

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 3 J.R.

BETWEEN

R (IDENTITY PROTECTED)

APPLICANT

AND

THE CHILD AND FAMILY AGENCY
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 29 November 2019

Introduction

1. This matter comes before the High Court by way of an application for leave to apply for judicial review. The Applicant is aggrieved that a series of care orders had been made in respect of her three daughters pursuant to the Child Care Act 1991. This grievance is expressed in very general terms, and it is not at all clear from the pleadings which orders in particular it is sought to challenge. The statement of grounds formally challenges a number of orders made by the District Court. It appears, however, from the numerous affidavits filed by the Applicant, and from her oral submissions, that the actual target of the proceedings are certain orders made by the Circuit Court in February and March 2017.
2. This presents an immediate difficulty for the Applicant in that the judicial review proceedings were not instituted until 2 January 2018. The proceedings have thus been brought outside of the three-month time-limit provided for under Order 84, rule 21 of the Rules of the Superior Courts (as amended in 2011). It will be necessary, therefore, for the Applicant to obtain an extension of time for the bringing of these proceedings.
3. The application for leave to apply for judicial review in the present case had first been moved before the High Court (Haughton J.) on an *ex parte* basis on 2 January 2018. The High Court directed that the respondents should have an opportunity to address the court on *inter alia* (i) the question of whether an extension of time should be granted, and (ii) the question of whether the application should proceed in the light of an appeal then pending before the Court of Appeal.
4. Matters are further complicated by the fact that the Applicant instituted a parallel set of judicial review proceedings on 2 January 2018. These proceedings have since been heard and determined against the Applicant by the High Court (MacGrath J.). An appeal has been brought against that judgment, and is pending before the Court of Appeal.
5. The *inter partes* application for leave to apply for judicial review came on for hearing before me yesterday (28 November 2019). The Applicant appeared as a litigant in person. The Child and Family Agency was represented by Nathan Jones, BL, and the Director of Public Prosecutions was represented by Kate Egan, BL.

Orders under the Child Care Act 1991

6. It may assist in an understanding of the subsequent complicated procedural history before the High Court to summarise, at the outset of this judgment, the nature of the

orders which had been made pursuant to the Child Care Act 1991. The Applicant confirmed at the hearing before me that the complaints in these judicial review proceedings are directed to orders made in respect of her eldest daughter. (The parallel judicial review proceedings are said to be directed to orders in respect of her other two daughters). See also paragraph 31 of the Applicant's affidavit of 27 November 2019.

7. The Applicant has exhibited five orders of the District Court in respect of her eldest daughter: (i) an emergency care order dated 18 November 2016; (ii) an interim care order dated 25 November 2016; (iii) an interim care order extension dated 7 December 2016; (iv) an interim care order extension dated 4 January 2017; and (v) a (full) care order pursuant to Section 18 of the Child Care Act 1991. These orders had all been appealed to the Circuit Court. The emergency care order was affirmed by the Circuit Court (Judge Comerford) on 8 February 2017. An affidavit has been filed in the proceedings by a solicitor from the firm Comyn Kelleher Tobin Solicitors who had represented the Child and Family Agency at the Circuit Court. It appears from this affidavit that the Circuit Court dismissed the appeal on the basis that the emergency care order had expired on 25 November 2016, i.e. several months prior to the hearing of the appeal.
8. The various interim care orders and the Section 18 care order had been affirmed by the Circuit Court (Judge Ó Donnabháin) on 7 March 2017. It appears from the affidavit filed by a solicitor from Comyn Kelleher Tobin Solicitors for the Child and Family Agency that the Circuit Court heard evidence in relation to the welfare of the eldest daughter from her social worker. The Applicant had purported to serve a number of summonses directing the attendance before the Circuit Court of witnesses, including a named guard and of her daughter.
9. With the single exception of the Section 18 care order, all of the orders at issue are of a type which is expressly time-limited under the Child Care Act 1991. An emergency care order is effective for a period of eight days or such shorter period as may be specified in the order. An interim care order shall not exceed a period of twenty-nine days (save with the consent of the parent having custody of the child or of the person acting in *loco parentis*).
10. A (full) care order had been made pursuant to Section 18 of the Child Care Act 1991 on 10 January 2017. This care order was for a period of [figure redacted] months and specified to expire on the day before the eldest daughter's eighteenth birthday on [precise date redacted] 2017.
11. In order to respect the privacy of the eldest daughter, the precise dates have been omitted. It should be noted, however, that the eldest daughter had reached the age of majority, i.e. eighteen years of age, prior to the institution of these judicial review proceedings. The eldest daughter was, therefore, no longer a "child" as defined for the purposes of the Child Care Act 1991.

