Neutral Citation [2016] IEHC 631

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 251 JR]

BETWEEN

VQ

APPLICANT

AND

HER HONOUR JUDGE ROSEMARY HORGAN

RESPONDENT

AND

THE CHILD AND FAMILY AGENCY

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 9th day of November, 2016.

1. The applicant seeks judicial review of a decision made by the President of the District Court on 25th February, 2015, by which she declined to grant an order that the notice party fund private orthodontic treatment in respect of the foster child of the applicant and her husband.

2. The applicant seeks declaratory relief that the respondent erred in declining to accept jurisdiction to determine the question under s. 47 of the Child Care Act 1991 (the "Act"), and an order of *certiorari* quashing her refusal to direct that the treatment be funded.

3. The grounds on which relief is sought are that the President of the District Court misdirected herself in law, unlawfully declined jurisdiction, and/or that she took into account irrelevant considerations and unlawfully fettered her discretion, and that the decision was irrational.

4. Leave was granted by Noonan J. on 18th May, 2015.

5. The question raised in this judicial review concerns the extent of the jurisdiction of the District Court in determining an application under s. 47 of the Act.

Factual background

6. The applicant and her husband are the foster parents of a young child, now aged 14, who has been in their care as foster parents since 2004.

7. The Child and Family Agency (the "CFA") is the statutory body responsible for children placed in the care of the State under the Act.

8. Foster parents are paid an allowance at a rate determined from time to time by government, and the scheme establishing the allowance expressly does not preclude the making of additional payments to foster parents in respect of medical expenses not covered by other public health schemes. The contract made between the foster parents and the CFA provides *inter alia* that the CFA shall "provide such additional or other assistance" as it considers necessary to enable the foster parents to take care of the child.

9. The young boy has poor dental alignment which resulted in a conspicuous overbite and crooked teeth of which he was conscious, and it was believed that some degree of bullying had occurred as a result. It is accepted that it would be beneficial that orthodontic treatment be provided to correct the misalignment and that the treatment was not available through any publicly funded scheme, as he did not meet the threshold clinical requirements of that limited scheme.

10. The treatment, at a cost of almost €5,000, has now been privately funded by his foster parents, who have arranged payment by instalments with the private specialist.

11. By application dated 4th December, 2014 the applicant sought the directions of the District Court pursuant to s. 47 of the Act in relation to the provision of dental treatment for the benefit of the child. The application was broadly framed and did not expressly seek that the cost of the treatment be met by the CFA. The application was grounded on affidavit of the applicant in which she chronicled her efforts to obtain treatment for the young boy through the public dental scheme, and later to seek funding for private treatment. She advanced the argument that the payments that she and her husband receive in respect of the foster placement do not stipulate or envisage that the foster parents meet exceptional payments such as the cost of orthodontic care.

12. The application was opposed by the CFA, not by reason of any disagreement that the treatment was not desirable for the child, but rather because the standard foster allowance was considered to be sufficient to cover the expense of the treatment, regarded by it as a "usual need and expense" experienced by many families with growing children.

13. Evidence was heard from the applicant, from a HSE dental surgeon and from the social work team leader appointed in respect of the child, and having heard this evidence, the President refused the application. The CFA made lengthy written legal submissions, furnished to the applicant in advance of the hearing.

The ruling of the President

14. The ruling of the President of the District Court was short and ex tempore. The parties agree that the report of Dr. Coulter in the Child Care Law Reporting Project (a body expressly recognised by s. 29 of the Act, as amended) accurately reflects what was said, albeit that report suggests that the ruling may have contained somewhat more than what was quoted. From that report it appears that the President ruled as follows:

> "The obligation of the executive is to determine how funding is spent. I accept they must balance the obligation to fund all children under the service, under their formula. [B] is in receipt of the treatment and it is not open to the court to direct the CFA to fund that treatment privately. The process we have gone through is outside the remit of this Court. With regret I refuse the application but I think that the foster parents deserve to be congratulated on the extent of their advocacy for [B] and their care which is acknowledged to be exemplary by the CFA."

