Neutral Citation: [2014] IEHC 8

THE HIGH COURT

Record Number: 2013 No.2226 SS

Between:

W

Applicant

And

Health Service Executive

Respondent

Judgment of Mr Justice Michael Peart delivered on the 3rd day of January 2014:

1. The applicant was born prematurely at 29 weeks gestation on the 3rd October 2013, and remains in a hospital neonatal unit where he is treated for neonatal chronic lung disease, and while slowly learning to feed by teat, still requires to be fed to an extent by nasogastric gavage feed. In addition, he has bilateral inguinal hernias, and these will require surgical repair under anaesthesia once he is stable and off oxygen. In due course he will need to be transferred by ambulance from the present hospital to a specialist paediatric hospital in Dublin, so that his hernias can be repaired.

2. Even when he is ready from a medical standpoint to be discharged from hospital care, the applicant will continue to need very significant and high quality parental aftercare at home over and above what would be required for any newborn baby. It is concerns around that issue, which I shall address in due course, which led to the HSE to make an application to the District Court for an interim care order. That order was granted on the 11th December 2013 after some 14 hours of evidence and submissions heard over two hearing days. It will expire on the 8th January 2014, but on that occasion it is anticipated that there will be an application for a full care order which in all probability will not be heard on that date, as it seems to be anticipated that the hearing may take up to four days before a different judge. I am informed that realistically the applicant will have to remain under hospital care for some weeks yet in circumstances where he will undergo surgery foreseeably in the next week or so, and will need to remain in hospital for some period of recuperation thereafter before being discharged either to the care of the HSE under a care order, or to his parents.

3. The present application before me is one under Article 40.4.2 of the Constitution for the release of the applicant from his 'detention' under the interim care order. The application is brought on his behalf by his father and next friend, and with the consent of his mother, both of whom are homeless, without any financial means other than welfare benefit, and each with their own troubled backgrounds, and significant ongoing life difficulties, particularly mother. Nevertheless, they wish to be allowed to have their baby discharged to their care as soon as he is well enough to leave hospital. There was some evidence before the District Court that father's parents who live in Dublin are willing to have mother, father and baby W live with them, and to assist them in the raising of W. While the applicant remains in hospital, mother and father have been provided with accommodation close-by and they visit baby W daily, and it would appear that hospital staff consider that they conduct themselves appropriately during any visits to their son.

4. On Thursday 19th December 2013, an application was made to me for an inquiry into the lawfulness of the applicant's detention. I directed such an inquiry, and made it returnable before me on Monday 23rd December 2013, on which date it was adjourned until yesterday, 2nd January 2014, when it was heard in full. Colman Fitzgerald SC appeared for the applicant, and Timothy O'Leary SC appeared for the HSE.

5. The HSE produced the order of the District Court which was made on the 11th December 2013, and submitted at the outset that it is an order made under section 17(1) of the Childcare Act, 1991, and is an order which on its face is a valid order, and they submitted that in such circumstances the detention of the applicant on foot of it is in accordance with law. In so far as the applicant's parents are unhappy with the conclusion reached by the District Judge that he was satisfied as to the matters he is required to be satisfied about before making such an order, Mr O'Leary submitted that they are entitled to appeal that decision to the Circuit Court in the usual way where they would have the benefit of a complete re-hearing, or alternatively address their concerns by way of judicial review. In such circumstances it is submitted that it is entirely inappropriate to seek to have the matter addressed under Article 40.4.2 of the Constitution.

6. Mr Fitzgerald on the other hand has submitted that if the parents are correct and the District Judge was not entitled on the evidence given before him to make the interim care order, then the order is of no legal effect, and applicant's detention is not in accordance with law. In such circumstances, he submits that an appeal is not the appropriate remedy, and while a remedy might be eventually become available by way of judicial review, an application under Article 40.4.2 of the Constitution is an expeditious remedy in circumstances where a person's liberty is at stake, and urgency is required in obtaining a remedy.