Three sets of proceedings before the High Court

12. The within proceedings are, in fact, the third set of High Court proceedings which the Applicant has instituted arising out of orders made by the District Court and the Circuit Court. A brief summary of each of the three sets of proceedings is set out below.

(i). *2017 No. 68 IA*

13. The first set of proceedings were instituted on 4 July 2017. The proceedings were instituted by way of originating notice of motion. No statement of grounds had been filed in those proceedings.

14. The High Court (Keane J.) made an order on 11 November 2017 refusing to extend time to enter judicial review proceedings. The Applicant then brought an appeal against that refusal of an extension of time. The appeal was dismissed by the Court of Appeal by order dated 5 November 2018.

(ii). *2018 No. 2 J.R.*

15. The Applicant next instituted two sets of judicial review proceedings in January 2018. The first in time bears the Record Number 2018 No. 2 J.R. These proceedings were ultimately heard and determined by the High Court (MacGrath J.). A written judgment was delivered by the High Court on 31 July 2018, *R. v Child and Family Agency* [2018] IEHC 469.

16. The statement of grounds filed in those proceedings is in almost identical terms to that filed in the within proceedings. In each instance, the principal relief is directed towards vacating orders of the District Court, i.e. as opposed to the subsequent orders made on appeal by the Circuit Court.

17. It appears, however, that the Applicant subsequently sought, in the affidavits which she swore in the proceedings, to reorient the case as one directed to a decision of the Circuit Court on 26 September 2017.

(iii). *2018 No. 3 J.R.*

18. The third set of proceedings are the within proceedings, Record No. 2018 No. 3 J.R.

19. These proceedings were also initiated on 2 January 2018. On that date, an ex parte application for leave to apply was made to the High Court (Haughton J.). The principal reliefs set out in the statement of grounds are as follows.

"1. Judicial Review to seek:

2. Order vacating District Court emergency care orders, interim care orders and care orders created since 18 November 2016 to 28 November 2017

3. Order to return my three daughters [Names and the dates of birth have been redacted for the purposes of this judgment] to me immediately

4. Issac Wunder Order and Injunction preventing Respondents further harassment
 5. Further and other relief."
20. Eleven grounds are then set out upon which the relief sought above is claimed as follows.
1. All District Court emergency care orders, interim care orders and care orders created between 18 November 2016 and 28 November 2017 are erroneous and based on details known to be inaccurate.
 2. No due process was followed by the Respondents or acting judges
 3. The detention of my three daughters by Respondent collusion is unlawful and amounts to abduction and false imprisonment contrary to sections 15 and section 17 Non-Fatal Offences against the Person Act 1997
 4. Sworn affidavits by Respondents contain details known to be untrue amounting to perjury that continues to ensure unlawful detention of my three daughters thereby amounting to a significant tort against each of my family members
 5. It is paramount Judicial Review be lodged to consider lawfulness of Applicant's three daughters detention and to prevent further miscarriage of justice
 6. I am fully competent to care for my three daughters
 7. My three daughters want to return home
 8. My three daughters are unlawfully detained against their will
 9. As the mother of my three daughters I am the most suitable person to look after their welfare and interests
 10. That the best interests of my three daughters are served by being cared for by their mother
 11. Such other grounds as may be adduced, the exhibits reasons to be offered on the nature of the case which application will be based upon *inter alia*"
21. As appears, the pleadings are directed to orders of the District Court. The Applicant has since sworn a number of affidavits in the proceedings. As in the first set of judicial review proceedings, the Applicant has sought to reorient the proceedings so as to challenge the subsequent orders of the Circuit Court affirming the District Court orders.
22. See, for example, paragraph 2 of the affidavit sworn by the Applicant on 18 January 2018.
- "2. I say High Court case number 2018 3 JR relates to two Circuit Court appeal hearings 1) Tralee Circuit Court appeal hearing on 8 February 2017 before acting Judge Francis Comerford on foot of appeal of Killarney District Court order created