The basis of the decision in the District Court

15. The decision of the President of the District Court must be seen in the context of the argument she had before her. The CFA was represented by a solicitor whose primary argument was that the application was not within the jurisdiction of the court, as it sought a direction to the CFA to expend monies. From the Child Care Law Report it is clear that the solicitor argued that jurisdiction did not lie because the District Court was obliged to respect the separation of powers, and that a direction from the District Court that would involve the expenditure of money was one that could only be made by the Oireachtas or by a State body and not by the court.

16. Submission presented by the CFA on the application related to the argument from the separation of powers. Reliance was placed in particular on the decision of the Supreme Court in *T.D. & Ors. v. Minister for Education & Ors.* [2001] 4 I.R. 259, as establishing that the power under s. 47 could not be used to direct the CFA and the State in the exercise of its policy, or the distribution of resources, as this would breach the constitutionally recognised competence of the courts. It was also argued that, as the Oireachtas has formulated a policy on the provision of State funded orthodontic services, the courts ought not interfere with this policy by directing payment for private treatment in respect of persons whose needs do not satisfy the criteria of that scheme.

17. The parties do not agree as to the basis of the District Court judgment. The respondent argues that the President of the District Court did not decline jurisdiction for reasons of the separation of powers, but rather because she took the view that the child's needs were, and would continue to be, met by the foster parents and the application before her failed to establish that any welfare question was engaged in those circumstances.

18. The applicant's uncontroverted evidence before me is that the President expressly relied on the reasoning of the Supreme Court in *T.D. & Ors. v. Minister for Education & Ors.* and refused jurisdiction in reliance on that decision, as she considered that she had no power "to direct funding". I consider that the primary reason for the decision of the President of the District Court was the argument from the separation of powers.

19. However, other matters also were engaged by the decision. The CFA had also argued that the Court did not have jurisdiction to review an administrative decision of the CFA made pursuant to s. 8(9) of the Child and Family Agency Act 2013, under which the CFA must "use the resources available to it in the most beneficial, effective and efficient manner", and the decision of the CFA not to fund private orthodontic treatment for the young boy was a lawful performance of its statutory function.

20. The CFA has discretion with regard to the allocation of its resources, and the application under s. 47 did not permit the District Court to consider whether the discretionary power was lawfully exercised. That issue would fall for determination in the judicial review jurisdiction of the High Court. The present application is not brought by way of a challenge to the exercise by the CFA of its discretionary power to make the additional payment. The applicant accepts that it is not my function to direct the payment by the CFA of the monies expended on the private orthodontic treatment. The review I engage is with the lawfulness of the decision of the President of the District Court.

21. Finally, the President did make express reference to the question of welfare and I will deal more fully with how that was engaged later in this judgment.

22. First, I examine the argument from the separation of powers, and how that principle interacts with the power of the District Court under s. 47 of the Act.

Section 47 of the Act

23. An order under s. 18 of the Act was made when the young boy was about two years old, and he has been in the foster care of the applicant and her husband since that time. They have been exemplary and loving foster parents, and their demeanour and engagement with the legal argument in the course of the hearing before me displayed great affection for their young son and considerable respect for the judicial process.

24. As a result of the making of an order under s. 18, a child is taken into the care of the State and the legal effect of such an order is that the CFA, as agent of the State, takes on many of the functions of guardian of the child, and has, during the currency of an order, the role of approving or consenting to medical treatment. This is clear from the judgment of Finnegan J. in *Western Health Board v. K.M.* [2001] 1 I.R. 729, at p. 733:

> "A care order pursuant to s. 18 commits a child to the care of the health board and gives the health board the like control over the child as if it were his parent."

25. Finnegan J. set out three areas of control and authority exercised in respect of a child in its care, all of which are indices of guardianship.