7. Before dealing with the central question as to whether there was a sufficient evidential basis for the making of an interim care order under section 17 of the Act of 1991, I should say that there have been a number of subordinate issues raised by either party. The applicant for example has raised an issue of both subjective and objective bias on the part of the District Judge, which, it is submitted, fatally infects the lawfulness of the hearing and therefore the order made. The respondent has raised an issue as to whether father's interest in these proceedings is in conflict with those of baby W, and whether in those circumstances he is an appropriate person to be acting as next friend of baby W. The respondent has also submitted that once the respondent produces a valid order, as has been done, the onus of proving that it is not a valid order shifts to the applicant. Mr Fitzgerald submits that this is not correct, and that it remains an onus upon the detainer to satisfy the Court that the detention of the applicant is in accordance with law. I have already mentioned that Mr O'Leary for HSE has raised the issue as to the appropriateness of Article 40.4.2 procedure in the circumstances of the present case, and has referred to the comments of Mr Justice Birmingham in a recent ex tempore decision in JC v. HSE, 8th November 2013. I will say something about these issues in due course, but, having directed an inquiry under Article 40 it is appropriate that I deal with the substantive issue at the core of the application, namely whether in the light of the evidence given to the District Judge on the 13th November 2013 and again on the 11th December 2013, it was possible for him to have been satisfied as to the requirements of section 17 and therefore to make the interim care order.

8. Section 17 1) provides:

> *17. — (1) Where a justice of the District Court is satisfied on the application of a health board that—*
>
> *(a) an application for a care order in respect of the child has been or is about to be made (whether or not an emergency care order is in force), and*
>
> *(b) there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or (c) of section 18 (1) exists or has existed with respect to the child and that it is necessary for the protection of the child's health or welfare that he be placed or maintained in the care of the health board pending the determination of the application for the care order,*
>
> *(c) the justice may make an order to be known and in this Act referred to as an "interim care order" (emphasis added)*

9. Section 18 (1) provides:

> *"18. – (1) Where, on the application of a health board with respect to a child who resides or is found in its area, the court is satisfied that --*
>
> > *(a) the child has been or is being assaulted, ill-treated, neglected, or sexually abused, or*
> >
> > *(b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or*
> >
> > *(c) the child's health, development or welfare is likely to be avoidably impaired or neglected,*
>
> *and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section, the court may make an order (in this Act referred to as a "care order") in respect of the child." (emphasis added)*

10. Before moving on, I would refer to an important distinction between these two sections. Where an application is made for an interim care under section 17 as opposed to a care order under section 18, a District Judge must, apart from being satisfied that a care order is about to be applied for, be satisfied, inter alia, that "*there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or (c) of section 18 (1) exists or has existed* (my emphasis), whereas under section 18 where a full care order is being applied for, the District Judge must be "satisfied" that any such circumstances actually exist.

11. This distinction makes complete sense in circumstances where a need is perceived on the part of the health authority for some swift action to be taken ahead of an intended full care order application. In the circumstances of an urgent application for an interim order, it is clear that the Oireachtas has decided that a lower threshold of proof is required in order to obtain an interim order, as time may not permit for the gathering of all witnesses and evidence for the purpose of a full care order application. This is clear from the wording of section 17 which requires only that the court be satisfied that there are reasonable grounds for believing that any of the circumstances in section 18 (a), (b) or (c) exist, rather than being satisfied that such circumstances do exist, as is required under section 18 itself.

12. An interim care order is of very temporary duration in order to ensure that the child in question is safe and well cared for until such time as the court has an opportunity to hear all available evidence in order to be satisfied that any of the circumstances set forth in section 18 (a), (b) or (c) do exist at the application for a full care order. If the judge is so satisfied on that occasion the judge may make a care order. If the judge is not so satisfied, the interim care order will have come to an end and the child will no longer be subject to a care order, though pursuant to section 18 (5) the court may in such circumstances make a supervision order under section 19 of the Act.

13. In the present case the interim order made by the District Judge was for a period of 29 days up to the 8th January 2014, being the maximum period for such an order under section 17, as amended.

14. As I have said the substantive issue in the present application for release is whether the District Judge, when the application came before him, had reasonable cause to believe that any of the circumstances set forth in section 18(1)(a),(b) or (c) existed. If he did, then this application must be refused, unless I am satisfied that the bias ground is, firstly, one that can be ventilated on an application under Article 40.4.2 of the Constitution to which the District Judge is not a party, and secondly, if so, whether it is made out.

15. I have been helpfully provided not only with affidavits sworn the applicant's solicitor, and the respondent's solicitor, both of whom attended at the hearing before the District Judge, but also with a transcript of evidence given on both days' hearing before the District Judge, prior to his making the interim care order.

