[2018] IEHC 23

THE HIGH COURT

2016 No. 148 JR

Between:

KW and SD

Applicants

v.

THE CHILD AND FAMILY AGENCY

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 23rd January, 2018.

I. Background

1. The applicants are United Kingdom nationals. The second-named applicant has three children. Her eldest child has been adopted through the courts of England and Wales following an assessment by that jurisdiction's social services authorities. Her second-eldest child resides with that child's father. Her youngest child (Z) was born on 6th December, 2015. Z's father is the first-named applicant; he is not the father of the second-named applicant's older children.

2. Immediately prior to November 2015, the applicants were residing together in Wales. At the time the second-named applicant was pregnant. There was some engagement with the Welsh Children's Services regarding the then-imminent arrival of Z. On 11th November, 2015, following a pre-birth assessment, the applicants were advised by the Welsh Children's Services of the latter's intention to commence legal proceedings to have Z placed into foster-care from birth.

3. At some point after 11th November, 2015, the applicants left Wales and came to Ireland. On 24th November, 2015, a duty social worker employed by the Child and Family Agency ('CFA') in the south-east of Ireland received a call from the Welsh Children's Services, a government body which appears to perform a function in Wales akin to that discharged by the CFA in Ireland. The caller advised the CFA that the applicants were believed to have arrived recently in the south-east of Ireland. The social worker was told that the second-named applicant was heavily pregnant and was advised of the concerns of the Welsh Children's Services in relation to the health and future welfare of Z (then unborn).

4. Following the just-mentioned telephone call, a strategy meeting was convened at the local hospital on 30th November, 2015. This meeting was attended by members of An Garda Síochána, representatives from the staff of the hospital, and members of the CFA. Among the matters discussed were the risks and child-protection concerns that had been identified by the Welsh Children's Services. At the conclusion of this meeting it was decided, *inter alia*, that due to child protection concerns, the CFA would make application for an Emergency Care Order as soon as practicable after the birth of Z.

5. On 6th December, 2015, Z was born. On 7th December, 2015, an application was made by the CFA to the District Court for an emergency care order, which order was granted. On 8th December, 2015, a social worker arrived at the hospital where Z was born to find that the second-named respondent appeared to have left. Z was then discharged into the care of the second-named respondent. The social worker left a letter for the applicants informing them of their right to consular assistance and advising that she would be in contact with the applicants, unless they did not want such contact.

6. On 9th December, 2015, the applicants were advised in writing by the CFA to obtain legal advice and provided with the contact details of a couple of legal aid centres. They were also advised of their right to seek copies of correspondence and reports held by the CFA in relation to Z and provided with a related information leaflet and application form.

7. On 14th December, 2015, the CFA made an application to the District Court for an interim care order, which application was successful, an interim care order being made to 7th January, 2016, and extended thereafter. On 21st December, 2015, the applicants applied for and were granted leave to seek judicial review in respect of the decision of the learned District Judge.

8. On 16th February, 2016, counsel for the CFA advised the High Court that it would not oppose the judicial review application because of certain concerns regarding the learned District Judge's decision. The court was further advised that the CFA intended to make a fresh application for an emergency care order on 18th February, 2016. The High Court (Noonan J.) made an order quashing the decision of the learned District Judge; however, this order was stayed until mid-morning on 18th February, 2016.

9. On 18th February, 2016, the CFA made a fresh application before the District Court. Although the application was opposed by the applicants, the order sought was granted by the District Judge. Both applicants declined to give evidence; however, they availed of the opportunity to cross-examine a social worker who gave evidence.

10. On 25th February, 2016, the CFA made an application before the District Court for an interim care order. This application was likewise opposed by the applicants; however, the order was granted by the District Judge. Both applicants declined to give evidence; however, they availed of the opportunity to cross-examine a social worker who gave evidence.

