[2020] IEHC 397

THE HIGH COURT

[Record No. 2020/452 S.S.]

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND, 1937
AND IN THE MATTER OF D.O., A CHILD
AND IN THE MATTER OF THE CHILDCARE ACTS, 1991 TO 2013

BETWEEN

A.O.

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 7th day of August, 2020

Introduction

1. This judgment concerns complex issues in relation to the costs of an application pursuant to Article 40.4 of the Constitution. The substantive matter was ultimately resolved, but the costs of the application were a contentious enough issue to warrant substantial debate and elaborate written submissions.

2. The applicant seeks her costs of the application against the respondent. Notwithstanding that the matter was resolved by agreement, the applicant contends that this agreement achieved the objective sought by the applicant, and that it constituted an "event" which costs should follow. The respondent strongly opposes this position, and submits that there should be no order as to costs.

3. In order to understand the issues and the context in which they arise, it is necessary to set out the background to the matters in some detail.

Background

4. The sequence of events which led to the applicant making the application to this Court under Article 40.4 is not disputed. Those events were set out in detail in the affidavit of Joan Callan of 27th March, 2020. Ms. Callan is the managing solicitor of Chancery Street Law Centre, and it is of some significance to note that, in addition to acting for the applicant in the present proceedings, Ms. Callan had acted for the applicant in respect of emergency and interim care orders obtained by the respondent in respect of the applicant's three older children in July, 2019. The applicant herself also swore a brief affidavit in support of the application, which exhibited an interim care order in respect of the applicant's youngest child, "D", made on the 25th March, 2020 by the District Court, to which I shall refer in more detail below. A helpful of chronology of events was also appended to the applicant's written submissions.

5. The facts leading to the Article 40 application can be briefly stated. On 11th July, 2019, the respondent sought from the District Court emergency care orders pursuant to s.13 of the Child Care Act 1991 ("the 1991 Act") in respect of the applicant's three older children. The applicant was placed on notice of this application and was present at the hearing, but was not represented. The District Court granted the orders sought.

6. On 18th July, 2019, the respondent applied for and was granted interim care orders pursuant to s.17 of the 1991 Act in the District Court in respect of these three children. The applicant, who was due to give birth in or around the day of the hearing, was represented by Ms. Callan and counsel, and contested the application. Ms. Callan states in her affidavit that these interim care orders have since then been extended in or around every 28 days by the District Court.

7. D was born on the following day, and remained in the care of the applicant for a period of eight months. While I do not propose in this judgment to address the details of the applicant's mental health, it is relevant to note that, during this period, the applicant sought medical assistance in respect of her mental health, ultimately being referred to a specialist mental health team. It appears that this resulted in a diagnosis of psychosis, for which the applicant was prescribed medication. While Ms. Callan deprecated the apparent use of certain social work, nursing and medical reports furnished to her by the respondent's solicitors on 25th March, 2020 for the purpose of supporting the respondent's application for an interim care order on that date, she expressed the view in her affidavit of 27th March, 2020 grounding the application under Article 40 that one of these reports in particular by a consultant psychiatrist of 3rd March, 2020 demonstrated that the applicant "would have had an arguable case for defending the application for an interim care order had she been provided with an opportunity to do so" (para. 31, Joan Callan affidavit).

8. Ms. Callan avers that, as manager of the Chancery Street Law Centre, she has access to the court list for the District Court in Chancery Street, and would normally have "at least one [case] and usually several" in the court's list. On checking the list on 24th March, 2020, she noticed a case "*CFA v. O*" listed for the next day. Being conscious of the proceedings regarding the applicant's three older children, Ms. Callan contacted the respondent's solicitor who had carriage of those proceedings. That solicitor, Mr. Diego Gallagher, was unable to update Ms. Callan and said that he would have to take instructions.

9. The following day, while present in the Law Centre, Ms. Callan heard "*CFA v. O*" being called over the Tannoy system. She approached Mr. Gallagher to enquire about the matter, but avers that she was told that Mr. Gallagher "was not in a position to provide me with the information that I was seeking".

