THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 929 J.R.]

BETWEEN

E.S.

APPLICANT

AND

HIS HONOUR JUDGE THOMAS TEEHAN

RESPONDANT

AND

M.S.

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 19th day of January, 2017

1. The present judicial review arises from family law proceedings between the applicant and the notice party, which His Honour Judge Teehan has been dealing with on numerous occasions over a prolonged period of time and with which he is very familiar. Mr. Colman Fitzgerald S.C. for the applicant submits that the family law proceedings were not live as of mid-2016, but in a sense one cannot say that about family proceedings where there is an issue of the welfare of a child involved, which have an inherent ongoing nature as distinct from normal *inter partes* litigation.

2. Mr. S., for whom Ms. Mary O'Dwyer B.L. appears, had issued a motion for attachment and committal of the applicant, which had at an earlier point been adjourned generally with liberty to re-enter. On 28th April, 2016, the learned judge wrote to the Circuit Court office in Clonmel indicating a wish to re-enter the matter and that the parties should be notified. On 26th July, 2016, he adjourned the matter to November, 2016. I am told that Ms. S. says that she applied to have the judge recuse himself at that point.

3. On 3rd November, 2016, the judge heard from Mr. S. having invited him to give evidence and I am told that the learned judge said that he was not going to make his mind up in relation to attachment and committal because he had not heard from Ms. S. but that there is a risk that she could be spending Christmas in prison. This was said in the context where there was not at that time an application by Mr. S. to re-enter the attachment and committal matter. The learned judge then adjourned the matter to 9th December, 2016.

4. On 7th December, 2016, Ms. S. applied for leave to seek judicial review. I granted a stay at that point of a temporary nature and directed that the application be made on notice, and then ultimately that it be dealt with by way of a telescoped hearing. As of the date of the hearing before me, no order had been made against Ms. S. in terms of attachment and committal and it is not clear that there is a definite intention or anything like it on the part of the learned judge to actually make such an order but Ms. S. apprehends that there is a risk in that regard.

5. I gave an *ex tempore* decision on this application on 19th December, 2016, and I now take the opportunity to set out reasons more formally.

6. The applicant's statement of grounds seeks an order of prohibition restraining the further hearing by Judge Teehan of the substantive family law proceedings and in particular prohibiting him from continuing to hear any attachment and committal matter (relief d(i)). Interlocutory relief, further and other relief and a recommendation under the custody issues scheme are also sought. Mr. Fitzgerald has helpfully organised his submission under essentially three headings which, together with a preliminary objection of delay from Mr. S., I can address as follows.

Preliminary objection of delay

7. The first issue is delay. Mr. S. complains that many of the matters of which complaint is made arise out of a letter of the learned judge of 28th April, 2016, and that this application should have been brought within three months of that date. While there does seem to have been delay on the part of the applicant I am reluctant in the circumstances to regard the application as being out of time on that basis. The situation has to some extent been evolving since the 28th April, 2016, and I do not consider that it would be fair to the applicant to regard her as disentitled for making a complaint on the basis that she did not act within three months of that date.

Whether the contempt issue can be re-entered without an application by the moving party

8. The second issue is whether the learned judge could re-enter the attachment and committal (which had been adjourned generally) by way of his own motion either (a) without an application by the notice party or (b) without advance warning and notice to Ms. S. It seems to me that the situation is analogous to that discussed by the Court of Appeal of England and Wales in *Al-Medenni v. Mars UK Limited* [2005] EWCA (Civil) 1041 in particular per Dyson L.J. at para. 21: *"The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision."* This is in the context of amendment but the same principle applies by analogy to other steps that are open to a party such as whether to bring, or re-enter, an application. In such a situation, the judge can invite and even encourage the parties to make a particular point but if they refuse to do so the judge must respect that decision. One consequence may be that the judge is compelled to reject a claim on the basis on which it is advanced although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. But there is nothing wrong with the court drawing the point to the parties' attention in the first place. In *T.D. v. Minister for Justice Equality and Law Reform* [2014] IESC 29 the Supreme Court noted without any apparent disapproval the fact that Hogan J. had of his own motion taken a point as to the validity of a statutory provision in that case. In *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 Hogan J. also took an important point of his own motion after having reserved judgment and reconvened the hearing of his motion to apply further submissions.

