THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 419 J.R.]

BETWEEN

L.O'G. AND P.F.

APPLICANTS

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 25th day of January, 2017

1. In these proceedings, the applicants claim a declaration that an emergency care order made on 7th July, 2015, in respect of the applicants' child S.O'G. ("the infant") was made in breach of the principles of natural and constitutional justice. That is the sole relief claimed herein.

Relevant facts

2. The infant was born on 15th May, 2015. She resides with her parents, the applicants, who are unmarried. On 29th July, 2015, when the infant was six weeks old the public health nurse called unannounced to the family home to visit the infant and her mother. On that occasion, the public health nurse is alleged to have noted significant bruising on the infant's upper body and head. It is suggested by the respondent ("the CFA") that the cause for this bruising has never been satisfactorily explained.

3. Arising from the circumstances, the public health nurse called an ambulance which brought the child to University Hospital Limerick. The infant there came under the care of a consultant paediatrician who provided a written report dated the 3rd July, 2015, at the request of the CFA. In this he described bruising on the left deltoid, left lower arm, left side of the chest and left temple area. In addition to a clinical examination, the infant underwent a CT scan of the head which was normal. A renal ultrasound was also normal. The consultant concluded: "The nature of this injury is likely non-accidental. The cause of the injury has not been explained reasonably. There is no satisfactory explanation offered by the carers."

4. Shortly after the infant's admission to hospital, the CFA were notified of these concerns and became involved in the matter. They interviewed the applicants. By Friday 3rd July, 2015, the infant was well and medically fit for discharge but it was agreed between the applicants and the CFA that the infant would remain in hospital pending the CFA's assessment of her welfare.

5. On Tuesday 7th July, 2015, an officer of the CFA informed the father that the agency intended applying to the District Court that afternoon for an emergency care order in respect of the infant. It would appear that this information was communicated to the father sometime around 11am that day. The applicants then sought the assistance of a solicitor and were given an appointment at 3pm that afternoon with their solicitor. Although there is some divergence in the accounts of the parties at this juncture, the CFA allege that they made repeated attempts to contact the father from about 2pm onwards when neither of the applicants arrived at court. In any event, it would appear that the matter proceeded before the District Court sometime shortly after 3pm.

6. The application before the District Court proceeded on foot of a document entitled "Ex Parte Notice of Application for an Emergency Care Order" naming the CFA and the applicants as the relevant parties to an application under s. 13(1) of the Child Care Act, 1991. When the matter proceeded before the District Court, the District Judge enquired as to whether the parents were on notice and was informed of the foregoing facts. The matter proceeded with oral evidence being given on behalf of the CFA and at the conclusion of the hearing, the court made an order placing the infant under the care of the CFA for a period of eight days and that the infant be placed with her maternal grandmother.

7. At the conclusion of the hearing, the CFA witnesses and their solicitor left the court. Shortly thereafter, it would appear that the applicants arrived with their solicitor who mentioned the matter to the District Judge and made complaint of the fact that it had proceeded in his clients' absence. The District Judge declined to deal further with the matter in the absence of the other side and accordingly put it in for mention at 10am the following morning.

8. On Wednesday 8th July, 2015, both sides appeared with their solicitors and submissions were made to the judge by the applicants' solicitor inviting her to vacate the order made on the previous day. This was responded to by the CFA's solicitor and the judge declined to vacate her order but invited the applicants if they so wished to make a further application later the same day to discharge the order before her or another judge if necessary. It would appear that the infant was discharged from hospital that day into the care of her grandmother.

9. On Friday 10th July, 2015, the applicants made an application to this court for an enquiry pursuant to Article 40 of the Constitution into the lawfulness of the infant's detention by the CFA. The matter was heard by Kennedy J. who declined to direct an enquiry pursuant to Article 40 but instead gave the applicants leave to seek judicial review and apply for the declaration above referred to on the grounds set out in the order. The emergency care order expired on 14th July, 2015, and on that date; a further application was brought by the CFA on notice to the applicants for an interim care order in respect of the infant pursuant to s. 17(1) of the Child Care Act, 1991. Having heard the parties, on that date the District Court granted an interim care order for a further period of eight days.

10. Prior to the court hearing that day, the CFA held a child protection conference which adopted a child protection plan. This plan determined that the action to be taken in respect of the infant was:

> "S. O'G will be listed on the Child Protection Notification System held by Tusla Child and Family Agency due to ongoing risks of physical abuse as evidenced by unexplained injuries which occurred while she was in her parents' care."

11. The matter came before the District Court again on 22nd July, 2015, on foot of a further application by the CFA for an extension of the care order. On that date, the applicants gave an undertaking to the court that they would move in with the infant's maternal grandmother and resume her care and on foot of that undertaking, in lieu of a care order the CFA applied for a supervision order for a

period of six months, which the court granted.