10. Ms. Callan further avers that she entered the courtroom, now suspecting that "*CFA v. O*" did indeed relate to her client. She states that she asked the judge – who was, in fact, the judge who had previously made interim care orders in respect of the applicant's three older children – to whom the application referred, and was told that it was indeed the applicant. Ms. Callan avers that she informed the court that neither the applicant nor she had received notice of the application, and that she had contacted Mr. Gallagher but had received no information. Mr. Gallagher then informed the judge that he intended to move the application on an *ex parte* basis, and the judge accordingly invited Ms. Callan to leave the courtroom, which she did. The application then proceeded in her absence.

11. Later that day, Mr. Gallagher sent an email to Ms. Callan informing her that the District Court had made an interim care order in respect of D, and that a guardian *ad litem* had been appointed. Mr. Gallagher attached the various reports presented to the court. As this email was sent at 18:48pm, Ms. Callan did not see it until the following day.

12. On 27th March, 2020, the applicant made an *ex parte* application to me for an inquiry pursuant to Article 40.4.2 of the Constitution. Ms. Callan referred in her affidavit to s. 17(3) of the 1991 Act, which is as follows:-

> "(3) An application for an interim care order or for an extension of such an order shall be made on notice to a parent having custody of the child or to a person acting in loco parentis except where, having regard to the interests of justice or the welfare of the child, the justice [sic] otherwise directs."

13. It was asserted by Ms. Callan in her affidavit that the subsection provides for "a very high threshold that must be reached before there can be any justification for moving an application under this section on an *ex parte* basis" (para. 35). Ms. Callan went on to aver that, having practised as a solicitor in this area for several years, she had "never been involved in a case where an initial interim care order was applied for and/or granted on an *ex parte* basis… It is my professional view that there is absolutely no justification which would warrant the Child and Family Agency having adopted the course of action for which it is responsible" (para. 36).

14. Ms. Callan makes the point in her affidavit that D was not in the custody of the Child and Family Agency at the time of the making of the application, and that he was removed from his mother "in very distressing circumstances, with no prior notice to her and in the presence of the Gardaí… The order in respect of [D], in effect, severed the ties between mother and child and put him into the care system… I have every reason to anticipate that this has started a series of events which will lead to [D] remaining in the custody of the Child and Family Agency for months, if not years, before there is a final determination of the issue of whether the children should remain in the custody of the Child and Family Agency on a long-term basis" (paras. 53 to 54).

15. It was submitted on behalf of the applicant that it was open to the Agency to seek an emergency care order under s. 13 of the 1991 Act, if there was an "immediate and serious risk to the health and welfare" of D, but that this course was not adopted because this threshold was not met. Instead, the Agency had, in breach of the applicant's right to fair procedures and parental rights, deprived her of the opportunity to contest the application for an interim care order, and it was submitted that there was no justification for this course of action.

16. Having read Ms. Callan's affidavit and heard the submissions of counsel, I directed an inquiry in accordance with Article 40.4.2 of the Constitution to be held on 31st March, 2020. An affidavit of that date of Christina Fannon, a social worker with the Child and Family Agency who was the allocated social worker in respect of D, was filed on the return date on behalf of the respondent, together with a certificate of detention.

17. While it is not necessary for the purpose of the present application to rehearse at length the matters addressed in Ms. Fannon's affidavit, it is appropriate to convey in general terms what was set out on behalf of the respondent. Ms. Fannon referred in some detail to the "significant supports and services" which were put in place by the respondent "in the form of a safety plan, to support the applicant to care for her son safely in the community". The respondent was particularly aware of the applicant's circumstances, having applied successfully for interim care orders for the applicant's three older children. However, concerns developed for D's care, welfare and safety, and the applicant was considered to have a "very limited support network" around her. Ms. Fannon stated that "the current state of emergency [i.e. the Covid-19 pandemic] also impacted on the Agency's ability to keep [D] safe without recourse to an Interim Care Order" (para. 20), due to an alleged inability on the part of the applicant to understand social distancing and a perceived failure to observe recommended guidelines. Staff were unable to provide the same level of support as was available prior to the pandemic.

18. Ms. Fannon readily acknowledged in her affidavit that the step of applying *ex parte* for an interim care order "is not taken lightly. Ordinarily it is far more preferable that parents are on notice of any such application and have an opportunity to engage fully in the process. Indeed, such an *ex parte* application is the exception not the norm" (para. 22). Notwithstanding this, Ms. Fannon set out in detail the concerns which the respondent considered justified applying *ex parte* for an interim care order, expressing the view that "…there was extensive evidence before the District Court upon which the Judge was satisfied that an Interim Care Order should be made" (para. 28).