16. I have also been provided with, inter alia, certain reports, including one dated 2003 which is a psychologist's report on mother at that time which addresses historical issues of concern at that time, a consultant psychiatrist's report dated 13th January 2013 in respect of mother which was sought by the applicant's solicitor who was acting for mother at that time in relation to another matter, and certain recent emails passing between medical personnel to social workers, and also to the solicitor acting for HSE.

17. In addition I have been provided with a report prepared in early October 2013 by a social worker ("S") in advance of, and for the purpose of, the application for an interim care order, and who gave evidence to the District Judge on the application, as well as a report by a Maternity Social Worker dated 8th October 2013.

18. On the 13th November 2013, evidence was given by the social worker "S", and by mother, father, as well as father's mother and father. On the 11th December 2013 further evidence was given by S.

19. The medical and social worker reports to which I have referred set forth a very sad and tragic history for mother especially. I do not need to set that out in full detail, but there is no doubt that mother had a very insecure and troubled childhood and early adult life herself. She grew up in care in the United Kingdom, but with a history of multiple placement breakdowns. In the late 1990s she was leading a peripatetic life, moving between Dublin, Cork and Galway. In December 1998 she gave birth to a son (E), who was diagnosed with cerebral palsy and hydrocephalus, and developed multiple difficulties as a result. E left hospital at age 9 months but to

foster parents since mother was homeless, of poor mental health and with little support. She was in touch with social services at this time but in circumstances where she failed to adhere to certain advices in relation to her life at that time E was taken into care so that his needs could be met following his discharged from hospital. He has remained in care ever since, and due to difficulties which arose between mother and E around access visits to him at his foster parents' house. These difficulties are detailed in October 2013 report by S. Mother has not seen E since 2005. Mother did make further contact with social services in November 2007 to inquire about E again but did not at that point seek access. However, the following month she did request access. This access request was apparently discussed with E himself, but it is reported that E became distressed and stated that he did not want to meet her. More detail about this is contained in the report.

20. It is noted in the report by S of October 2013 that mother gave birth to a daughter born prematurely at 22 weeks gestation, and who sadly died at three months old.

21. S's October 2013 report sets out her concerns about mother under a heading "Child Protection Concerns". She notes that mother had indicated that she suffered from manic depression in 1995 and had been admitted to hospital in Dublin for one week at that time. She notes also what was contained in a 1999 psychiatric report regarding mother's psychiatric history including a diagnosis of Adjustment Disorder, suicide ideation, paranoid ideation regarding medical/nursing staff at a named hospital, as well as an admission to hospital in 1999 following an episode of deliberate self-poisoning using a mixture of alcohol and anti-depressants. A further 2001 psychiatric report is referred to also where it was noted that mother was probably suffering from personality difficulties emanating from her own difficult childhood, and that while she was interested in her son E "she seemed to have a limited ability to sacrifice her needs for his". This report notes also an incident in 2004 when Gardai were called to the house where she was living. It appears that she was violent and drunk on that occasion, and threatening to kill herself. It is noted that when she came to the front door she was holding some large knives. She was taken into custody for her won safety and for breach of the peace. S's report goes on to state that in more recent years mother has had limited contact with social services but that concerns continue to exist with regard to her ongoing mental health needs. However, it is noted that mother did not accept this, and declined to access any support in that regard. S goes on to state that during her recent pregnancy medical and midwifery staff have described mother as being volatile, aggressive and unpredictable in her engagement with them.

22. In the next paragraphs of S's report she deals with mother's Ante-Natal Care history, stating that mother has shown poor insight into the lifestyle changes she needs to make in order to achieve a safe pregnancy. She apparently refused to engage with a GP and stated that she had no plans to do so. She also threatened to discontinue attending the hospital in question if asked to meet with the medical team. It is noted that she had been attending the High Risk Clinic at that hospital – presumably given her history and current lifestyle - and had had a number of admissions with power abdominal pain, but refused to provide urine samples during her pregnancy. Staff noted that mother appeared to have difficulty accepting direction from medical and midwifery personnel and "*dismisses suggestions offered by medical/midwifery team about changing lifestyle habits that are not good for her and the unborn baby*". The report goes on to note that mother "*cigarette intake was 80+ and she expressed no interest in decreasing same*".

