THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 484 J.R.]

BETWEEN

R.T.

APPLICANT

AND

CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice White delivered on the 27th of October, 2017

1. By statement grounding application for judicial review of 4th July, 2016, and verifying affidavit of Ken Smyth solicitor, deposed on 4th July, 2016, the Applicant was granted leave to apply for judicial review by order of 4th July, 2016. The Applicant sought the following reliefs:-

> (i) an order of *certiorari* quashing the decision and/or order of Haughton J. of 5th April, 2016, wherein the court refused to order that the first Applicant's legal costs or any portion thereof be paid by the Respondent;
>
> (ii) a declaration that the outcome of the case was particularly clear and compelling;
>
> (iii) in the alternative, a declaration that where the Respondent maintains that foster care is required and the legal criteria are fulfilled pursuant to the Childcare Act 1991 and it pursues Orders to this effect, whilst repeatedly refusing to accept an offer by a parent to consent to a Supervision Order or a lesser measure such as living in a foster mother and baby home with the baby, and where it does not succeed in obtaining such orders, when the case is tested that such conduct comes within either capricious, arbitrary or unreasonable conduct (in either initiating or maintaining the proceedings) and/or constitutes the outcome of the case being particularly clear and compelling;
>
> (iv) in the alternative, a declaration that where – upon a parent being legally represented and the Respondent's case accordingly being tested – a care order which was previously granted where there was no such representation, on the same asserted facts, is then refused; that a parent is entitled to the costs of such representation, particularly where they have no or low means and where such proceedings have been brought against them by the State to have a newborn baby placed in foster care and where such parent has no meaningful option than to engage the services of a legal team;
>
> (v) a declaration that a parent who has no income and is not even in receipt of a subsistence allowance – in the form of a Social Welfare payment – and who has no other personal assets or means, comes within the category of persons who could not be expected to pay their own legal fees and/or that were such a person to be left in a position whereby they had to discharge their legal costs from such a subsistence allowance, that this would equate to placing an inordinate burden upon such a person;
>
> (vi) a declaration that placing an inordinate burden upon a person/parent corresponds to visiting a particular injustice upon them;
>
> (vii) in addition, or in the alternative, a declaration that in the particular circumstances of the Applicant, that a particular injustice would be visited upon the parents if they were left to bear their own costs, having regard to the length and complexity of the proceedings;
>
> (viii) an ancillary declaration that in the particular circumstances of the case, the Applicant is entitled to have her legal costs or a stated portion thereof borne by the Respondent;
>
> (ix) an ancillary Order if necessary remitting the matter to the District Court for a consideration of the costs application;
>
> (x) such further or other Orders that this Honourable Court deems to be just and meets the case including any variation of the within reliefs; and
>
> (xi) the costs of the within proceedings.

2. The Applicant issued a motion on 6th July, 2016, originally returnable for 19th July, 2016. The statement of opposition was filed and served by the Respondent on 13th October, 2016. Catriona Walsh, Solicitor, on behalf of the Respondent, deposed a replying affidavit on13th October, 2016. The Applicant deposed a replying affidavit on 16th December, 2016.

Background

3. The Applicant is a British national who came to Ireland in January 2016. She had no prior significant connection with Ireland having lived in the United Kingdom. She was 38 weeks pregnant. The UK Social Services had emailed Irish Social Services concerning her.

4. The relevant email was sent by Ms. Andrea Woodcock on 12th January, 2016. Ms. Woodcock was a social worker attached to Barnsley Metropolitan Borough Council in Yorkshire and was the allocated social worker to the Applicant's unborn baby. Her presence in Ireland was brought to the attention of the Respondent by the hospital in Ireland to which the Applicant referred herself. On 28th January, 2016, a strategy meeting was convened at the hospital when it was agreed to apply for an Emergency Care Order in respect of the child on its birth. The child, P.T., was born on 7th February, 2016. An application was made for the order *ex parte* at the District Court nearest the hospital where the Applicant had given birth. This was followed by an Interim Care application on 15th February, 2016, on notice to the Applicant. The Presiding Judge granted the Emergency Care Order on 8th February, 2016, and satisfied himself on an *ex parte* basis that there was an immediate and serious risk to the health or welfare of the child which necessitated her being placed into care. On 15th February, 2016, the learned judge made an interim care order and satisfied himself

on the basis of the evidence adduced that the threshold criteria set under the Childcare Act 1991, had been met in the circumstances.

5. Subsequent to the Interim Care Order of 15th February, 2016, the Applicant instructed solicitor and counsel who represented her before the court on 14th, 21st March, 4th and 5th April, 2016.

6. On 4th April, 2016, the learned judge refused to extend the Interim Care Order any further on the basis that the Respondent had not met the threshold required pursuant to the relevant section. On the following day, 5th April, 2016, he considered an application for costs sought on behalf of the Applicant, which was refused. It is that order refusing costs which is the subject of this judicial review application.

7. The principles set out in the Supreme Court judgment of the *Child and Family Agency v. O.A.* [2015] IESC 52, were opened to the court on behalf of the Applicant and Respondent and the Judge considered the principles and decided not to award costs in favour of the Applicant.