19. The matter came before me on 31st March, 2020. Having heard counsel for both parties briefly in relation to the matter, I encouraged the parties' representatives to discuss the matter outside court to see if an acceptable accommodation could be reached, failing which I would hear the matter. Counsel agreed to do so.

20. In the event, I was subsequently informed by counsel that an agreement had been reached by the parties, the substance of which was as follows:-

> "It is hereby agreed between the parties that:
>
> (1) The within proceedings be adjourned until Wednesday the 8th April, 2020.
> (2) The Child and Family Agency will issue a fresh application for an Interim Care Order pursuant to Section 17 of the Child Care Act, 199 [sic], on notice to the applicant, returnable for Monday the 6th April, 2020.
> (3) The Child and Family Agency will make an application on Monday, the 6th April 2020 to discharge the current Interim Care Order that is in place.
> (4) The applicant will consent to [D] remaining in the voluntary care of the Child and Family Agency until the conclusion of the said application and any order made therein."

21. I adjourned the Article 40 application to 8th April, 2020. I am informed that, when the matter came before the District Court on 6th April, 2020, the respondent had in

accordance with the agreement instituted a fresh application on notice to the applicant for an interim care order, and applied to discharge the interim care order of 25th March, 2020. It is of relevance to note that, having consented in the agreement set out above to D remaining in the voluntary care of the respondent until 6th April, 2020, the respondent agreed on that date, having had the benefit of legal advice, to enter into a voluntary care agreement pursuant to s. 4 of the 1991 Act in respect of D

22. The applicant's position is that, as a result of these events, the Article 40 application had become moot, as "the voluntary care arrangement that was entered into pursuant to section 4 of the Child Care Act, 1991 has allowed [the applicant] to retain greater parental rights, to negotiate a regular regime of access, and to have greater involvement in respect of the conduct of the child's care pursuant to section 4(3)(b) of the 1991 Act, than would otherwise have been the case had [D] been brought into care on foot of an interim care order (as had occurred on 25 March, 2020)" (affidavit Joan Callan, para. 20, sworn 18th June, 2020).

23. The matter was adjourned on 8th April, 2020, and ultimately came back before me for hearing in relation to the question of costs. There was correspondence between the parties in which the applicant's solicitor set out in considerable detail the grounds upon which it was contended that the applicant should be awarded her costs of the Article 40 application, and seeking the respondent's consent to an award in her favour. The respondent's solicitor did not engage with the arguments, merely indicating that the respondent did not consent.

The Applicant's Position on Costs

24. The arguments regarding the costs issue were heard by me on 7th July, 2020. Both sides made substantial oral submissions and lengthy written submissions.

25. Ms. Teresa Blake SC, for the applicant, pointed out that the applicant was legally obliged to apply for her costs, and that s. 33 of the Civil Legal Aid Act, 1995 (the "1995 Act") requires that the court should assess the application as it would any other application for costs. Reference was made to the recent decision of the Court of Appeal in *The Child and Family Agency v. A, a Minor Represented by Order of Solicitor and Next Friend Gina Cleary and C* [2020] IECA 52 ("CFA v. A") in which it was held that, when adjudicating on an application for costs made by an individual in receipt of legal aid, the court is not permitted to determine the application by having regard to the fact that one State agency will be reimbursing another; the court must have regard to the terms of s. 33(2) of the 1995 Act which requires that, where one of the parties is in receipt of legal aid, the court must make its costs order "in like manner and to the like effect as the court… would otherwise make if no party was in receipt of legal aid…".

26. Ms. Blake argued that, as is usual, costs should follow the event. The essential objective of the Article 40 application was to address a situation where the applicant had been deprived of her right to fair procedures, as a result of which her child had been taken into care. Ms. Blake relied, in particular, on the judgments of the High Court and Supreme Court in *The Child and Family Agency v. SMcG* [2015] IEHC 733; [2017] 1 I.R. 1 ("*CFA v.*

SMcG"). In that case, a parent had been present at the hearing of an application for an interim care order in the District Court, but her solicitor had not been provided with adequate time to discuss reports and take instructions. The High Court (Baker J.) held that the applicant's rights to constitutional fair procedures had not been fully respected and granted relief under Article 40. The Supreme Court dismissed the appeal, holding that the Article 40 procedure was appropriate where there had been a fundamental denial of justice. Ms. Blake laid particular emphasis on the following passage from the judgment of Baker J. in the High Court:-