23. This report goes on to report a history of substance abuse in the past, though current abuse was denied. It refers to mother's long history of homelessness, noting that she arrives for hospital appointments with a plastic bag and carrying very little in the way of personal items of clothing. No address in the area is known for her, and it notes certain confusions about where she is living at any particular time.

24. This report notes that mother did engage, though on her own terms, with a social worker who was there to provide support and counselling during her pregnancy. It is noted that given her history of pregnancy loss including premature delivery every effort was made to ensure that she would be brought through the pregnancy safely. However, it notes also that mother declined to discuss any issues in relation to planning for her unborn baby "*as she believed that she would miscarry*".

25. The report notes that mother and father have no accommodation where they now are. They are living in a form of accommodation available to parents whose child is in the adjacent hospital for treatment. It is temporary and will come to an end when baby W is discharged. The report notes that there may be family support available with father's extended family but this is in Dublin. The report goes on to set out what is known about father and his extended family and the extent to which that family may be able to assist mother and father in relation to caring for W. It is noted that on the 8th October 2013 father's mother and sister travelled to the town where baby W was born and remains, and spoke to S about supporting mother and father in looking after W. The report notes "there might be good extended family support which can be assessed".

26. The conclusions to this report include that mother's engagement with services remains erratic even during her pregnancy, that she has always been mistrustful of professionals and services engaged with her family, and that there is no evidence that this has changed. It concludes that she has always been wary of sharing information and co-operating with professionals, and that much uncertainty remains about mother's life and movements over the past 5 years when she last had contact with social services. It notes that her plans in relation to her discharge from hospital and her own post natal care remain outstanding "with little attention to her own needs". It notes also that "*While [father] and his family are supporting [mother] and the baby, [mother]'s relationship with this family has been over the duration of her pregnancy*" and "*given [mother]'s previous history in family settings it might be aspirational to assume it might all be ideal into the future*".

27. This report notes that S met father for the first time three days prior to that report "and nothing is really known at this stage about his background and ability to care for his son". It notes also that his relationship with mother is also relatively new and that S has "no insight into this". The final paragraph of this report states:

28. "*In the context of the above information and the need to complete a further more detailed assessment, I consider it necessary for the protection of baby [W]'s health, development and welfare, that he be placed in the statutory care of the Health Service Executive*" [emphasis added]

29. I have underlined "*and the need to complete a further more detailed assessment*" as the applicant places emphasis upon it as indicating support for the submission that the requirements of section 17(1) of the Act of 2001 are not met in this case, since it is being submitted that it is not permissible that an interim care order is made so that some assessment or further assessment may be undertaken to see if a care order is required to be made. I will come back to that in due course.

30. As I have said, S gave evidence before the District Judge on both the 13th November 2013 and again on the 11th December 2013. She gave evidence of her engagement with mother and father since the birth of baby W, and spoke of his medical condition and needs, and possible future needs after discharge. She stated that it was hard to say at that time what his needs into the future might be, but she has been informed that he will need a monthly injection which will help to strengthen his lungs. Each injection has a cost of €1000. But she made the point that this injection needs to be administered in a very clean environment, and that baby will

need to be well-protected, particularly over the winter months. She was asked about mother's smoking habit. She stated that there is an issue around this, and that it was an issue throughout the pregnancy too, since she was asked by medical staff to stop smoking, but continued and continues to smoke. She was able to state also that there are smokers in the house where father's mother and father live in Dublin, and a smell of smoke in that house. She had had an opportunity to visit that house before coming to court. She stated that baby W would need to be in a smoke-free and hygienic environment, and that when she visited the house where father's family live in Dublin, there were a lot of people coming in and out including father's sisters and their children.

31. S stated that she had spoken to father's mother on the 10th December 2013 to find out for how long they would be prepared to have mother, father and baby W living with them, and was told "as long as it takes". She referred to mother's high levels of anxiety and he capacity to be unpredictable and explosive – matters to which she had referred in her report, and about which she still has concerns in terns of mother's interaction with W. She gave evidence of concerns about mother's personal hygiene which had also been noted in hospital records, and these concerns about cleanliness and personal hygiene, including hand hygiene, are concerns which she has in the context of mother's capacity to care appropriately for baby W.