12. Accordingly as of 22nd July, 2015, the infant was no longer under the care of the CFA.

13. Prior to the expiry of the supervision order, a further review child protection conference was held by the CFA on 7th January, 2016, at which it was decided that the infant no longer needed a child protection plan because the risk of significant harm had been addressed. On 11th January, 2016, the CFA wrote to the applicants confirming this fact and stating that the infant's record on the child protection notification system would now be changed to "inactive". The letter went on to state:

> "Inactive means that she was at risk of harm before and had a child protection plan in the past. When she turns eighteen, her details will be removed completely from the list.
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> The CPNS records the names of children who have child protection plans agreed at a child protection conference. The CPNS can only be accessed by a very small group of people, such as doctors or gardaí, who might need to make important decisions about the safety of the child. We control the access to the CPNS very strictly and only allow access to those who have a very good reason to look for the information".

Mootness

14. Although the parties addressed submissions to the court on a range of issues which included the issue of mootness, it seems to me in the light of the authorities to which I will refer that this issue should be considered first. The CFA submits that since this application was first made on 10th July, 2015, the emergency care order which is the subject matter of these proceedings expired and is of no further effect making the reliefs sought herein of no practical value to the applicants and thus moot. Counsel for the applicants submits that the mootness argument ought not be permitted to avail the CFA and circumstances where if the matter had proceeded as an Article 40 enquiry as originally intended, it would never have arisen.

15. He suggested that the fact that the applicants had been placed on the Child Protection Notification System was a potential ongoing prejudice which could affect them in the future in any dealings with the CFA or the court. The fact of the order having been made could have had a bearing on the subsequent interim care order and indeed any further orders that might potentially be made in the future. Even if the claim were to be considered moot, the court should exercise its discretion in viewing it as an exceptional case in circumstances where the CFA appeared to think that they were entitled to apply for an emergency care order on giving a few hours notice to the persons affected thereby when they could not possibly respond within that timeframe, which the District Court rules stipulated was to be a notice period of two days.

16. In this regard, the parties referred to a number of authorities which included *Goold v. Collins* [2004] IESC 38, *SMCG and JC v. Child and Family Agency* [2015] IEHC 733, *P.V. v. Court Service* [2009] 4 I.R. 264, *AQ v. KJ* [2016] IEHC 721 and *M v. Legal Aid Board* (High Court, unreported, 17th January, 2017). The relevant authorities are usefully summarised by Ní Raifeartaigh J. in *AQ* where she said:-

> "[23.] In approaching the issue of whether the matters relating to the District Court are now moot in the case, I must of course have regard to the various general definitions of mootness as set out in the previous authorities, in particular the *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 I.R. 274,where Denham CJ said:-
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> > "[13] The current proceedings, insofar as they relate to the deportation order against the third appellant, are moot, as that deportation order has been revoked.
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> > [14] As the deportation order has been revoked, there is no basis upon which to proceed. Furthermore, any decision by this court would be based on a hypothesis, and would be an advisory opinion. It has long been the jurisprudence of this court that it will not give advisory opinions, except in exceptional circumstances, such as under Article 26 of the Constitution, or as identified in the case law of the court.
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> > [15] Thus, while the parties had a real dispute when the proceedings were commenced, this is no longer the case.
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> > [16] As has been cited by this court previously, including by Hardiman J. in *Goold v. Collins* [2004] IESC 38 (Unreported, Supreme Court, 12th July, 2004), the dictum of the Supreme Court in *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342 reflects the law of this jurisdiction where it is stated:-
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> > > 'An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercised its discretion to depart from it.'"

17. In *P.V.,* the applicant's mother had sought to apply ex parte to the District Court for the surrender of the applicant's passport, then held by his father. The District Court clerk refused to accept or list the application on the basis that it could not be moved ex parte. Subsequently, the applicant applied for an interim injunction in the High Court restraining the applicant's father from removing him from the jurisdiction and that application was successful.