9. The approach that arises from those authorities is that a court can raise an issue of its own motion if it considers it to be relevant, it can reconvene a hearing of its own motion to draw that issue to the attention of the parties but if neither party wants to adopt

and run with that issue, then the court should let matters rest at that point absent limited circumstances such as an autonomous duty on the court. It seems to me that the correct procedure if Mr. S. wanted to re-enter his attachment and committal matter would be, as Mr. Fitzgerald submits, to make an application under O. 59 r. 4(26) to re-enter the matter and then, if it is re-entered, to apply for relief by way of attachment and committal as appropriate. That is quite separate from the entitlement of the court to list proceedings (as opposed to re-entering a contempt motion which has been adjourned generally) of its own motion. The proceedings are certainly capable of being relisted at the instance of the learned judge and I would not accept that this matter was not live as there is a child welfare issue involved which means it is ongoing in the way that other proceedings are not. Upon such re-listing the court can discuss with counsel whether Mr. S. wishes to re-enter his contempt motion or not.

Whether a fresh application for attachment and committal is required

10. The third issue is whether an attachment and committal can be dealt with in the manner apparently involved here, namely by possible re-entry. Mr. Fitzgerald submits what is being done is effectively an application *ab initio* which should be served afresh with a new penal endorsement. I would not accept that as being a correct characterisation of what is potentially before the Circuit Court. There was a motion which was presumably served in an appropriate manner, although if there is an issue about that that can be ventilated to the Circuit Court. That has been adjourned generally with liberty to re-enter so therefore that motion can be re-entered. If it is not re-entered there is nothing before the Circuit Court by way of attachment and committal. If it is re-entered, then what is re-entered is the previous motion and not some sort of *ab initio* matter. It seems to me there is no requirement for some further service of any order with a new penal endorsement, assuming that such service was already effected prior to the motion for attachment and committal. If it was not done then that is a different situation but if it was done it does not need to be done again.

Whether there is objective bias

11. The fourth issue is the question of whether there is objective bias. Mr. Fitzgerald submits that, if one takes the totality of the actions of the Circuit Court judge, an objective observer could have an apprehension of objective bias. Mr. Fitzgerald in this regard refers to the letter of 28th April, 2016, the fact of re-listing on the judge's own motion, what was said in November (particularly the reference to risk of Christmas in prison), the judge's opinion that the applicant was in contravention of the order and his action in calling and inviting Mr. S. to give evidence.

12. In *D.D. v. Gibbons* [2006] 3 I.R. 17 it is clear that making an earlier adverse decision against an applicant is not in and of itself objective bias and indeed the Supreme Court has confirmed this more. Merely having made a decision on a point adverse to the position that a particular party is seeking to make does not constitute bias: *"It must be clearly understood that one adverse ruling, or even a series of adverse rulings, by a court is not, without significantly more, to be regarded as grounds for claiming either subjective or objective bias" Tracey v. Burton* [2016] IESC 16 (Unreported, Supreme Court, 25th April, 2016) per MacMenamin J. (Denham C.J. and Charleton J. concurring) at para. 45.

13. It may be that, as Ms. O'Dwyer submits, things were not going the applicant's way but that, as she correctly suggests, is not basis for a party to apprehend a risk of objective bias. *A.P. v. McDonagh* [2009] IEHC 316 dealt with a situation of premature judgment where a court formed a view on the ultimate issue in the application prior to the appropriate time for that matter to be determined. The question in this case is whether the judge, on the view of the circumstances in their context, formed a premature view or on the other hand whether a proper view of his position was that in accordance with the requirements of natural justice he was putting the applicant on notice of a risk of an attachment and committal process being put in motion against her.

14. It seems to me that the question informing her of a risk of spending Christmas in prison has to be viewed in all the circumstances as a statement to put her on notice of the possibility of that mechanism being triggered. It seems to me that there is a potential obligation on the court, in certain circumstances, where the personal liberty of a party could be an issue, to ensure that the party is aware that there is such a risk (unless it is obvious that they are already so aware) in order to enable them to address such risk, ideally on legal advice, and thereby obviate the risk by doing whatever is necessary, if anything is in fact necessary. I consider that an objective observer would read the reference to a risk of Christmas in prison as being no more than a risk and simply as putting the applicant on notice that there was that risk there. This is something that is done in the interest of natural justice and not by way of pre-judgment or premature judgment. In *Garda Commissioner v. Penfield Enterprises Limited* [2016] IECA 141 the Court of Appeal dealt with a situation where the court had made adverse findings in relation to a party in proceedings in which that party was not involved. It seems to me that that does not seem to really relate to the situation that is presented here.

