

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 692 J.R.]

BETWEEN

R. K. A.

APPLICANT

AND

P. T. P.

RESPONDENT

JUDGMENT of Mr. Justice White delivered on the 19th day of May, 2017

1. This is an application for leave to bring judicial review proceedings, seeking to quash a District Family Court order and various other reliefs.

2. The Applicant and Respondent were married in August, 2005. They have three children, A born in 2006; S born in 2010; and G born in 2013. The Respondent has claimed that difficulty existed in the relationship between them for a number of years. The Applicant disputed this. The Respondent left the family home on 2nd February, 2016. She had consulted solicitors and a preliminary letter was written to the Applicant on 1st February, 2016. Subsequently, family law proceedings were issued in the Circuit Family Court by the Respondent on the 7th March 2016 seeking comprehensive relief arising out of the alleged breakdown of the marriage. The Applicant has also issued proceedings in the Circuit Family Court pursuant to the provisions of the Domestic Violence Act 1996 on the 18th March 2016.

3. Prior to the issue of Circuit Family Court proceedings the Respondent made application by way of summons for a safety order on 14th September, 2015, originally returnable to the District Court on 30th September, 2015. The application was heard on 1st December, 2015 and the District Court granted an order that the Applicant, shall not use or threaten to use violence against, molest or put in fear the Applicant and/or the dependent persons and directed that the order should remain in force for a period of one year commencing on 1st December, 2015. The Applicant named is the Respondent in these proceedings.

4. The Applicant appealed that order by notice of appeal of 2nd December, 2015. There was a full rehearing in the Circuit Family Court on 23rd February, 2016, and the Circuit Family Court affirmed the safety order granted in the District Court on 1st December, 2015. On 24th March, 2016, the Applicant issued a further summons to vary the safety order of 1st December, 2015. This variation summons came before the District Court on 31st May, 2016, and the court ordered that the safety order be amended to reflect the correct name of the Applicant but made an order refusing an application to exclude the children from the safety order.

5. Subsequently, by order of the Circuit Family Court in the Circuit Court proceedings, on the 9th May 2016 the Court made an order that a report be commissioned pursuant to the provisions of s. 20 of the Childcare Act 1991, in respect of the three children of the marriage, and granted the Respondent interim sole custody of the children pending the finalisation of the s. 20 report and any further order of the court.

6. The Applicant first applied for judicial review by way of statement required to ground the application on 31st August, 2016. He filed revised grounds on the 17th October 2016. The original application was opened before Baker J. in the High Court on 9th September, 2016, and adjourned to the Judicial Review List on 10th October, 2016. The application was adjourned from time to time without any leave order being granted. By order of this Court of 16th January, 2017, the court directed that there would be a single combined hearing of the Applicant's application for leave to apply for judicial review and the Applicant's substantive judicial review application, the court firstly considering the Applicant's application for leave to appeal for judicial review and if leave is granted proceeding immediately thereafter to consider the Applicant's substantive judicial review application, the court fixed 24th March, 2017 to hear the applications. This Court heard the application on 24th March, 2017 and judgment was reserved to 19th May, 2017.

7. The reliefs sought are:-

- (a) an order of *certiorari* to quash the order dated 31st May, 2016, of the District Family Court refusing to exclude children from the safety order;
- (b) an order of *mandamus* directing the District Family Judge to issue the copy of Digital Audio Recording of the respondent's sworn statement given in safety order case dated 1st December, 2015 in record DO7FL1500195;
- (c) a declaration that the removal of children from the custody of married natural parent/applicant from the rented family home by respondent/mother, her employer, M Mc and others without any custody order from court on 2nd February, 2016, was unlawful; and
- (d) applicant prays the leave to apply for judicial review be allowed in the interest of justice otherwise abductions, wrongful, forceful and unlawful removal of children without any court order will be encouraged.

8. The grounds upon which judicial review was sought were:-

- (a) Denial of cross examination and ordering a safety order without fair hearing is unfair and unconstitutional;
- (b) Safety order dated 1st December, 2015, violated ECHR Article 6 right of fair trial;
- (c) Safety order ordered without following basic principles of natural justice and fair hearing caused a wrong presumption against the applicant in safety order appeal hearing and judicial separation proceedings in record 396/2016 of Circuit Family Court No. 30 Phoenix House, Smithfield, Dublin, while granting interim sole custody order of three children in favour

of the respondent/mother;

(d) Non-compliance of court order to issue applicant, copy of Digital Audio Recording of respondent and witnesses is unfair and applicant was denied opportunity to defend the case based on the recorded sworn statement;

(e) on the basis of a safety order and solicitor's letter, abduction, kidnapping, forceful, wrongful and unlawful removal of children from lawful custody of a parent without any court order is unlawful;

(f) Article 24(3) of the Charter of Fundamental Rights of the EU, the right of every child to maintain a personal relationship and direct contact with his or her parents violated in the pre-text of the safety order and refusal to vary children from the order. Both orders were ordered without permitting applicant hearing or cross examination.