in District Area 17, County Kerry and 2) Cork Circuit Court appeal hearing the following month on 7 March 2017 before acting Judge Sean O'Donnabhain on foot of appeals of district court orders created between 25 November 2016 and 19 January 2017 in District Area 20, County Cork: the resulting Five Circuit Court orders are marked Exhibits A, B, C, D and E."

23. No application has ever been made by the Applicant to amend her statement of grounds. In the circumstances, it is not open to the Applicant to seek to reorient her proceedings in this way. There is an obligation on an application to plead their case with precision. See Order 84, rule 20. The only orders in respect of which relief has been sought in the statement of grounds are those of the District Court. Any challenge to those orders is inadmissible in circumstances where the Applicant chose to exercise her statutory right of appeal against those orders to the Circuit Court.
24. However, given that the Applicant is a litigant in person, it seems preferable not to decide the case on a pleading point. Instead, I propose to address de bene esse the separate objection that the proceedings are inadmissible by reason of delay.

Three Month Time-Limit

25. Judicial review proceedings are subject to a three-month time-limit under Order 84, Rule 21 of the Rules of the Superior Courts (as amended in 2011).
- "21.(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.
- (2) Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding."
26. It is immediately apparent that these proceedings have been instituted outside the three-month time-limit. The principal complaints made by the Applicant are directed to orders of the Circuit Court made in February and March 2017. These proceedings were not issued for some nine months thereafter (2 January 2018).
27. The High Court has a discretion under Order 84, rule 21(3) to grant an extension of time.
- "(3). Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:
- (a) there is good and sufficient reason for doing so, and
- (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:
- (i) were outside the control of, or
- (ii) could not reasonably have been anticipated by

the applicant for such extension.

- (4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party."

28. The application of this test has recently been considered by the Supreme Court in its judgment in *O'S v Residential Institutions Redress Board* [2018] IESC 61; [2019] 1 I.L.R.M. 149.

"I have concluded that the case law cited above, insofar as it applies to the extension of the time specified under O. 84 for the bringing of judicial review proceedings, makes clear that the jurisdiction which the Court is to exercise on an application to extend time is a discretionary jurisdiction which must be exercised in accordance with the relevant principles in the interests of justice. It clearly requires an applicant to satisfy the Court of the reasons for which the application was not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought. It also requires the Court to consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified and any subsequent period prior to the application and are sufficient to justify the Court exercising its discretion to extend time. The inclusion of sub-rule (4) indicates expressly that the Court may have regard to the impact of an extension of time on any respondent or notice party. The case law makes clear that the Court must also have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted. The decision may require the Court to balance rights of an applicant with those of a respondent or notice party. The judgments cited do not, in my view, admit of a bright line principle which precludes a court taking into account a relevant change in the jurisprudence of the courts when deciding whether an applicant has established a good and sufficient reason for an extension of time. Further, the judgments cited above do not envisage any absolute rule in relation to what may or may not be taken into account or constitute a good reason or a good and sufficient reason. The Court, in an application for an extension of time, is exercising a discretionary jurisdiction and in the words of Denham J. in *de Roiste*, '[t]here are no absolutes in the exercise of a discretion. An absolute rule is the antithesis of discretion. The exercise of a discretion is the balancing of factors - a judgment.'"

29. The Applicant seeks to justify her delay in bringing these proceedings under two broad headings as follows. First, it is said that she had formed an intention to challenge the orders of the Circuit Court within the three-month period allowed, and had, in fact, attempted to institute proceedings. The Applicant relies in this regard on the earlier (irregular) proceedings instituted by her on 4 July 2017.