11. It is perhaps useful to note that although the CFA's views were initially informed exclusively by what it had been told by the Welsh Children's Services, the social worker directly involved with the applicants had by this time formed her own professional opinion of the applicants and the implications that she perceived to present as regards Z. Thus, this social worker avers in an affidavit of 7th April, 2016:

> "*In light of my dealings with the Applicants, coupled with the information provided to me by*…[the Welsh] *Children's Services, I remain of the view that there is a real risk*…[that Z's] *health, development and welfare is likely to be avoidably impaired or neglected if he was to be returned to the care of the Applicants. I remain of the view that* [Z] *…requires care and protection which he is unlikely to receive if he was to be returned to the care of the Applicants….*
>
> *I have met with the Applicants on a number of occasions. I have formed my own views on their behaviour and parenting capacity from these meetings….*
>
> *The applicants have been afforded ample opportunity to discuss their concerns with me regarding the accuracy of the*

information provided to me by…[the Welsh] *Social Services and/or to respond to or address these concerns….*

Every attempt has been made to work with the Applicants. At all material times hereto, the actions taken by the Respondent and, in particular, the decision to apply for an ECO [emergency care order] *and ICO* [interim care order] *were motivated by concerns for the health, development and welfare of Z".*

12. On 7th April, 2016, following a 5½ hour hearing before the District Court that lasted until 20:30 (which hearing concerned the proposed extension of the interim care order) the applicants consented to an extension of the then extant interim care order to 11th April. Between 10:30 to 13:00 on that later date, the hearing resumed. At the end of that hearing the District Judge concluded that there were serious issues presenting, extended the interim care order and made various directions, including that there be an independent Forensic Parenting Capacity Psychological Assessment of the applicants.

13. From December 2015 through to end-July 2016, the CFA were in regular contact with the applicants. The applicants were kept informed by the Agency of the approach being taken by it vis-à-vis the applicants, and there were bi-weekly access visits arranged between the applicants and Z. By July 2016 the plan was gradually to transition Z back to the care of the applicants. This appears to have been in train, with application being made for a supervision order in September 2016. That supervision order was refused and promptly thereafter the applicants returned with Z to the United Kingdom. Since returning to the United Kingdom, the applicants have had a further child; as of the date of hearing, both Z and that further child were the subject of interim care orders in the United Kingdom.

II. Reliefs Sought

14. Arising from the foregoing, the applicants have come to court seeking the following reliefs: (i) an order of *certiorari* in respect of the issuance of an interim care order by the District Court on 25th February, 2016; (ii) an interlocutory mandatory injunction in respect of the said interim care order; (iii) an interlocutory mandatory injunction in respect of the applicants' daily access to Z; (iv) a permanent mandatory injunction "*in respect of the seeking of further Care Orders under the Child Care Act 1991 by*…[the] *CFA whereby the child is held outside of his birth family unit";* (v) a mandatory injunction in respect of the seeking of an order moving jurisdiction of this matter to the United Kingdom; (vi) enforcement of the rights of Z and his parents under Arts 5-9 (inclusive) of the European Convention on Human Rights; (vii) damages in respect of (alleged) violations of the rights of Z and his parents under the said Convention.

III. Mootness

15. An immediate and fatal difficulty that presents as regards the majority of the reliefs sought by the applicants (specifically reliefs (i)-(iii) (inclusive) and (v)-(vi) (inclusive)) is that those reliefs are clearly moot when one has regard to the respective considerations of mootness and its consequences by Hardiman J. in *Goold v. Collins* [2004] IESC 38 and, more especially, in the below-quoted segment of the judgment of McKechnie J. in *Lofinmakin v. The Minister for Justice, Equality and Law Reform & Ors* [2013] 4 I.R. 274, 298-300:

> "*[82] From the relevant authorities thus reviewed…the legal position can be summarised as follows:-*
>
> *(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing;*
>
> *(ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined;*
>
> *(iii) the rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model;*
>
> *(iv) it follows as a direct consequence of this rationale, that the court will not – save pursuant to some special jurisdiction – offer purely advisory opinions or opinions based on hypothetical or abstract questions;*
>
> *(v) that rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two-step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness;*
>
> *(vi) in conducting this exercise, the court will be mindful that in the first instance it is involved in potentially dis-applying the general practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved. It will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice;*
>
> *(vii) matters of a more particular nature which will influence this decision include:-*
>
> > *(a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for the case to retain its essential characteristic of a legal dispute;*
> >
> > *(b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;*
> >
> > *(c) the type of relief claimed and the discretionary nature (if any) of its granting, for example, certiorari;*
> >
> > *(d) the opportunity for further review of the issue(s) in actual cases;*
> >
> > *(e) the character or status of the parties to the litigation and in particular whether such be public or private: if the former, or if exercising powers typically of the former, how and in what way any*

decision might impact on their functions or responsibilities;

(f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law;

(g) the impact on judicial policy and on the future direction of such policy;

(h) the general importance to justice and the administration of justice of any such decision, including its value to legal certainty as measured against the social cost of the status quo;

(i) the resource costs involved in determining such issue, as judged against the likely return on that expenditure if applied elsewhere; and

(j) the overall appropriateness of a court decision given its role in the legal and, specifically, in the constitutional framework.