32. S went on to state that while she has had a number of visits to mother and father her assessment is not yet complete since they are still living in the relatively protected environment of the accommodation provided to them while W remains in hospital. It appears that father has started to engage with baby W in terms of feeding W and changing his nappy. Nevertheless S feels that it is not really representative of the real world and how they would manage when not in that protected environment. She has concerns about their ability to manage financially and provide for W's needs, since everything is provided for them where they are presently accommodated. She is also concerned to know more about father, and to run a Garda check in relation to him. At the time she was giving her evidence on the 13th November 2013 a psychiatrist's report was still awaited. At that date also, it was anticipated that W would be ready to be discharged from hospital within two or three weeks, though that has turned out to be overly optimistic. At that point in time, S intended to visit father's mother and father again, since her main focus had been W's mother and father.

33. She considered that an interim care order was required because while W was progressing, there would still be many demands to be met upon his discharge, and that even at that time those demands were not precisely known. She was concerned that mother and father had no accommodation, and she was still concerned about the plan being mooted that they would all stay with father's mother and father in Dublin. She thought that there could be safety issues around that. It was in all of these circumstances that she wished to continue her assessment of the situation, and that an interim order be in place while all that was undertaken.

34. S was cross-examined about many matters, including why it had not been possible for all necessary assessments to have been carried out by the time the matter came to court. She stated that there was uncertainty about what the future plans were, and in relation to W's health. She was questioned about her evidence that she could not really carry out a social work assessment while mother and father were still in the protected environment where they now are, and until they were out living independently. It was put to her that putting the child into care was inconsistent with the need to carry out an assessment of mother and father's capacity to look after their child. S disagreed that this was necessarily so. It was put to her that if the baby is in foster care under an interim care order then the parents cannot be seen or observed parenting independently. S responded by saying:

35. "*But we can observe how they will be with the baby. If the baby was in foster care we can observe their commitment to the baby while the baby is in foster care*".

36. It was suggested also to her in cross-examination that if she wished to see how well mother and father were parenting, then surely the first step should be to see how they are parenting under a supervision order, rather than simply taking the baby into care now. S did not get an opportunity to answer that particular question as another matter was asked about thereafter. Various matters were explored on cross-examination as one would expect, including the health and hygiene concerns, the stability of the relationship between mother and father, their interaction with baby W in the neo-natal unit, bonding with W, mother's stress levels and how they might impact on baby in the future, her reluctance to interact with medical and social service personnel, her smoking habit and so forth. The question of the post-discharge injections for W was dealt with. It appears that these might be dealt with at hospital and that a medical card might be available for baby W's needs. This will have to be explored. The question of accommodation was explored also. It was put to S that in circumstances where father's parents were expressing a willingness to have them live with them, it could not be said that father and mother were homeless. S still maintains that they have had no permanent address for some time, and that while they may be able to stay for a while with father's parents while they apply for some sort of social housing, that could take quite a while, and she was unsure whether that accommodation would work out because it was a long time since mother had lived in any household with any one person and she wonders "how long she will be able to hold a family around her".

37. Evidence was also given by father's father and mother on 13th November 2013. They have said they are willing to help out by having mother and father live with them while they find somewhere. Even though mother has had a lot of difficulties in her past, they seem to be happy to try and give her a chance to get herself sorted out. Father's mother seems to think that they would make good parents of baby W. Again, Time does not allow me to set out their evidence in great detail, but it is safe to summarise it by saying that they are supportive of the plan that mother, father and W would move to Dublin and live with them until they get accommodation of their own, whenever that might be.

38. Father and mother also gave evidence on 13th November 2013. Nothing is to be gained for present purposes in setting out the matters which were explored during the course of their evidence.

39. As I have said, social worker S gave evidence on the 11th December 2013. Since giving her evidence in November she had been able to continue her assessment by having further meetings with father and mother so that she could discuss further with them their plans for the future, and seeing how baby W was getting on as well as mother and father's interaction with him. There were a number of dates on which she met the parents for the purpose of assessment. They discussed how they were getting on in the temporary accommodation close to the hospital. S gave details of meetings, and it seems that at times mother was difficult to talk to about issues arising. It appears that father did most of the talking. Mother was silent or reluctant to engage with S. S provided a medical report from Dr M which referred to the ongoing lung condition affecting baby W and which is associated with prematurity. She stated that it was difficult to say at that time exactly what would be needed into the future regarding his ongoing needs, but she referred to the monthly injection which has already been referred to. She referred, as I have said, to mother's rather explosive nature and her anxiety during visit, and her unpredictability.