30. Secondly, it is said that the Applicant had to prioritise the welfare of her daughters during the period after the making of the Circuit Court orders, and that she was unable to prepare the necessary paperwork for a proper application for judicial review during this time because of the distress she was enduring.

Findings of the court on extension of time

31. I have concluded that the criteria for the grant of an extension of time have not been met on the facts of this case. First, in considering whether or not there is good and sufficient reason to extend time, it is open to a court to consider the strength or otherwise of the judicial review proceedings. It is also appropriate to consider whether it would serve any useful purpose to allow the out-of-time proceedings to be pursued. The issues raised in the within proceedings are entirely moot. The orders the subject-matter of the appeals to the Circuit Court were all time-limited orders. The emergency care orders and the interim care orders were subject to prescribed maximum periods. The (full) care order made pursuant to Section 18 of the Child Care Act 1991 lapsed on the eldest daughter reaching the age of eighteen years. The proceedings are, therefore, moot. The Applicant cannot secure any practical benefit from the proceedings.
32. The Applicant argues that the proceedings are not moot, and referred in the course of her submissions to the judgment of the Supreme Court in *Child and Family Agency v. McG* [2017] 1 I.R. 1., [51]
- “The respondents submitted that the appeal is moot. I would not accept that contention. As was pointed out in *K.A. v. Health Service Executive* [2012] IEHC 288, [2012] 1 I.R. 794, a procedural flaw of a fundamental nature, at the outset of a custody case, may have ongoing effects, which necessarily have continuity. Moreover, the issues arising bear not only on this case, but may have consequences in other cases. Thus, it seems to me that this case should be seen in the same light as those cases, such as *Condon v. Minister for Labour* [1981] I.R. 62, and *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2006] IESC 62, [2007] 1 I.R. 328, where the court should determine the appeal in the interests of the proper administration of justice (cf. *Lofinmakin v. Minister for Justice* [2013] IESC 49, [2013] 4 I.R. 274).”
33. The circumstances of the case are distinguishable from those at issue in *Child and Family Agency v. McG*. The Applicant's eldest daughter is no longer subject to any orders under the Child Care Act 1991. There is no question, therefore, of any alleged invalidity in either the District Court or the Circuit Court orders having any ongoing effects. Of course, there will be some circumstances where judicial review proceedings will be appropriate notwithstanding that the decision or orders impugned are moot. It might, for example, be appropriate to remedy a breach of an individual's rights even in circumstances where that breach is historic (as opposed to ongoing). In the present case, any alleged breach was to the eldest daughter's rights. The eldest daughter had already achieved her majority before these proceedings were instituted. If she had wished to do so, it would have been open to her to institute proceedings in her own name.

34. As it happens, the eldest daughter held a watching brief on these proceedings and, in the circumstances outlined below, counsel on her behalf confirmed that she does not wish to participate in the proceedings nor to be heard by the court in relation to same.
35. The Applicant has not identified any issue of principle which may be of relevance to other cases. The statement of grounds fails to articulate any criticism of the Circuit Court orders. There is no reference to the Circuit Court orders at all. Insofar as it is either necessary—or indeed appropriate—to consider any complaints made in respect of the Circuit Court in the various affidavits filed by the Applicant, these are in the most vague and generalised terms. Some do not disclose any arguable ground of judicial review.
36. The second reason for concluding that an extension of time should not be granted in this case is the adverse effect it would have on a third party, namely the Applicant's eldest daughter. The Applicant has consistently sought to implicate her daughter in the various legal proceedings. The Applicant purported to issue a subpoena against her own daughter in the context of the Circuit Court appeal and these High Court proceedings. In the course of her submissions yesterday afternoon (28 November 2019), the Applicant asked this court to issue a "bench warrant" against her own daughter to compel her attendance at the proceedings. At that stage, counsel on behalf of the daughter, who had been maintaining a watching brief, intervened. Mr Darren Lehane, BL, confirmed that his client did not wish to have any part in the proceedings.
37. Were this court to grant an extension of time and to allow these judicial review proceedings to be pursued, it seems to me that there is a real risk that it would adversely affect the Applicant's eldest daughter. The Applicant is intent on dragging her own daughter before the courts.
38. The third reason for refusing an extension of time is that the circumstances giving rise to the delay were not outside the control of the Applicant. It is clear from the sequence of events that the Applicant had been in a position to institute proceedings much earlier than 2 January 2018. It will be recalled that proceedings had been issued on 4 July 2017, that is some four months after the last of the relevant Circuit Court orders. These proceedings were misconceived in that they sought, in effect, an extension of time on a freestanding basis. No statement of grounds was ever filed in the earlier proceedings.
39. The Applicant has since sought to amend her hand by instituting the within proceedings. It would undermine the object and purpose of the statutory time-limit if an applicant were entitled to rely on defective proceedings to justify instituting a second set of proceedings well outside the three-month time-limit. To do so would be to place a premium on a person's lack of knowledge of proper legal requirements.