8. Ken Smyth, Solicitor, in his affidavit of 4th July, 2016, at para. 18 stated:-

> "The Court having heard submissions from both the Applicant and the Respondent (the Respondent asserted that none of the criteria of *O.A.* were met) stated words to the effect of:-
>
> > 'I'm not holding that the CFA were capricious in taking the case. It was not a particularly clear or compelling outcome. I was considering a supervision order, but I am satisfied that I don't have jurisdiction to do so. As to injustice on parents, I have difficulty to identify what that might mean. There have been no submissions on Ms. T's financial circumstances. I will refuse the order for costs.'"

9. Catriona Walsh, Solicitor, on behalf of the Respondent in her affidavit of 13th October, 2016, referring to the learned judge's decision of 5th April, 2016 stated at para. 20 of her affidavit:-

> "I say and believe that following a consideration of the *O.A.* Supreme Court decision, as appears from the transcript, the judge held the following:-
>
> > (i) that this was an application for an interim care order where he did not see any exceptional or unusual or unprecedented issues in the case;
> >
> > (ii) Judge Haughton was satisfied that the Child and Family Agency did not act capriciously, arbitrarily or unreasonably in commencing or maintaining the proceedings;
> >
> > (iii) the outcome of the case was not particularly clear or compelling, it took quite a number of days;
> >
> > (iv) there was no evidence or submissions as to Ms. T's financial circumstances to identify a particular injustice on the parents; and
> >
> > (v) Nothing brought the case within the exceptional that would allow an order of costs."

10. The principles to be followed by the District Court or Circuit Court on appeal when considering an application for costs of a Respondent in care proceedings were set out in the Supreme Court judgment in a case stated of *Child and Family Agency v. O.A.*, a judgment of MacMenamin J. delivered on 23rd June, 2015.

11. Under the heading criteria which may appropriately be adopted in the District Court on an application, the learned judge stated at paras. 49 as follows:-

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

12. There is a difference between an unlawful decision that is made outside of jurisdiction or unlawfully made in accordance with the law applicable and in an incorrect decision where judicial review is not warranted but the aggrieved party has a right of appeal.

13. In *Sweeney v. District Judge Fahy & Anor*, judgment of the Supreme Court of 31st July, 2014, [2014] IESC 50, Clarke J. at paras. 3.5 and 3.6 stated:-

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

14. The District Court and on appeal the Circuit Court has exclusive jurisdiction to deal with applications pursuant to the Child Care Act 1991. While the High Court has an original jurisdiction it exercises that jurisdiction only in respect of minors who require to be detained for their own safety and welfare.

15. The recital in para. 2.5 of the statement of opposition is correct which states:-

> "The Child Care Act 1991 provides that childcare proceedings are within the jurisdiction of the District Court and accordingly, the awarding of costs in relation to childcare proceedings are within the jurisdiction of the District Court. The view of the District Court Judge in the exercise of his discretion should be given great weight as the District Court Judge had the appropriate knowledge of the case with which to make an informed decision."

16. When the Respondent considers it appropriate to make an application to the District Court for an Emergency Care Order, an Interim Care Order or a Final Care Order, it does not apply for an order for costs against the Respondent to those care proceedings.

17. The District Court applied the principles in *OA*. It made no error of jurisdiction and acted within it's powers and discretion. The reliefs sought by the Applicant would involve this Court questioning the judgment and competence of the learned judge in the exercise of his discretion. There is no evidence to suggest that he exercised that discretion in a manner which would allow this Court to interfere by judicial review.

18. The Respondent had no option given the alert circulated by British Social Services to bring the application when notified by the hospital to which the Applicant had been referred. There was a case conference. There was no evidence to suggest that the Respondent had acted capriciously, arbitrarily or unreasonably in bringing these applications. There was no evidence to suggest that the outcome of the case was particularly clear and compelling in view of the background of the Applicant as outlined in detail in the proceedings before this Court.

19. It was within the learned judge's discretion to decide if a particular injustice would be visited on the then Respondent, if she were left to bear the costs having regard to the length and complexity of the proceedings. It was also up to him to decide if there was some unusual or unprecedented issue or issues which required determination which rendered the case truly exceptional. The learned judge was at all times acting within jurisdiction in determining these matters.

The Appropriate Remedy

20. If the Applicant was aggrieved in those determinations she had a right to appeal the refusal to grant costs. The court accepts that the principles in the *O.A.* case and its implementation can affect the rights of Respondents in interim care proceedings. An emergency care order is usually always applied for *ex parte* so no issue as to costs arise. There may well be occasions in interim care proceedings where a Respondent has not been able to be approved for civil legal aid in time when an assessment of means would justify legal aid, however the Supreme Court judgment in *O.A.* balances carefully the welfare interests of children who may be the subject of care proceedings, the responsibility of the statutory agency, the Child and Family Agency, to ensure that the welfare of the child in these proceedings is paramount and the rights of the Respondent, normally the parent in these proceedings.

This Court must follow those principles, and accordingly the application for judicial review is refused.