THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 289

[2023/90 JR]

BETWEEN

L.M. (A MINOR SUING BY HER DISTRICT COURT GUARDIAN AD LITEM AND NEXT FRIEND CLARE O'CONNOR)

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

AND

S.M., THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM, THE MINISTER FOR HEALTH, THE MINISTER FOR CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH, IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Charles Meenan delivered on the 23rd of May, 2023

Introduction

1. The issue at the heart of this application is one that frequently arises in judicial review proceedings. The issue is whether lack of resources, be they financial or otherwise, relieve an authority such as the respondent (the CFA), from discharging its statutory duties.

2. As will be clear, the applicant is a deeply troubled person posing serious risks both to herself and others. The Oireachtas by enacting the Childcare Act 1991 (as amended) (the Act of 1991) has set out a statutory framework whereby care, safety and support can be given to the applicant. However, the CFA, the body designated to put these steps in place, maintain that they have not done so because of the absence of a placement for the applicant due to a lack of resources. The CFA have also raised issues that the placement of the applicant in such a unit without resources could potentially expose it to sanction by the Health Information and Quality Authority ("HIQA").

3. This application is one of a number of applications that are pending in the court in which similar issues are raised and this case was designated by the court as a "lead case". However, it is the case that the statutory duties on the CFA where resources are an issue have been the subject of two earlier decisions of the High Court. I will refer, in some detail, to both these decisions which are clear and were not the subject of an appeal by the CFA.

The applicant

4. I will now set out, in a somewhat brief form, the applicant's situation.

5. The applicant was born on 27 November 2005. Her parents had serious issues which were concerning for the welfare of the applicant. These included neglect, witnessing inappropriate sexual behaviour, exposure to behaviours of self-harm, concerns around alcohol and drug use and poor living conditions.

6. The applicant had three foster placements, all of which broke down and the applicant was then placed in residential care. Problems with the applicant had persisted and included mental issues, engaging in physical attacks and self-harm. A report from the applicant's guardian *ad litem*, prepared for the District Court in January 2023 sets out the ongoing concerns:-

(i) The applicant has expressed suicidal ideation on a number of occasions, has superficially self-harmed and, on 17 November 2022, reported she had taken an overdose of medication. There is significant concern that the applicant may actually cause serious harm to herself even if this is not her true intention.

(ii) The applicant has placed herself in unsafe situations. She has very little understanding of self-safety and, thus, there is a high risk in respect of how she interacts with males. There are concerns that the applicant has and continues to engage with older males online (this has recently been referred to An Garda Síochána).

(iii) The applicant has had a number of episodes of being missing from care. During the summer of 2022, the applicant absconded from staff whilst shopping in a shopping centre. She remained missing for a few days and there were reports that she had stayed in Dublin City Centre with a male and taken "hard drugs".

(iv) A very serious incident took place on 5 January 2023 where the applicant was reportedly collected by four males and asked to engage in "sex" with them. The applicant reported this.

(v) The applicant's life skills are nowhere near where they need to be and there is significant concern given that she will be an adult in November 2023.

(vi) The applicant struggles in her relationships with others and can become abusive to staff, engaging in assault and causing property damage.

Relevant statutory provisions

7. Section 23F of the Act of 1991 provides as follows:-

"(1) The Child and Family Agency shall not apply for a special care order in respect of a child unless it is satisfied that the child has attained the age of 11 years and

it has made a determination, in accordance with this section, that the child requires special care.

…

(7) Where a family welfare conference—

(a) has been convened in accordance with subsection (5) and the (Child and Family Agency) has had regard to the recommendations, if any, notified under section 12 of the Act of 2001, or

(b) …

and the (Child and Family Agency) is satisfied that there is reasonable cause to believe that the child requires special care it shall make a determination as to whether the child requires special care.

(8) Where the (Child and Family Agency) determines that there is reasonable cause to believe that for the purposes of protecting the life, health, safety, development or welfare of the child, the child requires special care the (Child and Family Agency) shall apply to the High Court for a special care order."

8. It is clear that the wording of subss. (7) and (8) is mandatory in nature. I will be referring to authorities which support this interpretation.

9. Section 23H refers to the making of special care orders by the High Court:-

"(1) Where the High Court is satisfied that—

…

the High Court may make a special care order in respect of that child.

(2) A special care order shall specify the period for which it has effect and that period shall not exceed 3 months from the day on which that order is made unless that period is extended under section 23J and shall—

…

and the High Court may make such other provision and give directions, as it, having regard to all the circumstances of the child, considers necessary and in the best interests of the child."