26. McGuinness J., giving the judgment of the Supreme Court in *Western Health Board v. K.M.* [2002] 2 I.R. 493, described the effect of a care order as being that the "majority of the powers of the parent or guardian" are transferred to the health board. Residual constitutional rights of a parent are not displaced.

27. The Oireachtas considered it desirable and necessary to put in place the statutory mechanism in s. 47 by which questions regarding the care and welfare of the child could be determined.

28. Section 47 of the Act, as amended, provides as follows:

> "Where a child is in the care of the Child and Family Agency, the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order."

29. Finnegan J. noted in *Western Health Board v. K.M.* that the District Court is "something more than a court of appeal and exercises something more than a supervisory jurisdiction". Section 47 is "couched in the widest possible terms", and a restrictive interpretation

of the extent of that power is not justified in the scheme of the legislation. As Finnegan J. pointed out, there is no qualification on the statutory power, and the section empowers the District Court to make directions and to do whatever it deems appropriate to achieve the policy of the Act as a whole.

30. Equally, in *Eastern Health Board v. McDonnell* [1997] 1 I.R.174, McCracken J. emphasised the role of the District Court with regard to the protection of the best interest of a child in the care of the State. At p. 184 of the judgment he said the following:

> "In my view s. 47 is an all embracing and wide ranging provision which is intended to entrust the ultimate care of a child who comes within the Act in the hands of the District Court. It should be noted that it is contained in part of the Act dealing with "Children in the Care of Health Boards", and is not qualified in any way. I think the only reasonable interpretation of s. 47 is that it is intended to give the overall control of children in care to the District Court."

31. McCracken J. had earlier described the jurisdiction of the court under s. 47 as "extremely wide".

32. This approach found favour in the Supreme Court in *Western Health Board v. K.M.*, where McGuinness J. pointed to the fact that the statute was a remedial social statute and should be approached in a purposive manner and be construed as widely and liberally as can fairly be done, and that it was for the court to enforce and ensure respect for the constitutional and other rights of both child and parent. She expressly shared the views of both McCracken J. in *Eastern Health Board v. McDonnell* and of Finnegan J. in the decision under appeal before her.

33. These decisions were given before the 31st Amendment to the Constitution by which Article 42A now mandates that "the best interests of the child shall be the paramount consideration" in all proceedings relating to its care and custody. The District Court must now be considered to engage a statutory power and obligation to protect and vindicate those best interests.

34. The power is constrained however, and McCracken J. in *Eastern Health Board v. McDonnell* noted the limitations on the role, that the District Court should not interfere in all day-to-day decisions made by a health board in relation to a child in its care. The role of the court was rather to make determinations and give directions when matters brought to its attention could "reasonably be considered adversely to affect the welfare of the child".

35. In *J.G. & Ors. v. Judge Staunton & Anor*. [2014] 1 I.R. 390, Hogan J. also accepted that the District Court had a wide jurisdiction under s. 47 and he expressly quoted with approval the statement by McCracken J. in *Eastern Health Board v. McDonnell* that the power was " an all embracing and wide reaching provision". In that case the question before the court was whether the District Court had power to make a direction to another person, and he held that the Oireachtas did not envisage that the jurisdiction under s. 47 could be used to impose obligations on third parties, even on parents, to do certain things.

36. The role must be seen as inquisitorial, and the court has vested in it the power to initiate an inquiry of its own motion, or upon the application of any person. O'Malley J in *HSE v. O.A.,* [2013] IEHC 172, [2013] 3 I.R.287 explained the role at para 63:

> "I accept that child care proceedings under the Child Care Act, 1991 may not be directly analogous to most other forms of litigation. It is certainly the case that the judge's function is different, in that he or she must adopt a more inquisitorial role and reach a conclusion based on the welfare of the child beyond all other considerations."

Discussion

37. The effect of a care order is that the State takes on many of the functions of a guardian of the child.

38. Following the making of a care order, the CFA is responsible for the care of the child and may take certain decisions relating to day to day care through the foster parents, to whom it has delegated its function.