40. I will have to be forgiven for not setting out in more detail the evidence and cross-examination of S, but time does not permit it. But I trust that I have managed to give a flavour of it so as to demonstrate the concerns on the part of S around the capacity of mother and father to appropriately look after the needs of baby W if he was to be discharged into their care, and about their possible future accommodation and means.

41. I have heard very helpful submissions from both Colman Fitzgerald SC for the applicant, and from Timothy O'Leary SC for the HSE.

42. For the applicant it has been submitted that it is clear from the evidence of social worker, S, that the reason for the need for an interim care order is so that she can continue to carry out an assessment in order to ascertain whether or not baby W needs to be taken into care, and that this is not a purpose contemplated or provided for in section 17 of the Act of 1991.

43. It has been submitted that the deprivation of W's liberty in the sense of him being taken into the care of foster parents is an extreme step, and one to be taken only in an exceptional circumstance which justifies it, and only where no measure short of a care order is possible. In the present case it is submitted that on the evidence given to the District Judge, the concerns about the ability of mother and father to adequately and properly care for their son could be reasonably addressed by the making of a supervision order where the social services could see the parents parenting their baby, and assess in situ their abilities and reach a conclusion at that point as to whether a care order is required.

44. It has been submitted that what is proposed at the moment is a plan which is designed to fail. In other words, if the concerns are about whether the parents can or cannot adequately care for and look after baby W, they must be given an opportunity to demonstrate whether they can or cannot, albeit under some sort of supervision order. But to do as planned, namely to simply take W into care now will effectively deprive mother and father of a chance to allay those concerns. In that context it is submitted that the District Judge had evidence from father's mother and father which was sufficient to establish an address where mother and father can live with W while that supervision could be done, and that in these circumstances the District Judge was not entitled to conclude that an interim care order was the only order that could be made. I have been referred to several authorities emphasising the importance of parental responsibility, and the importance of the position of the family in the Constitution, and pointing out that it is to be only in very exceptional circumstances that the right of a child to the company and care if his parents within the family should be overridden – in the present case by the making of an interim care order. It is submitted that in this case the District Judge has failed in his duty to intervene only in exceptional circumstances, and that the need to carry out a further assessment cannot be a sufficient justification for such interference. Mr Fitzgerald submits that if there is a question mark over the parents' ability to parent appropriately cannot itself justify the taking of the child into care as has been done, especially where the parents have not yet been given an opportunity to parent independently, and satisfy those concerns.

45. I intend no discourtesy to either counsel if I do not dwell further upon legal submissions which have been made. But time does not permit me to do so as fully as I might otherwise wish.

46. I have reached the conclusion that the evidence before the District Judge both in terns of reports provided and the evidence which he heard was more than sufficient for him to decide that an order under section 17 of the Act of 1991 should be made. That emerges from the wording of the section itself as I have already set forth. I have already pointed to the distinction between the terms of section 17(1) of the Act, and the terms of section 18(1) thereof.

47. What the District Judge had to be satisfied of was firstly that a care order would in due course be applied for, and secondly that "*there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or (c) of section 18 (1) exists or has existed*", one of which at (c) is that "*the child's health, development or welfare is likely to be avoidably impaired or neglected*". In addition of course the judge must be satisfied that "*that the child requires care or protection which he is unlikely to receive unless the court makes an order*".

48. The test for an interim order is lighter than that under section 18 for a full care order. In the present case the evidence given by social worker S as to her concerns about mother in particular, her history and current presentation, even if father's presence might assist, and even though her concerns were contested and in some respects denied, were in my view more than sufficient to give him reasonable cause to believe that baby W's health, development or welfare is likely to be avoidably impaired or neglected, and that he child requires care or protection which he is unlikely to receive unless the court makes an order. The District Judge gave this application a considerable number of hours of hearing. He heard lengthy submissions from Counsel for the applicant and from the solicitor acting for the HSE. I have no doubt that the occasions in court were extremely stressful for all concerned. That is an unfortunate feature of sad cases of this kind. While the District Judge has apologised to the applicant's counsel for a particular remark on his part, I cannot read the transcript other than to conclude that in all the circumstances he dealt with the matter fairly in the circumstances, and only after giving full consideration to the evidence which he heard. In fact the evidence taken as a whole is in my view compelling, at least at this stage. That is not to foreclose on the possibility that by the time it comes to considering the application for a full care order the District Judge then dealing with the application might not be satisfied of matters for the purpose of section 18, as opposed to having "reasonable cause to believe". That is a significant distinction to be drawn, and is sufficient in my view to dispose of the present application for release.

