

THE HIGH COURT

[2018 No. 239 MCA]

IN THE MATTER OF O.B. A MINOR

BETWEEN

THE CHILD AND FAMILY AGENCY

APPLICANT

AND
K.B.

FIRST RESPONDENT

AND
R.B.

SECOND RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 17th day of September, 2018

1. This is an application by the Child and Family Agency for an order pursuant to s. 23J(7) of the Child Care Act 1991, and O. 65A r. 10(2) of the Rules of the Superior Courts, extending the period for which a special care order has effect. The threshold issue is whether the application has to be heard *in camera* or can be dealt with by way of reporting restrictions. Section 23NH of the 1991 Act provides that: "*Proceedings under this Part shall be heard otherwise than in public*", and the question is whether "*otherwise than in public*" means entirely otherwise than in public, in the sense of *in camera*, or could encompass situations of something less than that. In one sense the present application is not a tremendously suitable vehicle for determining this issue because I am informed that Reynolds J. has reserved judgment on a related question in other proceedings. Nonetheless, it does not seem to be possible to deal with the application without surmounting this threshold question even if my views on it may have to be regarded as somewhat provisional and subject to hearing full argument, which presumably has been possible in the proceedings before Reynolds J.

2. I have received helpful submissions from Mr. Tim O'Leary S.C. (with Ms. Sarah McKechnie B.L.) for the agency, from Mr. Alan D.P. Brady B.L. for the first-named respondent, and from Mr. Matthew Judge B.L. for the guardian *ad litem*. The second-named respondent did not get involved in the hearing.

3. The agency's position was that it had no strong views on whether the application had to be *in camera*, and indeed Mr. O'Leary noted that a mandatory rule requiring all such applications to be *in camera* was somewhat "*cumbersome*" in terms of the practical mechanics of clearing the court every time an application of this nature had to be made.

4. The other parties, however, seemed to express a preference for an *in camera* hearing. Judging from the authorities set out at pp. 737 – 744 of Kelly's *The Irish Constitution*, 4th Ed. (Dublin, 2003), some flexibility in the "*otherwise than in public*" rule applies in practice, particularly as regards the delivery of the judgment, and in such situations there is an element of discretion vested in the court. Indeed, the parties did not seem to strongly dispute the possibility of the court exercising a discretion to allow reporting restrictions rather than an *in camera* hearing. The learned authors of Kelly's *Constitution* suggest (at pp. 741-742) that otherwise, if there was no such flexibility, such an interpretation could raise constitutional or ECHR issues. Of course a court is required to give both a constitutional and an ECHR-compatible interpretation to any legislative provision, if such an interpretation is legitimately open.

5. The importance of public justice as a constitutional principle is such that a court should be slow to read a statutory provision like the one at issue here in an absolute manner incapable of legitimately flexible and discretionary application, while remaining sensitive at all times to the confidential nature of the subject-matter of the proceedings, and on that basis I do read it as allowing a court to have discretion to impose reporting restrictions rather than requiring an *in camera* hearing. Such an approach involves reading "*otherwise than in public*" as meaning "*otherwise than fully in public*", so as to allow the possibility of the protection of the confidentiality of the proceedings to be secured in a particular case by means (such as reporting restrictions) short of closing the doors of the court (even if the latter is the general approach in practice in any particular category of cases).

6. In terms of the application of that approach to the facts of this specific case as to how such a discretion should be exercised, any legitimate concerns of the parties in the particular circumstances of this specific application can be dealt with by reporting restrictions to the effect that nothing should be published either identifying the non-professional parties or setting out the contents of the affidavits and pleadings other than in general terms, and by excluding persons not involved in the case other than legal professionals and representatives of the media, so I propose to hear the application on that basis.