39. The District Court has an overall supervisory and directory jurisdiction in regard to the exercise by the CFA of its powers, and over the foster parents or other persons in whose care a child is placed. The case law has emphasised the far reaching and wide jurisdiction under s. 47, by which is vested in the District Court the power to make all decisions relating to the care and welfare of a child, subject only to the proviso that the court ought not interfere unless matters arise which require consideration of the welfare or interests of the child. The court will not generally make orders more properly characterised as day to day matters and thus cannot be said to exercise a role by which it interferes with reasonable and prudent decisions made by the CFA or the foster parents. The decision of the court may be required in matters where there is disagreement as to whether a particular course of action is in the interest of a child, or where the issue is one where it is difficult to assess where the bests interest of a child might lie.

40. The District Court may, under the section make orders regarding educational or medical needs or interests of the child, and in many cases the indirect effect of orders or directions given by the District Court under s. 47 of the Act may involve the CFA, or the foster parents, incurring expenditure. By way of example if a child under the care of the State requires life-saving medical treatment not publically available, I consider that the District Court must be viewed as having power under s.47 to determine that the treatment be provided and where. That this may involve expenditure by the State does not in my view mean that the District Court is deprived of jurisdiction to make a declaration. The question would be one regarding welfare, not a day to day matter.

41. On the other end of the spectrum, if a child wants to go on a voluntary school trip the foster parents are not in a financial position to fund, the Court may well decline to grant a declaration unless it could be shown that the child's welfare would be adversely affected by not going on the trip.

42. The jurisdiction is vested in matters of welfare, not such that only matters which adversely affect welfare come to be considered, but where the welfare or interest of a child are engaged and require to be clarified, or steps taken to direct the means by which these are to be furthered.

43. It is not correct to interpret the powers of the District Court under s. 47 as meaning that the CFA must, as a result of a declaration made under s. 47 be directed to fund treatment sought in respect of a child in care merely on account of the fact that it is found to be of some benefit to the child. The District Judge, exercising the jurisdiction pursuant to s. 47, may make orders relating to matters that "affect" the welfare of the child, and may have regard to various factors, including what is called by counsel for the CFA "the existence and ongoing provision of financial and other support by public bodies" to determine whether the welfare of the child requires that its direction be given. The Court must assess the welfare question, whether the treatment is one in the ordinary course of anticipated expenditure, whether the resources of the parents are sufficient to meet the costs, and whether there is a risk that the needs of the child may not be met if the treatment cannot reasonably be funded by the foster parents. The court has the

power and the obligation to weigh these factors and make a determination in the individual case, and is the ultimate decision maker in regard to all such matters.

44. The question before me is whether the President of the District Court was correct to decline jurisdiction, having accepted the argument of the CFA that the order sought would involve the court making an order the direct consequence of which would impose a requirement on the CFA to supply funding outside the normal foster care allowance.

45. Counsel for the applicant argues that the Supreme Court decision in *T.D. & Ors. v. Minister for Education & Ors.* was wrongly relied on by the President of the District Court. The Supreme Court had allowed an appeal from a decision of Kelly J., where he had granted a mandatory injunction directing the Minister for Education to provide facilities for disadvantaged children in need of accommodation and treatment in high support units, because it was not within the remit of the courts to force the executive branch of government to implement a particular policy which extended beyond the particular needs of the applicants, and that by doing so, the High Court had breached the doctrine of the separation of powers.

46. Keane C.J., giving the majority judgment, held that the Minister for Education in determining how resources where to be allocated for the building and staffing of special needs units was exercising the executive power of the State on behalf of the Government as a whole, and that the High Court by requiring the executive to implement "in a specific manner by the expenditure of money on defined objects within particular time limits", had exceeded its authority, and had sought to determine a policy in dealing with a particular social problem.