49. Nevertheless there are two further issues which arose on the present application, and it is appropriate to say something in relation to each, namely the question of subjective/objective bias, and also the appropriateness of pursuing a remedy by way of Article 40 in relation to 'detention' under a child care order, or whether it is more appropriate that such matters be dealt with by way of appeal to the Circuit Court or by way of judicial review.

Objective/Subjective Bias:

50. One of the grounds put forward as an argument that the order made on the 11th December 2013 is unlawful is based on a contention, as averred to in the grounding affidavits, that during the course of the hearing of the application, the District Judge said certain things to and about Counsel appearing for the applicant, and generally conducted himself in a manner which indicated that he was not impartial.

51. It is also averred, as had been submitted to the District Judge himself during the application in the District Court, that statistics available from the Courts Service indicate that in the District Court area to which this application relates, not a single application for a care order has been refused over a number of years when applied for by the HSE. This is said to indicate a pre-judgment or bias on the part of the District Judge in question, and to indicate that it is not possible for this or any other respondent who might wish to resist such an application, to get a fair and impartial hearing.

52. In my view, it is not appropriate to reach a conclusion in that regard on an application under Article 40 to which the District Judge in question is not even a party. The applicant alleges not simply objective bias, but actual or subjective bias. In such circumstances, the District Judge might be entitled to be heard, or be at least represented before any adverse finding against him could be made with regard to bias. Such a ground is better pursued in my view by way of judicial review, when the Court at leave stage would be in a position to satisfy itself that arguable grounds exist for making such a claim of bias, be it objective or subjective.

53. Having said that I would just note in the present case that by way of correspondence the District Judge has apologised for

something that was said by him during the course of the hearing. This was clearly a case which took a considerable amount of court time over a period of two long days of hearing. No doubt it was a stressful case for all concerned. Human beings, judicial or otherwise, are after all only human. It is inevitable that on a rare occasion even the most patient and courteous judge will find himself or herself under strain, and may express himself or herself in a way that may later seem infelicitous. But that alone should not mean that the entire proceeding should be seen as contaminated. A balance must be struck so that a counsel of perfection does not prevail over a balanced approach which ensures that an otherwise thorough and fair hearing is not derailed by over-sensitivity on the part of either party by an unfortunate remark from the bench.

54. Nevertheless, I agree with the eloquent remarks of Hogan J. in *Maher v. His Honour Judge Anthony Kennedy* [2001] IEHC 207 – a case where a conviction was in fact quashed on grounds of objective bias arising from something said by the judge prior to conviction – concerning the importance of courtesy and civility on the part of judges. During the course of his judgment he stated:

> *" … if confidence is to be maintained in our legal system, then it is vital that these high standards of courtesy and civility are observed by all who have been privileged by society with the exacting task of administering justice. While this does not mean that judges are entitled to shirk from speaking the unpleasant truth in the name of excessive politeness or from speaking sternly where the situation requires it, as we are nevertheless administering justice in the name of the People of Ireland, it behoves us where at all possible to treat solicitors, counsel, witnesses – and above all – litigants with such courtesy and decorum as befits the proper administration of justice. If this is, perhaps a counsel of perfection which in practice cannot always be achieved and in respect of which every single judge will fail from time to time, it is a standard to which the legal system should nonetheless aspire."*

55. Having referred to that passage, I should add for the moment that having had the opportunity of perusing a transcript of the two days' hearing before the judge in question, I see no evidence therein that the hearing of this matter fell below an acceptable standard, given all the circumstances under which it took place, even allowing for the matter about which a written apology has been made.

56. While I have made my remarks in relation to the allegation of bias based on the hearing itself, I make no comment in relation to the other bias argument based on the statistic that allegedly at least all applications for care orders in this particular court are routinely granted when applied for. These matters are, in my view, not appropriate to be dealt with as part of an application under Article 40.4.2 of the Constitution. It is a ground more conveniently dealt with by way of judicial review.