18. The applicant brought judicial review proceedings challenging the refusal of the respondent to accept the application in the District Court. The High Court held that the application was moot. In the course of his judgment, Clarke J. said:-

> "[18.] In the United States, an issue is not deemed moot if it is capable of repetition, yet evading review. This will be the case where there is a reasonable expectation that the same complaining party would be subjected to the same action again. Likewise Irish Courts have held that proceedings may not be considered moot where the matters raised concerns which have future ramifications for the parties involved. In *G. v. Collins* [2004] IESC 38, [2005] 1 I.L.R.M. 1, Supreme Court, in holding that the proceedings were moot, noted at p. 27 that there was no "live, concrete dispute between the parties," with a decision on the issues having no direct impact on the parties involved. The court, in reaching that conclusion, took into consideration the fact that the protection order in that matter had been discharged by agreement between the parties and the criminal proceedings taken on foot of alleged breaches of the order had been dismissed.
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> [19.] In *O'Brien v. Personal Injuries Assessment Board* [2006] IESC 62 [2007] 1 I.R. 328, this court granted declaratory relief, having determined that the respondent concerned had acted unlawfully in the exercise of its statutory powers by

> refusing to deal with the applicant's duly appointed solicitor in connection with his claim for damages for personal injuries. The respondent appealed, but during the appeal the applicant received an authorisation from the respondent to institute proceedings in respect of his claim for personal injuries. Such proceedings were then commenced. As a consequence of such authorisation and the initiation of the relevant proceedings, the applicant was no longer obliged to deal with the respondent. The Supreme Court rejected the argument that the appeal was moot as the respondent had a real and current interest in the issues pending appeal before the court regarding the exercise of its statutory powers. Murray C.J. framed the question at p. 332 as whether the case was moot in the sense of being "purely hypothetical or academic" and noted that this was a case in which the respondent had a wider interest than the applicant insofar as the conclusion and declaration of the High Court affected the manner in which the respondent exercised its statutory functions not only vis-à-vis the applicant but with regard to many other applications made to it. Murray C.J. found that it was obvious that the respondent had a real, current interest in the issues pending on appeal before the court for the purpose of a final determination of the controversy between the parties regarding the exercise of its statutory powers."

19. Clarke J. went on to refer to the submission of the respondent that even a positive determination of the proceedings in favour of the applicant would be of no practical or concrete benefit to him in circumstances where all issues surrounding his passport had been conclusively determined. It would serve no useful purpose. Clarke J. accepted that submission saying:-

> "[27.] On that basis, I was satisfied that these proceedings clearly came within the category of moot proceedings. The only other question which remained was as to whether there were circumstances which ought require the court to exercise its discretion to depart from a strict application of the mootness rule. I was not satisfied that any such circumstances existed on the facts of this case. There is no particular reason to believe that a similar issue concerning the applicant will arise in the future, such as would make it important to determine at this stage and, therefore, in advance, the entitlement of the applicant (or the applicant's mother on his behalf) to apply on an ex parte basis to the District Court. It is, of course, impossible to rule out the possibility that such an issue might arise again. But it is likewise impossible to rule out the possibility that any other party might not sometime have a desire to make an application of the type sought to be made by the applicant's mother in the District Court, such as gave rise to these proceedings. The applicant is in no different position to any other party in that regard. It would, of course, have been theoretically possible, on the facts of *G. v. Collins* [2004] IESC 38, [2005] 1 I.L.R.M that further applications for protection orders and prosecutions for breaches of same might have arisen between the same parties. However, that theoretical possibility was not regarded as an appropriate basis for entertaining the proceedings. Likewise the theoretical possibility that the same or a similar issue might arise involving the applicant at some stage in the future is no more than just that, a theoretical possibility with no significantly higher degree of likelihood of same occurring than in relation to any other party."

Conclusions

20. The emergency care order in this case expired on 14th July, 2015, eight days after its making. It had no further effect after that date. It could not be said to have had any bearing on the making of the subsequent interim care order made on 14th of July, 2015, after an inter partes hearing, and about which order no complaint is made. It seems clear to me that the granting of the declaration sought herein by the applicants could have no practical utility, even if justified. It cannot benefit the applicant in any way. The emergency care order obtained, as with other ex parte applications, has no reputational significance for the reasons explained by Hardiman J. in Goold, nor in fairness do the applicants make that complaint. It has no relevance whatsoever to any future proceedings that could theoretically be taken by the CFA against the applicants in the same way as the proceedings in *P.V.*

21. Although complaint is made by the applicants of the fact that their names have been included on the Child Protection Notification System and will remain there for a period of time into the future, that is entirely unconnected to the proceedings before the District Court and the applicants' inclusion on the system could have occurred even in the absence of any court proceedings.

22. Nor does it seem to me that there is any exceptional circumstance of the kind discussed by Clarke J. in *P.V.* which would warrant the court departing from the normal rule regarding moot issues. There is no point of wider application or of potentially exceptional public importance such as arose in O'Brien. The complaint of the applicants here is a relatively simple one viz. that an order was made in their absence without affording them an adequate opportunity to be heard. I cannot see how that has any wider implications outside the four walls of this case nor is that seriously contended.

23. In those circumstances, I am satisfied that the applicant's claim is moot and accordingly that it is neither necessary nor appropriate that I should proceed to consider any of the other issues in the case.

24. For these reasons therefore I will dismiss this application.