THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 111 J.R.]

BETWEEN

C.J.

APPLICANT

AND

JUDGE SEAMUS HUGHES

RESPONDENT

AND

M.S. AND MARY TIERNAN

NOTICE PARTIES

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18th day of March, 2016.

1. The first named notice party to this *ex parte* leave application obtained an order from the District Court regarding access to the child of himself and the applicant, on 18th June 2012, which did not provide for any overnight access to be afforded to the applicant.

2. The applicant has been seeking a variation of that access order in order to obtain greater access including overnight access.

3. In a report dated 12th December, 2014 under s. 20 of the Child Care Act 1991, the Child and Family Agency declined to recommend any overnight access for the applicant.

4. A further report was prepared dated 25th April, 2014 which broadly expressed satisfaction with the current situation, although noting that the applicant "*is making progress in addressing her mental health needs and parental capacity needs"*.

5. Judge Seamus Hughes ordered an updated report under s. 20 of the Child Care Act 1991. An undated report was prepared by Ms. Mary Tiernan, Social Work Team Leader, pursuant to this order. In that report the agency expressed itself as "*strongly supporting ongoing consistent access*" with the applicant but said it "*would not recommend overnight visits at present*". It stated that "the *concern previously identified by the Social Work Department regarding inappropriate physical boundaries in [the applicant's] relationship with her children still exists".*

6. Notwithstanding the foregoing reports, Judge Hughes sitting in Athlone District Court on 21st December, 2015 varied the access order so as to permit the applicant overnight access on the last Saturday of each month, as well as weekly access on Friday afternoons.

7. The applicant, who appears in person, now applies for leave to challenge, by way of judicial review, the process by which an order varying access to the child of herself and M.S. was made by Judge Hughes. The learned judge should in any event not be named in the proceedings in accordance with O. 84, r. 22(2A), which requires that the respondent be the other party to the underlying proceedings, in this case M.S.

Relief sought

8. The applicant seeks leave to apply for a number of reliefs, as set out in her original filed Statement of Grounds, which I will address as follows.

9. Firstly she seeks a recommendation under the Legal Aid Custody Issues Scheme.

10. However, pursuant to para. 3(iii) of the scheme, legal aid for judicial review is only covered where it concerns "*criminal matters or matters where the liberty of the applicant is at issue"*. As this is not such a case, the scheme simply does not arise.

11. Secondly the applicant seeks "*a declaration by way of application for judicial review in the circumstances, where the applicant seeks a revision and a variation of the access order between the child… and the applicant granted by Judge Seamus Hughes on 21st December 2015, promoting alienation of the child*". The precise declaration being sought is not clear from this complaint but I infer that the applicant is taking issue with the failure of the learned judge to afford her greater access, and considers that the limited amount of access available is promoting alienation. This appears to me to be a complaint as to merits of the decision rather than legality, and in that regard the appropriate remedy is an appeal, or a further variation application, and not judicial review.

12. The next relief sought is leave to seek an order of *mandamus* for the purpose of allowing the applicant to cross-examine Ms. Tiernan on her s. 20 report "*and to present the evidence for the allegations within, that are unknown to the applicant".*

13. Where a court receives evidence in the form of an expert report, it is clearly arguable (and I can go no further for the purposes of the present leave application) that a party should have an entitlement to challenge that evidence in cross-examination, if it is adverse to that party and if any weight is to be attached to it by the court, given the central role of cross-examination in our conception of procedural fairness (see *In re Haughey* [1971] I.R. 217; *Flanagan v. U.C.D.* [1988] I.R. 724 at 731 *per* Barron J.; *Maguire v. Ardagh* [2002] 1 I.R. 385 (in particular *per* McGuinness J. (Keane C.J., Hardiman and Geoghegan JJ. concurring) at p. 645 and *per* Hardiman J. (Keane C.J., McGuinness and Geoghegan JJ. concurring) at pp. 704 to 707); *O'Callaghan v. Mahon* [2008] 2 I.R. 514 *per* Hardiman J. (dissenting)).

14. However in the present case, it is notable that the learned judge did not entirely follow the agency's report, and indeed made an order in favour of the applicant. It might be appropriate to grant leave for mandatory relief if the applicant had sought to set aside the District Court order, but she has not done so. Under those circumstances, it is hard to see procedurally how it would be appropriate to grant a mandatory order requiring the learned judge to conduct, in a different manner, a hearing that had already concluded and was not sought to be removed by *certiorari*. Given that context it does not seem to me to be desirable to give leave for a mandatory order that would have the effect of reopening a hearing that concluded in the applicant's favour (albeit to a limited extent). It seems to me that the more appropriate course in the interests of justice would be to give leave for declaratory relief as to the entitlement to cross-examine. If the applicant is successful in obtaining that relief, then any further or future applications would have to be conducted in the light of any such declaration.