Appropriateness of Article 40 in child care matters:
57. In his judgment in *Curiar v. Health Service Executive* on 8th November 2013 of which I have only a transcript rather than any approved judgment, Birmingham J. expressed his "unease" about the appropriateness of Article 40 as a method of dealing with issues around child care orders, even though what is at issue can come within a meaning of 'detention', though to be distinguished from the more usual form of actual detention in a criminal context. There is not the same character of deprivation of liberty at play in proceedings in relation to child care cases, and in particular, I would say, in the present case where a new-born baby is made the subject of a care order so that he can be cared for and sustained by foster carers after his discharge from hospital. Nevertheless there can be a case where an application under Article 40 of the Constitution is appropriate in particular circumstances, such as occurred before O'Malley J. in *K.A. v. Health Service Executive* [2012] 1 IR. 794 where a child was made subject to a care order without any evidence whatsoever being offered to the court, and without any oral hearing in spite of known objections on the part of mother. Clearly the judge had no jurisdiction to make the order in the absence of hearing any evidence to justify its making. But that type of egregious case is to be distinguished clearly from the present case where a very full hearing preceded the making of the order taking W into care.

58. Birmingham J. went on to refer to a passage from Farby: Habeas Corpus Law at page 85 to similar effect, and to a judgment of Munby J. in *S v. Haringey London Borough Council* where he stated:

> *"Applications for habeas corpus are to be deprecated where care proceedings are afoot and where the purpose of the application is to challenge the exercise by the local authority of its powers. The proper forum for such challenges is within the care proceedings".*

59. I would wish to add my own voice to those in favour of not pursuing what is essentially a challenge on the merits to the making of a care order in the District Court by way of an application for release under Article 40.4.2 of the Constitution. First of all, there is the right of appeal to the Circuit Court where the unsuccessful party wishes to appeal on the merits. That appeal is by way of a complete re-hearing. But where the complaint relates to the process by which, or the fairness of the hearing leading to, the order being granted, that is best dealt with by way of judicial review.

60. In that regard it is worth observing perhaps that the Oireachtas may have flagged its intention that this be so when it enacted section 23 of the Act of 1991 which provides:

> *"23. – Where a court finds or declares in any proceedings that a care order for whatever reason is invalid, that court may of its own motion or on the application of any person refuse to exercise any power to order the delivery or return of the child to a parent or any other person if the court is of opinion that such delivery or return would not be in the best interests of the child and in any such case the court, of its own motion or on the application of any person, may –*
>
> *(a) make a care order as if it were a court to which an application had been made by a health board under section 18,*
>
> *(b) make an order remitting the matter to a justice of the District court for the time being assigned to the district court district where the child resides or is for the time being or was residing or was at the time that the invalid order was made or the application therefore was made; and where the matter has been so remitted the health board shall be deemed to have made an application under section 18,*
>
> *(c) direct that any order under paragraph (a) shall, if necessary, be deemed for the purposes of this Act to have been made by a justice of the District Court for the time being assigned to a district court district, specified by the court, or*
>
> *(d) where it makes an order under paragraph (b), make a temporary order under paragraph (a) pending the making of an order by the court to which the matter or question has been remitted."*

61. On an application under Article 40.4.2 of the Constitution the Court conducts an inquiry into the lawfulness of the applicant's detention, and unless the Court is satisfied that the detention is in accordance with law, the Court is required under that Article to

order the release of the applicant. There is no discretion in the matter. That constitutional provision cannot be diluted or amended in any way by statute.

62. Even though section 23 speaks of "*where a court finds or declares in any proceedings that a care order is invalid*", and it could be argued that such a finding could be made on an application under Article 40 as the basis for the detention of the applicant not being in accordance with law, the application of the double construction rule requires that section 23 be interpreted in a manner where its operation is confined to where a Court on a judicial review application finds or declares a care order to be invalid.

63. Certainly, an applicant ought not to be permitted to avoid the provisions of section 23 of the Act of 1991 by, instead of seeking judicial review of the care order, seeking a release pursuant to Article 40.4.2 of the Constitution.

64. But, quite apart from the implications of section 23 which I have mentioned, I respectively agree and support the remarks of Birmingham J. in *Curiar*, and consider that unless there are particular facts which justify an application for release under Article 40, any dissatisfaction with the making of a care order should be addressed by way of an appeal to the Circuit Court or by way of judicial review in the High Court, and if necessary, an application for an urgent hearing either of an appeal or a judicial review application.