> "40. I consider that the interests of the parents, or of an unmarried mother of children, while they may not always coincide with the interests of the children are to be considered as a factor which must be weighed in assessing the best interests and welfare of the children. Because the constitutional starting point recognises that a child's welfare is primarily to be found in the custody and company of his or her mother, in any decision to remove the child from that custody, or to deprive the mother of those rights of custody and company of a child, the court must recognise and respect the symbiotic relationship between mother and child. To argue that the interests of the children are separate or distinct from, or in some way constitutionally prior to, those of the mother is to fail to recognise that constitutionally established nexus.
>
> 41. I am of the view that a court in determining whether to deprive a mother of the custody and company of her children will fully recognise and respect the interests and rights of those children only by fully respecting the procedural and substantive rights of the mother in the course of that litigation.
>
> 42. To consider otherwise could have the effect that a child must in cases under the Act be represented by a guardian ad litem or by solicitor and/or counsel in a way that might set the interests of the child against the procedural and substantive rights of the mother, or parents, as the case may be. This in my view is not desirable or, at least, not to be presumed to always be necessary.
>
> 43. As the children in this case did not have the benefit of their own separate legal representation, and as no guardian ad litem had been appointed to represent their interests, the interest and right that they had to have their welfare protected within their family unit was required to be vindicated, and could only be vindicated, by affording their parents fairness of procedure and process. This seems to me to have been implicitly acknowledged by the Agency in agreeing to a short adjournment to enable both parents to fully instruct their legal representatives with regard to the views of the parents as to how the interests of the children were best to be met.
>
> 44. I reject the argument that a conflict of interest necessarily arises between the welfare of the children and the interests of one or both of their parents."

27. The applicant also emphasised the following passage from the judgment of O'Donnell J. in the Supreme Court in *CFA v. SMcG*:-

"2. … I agree with MacMenamin J. that the breach of fair procedures in the District Court hearing on 29 October 2015, even if the product of concern as to the safety of the children, and frustration with the difficulty in providing legal aid, was nevertheless a fundamental departure from the requirements of a fair hearing. I also agree that what is and was required from the court system in this case, whether by agreement at District Court level, or by an appropriate order at the level of the Superior Courts, was that the clock should be reset to zero and proceedings should recommence in circumstances where both parents here were fully and properly represented, and did not in any way suffer from the fact that there had been a determination made on the application on 29 October 2015."

28. Counsel argued that the effect of the implementation of the agreement between the parties as set out in para. 20 above was that, as O'Donnell J. put it, the clock had been "reset to zero", with the matter proceeding with the applicant being able to avail fully of legal representation and advice. Crucially, the applicant submits that this objective "was achieved by the Respondent applying on 6 April 2020 to discharge the interim care order of 25 March 2020 and issuing a fresh application" (para. 37 of written submissions).

29. It was submitted on behalf of the applicant that the agreement and its subsequent implementation was the "event" which costs must follow, notwithstanding that the Article 40 application became moot as a result. The applicant relied on the decision of the Supreme Court in *Cunningham v. President of the Circuit Court* [2012] 3 I.R. 222, in which Clarke J. (as he then was), in giving the judgment of the Supreme Court, referred to his own previous judgment in the High Court in *Telefonica O2 Ireland Limited v. Commission for Communication Regulation* [2011] IEHC 380, and stated:-

"[24] … In summary, and for the reasons set out in [Telefonica], a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot."

30. Counsel also referred to the decision of the Court of Appeal in *Phelan v. South County Dublin County Council* [2019] IECA 81. In that case, the applicants sought to quash what they considered to be a decision of the first named respondent to withdraw the applicants' emergency accommodation at a certain hotel. Ultimately, the first named respondent provided social housing to the applicants, which rendered the proceedings moot. Peart J. held that this act was the "proximate cause" of the proceedings becoming moot, and that the Council had not discharged its onus of establishing an evidential basis which would justify a departure from the general rule that costs would be awarded against the party through whose unilateral action the proceedings had become moot.