9. The applicant filed a further *ex parte* application for leave on 17th October, 2016, which added the following grounds:-

"(d) arrest on 20th September, 2016, alleging breach of safety order is unlawful;

(e) a stay on the arrest in criminal proceedings issued on 20th September, 2016, by S Garda Station alleging breach of the safety order;

(f) an order for costs of the proceedings; and

(g) any other order as the court deems fit according to circumstances."

10. The Respondent swore an affidavit in reply on 1st November, 2016. A Statement of Opposition dated 18th November, 2016, was filed on 22nd November, 2016. Tracey O'Reilly, Solicitor for the Respondent both in the judicial review and in the family law proceedings swore and filed an affidavit on 29th November, 2016.

11. The Applicant issued another document dated 5th December, 2016, headed "interlocutory application pursuant to Article 6 ECHR and s. 11 of Guardianship of Infants Act 1964, requesting to issue Applicant a copy of s. 20 report filed in 2016/692 J.R. from the record 396/2016 of Circuit Family Court Phoenix House, Smithfield, Dublin 7. This document seeks an order from the court to issue a copy of the s. 20 report.

12. Subsequently by way of a document headed interlocutory application of 12th December, 2016, the Applicant sought an order seeking a number of reliefs.

- Permission to vacate and move from the rented family home to any other accommodation due to fear of another possible attempt for malicious prosecution
- an order to move chattels in view of a new summons for a safety order for reasons known to me so far,
- an order as to damages and costs
- any other orders as this Honourable Court deems fit.

Decision

13. The District Family Court on 6th January, 2016, granted the Applicant an order that he receive an audio copy of the DAR only and not transcripts of evidence of the court proceedings dated 6th October, 2015, at S District Court and no direction was given that same was to be provided free of charge as sought. The Applicant is entitled to receive an audio copy of the DAR of the information sworn by the Respondent to ground the application for the safety order and there is no requirement to grant mandamus. I am satisfied having considered paragraph 3 of the affidavit of Tracey O'Reilly solicitor sworn on 29th November 2016 setting out the comprehensive nature of the appeal hearing before Judge O'Callaghan in the Circuit Family Court on the 23rd February 2016, that the Applicant did not suffer any injustice arising out of any delay in compliance with the order of the 6th January 2016.

14. At present, there are substantial family law proceedings in being in the Circuit Family Court issued both by the Applicant and the Respondent. In respect of some orders, the Applicant has appealed to the High Court. The interim custody of the children was regularised by order of 9th May, 2016, when sole custody was granted to the Respondent pending a s. 20 report being carried out or on further order of the court. It is not appropriate for this Court to grant any declaration that the removal of children from the custody of the married natural parent/ Applicant from the rented family home by the Respondent allegedly assisted by her employer, without any custody order was unlawful. It is not unusual when a relationship breaks down that certain steps are taken before court orders are applied for to regularise what has happened. The Respondent alleges that she had to leave the family home with the children because of the behaviour of the Applicant. That is a matter for the determination of the Circuit Family Court in the substantive proceedings.

15. Arising from the additional reliefs sought in the statement filed on 17th October, 2016, it has been submitted on behalf of the Respondent that these issues are moot as the Applicant was arrested and prosecuted for a breach of a further safety order granted on 1st December, 2016. These criminal proceedings were heard by the District Court on 28th November, 2016 and the prosecution against the Applicant was dismissed. It is not appropriate for this Court to make any order on those reliefs sought which have already been determined in accordance with law.

16. The issue of substance before the court is the jurisdiction of the District Family Court to refuse the Applicant the right to cross examine the Respondent on an application of variation to the safety order of 1st December, 2015.

17. It should be stressed that this order is now spent and has no further effect. In addition the Courts refusal to allow cross examination was made after an original hearing in the District Family Court on 1st December, 2015 and a full appeal to the Circuit Family Court heard on 23rd February, 2016.

18. The District Judge was acting within jurisdiction to refuse the Applicant permission to cross examine the Respondent at the hearing on 31st May, 2016, as a full rehearing on the matter, had taken place on 23rd February, 2016, in the Circuit Family Court and there had been no change in circumstances between the date of that hearing and 24th March, 2016, the date of the issue of the

summons to vary the original safety order.

19. The court hearing on the 31st May 2016 did not breach the Applicants rights to fair procedures. The Applicant is out of time to challenge any aspect of the original safety order of 1st December 2015. The granting of a safety order does not create any presumption adverse to an Applicant who seeks custody and access to his or her children.

20. The court will treat the reliefs sought in the interlocutory applications of 5th and 12th December 2016 as further grounds upon which the Applicant is seeking judicial review. The Applicant has seen and read the Section 20 report. The delivery of any copy to him is a matter for the Circuit Family Court. The Applicant does not need any permission from this court to move from the rented family home.

21. The contact between the Applicant and his children is a matter for the Circuit Family Court in the substantive proceedings.

22. The appropriate orders of the court are to grant leave to the Applicant to bring judicial review proceedings pursuant to his initial statement required to ground application for judicial review of 31st August, 2016, and revised statement required to ground application for judicial review of 17th October, 2016, and further interlocutory applications of 5th and 12th December 2016, but to refuse the substantive relief sought on all grounds.