47. In *CFA v. O. A.* [2015] IESC 52, the question before the Supreme Court was whether a district judge had the power to award costs against the CFA in child care proceedings, and if such jurisdiction existed, what factors ought to influence the court in the exercise of its discretion. MacMenamin J. refused to accept a rule that parents were automatically to be entitled to their costs, as this could involve a judge implicitly "making a predetermination as to the distribution of State funds, thereby calling into question the principle of separation of powers". O'Malley J. in the High Court, *HSE v. O.A.,* had awarded costs to the parents, and that order was not challenged merely on account of the fact that the effect of her order was that the State would be directed to expend money.

48. A distinction is to be drawn between a decision which directs policy in general, and the decision in an individual case the practical effect whereof is that the financial resources of the State are impacted.

49. I consider that the applicant is correct, and that the judgment of the Supreme Court in *T.D. & Ors. v. Minister for Education & Ors.* was not correctly relied on by the President of the District Court in a number of respects.

50. No question of policy was sought to be directed in the application to the District Court, the Oireachtas had already determined the question of policy, the distribution of roles, and the interaction of the various players, in the enactment of the Act, and by vesting a wide jurisdiction in the District Court under s. 47.

51. The relevant funds from which the orthodontic treatment might have been paid had already been allocated to the CFA, and what was being sought was not a direction to government that funds should be allocated to the CFA, but rather a direction as to the interest of the child which may have led to a determination that in this case the expenditure be met by the CFA. The Court was not asked to predetermine whether the cost of orthodontic treatment be met for all children in care once the treatment was found to be in the interest of that child. Such a decision would not be within its jurisdiction.

52. I consider that the President was led in error into high constitutional principles, when none arose for consideration by her. Having heard the evidence, she was in my view competent to determine the following questions:

> a. Whether the orthodontic treatment was merely desirable, or was necessary in the best interests of the young boy, or whether it was genuinely a matter in regard to which no real question of welfare or interests arose. The evidence was conflicting with regard to this question, and the Court was competent to determine whether a welfare issue arose in those circumstances.
>
> b. Whether the suggestion the young boy was being bullied raised a separate issue outside the clinical views of the dental specialists.
>
> c. Whether the foster care allowance paid to the applicant and her husband in respect of the young boy, on a construction of their contract with the CFA, did require that they meet the expenditure for orthodontic care from that funding.
>
> d. Whether the orthodontic treatment was, as was submitted in evidence by the social worker, not "a sudden or unexpected event", but a usual need and expense experienced by many families with growing children.
>
> e. Whether the applicant and her husband believed, or were led to believe, the treatment would be funded, or, were not told that they the CFA would not fund the treatment in sufficient time.
>
> f. Whether there were other considerations that might favour the provision from State funds of the money to meet the treatment. These considerations could include the fact that the discretionary fund available to the CFA was small, or too small to meet the request as a matter of budgetary considerations in a given period.
>
> g. The means, and other demands on the financial resources, of the foster parents.
>
> h. Whether in these circumstances the child should receive the treatment.

Was there a welfare question in play?

53. The respondent argues that no welfare issue arose for consideration in the District Court and that the President made no error as a result.

54. Before the jurisdiction under s. 47 may be exercised, the court must be satisfied that a welfare issue is directly engaged: per Hogan J. in *J.G. & Ors. v. Judge Staunton & Anor*. The report of Child Care Law Reporting Project suggests that the solicitor for the CFA made a second point, not a jurisdictional point, that the needs of the child were being met because the foster parents had opted

to fund the treatment themselves from their private resources, and that no welfare question was therefore engaged.

55. The argument that no welfare question arose, on account of the fact that the foster parents were in fact meeting the expense themselves, does not persuade me. It would mean that the applicant, by seeking to do the best that she and her husband could do by financing the treatment by instalment payments, found herself without a remedy in the District Court, where she had set out on affidavit various factors to support her application. It also fails to take account of the fact that the clinical evidence was contested, that applicant gave evidence in the District Court that she believed the CFA would meet the expenses, and that she had been given an assurance that this was so. While that was a contested matter of fact, it could not be said that no issue arose for determination by the District Court under s. 47, merely on account of the fact that the treatment had started, and the foster parents had a private contract with the orthodontist to meet the payments.