31. It was submitted that it was also clear that the court should decide whether an "event" existed to which the rule that costs follow the event applied, and that where an action which rendered the proceedings moot was taken in "direct response" to the proceedings

having issued, an applicant should be entitled to her costs. In this regard, counsel referred to the decision of *Godsil v. Ireland* [2015] 4 I.R. 535, in which the Supreme Court held that the actions of the respondents, in enacting legal provisions which repealed certain legislation impugned in the proceedings by the plaintiff, could only reasonably be understood as being in direct response to the proceedings, and could "only be regarded as being an explicit acknowledgement and admission of the legal validity of the challenge as mounted" (para. 63, p. 557). Those actions, therefore, were the "event" which costs should follow.

32. Consistent with this approach, the applicant submits as follows:-

> "The within proceedings became moot as a result of the Respondent applying to discharge the Interim Care Order of 25 March 2020 and a voluntary care arrangement being entered into – this would not have occurred without, and was in direct response to, the within proceedings having been instituted. It was open to the Respondent to defend the proceedings and to stand over the lawfulness of the Interim Care Order of 25 March 2020, this is not the course of action that it elected to take." (para. 41, written submissions)

The Respondent's Submissions

33. It is fair to say that the respondent has an entirely different perspective on the matter. Ms. Sarah McKechnie BL, acting for the respondent, submitted that it could not be contended that the compromise agreement was "tantamount to a finding by the High Court that the Child and Family Agency acted inappropriately and/or that the District Court order was unlawful" (para. 2, written submissions). It was argued that what the applicant is trying to do is to assert the unlawfulness of the District Court order in circumstances where the lawfulness or otherwise of that order is not in question, as it was the subject of an agreement between the parties. The High Court did not accordingly enter upon a consideration of the merits of the District Court order, and it is submitted that it would have been unlawful for this Court to do so on the basis of affidavit evidence which was not before the District Court judge.

34. The respondent's submission is that the District Court interim care order must be regarded as a valid and lawful order, unless the High Court were to determine that it was in fact unlawful, which of course has not occurred. As the respondent puts it "…[i]n circumstances where the Applicant abandoned her Article 40 Inquiry by entering a compromise agreement, the lawfulness of the District Court Order is no longer in question" (para. 5, written submissions).

35. The respondent argues that the only way to establish the unlawfulness of the District Court interim care order would have been to proceed with the Article 40 application, which the applicant chose not to do, having agreed to compromise the matter. It is submitted that, as the District Court order must be regarded as lawful, there is no basis for finding that there is an "event" which the costs should follow.

36. Counsel remarked during the course of argument that, while the respondent's position was that it would be inappropriate for the court to embark upon an inquiry as to the lawfulness of the District Court order for the purpose of the costs application, it was difficult, in meeting the applicant's case, not to be drawn into debating the merits of the District Court order to some degree. It was pointed out that s. 17(3) expressly permits an *ex parte* application where "having regard to the interests of justice or the welfare of the child, the [District judge] otherwise directs". It was submitted that the concerns of the social work team for the safety of the child in the light of the applicant's mental health issues justified the application, and further details of those concerns were set out in Ms. Fannon's affidavit before this Court. The interim care order was for thirteen days – as opposed to the 29-day order available under s. 17(2) – with the applicant having the opportunity to have a fully contested hearing on the return date. It was also the respondent's position that it was not agreeable to the quashing of the order and the return of the child to the applicant's care, so that the compromise agreement provided that D would remain in the voluntary care of the respondent until the conclusion of the application for an interim care order to be made on notice on 6th April, 2020.

37. In this latter regard, the respondent's position was that D's welfare was protected by the respondent's retaining the child in care until an *inter partes* hearing could be achieved. As the respondent put it, "…it is of course entirely different for the Child and Family Agency to agree to an inter partes hearing once the child is already in the care of the Agency".

38. As regards the costs, the respondent submitted that the settlement agreement was silent as to costs, and that this Court should infer from this fact that the parties should bear their own costs. It was argued that it was not flagged by the applicant's representatives that they were going to make a "substantive" application for costs, as opposed to a perfunctory application in compliance with the applicant's obligation under s. 33(4) of the 1995 Act. It was suggested that "a substantive costs application by a legally aided party against the Child and Family Agency is extremely unusual in child care cases… had the respondent been put on notice of the substantive costs application necessitating a half day hearing and legal submissions, the agreement would not have remained silent in respect of same" (para. 13, written submissions).