15. The important thing here is to put the actions and statements of the learned Circuit Court judge in their context. Starting with the letter sent to the Circuit Court office, he says that the case had been on his mind, which in my view is a very proper and legitimate thing and speaks to the dedication and seriousness with which the learned judge approached his task and not remotely to any question of bias. A judge is entitled to reflect on his or her potential decisions and on the progress of litigation in between mention dates. Further judicial thought and reflection before a final decision should be encouraged rather than the opposite (see recent comments of the U.S. Supreme Court in *White v. Wheeler* (2015) 577 U.S. slip op. at p. 8, per curiam).

16. There is certainly a lot to be said for a judge giving thought to cases between mention dates, and if the case is on the court's mind and the court considers that the matter should be re-entered, there is nothing objectively biased about that. The thing that stands out most from the letter and indeed all the actions of the learned Circuit Court judge is the priority he is seeking to afford to the interests of the child. That is something for which a court has to have an autonomous concern by virtue of Article 42A of the Constitution. The Supreme Court in *Sivsivadze v. Minister for Justice* [2015] 2 I.L.R.M. 73 indicated that the welfare of a child was an objective interest which the court had to have regard to even independently of the behaviour of the parties.

17. In the letter he does acknowledge the position of the applicant. He acknowledges that there had been compliance with the orders, he acknowledges that maybe there has been an improvement since the case was before him, and he acknowledges that the matter may be dealt with in mere moments if that is the case. He says that he is taking at face value what he was told at the previous court hearing that the applicant has been attempting to persuade the child towards a more positive approach. He says his primary concern is not for the position of either party but for the welfare of the child. That is not an indication of bias.

18. *"Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will"*: per Frank J. in In re J. P. Linahan 138 F.2d 650 (2d Cir. 1943). The court certainly is entitled to have views at a level of generality such as the kind that might be said to arise from this letter such as a concern about what amounts to possible parental alienation. But those concerns at a broad level are always to be taken to be either explicitly or implicitly subject to hearing argument, hearing evidence and hearing counsel and one cannot necessarily conclude from a view of that nature to a conclusion holding that objective or subjective bias exists. This is particularly so here when one puts the letter together with the comments in November and the other actions of the learned judge in the overall context; the context particularly being his entitlement to relist the matter, his primary and autonomous concern for the welfare of the

child, his having dealt with the matter over a long period of time on numerous occasions, his familiarity with the case and his concessions in favour of the applicant. Having regard to all those circumstances it seems to me that the matters complained of do not give rise to a risk of objective bias and do not amount to conduct such as would prevent him from dealing further with the matter subject to the point I made earlier, which is that the learned judge would not be entitled to make any orders in relation to attachment and committal unless there is an application by Mr. S. to re-enter his motion. Crucially, even if (which I do not, as explained, accept) the acts and comments of the learned judge did amount to the expression of a view adverse to the applicant, it was not the objectively biased view expressed prior to the appropriate time, as discussed in A.P. Rather it was, on that hypothesis, the view of a judge who had been dealing with the matter over a period of time and had already heard substantially from all of the parties. It was in that light a view generated in an impartial and objective context of knowledge of the case and not a biased view of prejudgment. It remained a view subject to hearing any further submission and argument. If such a view is disqualifying, that would be to put a premium on a passive approach which would do little justice to the objective interests involved, particularly where the court is required to give effect to the rights of the child under Article 42A of the Constitution.

Order

19. It does not seem to me that the learned judge did go beyond the appropriate boundaries in that regard but to clarify matters for the benefit of all the parties and hopefully to assist the resolution of this matter overall in the interests of the welfare of the child at the earliest possible opportunity in the context of whatever further hearing takes place in the Circuit Court. I think it is appropriate to set out the position clearly by way of a declaration.

20. The appropriate order is therefore as follows:

> a. that the learned judge be struck out as a respondent under O. 84 as amended by the Rules of the Superior Courts (Judicial Review) 2015 and that the notice party be substituted as the respondent;
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> b. that under the heading of the further and other relief sought, there be a declaration that the learned Circuit Court Judge is entitled to list the family law proceedings of his own motion but is not entitled to make an order by way of attachment and committal in respect of civil contempt against the applicant unless there is an application by Mr. S. to re-enter the attachment and committal motion and unless liberty to re-enter is granted (or unless Mr. S brings a new motion)
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> c. that the relief at para (i) be refused.

21. I would finally emphasise that at the centre of this case is a sixteen year old child whose welfare has to be at the forefront of concern of all persons involved with this matter. It was certainly to the forefront of the mind of the learned Circuit Court Judge and he has to be commended for that and not discouraged from maintaining that position.