[83] The matters above mentioned as being material to the exercise of the court's discretion are indicative only and are not intended in any way to be exhaustive and may well have to be adjusted to reflect the particular circumstances of any given situation. However, once all appropriate matters are established and their relevance identified, the conclusion of the resulting analysis in all cases should reflect the basic purpose of the rule and should be concordant with its underlying rationale.

[84] In summary it can be said that, in light of the considerations stated above, the courts do not in principle try issues which are moot, notwithstanding that these may have been an important question of law in issue between the parties and it is only where there are a range of exceptional circumstances that the courts will exercise their discretion to do so."

16. From a legal perspective there is no longer, to borrow from the wording of McKechnie J. in *Lofinmakin*, para.82, a "*live controversy*" extant between the parties, it would be futile to make the bulk of the orders sought, and, as is clear from cases such as *Ryan v. Compensation Tribunal* [1997] ILRM 194 and *O'Donovan v. Board of Management of De La Salle College Wicklow and ors* [2009] IEHC 163, the court will not exercise its supervisory jurisdiction in vain.

17. More particularly, as regards mootness:

(1) (a) the District Court proceedings which it is sought to impugn are finished,

(b) the interim care order which is challenged has long expired, and

(c) no extension of the said order has been sought;

(2) as regards relief (i) (as identified in the notice of motion) Z has previously been returned to his parents;

(3) as regards relief (ii), this is moot for the same reason as identified at (2);

(4) as regards relief (iii), the need for such an order ended when Z was previously returned to the care of his parents;

(5) as regards relief (v), it appears that the purpose of this relief was to restrain the CFA from proceeding with an application under Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (O.J. L338, 23.12.2003, 1) to transfer the care proceedings to the jurisdiction of the courts of England and Wales; however, the said proceedings have been withdrawn and struck out, again making this relief moot; and

(6) as regards relief (vi), Z has been in the care of his parents and the need for such relief therefore falls away and is moot.

18. Although the court, to borrow from the above-quoted segment of McKechnie J's judgment in *Lofinmakin*, retains "*a discretion to hear and determine a point, even if otherwise moot",* it does not seem to the court that any of the indicative factors touched upon by McKechnie J., or indeed any other factors, present that would justify the court in exercising its discretion so in the within proceedings.

IV. Permanent Injunction of a General Character

19. By way of relief (iv), the applicants seek, as was mentioned above, a permanent mandatory injunction "*in respect of the seeking of further Care Orders under the Child Care Act 1991 by*…[the] *CFA whereby the child is held outside of his birth family unit".* What is sought in this regard is that the court in effect undo what the Oireachtas has done, withdrawing powers of action that the legislature has bestowed, through statute, on the CFA. That (a) would be an improper usurpation by the court of the powers of the legislative branch of government and (b) is not a power that the court enjoys.

V. Damages

(i) General.

20. Under O.84, r.25 of the Rules of the Superior Courts 1986, as amended, the court has the power to award damages in judicial review proceedings, so it is not necessary to approach the European Convention on Human Rights in this regard. The criteria for an award of damages include, per O.84, r.25(1)(b) that "*the Court is satisfied that, if the claim had been made in a civil action against any respondent or respondents begun by the applicant at the time of making his application, he would have been awarded damages*." Under O.84, r.25(2), "*Order 19, rules 5 and 7…apply to a statement regarding a claim for damages as it applies to a pleading*". This has the result that an applicant is required to set out the particulars of the wrongdoing alleged and any items of special damages as in an ordinary action. In the within application, no claim for special damages is advanced and it is not alleged in the pleadings that the applicants have suffered any financial loss.

(ii) Misfeasance of Public Office.

I. General.

21. Additional difficulty arises in any event as regards the basis for any claim for damages. If it is for misfeasance of public office, that wrong is not alleged in the pleadings, nor does the court understand from the hearing of the within application that it is a wrong which Z's parents intended to allege; however, it is one of only two bases on which the court could see the claim for damages possibly arising (though it does not arise), the other being breach of constitutional rights (which alternative basis is considered later below but likewise fails).

II. Elements and Attributes of Misfeasance of Public Office.

22. The elements and attributes of the tort of misfeasance of public office might be summarised as follows:

A. Decisions in Good Faith.

(1) Irish law generally protects decisions made in good faith, provided they are not otherwise legally vulnerable; this approach is informed by a desire to avoid a *"paralysis of the capacity for decisive action in the administration of public affairs"* (*Pine Valley Developments Ltd v. Minister for the Environment* [1987] ILRM 747, 758 (Finlay CJ)).

