address some of the realities in this regard and take a more active and engaged approach to dealing with those issues. High-level objections to the extent to which the court can have regard to the best interests of the child will only take her so far. I would like to think that if she demonstrates a willingness to so engage, the agency and (if it comes to it) the English authorities will be capable of responding accordingly.

44. Article 42A of the Constitution, with its emphasis on the rights of the child and the paramountcy of best interests, does not take away from (indeed it enhances) the right of the child to the society of both of its parents, and the presumption that the best interests of the child lie in the child's enjoying such society. To that extent *N. v. H.S.E.* [2006] 4 IR 374, a case that dealt with married parents, remains the position post-Art. 42A. Hardiman J. pointed out at p.504 that the natural rights of the child were already protected by the Constitution and that *"[a] presumptive view that children should be nurtured by their parents is, in my view, itself a child centred one".*

45. As concerns unmarried parents, the striking emphasis on non-discrimination introduced by the 31st Amendment (Art. 42A.1 applies to "*all*" children, and Art. 42A.2 acknowledges the rights of children in the context of the need for proportionate state action having regard to parental failures "*regardless of their marital status*") supports the position such a presumption should apply in favour of the child's best interests lying with the society of its parents, regardless of their marital status. Such a presumption may be displaced where there are compelling reasons that the welfare of the child cannot possibly be upheld in the society of its parents, or where proportionate state action becomes necessary in the exceptional case of parental failure of sufficient gravity as to trigger Art. 42A.2. However, as the concept of proportionality itself connotes, the greater the impact on the relationship between parent and child, the greater the need for compelling justification for the interference with that relationship.

46. Action cannot be proportionate if it is contrary to the legal, constitutional or ECHR rights of any of the parties. The Constitution itself describes the interference with the relationship between parent and child as "*exceptional*", and any such interference must not only be lawful and proportionate but must be conducted by public bodies with the utmost integrity, honesty, sympathy and transparency, at the level of objectively demonstrated substance rather than merely officially presentable appearance. Failure to do so in a context as supremely important as the separation of parent and child must be visited with significant consequences.

47. It will be a matter for the District Court to assess these matters on the already-appointed date of 1st March, 2016.

Order
48. For the reasons set out in this judgment I will order:

> (i). that there be an order pursuant to s. 45 of the Courts (Supplemental Provisions) Act, 1961 (in substitution for the previous interim order) restraining on a permanent basis the identification of any non-professional persons referred to in the proceedings;
>
> (ii). that leave be granted in accordance with the statement grounding the application for the reliefs at section D on the grounds set out in the statement; the applicants having 14 days to serve an originating notice of motion to be made returnable for 12th April, 2016;

(iii). that the District Court be restrained from entering upon any consideration of an application for a care order or interim care order or renewal of such an order or interim order in respect of the second named applicant until 1st March, 2016;

(iv). that the first named applicant be required to file a further affidavit within 14 days confirmatory of the grounding affidavit of Ken Smyth and in addition exhibiting so far as available the correspondence, documents and material referred to in this judgment not already exhibited including the purported agreement of 18th February, 2016, the papers in the Art. 40 application and the papers for the proposed application on 25th February, 2016 including covering letters to the first named applicant and her solicitors; and

(v). that costs be reserved.