39. Counsel commended to the court the approach of the Supreme Court in *Child and Family Agency v. O.A*. [2015] 2 I.R. 7, in which MacMenamin J. set out in detail the principles and criteria applicable to determining cost applications in District Court child care proceedings. The Supreme Court in that case held that the "general default position" in child care cases was that there should be no order for costs in favour of parent respondents in District Court care proceedings:-

"[52] … unless there are distinct features to the case which might include:-

(i) a conclusion that the CFA had acted capriciously, arbitrarily or unreasonably in commencing or maintaining the proceedings;
(ii) where the outcome of the case was particularly clear and compelling;

(iii) where a particular injustice would be visited on the parents, or another party, if they were left to bear the costs, having regard to the length and complexity of the proceedings; and

(iv) in any case in which a District Court seeks to depart from the general default position, and to award costs, it is necessary to give reasons…"

40. It was accepted by counsel for the respondent that the Supreme Court in that case acknowledged that considerations different to those applying in the District Court would often apply in relation to child care proceedings in the High Court where the court was exercising its inherent jurisdiction. In fact, in her oral submissions, Ms. Blake sought to draw a further distinction, that in the case of an Article 40 application, the court is in fact exercising a jurisdiction mandated by the Constitution, rather than an inherent jurisdiction.

41. In any event, Ms. McKechnie also drew the attention of the court to para. 42 of the judgment of MacMenamin J. in *CFA v. O.A.*, where he stated as follows:-

"[42] … the use of the term 'the event', as in 'costs follow the event' is not always, in itself, a satisfactory criterion, in the context of child care cases, where, as here, there may be a number of 'events', and there are different orders made as part of a continuum. The term 'outcome' may be a more apposite approach when considering such applications, thereby allowing a judge to take a more all-encompassing view…"

42. The net position of the respondent was expressed in its written submissions as follows:-

"The compromise agreement effectively protected the position of both parties. In light of the mutually beneficial outcome, the appropriate order is that there is no order for costs." (para. 40)

Discussion

43. Obviously, if this Court had been required to conduct the Article 40 inquiry, and had found the detention on foot of the interim care order to be unlawful, or the respondent had consented to the making of an order to that effect without the necessity for a hearing, the "event" would be clearly established and the costs would follow. Neither of these events occurred in the present case.

44. Put at their simplest, the respective positions of the parties in relation to the settlement are as follows: the applicant contends that the settlement between the parties achieved the purpose of the Article 40 application, and that the respondent "effectively conceded the case to the applicant". The respondent contends that the settlement "effectively protected the position of both parties", and resulted in a "mutually beneficial outcome".

45. Both parties to some degree engaged with the substance of the District Court interim care order. Ms. Blake pointed out that application could have been made by the respondent for an emergency care order under s. 13 of the 1991 Act. This would require the District judge to be of the opinion that there was reasonable cause to believe that, *inter alia,*

there was an immediate and serious risk to the health or welfare of the child which necessitated his being placed in the care of the respondent. Section 13(4)(c) permits an application to be made *ex parte* "if the [District judge] is satisfied that the urgency of the matter so requires…". No explanation was offered by the respondent as to why it did not avail of this section, under which *ex parte* orders are not uncommon, or as to why the application under s. 17 for an interim care order was considered more appropriate, even though, as Ms. Fannon conceded in her affidavit, an *ex parte* application for an interim care order "is the exception not the norm".

46. Also, while s. 17(3) of the 1991 Act provides that the application for an interim care order or the extension of such an order must be made on notice to the parent of the child, the exception is "where, having regard to the interests of justice or the welfare of the child, the [District judge] otherwise directs". While the District Court order refers to the *ex parte* nature of the application, there is no direction as such on the face of the order that an *ex parte* application be permitted, having regard to the statutory criteria.

47. However, this is not to suggest that the order is unlawful; indeed, even if I were of the view that there was an infirmity in the order, I agree with Ms. McKechnie's submission that it is not appropriate for this Court, in circumstances where the Article 40 challenge to the order has been compromised, to regard the interim care order as other than a completely lawful order which was discharged by the District Court at the request of the parties.