10. Thus, although the High Court has discretion in making a special care order, this discretion is to be exercised having regard to the circumstances and needs of the child. It follows from this that the non-availability of a placement for a child in a special care unit cannot be a reason for the court not to make a special care order.

Factual background

11. On 13/14 December 2022, the National Special Care Referrals Committee met to consider the applicant's case. The following decision was reached:-

"The determination of the National Special Care Referrals Committee is that the case of L.M. now fulfils the criteria for admission to special care. Please be advised that the referral information has been forwarded to the service director for special care for determination in accordance with the legislation."

12. This determination ought to have "triggered" the provisions of s. 23F(7) of the Act of 1991 but this did not happen. As no determination was made under subs. (7), no application was made to the High Court as is provided for in subs. (8).

13. In the course of the proceedings, the applicant served on the CFA a Notice to Admit Facts as follows:-

(1) The respondent's service director, National Residential Care, has never refused to make a determination under s. 23F(7) of the Childcare Act 1991 where same

has been recommended by the respondent's Special Care Committee unless there has been a material change in circumstances in respect of the presentation of the relevant child in the period between the decision of the Special Care Committee and the determination of the service director, National Residential Care.

This fact was admitted by the CFA.

(2) Since the judgment in *A.F. v. Child and Family Agency* (Unreported, 28 January 2019, Faherty J.), the respondent's service director, National Residential Care, has always made a determination under s. 23F(7) within three weeks of the Special Care Committee's decision that a child requires special care.

This fact was admitted by the CFA.

(3) Since the judgment in *A.F. v. Child and Family Agency* [2019] IEHC 435, the respondent has always moved any application for a special care order within three weeks of the Special Care Committee's decision that a child requires special care.

This fact was admitted by the CFA.

14. It should be noted that, as regards (1) above, there has been no "material change in circumstances" of the applicant.

Application for Judicial Review

15. On 3 February 2023, the High Court (Phelan J.) granted leave to the applicant to seek the following reliefs by way of judicial review:-

(1) An order of mandamus directing the respondent to apply to the High Court for a special care order in respect of the applicant pursuant to s. 23H of the Act of 1991 forthwith.

(2) A declaration that the decision and/or policy of the respondent to defer the making of an application for a special care order is unlawful when the CFA has, as of 14 December 2022, determined that the applicant requires special care.

16. When the judicial review proceedings were initiated, it was believed that the CFA had made a determination under subs. (7). When the applicant became aware that this was not the case, an amendment of the statement of grounds was delivered seeking certain additional reliefs including:-

"If necessary, an order of mandamus directing the respondent to make a determination that the applicant requires special care pursuant to s. 23F(7) of the Act of 1991 forthwith."

17. The notice parties (save the first named notice party) were joined to the proceedings out of a concern that if the CFA could lawfully defer meeting the requirements of subss. (7) and (8) because of the lack of a placement, this would render the statutory provisions unconstitutional. Hence, the following relief was sought:-

"If necessary, insofar as the decision and/or policy of the respondent to defer the making of a determination under s. 23F(7) and/or defer the making of an application for a special care order was necessitated by s. 23F of the Childcare Act 1991, a declaration that the said section is repugnant to the Constitution of Ireland 1937."

Submissions

18. The applicant submitted that the wording of s. 23F(7) and (8) makes it mandatory for the respondent to make a determination and then apply to the High Court for a special care order. It was submitted that there was no statutory provision to the effect that these steps could be deferred in circumstances where there was no place available in special care for the applicant. In support of these submissions, reliance was placed on two earlier decisions of the High Court, firstly, *A.F. (a minor, suing by his guardian ad litem David Kennedy) v. Child and Family Agency* (Unreported, 28 January 2019, Faherty J.) and, secondly, *A.F. (a minor, suing*

by his guardian ad litem David Kennedy) v. Child and Family Agency [2019] IEHC 435. It should be noted that both of these decisions concern the same applicant, though the decision of Faherty J. also included another applicant, C.K.

19. The respondent maintained that this application was moot as the applicant was now the subject of a special care order and had been placed in special care.

