THE COURT OF APPEAL

CIVIL

[2024 No. 45]

The President **Neutral Citation Number [2024] IECA 108**

Binchy J.

Meenan J.

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION

BETWEEN

N.P.

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of the Court (*ex tempore*) delivered on the 4th day of March 2024 by Birmingham P.

Introduction

1. This is an appeal from an order of the High Court (Bradley J.) of 2nd February 2024, made on foot of an inquiry pursuant to Article 40.4.2 of the Constitution.

Background

2. The background to the proceedings is to be found in the fact that on 31st January 2024, the District Court (Judge Aylmer) made an Interim Care Order (ICO) under s. 17 of the Childcare Act 1991 (the "1991 Act"), taking CMcD (a minor), who was then aged approximately two years and nine months, into the care of the Child and Family Agency (CFA). The applicant who is seeking an inquiry, now the appellant before this Court, is the

elder sister of the minor, CMcD. She had been living in England for a period. In or about June 2023, she returned from England on a visit and became aware of serious concerns in relation to her mother's drug taking and that the CFA was concerned for the welfare of CMcD and also for the welfare of a 15-year-old brother of CMcD; both of them were then living with their mother. In September 2023, the CFA initiated an application for an ICO in respect of CMcD and her brother. Those applications it seems were adjourned and that same month, the applicant moved to her grandmother's house, with her own daughter, with CMcD, and with her 15-year-old brother, this was under a private family arrangement. It appears this was acquiesced to by the CFA.

3. We understand that in the period from September 2023 to the end of January 2024, the applicant took on responsibility for the care of CMcD, whose day-to-day care included enrolling her in a creche which she attended for a number of hours each day.

4. On 31st January 2024, the CFA applied for an ICO in respect of CMcD and such an order was made in the District Court at about 8pm that evening. The application for the ICO was opposed by the mother of CMcD, who contended that the order was inappropriate and unnecessary as the minor was being cared for by the minor's elder sister. The second named notice party, the guardian *ad litem* (GAL), urged that the CFA should place CMcD in the care of her elder sister. However, the order was made, and on 1st February 2024, CMcD was placed in the care of foster parents.

5. In the early afternoon of the following day, the High Court (Brett J.) directed an inquiry into the lawfulness of the detention of CMcD, directing that this inquiry should be made returnable for 4.15pm that day. Later that evening, the High Court dismissed the application for an order pursuant to Article 40 directing the release of CMcD.

6. The next development is on 7th February 2024, the applicant issued an application pursuant to s. 47 of the 1991 Act for a direction placing CMcD in her care. This was an

application which was refused in the District Court by Judge Campbell. The GAL appealed to the Circuit Court, where the matter came before Her Honour Judge Hutton. She appealed against the refusal of the District Court to make a direction pursuant to s. 47 of the 1991 Act that the CFA should place CMcD in the care of her elder sister. On 26th February 2024, that appeal was successful, and the Circuit Court directed that CMcD should be placed with the applicant by 6pm on 27th February 2024; that occurred. This raises a question as to whether the present proceedings are moot.

Discussion and Decision

7. This is, it may be noted, an issue that was raised by the CFA in the course of written submissions, but if it had not been, it certainly is a matter that members of this Court would have been raising on their own volition. Certainly, for my part, it is a matter I would have raised. For my part, I have some doubts as to whether Article 40 was ever the appropriate route in this particular case. In that regard, we will draw attention to observations made by O'Donnell J. (as he then was) in *SMcG v. The Child and Family Agency* [2017] 1 IR 1. At paragraph 8 he commented:

> "The remedy of an inquiry under Article 40 is the great constitutional remedy of the right to liberty. It carries with it its history in the common law as the vindication of the rule of law against arbitrary exercises of power. It is and remains the classic remedy when a person's liberty is detained without any legal justification, or where the justification offered, is plainly lacking. However the right it protects is a right not to be deprived of liberty save in accordance with law. More difficult issues arise when it is sought to justify detention by the production of a valid order which is regular on its face, but which it is asserted is liable to be quashed because of some defect in procedure. The High Court on an Article 40.4 inquiry does not have jurisdiction to

make any order other than release or to refuse release. It cannot for example quash an order or direct the performance of a legal duty. Given the importance of the remedy, and its power, I do not doubt that it is possible in a fundamental case, for the High Court to as it were, 'look through' an otherwise validly issued order, or at least an order which has not yet been quashed by a court with jurisdiction to do so, and direct the release of the applicant."

8. It seems to me that, whatever view might be taken about appropriateness of the initial invocation of Article 40, whatever doubts there might have been dispelled by what has occurred since, quite simply, matters have been overtaken by events. For my part, I am quite satisfied that the matter is indeed moot, and I am further quite satisfied that Article 40 is not at this point in time, whatever might or might not have been the situation in the past, an appropriate remedy. If it is the case that the applicant's desire is to challenge the effectiveness of the ICO, then I would be happy to facilitate that. The proceedings can, if the applicant so desires, be converted to judicial review proceedings, and the proceedings so converted can be remitted to the High Court for direction, but I am firmly of the view that the present proceedings are moot and are not the appropriate way of proceeding at this stage.