56. That is not to say that the District Court was bound to find that the foster parents had to be reimbursed for some or all of the money expended. That Court was required to take account of all factors relevant to the exercise of its discretionary power, and cannot be said to be constrained to come to a conclusion on one factor alone.

Conclusion

57. In my view, the question raised in the s. 47 application did not engage the principle of the separation of powers, nor was it answered by reference to the judgment of the Supreme Court in *T.D. & Ors. v. Minister of Education & Ors*. It is established as a matter of law, that the courts have no role in directing the executive arm of State as to how scarce resources are to be distributed. What was asked of the President of the District Court in the decision under review was that she would make a determination with regard to the welfare and needs of an individual child in the circumstances before her. She was not asked to direct the policy of the State with regard to the provision of state funded orthodontic treatment, nor was she asked to direct that the CFA would always fund such treatment for children in State care. She was asked a question relating to the individual interests of a child, whether the treatment was routine, anticipated, or discretionary. It also fell to be determined whether the contract between the foster parents and the CFA, and the guidelines issued by the CFA with regard to what was intended to be covered by the foster allowance, meant that the foster parents in the circumstances were obliged to meet the costs of orthodontic care out of their own resources.

58. I consider it was within the jurisdiction of the District Court to make findings of fact, as to the meaning of the agreement reached between the foster parents and the CFA, whether the young boy did need the orthodontic treatment, and whether the parents had agreed to fund the treatment out of their own resources in reliance on a representation that the money would be refunded. The questions engaged were questions specific to the concrete circumstances before the Court, and whether it was reasonable to expect the treatment to be funded by the foster parents in all of the circumstances. No question of State policy or that of a State agency arose for consideration.

59. I consider that the President of the District Court did fall into error, albeit it was one that arose from what I consider to be an incorrect emphasis on the separation of powers in the submission made by the CFA to her. I understand that the CFA was concerned that its discretion to manage its limited resources was not one with which the District Court should engage, and it was anxious not to create a precedent or practice which might mean it would be called upon to fund orthodontic treatment for other children in the future. That was not a concern of the District Court. It was not part of the application under s. 47, and the President of the District Court was competent in my view to give a direction on the matters raised before her without making any observations, rulings or findings, with regard to the funding of orthodontic treatment for children in care in general.

60. In those circumstances, I consider that the President of the District Court did have jurisdiction to make orders pursuant to s. 47 as I have identified in the course of this judgment. Her decision might well have had the effect that monies would have to be found for the treatment. The role envisaged by s. 47, as interpreted by the authorities, means that the District Court may make a decision that requires the CFA to expend money in the individual circumstances of a case, when all relevant factors are taken into account. The parent of a child will often be met with such considerations, and the court has been given the power under s. 47 to make a decision of the type that comes to be made by a parent in choosing how to allocate financial resources.

61. The CFA did offer to conduct a further review of the application. There is no statutory mechanism available to an applicant who is refused an additional allowance in respect of what is claimed to be extraordinary or exceptional expenses incurred on behalf of a foster child. The offer was that the application would be considered de novo, but no procedures were put in place to ensure a degree of independence in that process. I strongly urge that a review be engaged, and that some mechanism be put in place by which this can be conducted by a person with a sufficiently clear distance from the decision maker at first instance to allay the concerns of the applicant.

62. I do not have in the present proceedings any power to direct the payment to the applicant of part or all of the expenses met in respect of the orthodontic treatment. The focus of the judicial review is narrow. It has been a matter of some concern to me however, that the costs of the District Court proceedings, and the presumably much larger costs incurred in the judicial review, far outweigh the cost of the orthodontic treatment.

63. In the circumstances, I will make an order of certiorari quashing the decision of the respondent given on 25th February, 2015.