15. The next relief for which leave is sought is "*a declaration … that any form of parental alienation (as known by different terminology) is serious emotional child abuse, endangering the child"*. Again this appears to be an attempt to engage with the merits of the decision rather than its legality, and is therefore not appropriate for judicial review.

16. The applicant next seeks liberty to allow her statement to be amended "*by specifying different or additional grounds of relief or otherwise on such terms if any as are deemed fit*". This is a boilerplate plea which is neither necessary nor appropriate for inclusion in a grant of leave. Interlocutory relief does not need to be specifically claimed in the statement of grounds (although an extension of time is in a different category). That does not take away from the fact that an amendment of her statement would be necessary to pursue the issue of cross-examination, but I will deal with that further below.

17. The next substantive relief for which leave is sought is "*an order providing for damages, according to Paul Ward in his book* The Child Care Acts *(Thompson Round Hall) the HSE/CFA in carrying out its functions under s. 3 of the Child Care Act 1991 may be vicariously liable for the negligent acts, omissions or statements of its servants and agents"*. That is no doubt true, but this is not an action in negligence. Insofar as it is properly framed as a judicial review, it is a challenge to the decision of the learned judge not to accede to the applicant's request to cross-examine an official of the agency. Thus the complaint is essentially about a judicial decision and not any conduct on behalf of the agency as such. Therefore the question of damages does not arise.

18. Apart from further and other relief and costs, which arise in every case without the necessity for express provision in the order granting leave, the only other relief for which relief is sought is "*an order seeking full discovery of all related documents, statements and evidence including all report forms in a legible format held by the Child and Family Agency in relation to the applicant's case"*. It does not seem to be necessary or appropriate for interlocutory orders to be included in the reliefs sought in a statement of grounds or in the order granting leave (leaving aside the special case of an extension of time, which is sought in a statement of grounds because it is jurisdictional to the launching of the proceedings in the first place), but in any event a request for discovery of this kind, even if it complied with O. 31, which it does not, simply does not arise given the limited nature of the complaint made in relation to the failure to allow cross-examination.

19. However, complication is added to the picture by the fact that the applicant has now sought to completely amend her statement to seek a new set of reliefs, (although whether in substitution or as the applicant put it "*in conjunction with"* the original application was not absolutely clear), notably orders revising and varying the order regarding access and seeking a declaration as to the right of the child and the applicant to have a meaningful relationship. The latter relates to merits rather than legality and the former is not something that is appropriate to judicial review, if for no other reason than that a mandatory order regarding access would require a hearing of oral evidence which the District, and on appeal Circuit, Courts are better placed to provide.

20. More fundamentally, the proposed new statement omits the one ground which I have found to be arguable, namely a failure to permit cross-examination. It was therefore necessary for me to explore with the applicant whether the proposed new grounds were merely supplemental or whether they were intended to supplant the original, and if so whether she wished to pursue the cross-examination point, and she has indicated that she does. Therefore the appropriate course is to refuse the proposed amendments but to allow an alternative amendment to permit her to plead the one arguable aspect of the case.

Order

21. Given that the applicant has identified an arguable ground in relation to the alleged failure to permit cross-examination, I will order as follows:

(i) that the order under s. 45 of the Courts Supplemental Provisions Act 1961 restraining identification of any non-professional persons referred to in the proceedings continue on a permanent basis;

(ii) that the amendments sought in the proposed "Revised Statement Required to Ground Application for Judicial Review" be refused;

(iii) that the applicant have liberty to amend her statement in order to claim as a sole relief a declaration that Judge Seamus Hughes erred in receiving a report from Mary Tiernan of the Child and Family Agency without permitting the applicant to cross-examine Ms. Tiernan on that report;

(iv) that leave to seek other reliefs be refused;

(v) that leave to seek the foregoing relief be granted on Grounds (e) (ii), (iii)(a)(b)(c) and (d), 4, 5 and 7 of the filed Statement of Grounds, the remaining grounds being refused, and that the remaining grounds on which leave is not being granted are to be deleted in the amended Statement of Grounds;

(vi) that Judge Seamus Hughes be struck out as respondent, that M.S. be the respondent and be therefore struck out as a notice party and that Mary Tiernan be the sole notice party;

(vii) that the applicant file and serve on M.S. and Mary Tiernan the amended Statement of Grounds and an originating notice of motion, returnable for a date to be fixed, within 3 weeks from the date of this judgment; and

(viii) that costs be reserved.