B. Misfeasance of Public Office.

(2) The following statement of law from Wade's *Administrative Law* (5th ed., 673) has been adopted with approval by Finlay CJ in *Pine Valley* (at 757), with the tort of misfeasance of public office embracing situations 2 and 3:

> "[A]*dministrative action which is* ultra vires *but not actionable merely as a breach of duty will found an action for damages in any of the following situations*:
>
> *1. If it involves the commission of a recognised tort….*
>
> *2. If it is actuated by malice, e.g. personal spite or a desire to injure for improper reasons.*
>
> *3. If the authority knows that it does not possess the power which it purports to exercise.'"*

(3) Misfeasance of public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his or her office whereby loss is caused to a plaintiff. Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse or misfeasance of public office. If the impugned conduct then causes injury, the cause of action is complete. (*Northern Territory v. Mengel* 185 CLR 307 (1995), 357; applied in *Glencar Explorations plc v. Mayo County Council (No. 2)* [2002] 1 IR 84, 98).

C. Attributes of Defendant to Claim of Misfeasance of Public Office.

(4) The defendant to an allegation of misfeasance of public office must be a public officer (or holder of a public office). The concept of a public officer (or holder of a public office) is broad, comprising all vested with governmental authority and the exercise of public powers. (*Three Rivers District Council v. Bank of England (No 3)* [2003] 2 AC 1, 229-230; see also *Minister for Justice, Equality and Law Reform v. Devine* [2012] IESC 2, para. 45). It is not clear from the case-law whether the public officer must be exercising a public function. (McMahon and Binchy, *Law of Torts*, 4th ed., 808).

(5) Judges and judicial tribunals enjoy an immunity to a claim for damages for misfeasance of public office, save, it appears, (i) where they knowingly engage in behaviour that is criminal or malicious (*Beatty v. Rent Tribunal* [2006] 2 IR 191, 199), with (ii) its being a pre-requisite to adjudication of an allegation of behaviour that is claimed to come within (i) that a plaintiff sets out some basic facts that could take the facts outside the general immunity (*Bennett v. Egan* [2011] IEHC 377, para. 15).

D. State of Mind of Defendant to Claim of Misfeasance of Public Office.

(6) As to the state of mind of the defendant to an allegation of misfeasance of public office, case-law reveals two different forms of liability for such misfeasance (as opposed to two different torts):

> (i) targeted malice by a public officer*, i.e.* conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive (*Three Rivers*, 191);
>
> (ii) where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. This type of case involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful. (Three Rivers, 191).

(7) As to the second form of liability (*i.e*. that identified at (6)(ii)), this is based on a defendant public officer taking a decision that is likely to cause damage to one or more individuals, *i.e*. an element of bad faith. (*Three Rivers*, 192). Subjective recklessness on the part of a public officer in acting in excess of his powers is sufficient; recklessness as to the consequences of his act (in the sense of not caring whether the consequences happen or not) is also sufficient. (*Three Rivers*, 196). Negligence, however gross, is not sufficient; objective recklessness in the sense of outrageous irresponsibility or rank stupidity in the discharge of one's duty is not sufficient, being wanting in the necessary subjectivity. (McMahon and Binchy, 801). What is required is at least a moment of cerebral engagement before the

defendant dismisses a concern from his or her mind. (McMahon and Binchy, 801).

(5) A case in which *bona fide* but mistaken exercise by a public officer of a statutory authority does not yield liability in misfeasance, notwithstanding harm to a plaintiff seems likely to be explainable as (i) not involving "*targeted malice*" of the type contemplated in the first form of misfeasance identified at (6)(i) above; or (ii) involving a want of that knowledge or recklessness necessary to yield liability under the second form of misfeasance identified at (6)(ii) above.

III. Conclusion.

23. There is no evidence before the court (none) to suggest that there was any behaviour of any nature on the part of the CFA (or its officers or agents) in its actions in Z's case that could even conceivably begin to come within the parameters of the tort of misfeasance of public office as outlined above. It follows that no damages can issue for misfeasance of public office.

(iii) Breach of Constitutional Rights.

24. As to breach of constitutional rights, there is no evidence before the court (none) to suggest that the CFA (or its officers or agents) in its actions in Z's case acted other than in good faith and without negligence. That this should be so (and it is so) yields the following observations.