Position of Director of Public Prosecutions

40. For the sake of completeness, it should be observed that there is no case whatsoever pleaded as against the Director of Public Prosecutions. It is apparent from the affidavits filed on behalf of the Applicant that she is aggrieved by what she perceives to have been

harassment of her by members of An Garda Síochána. This has, apparently, been the subject of earlier proceedings.

41. At all events, without making any finding in relation to the merits or otherwise of this complaint, there is no causal link between same and the position of the Director of Public Prosecutions. The Director does not have operational responsibility for An Garda Síochána.
42. As it happens, most of the alleged events relied upon by the Applicant for the purposes of the present proceedings had also been ventilated in the first set of judicial review proceedings, 2018 No. 2 J.R. This aspect of the case was addressed as follows by MacGrath J. in his judgment of 31 July 2018. See *R v. Child and Family Agency* [2018] IEHC 469, [21] and [22]

“Thus the factual basis which the applicant relies upon relates primarily and significantly to operational matters concerning individual members of An Garda Síochána, rather than to the role of the DPP in the prosecution of an offence.

In my view the actions relied upon as against the DPP to ground the application can not, on the facts averred to, as a matter of law, be laid against the Director of Public Prosecutions who is not responsible, vicariously or otherwise, for the operational actions of An Garda Síochána in circumstances such as this; and in any event cannot found an application such as this. No authority has been cited to the contrary and no factual basis has been averred to in support such proposition in this case. If there is a liability for the actions of An Garda Síochána, and the Court expresses no opinion on this, it does not lie against the DPP and in the circumstances I am not satisfied that the applicant has made out a prima facie stateable case or has discharged the burden of proof which is imposed upon her in an application such as this, as against the second respondent.”

43. I respectfully adopt this analysis as directly applicable to the facts of the case before me.

Reporting restrictions

44. These proceedings are subject to reporting restrictions in the following circumstances. Whereas the Applicant's eldest daughter is not a minor, one of her sisters is underage and is subject to a care order. Given that there is a considerable overlap in the factual background between the two sets of judicial review proceedings issued on 2 January 2018, I am concerned lest the disclosure of the identities of the Applicant and/or her eldest daughter in the context of the proceedings before me could inadvertently allow the identity of the minor child to be deduced.
45. I will, therefore, make an order prohibiting the disclosure of the identity of either the Applicant and/or any of her daughters. Without prejudice to the generality of the foregoing, the names of those individuals, their addresses and their dates of birth are not to be disclosed.

Conclusion

46. The application for leave to apply for judicial review is dismissed. This is done primarily on the basis that the proceedings are inadmissible by reason of delay, and that it would be inappropriate in the circumstances of this case to grant an extension of time pursuant to Order 84, rule 21 of the Rules of the Superior Courts (as amended in 2011).
47. I would have dismissed the proceedings in any event on the basis that no case is pleaded in respect of the Circuit Court orders. Nor is there any case properly pleaded as against the Director of Public Prosecutions.