48. Notwithstanding Ms. McKechnie's submissions regarding the applicant's approach to costs, I did not understand Ms. Blake to be urging the court to award the applicant costs on the basis that the District Court order was unlawful; indeed, it would be difficult to see how such a case could be made without a finding of this Court to that effect. Rather, her point was that the applicant had fully achieved her objective in making the Article 40 application, as the settlement had effected a "reset to zero" – to borrow the phrase used by O'Donnell J. – in that "she ensured fair procedures were afforded to her in respect of the application to remove her child from her care and she ensured that she did not in any way suffer from the fact that there had been an earlier determination made on 25 March 2020" (para. 37, written submissions).

49. The difficulty with this is that the applicant's position as expressed in the foregoing paragraph, with its no doubt deliberate echo of *the dicta* of O'Donnell J. in *CFA v. SMcG* set out at para. 27 above, demands an inference that the order had been procured in breach of her right to fair procedures, and was, thus, unlawful; in short, that a wrong had been set right. This is emphatically disputed by the respondent, which does not accept that there was any breach of fair procedures, or that the District Court order can be impugned in any way.

50. Considerable reliance was placed by counsel for the applicant on *dicta* of the High Court and Supreme Court in *CFA v. SMcG*. The judgment of Baker J., in particular, was relied upon in what was submitted to be a closely analogous case in which the detention of two children on foot of an interim care order "was not lawfully made and was made without

affording an opportunity to the applicants to fully engage with the evidence" (para. 50). However, that case involved a full hearing by this Court and a finding that the detention of the children was unlawful. Due to the compromise agreement by the parties in the present case, I have not either conducted such an inquiry nor come to any conclusion as to the lawfulness of the detention of D For the reasons set out above, I do not believe it would be appropriate for me to do so.

51. It is argued on behalf of the applicant that a finding of unlawfulness is not required where there is an "event" which, in the words of Finlay Geoghegan J. in *Benloulou v. Minister for Justice and Equality* [2016] IECA 81 at para. 16, occurs "in circumstances where it can only be reasonably understood as being in direct response to the proceeding". The applicant submits that the settlement is such an event, and that it was the application of the respondent to the District Court to discharge the interim care order and issue a fresh application – which application under s. 17 could only be made by the respondent – which had the effect of achieving the objective of the applicant in initiating the Article 40 application.

52. However, the Supreme Court emphasised in *Cunningham* that in order for costs to be awarded against a party whose act has rendered the proceedings moot, that act must be the proximate cause of the proceedings becoming moot, and must be the unilateral act of that party. *Godsil and Benloulou* establish that the act must be regarded as being in "direct response" to the proceedings.

53. In my view, the proximate cause of the present proceedings becoming moot was not the applications by the respondent to strike out the interim care order of 25th March, 2020 and the issue of a fresh interim care order application. These actions were taken on foot of the agreement of the parties, which was, in my view, the proximate cause of the Article 40 challenge becoming unnecessary. This settlement was not a unilateral act of the respondent, but a consensus arrived at by both parties.

54. There is no doubt that the settlement achieved the objective intended by the Article 40 proceedings. However, the settlement did not constitute a unilateral capitulation on the part of the respondent. If it had agreed that custody of D be restored to the applicant pending the hearing on 6th April, 2020, it might be difficult not to view the respondent as having accepted that it had acted incorrectly. It is clear, however, from the material in the affidavit grounding the original application for an interim care order, and even more so from the affidavit of Ms. Fannon before this Court, that the respondent had genuine concerns about D, and these concerns appear to have been assuaged by the term of the settlement requiring the applicant to consent to D remaining in the voluntary care of the respondent until the conclusion of the application to discharge the interim care order.

55. In circumstances where the parties negotiated the basis upon which the interim care order would be discharged and a fresh application on notice to the applicant would be made, arriving at a mutually acceptable outcome, I do not believe that I can regard the steps taken by the respondent which rendered the Article 40 application moot as being a unilateral act. In any event, I consider that I am precluded from inquiring into the legality

of the District Court order, and, in particular, whether the procedure leading to the making of that order involved a breach of fair procedures. As such, I think that it would not be appropriate for me to conclude that the effect of the settlement had been to "right a wrong", as it were.

Conclusion

56. In all the circumstances, I consider that the appropriate order to be made is that there be no order as to costs. I will give liberty to the parties to apply in the event of any practical or unforeseen difficulty.