25. First, as mentioned previously above, Irish law generally protects decisions made in good faith, provided they are not otherwise legally vulnerable; this approach is informed by a desire to avoid a "*paralysis of the capacity for decisive action in the administration of public affairs*" (Pine Valley, 758).

26. Second, there is good practical reason why awards of damages against the CFA should not, it seems to this Court, routinely be awarded; this practical reason flows from the below-quoted observations of McMenamin J. in *Child and Family Agency v. O.A*. [2015] 2 IR 718, 738 a case in which the Supreme Court had to consider the circumstances in which a District Court judge could award costs against the CFA consequent upon child care proceedings (an analogy, it seems to this Court, arising to be drawn in this regard between costs and damages):

> *"If costs are to be routinely awarded, and the CFA itself becomes over-careful in deciding not to bring proceedings, then children may be at risk. Additionally, the financial consequences which may result from non-action may ultimately come out of some other part of the CFA's budget, or the State budget more generally. Substantial awards of damages are not unknown for State agency failures in statutory duty in child care cases. A consideration must be child welfare, and the protection of children. I am not persuaded, therefore, it is a function of a District Court to engage in a type of determination which would be tantamount to a resource allocation decision, inductively applied, by a process of analysis conducted through the narrow lens of a single costs application and award."*

27. Notably, the just-quoted comments speak to the difficulties presenting where the CFA failed to act. In the within case the CFA took positive actions in good faith, without negligence, in pursuit of its statutory role and pursuant to its statutory functions. It just could not be consistent with the common good (with which the proper functioning of the CFA in accordance with law would appear itself to be demonstrably consistent) if, at every meeting convened within or under the aegis of the CFA to decide how best to protect a child, the fear of an action for damages was to arise as a spectre and expressly or impliedly to feature as a central and critical consideration in the deliberations of such a meeting. Instances may (regrettably) arise in which an award of damages might fall to be made against the CFA; however, for the reasons just stated it seems to the court that such instances are likely to be so unusual as to be remarkable when they present.

28. Third, the CFA is a specialist body staffed by people who are considerably more expert in the delicate personal matters in which they deal on a daily basis than any judge trained in the law. It follows, as this Court observed in *A v. Child and Family Agency* [2015] JIC 0402, a case in which Ms A was refused permission by the CFA to bring legal representation to a child protection conference, that "*although the lawful can never take second place to the practical, this Court's strong sense is that the CFA's area of expertise is one where the courts must yield significant space to the informed discretion of CFA professionals."*

29. There is no basis presenting in the case at hand on which the court could properly award damages against the CFA for breach of constitutional rights. In essence, these proceedings are concerned with the seeking and making of an interim care order in circumstances where the CFA was acting on information from the United Kingdom authorities concerning the welfare of Z and in which the District Court considered it appropriate as it did. While Z was later returned to the care of his parents, an entitlement to damages does not flow from these events for the reasons described above.

VI. Conclusion

30. The applicants endured no little stress while they were in Ireland and clearly no-one would have wished that state of affairs upon either of them. However, the court would respectfully suggest to the applicants that they consider how matters looked to the CFA: two young people (the applicants) turn up in Ireland, one of them in an advanced stage of pregnancy; the authorities in Wales contact the CFA and alert it to certain concerns about those people; those concerns are so serious that had those young people remained in Wales, their child-to-be, Z (the child eventually born to them in Ireland), was due to be taken into foster-care from birth. Following this contact, the CFA elected, after a strategy meeting attended by various professionals from different disciplines, to take Z into care after Z's birth. Sufficient concerns thereafter presented regarding the applicants that the District Court granted successive emergency and interim care orders to the CFA. Moreover, as a result of the CFA's involvement with the applicants, it came to hold its own independent, professionally informed concerns about the applicants as parents (and, in fairness, the fact that Z and Z's recently born sibling had, as of the date of hearing, been taken into care following the applicants' return to the United Kingdom offers some basis to believe that the CFA's concerns about the applicants may not have been entirely without foundation). So although the applicants undoubtedly suffered stress and upset while they were in Ireland, and although they may not like the CFA or perhaps even individual members of its staff, that does not have the result that the CFA or its staff were guilty of some legal or lesser wrongdoing. Much of the within application is, for the reasons outlined previously above, entirely moot and does not require any ruling by the court, save to note that mootness. To the extent that the application is not moot, each of the reliefs sought by the applicants is respectfully declined for the reasons identified in the preceding pages.