20. The statement of opposition filed by the CFA states:-

> "20. …insofar as the respondent is unable at present to accommodate [L.M.] in a special care unit, this is not a result of any deliberate choice or policy on the part of the respondent, but rather it was due to a lack of availability of such placements. In turn, and as explained in the evidence to be adduced by the respondent, that lack of availability is a function of factors that are outside the control of the respondent."

and

> "29. It is not possible, as yet, to bring an application for special care in this case for the reasons set out and explained in evidence in the affidavit sworn on behalf of the respondent. By way of summary:
>
> (a) There are only three special care units in the State.
>
> (b) The number of beds that can be filled in those units is limited in two main ways. First there is the physical capacity of the units; and second, there is the staffing capacity to provide its safe care to children who are accommodated.
>
> (c) Special care units must be registered with the Health Information and Quality Authority ("HIQA"), and HIQA must be satisfied, *inter alia*, that the number of residents of which registration is sought and approved is safe. The agency is not entitled to operate a unit in a manner that

disregards the terms and conditions attaching to the registration and approval of that unit by HIQA, or in a way that otherwise fails to comply with the relevant legislation, regulations or standards in that regard.

(d) It is not safe for the children or staff to operate a special care unit without an adequate level of suitably qualified staff.

(e) The recruitment and attention of staff for special care units is and has been profoundly problematic. Staff require a high level of expertise and commitment and are employed to work in an environment that is very challenging and where injuries are far more common than in other children's residential units. In addition, the remuneration and general terms of employment for staff are subject to public service constraints that are not set by the respondent, but which must be adhered to by the respondent.

30. As a result, for reasons that are outside the control of the respondent, admissions to special care units are dependent on the availability of places, and, in this case, that lack of availability means that at present it is not possible to accommodate L.S. in special care."

In support of these submissions, a lengthy and detailed affidavit was filed by Mr. William O'Rourke director of Ballydowd and Coovagh House special care units. This affidavit set out the resource and staff issues facing the CFA and also the concerns about regulations being enforced by HIQA.

21. The CFA also submitted concerns about obtaining special care orders from the High Court which they were not in a position to implement, thus being vulnerable to possible contempt proceedings.

22. The first named notice party is the mother of the applicant. In her submissions she effectively adopted the submissions made by the applicant. However, it was observed that some 113 days had passed between the decision of the committee and the applicant being placed in special care.

Consideration of submissions

23. The first issue to be addressed is mootness. I will refer to the oft cited passage from the judgment of McKechnie J. in *Lofinamakin v. Minister for Justice and Ors* [2013] IESC 49 but before I do so it is necessary to note that the instant case is not a "stand alone" case but one of many that raise, effectively, the same issue. Thus, though the issue may not be live in the instant case it is live in several others so determining this case is not an academic exercise but will have a direct bearing on many other cases. In *Lofinamakin* McKechnie J. stated:

> "82. From the relevant authorities thus reviewed and leaving aside the issue of costs which is dealt with separately …, the legal position can be summarised as follows:
>
> (i) A case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing.
>
> …
>
> (v) That rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two-step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness.
>
> (vi) In conducting this exercise, the court will be mindful that in the first instance it is involved in potentially disapplying the general practice of

supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved. It will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice.

(vii) Matters of a more particular nature which will influence this decision include:-

(a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for the case to retain its essential characteristic of a legal dispute;

…

(f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law."

24. I am satisfied that in the circumstances of this case, being one of many, that I should not treat the issue as being moot. Further, I note that in *A.F*. which was heard alongside another application, C.K., Faherty J. stated at p. 69:

"191. I should say at this juncture, that C.K.'s circumstances have changed since the hearing of these judicial review applications on 10th January 2019. C.K. is now the subject of interim special care order, made on 23rd January 2019.

192. On 25th January 2019, the Court heard submissions as to whether C.K.'s proceedings were moot as a result of his now being the subject of an interim special care order.

193. For the reasons set out by the court in an *ex-tempore* ruling delivered immediately before this judgment was delivered, the court is not satisfied to deem C.K.'s proceedings moot."

Unfortunately, we do not have the transcript of this *ex-tempore* ruling but it is the case that, notwithstanding the applicant C.K. being the subject of a special care order, the proceedings were held not to be moot.

25. Further, in *A.F. (a minor) suing by his guardian ad litem (David Kennedy) v. Child and Family Agency* [2019] IEHC 435 the issue of mootness was further considered. It should be noted that the applicant in this case was the same person as the applicant in the earlier case decided by Faherty J. In this case, on mootness, O'Regan J. stated as follows:-

"19. The issue as to whether or not the proceedings are moot was raised at the outset and a ruling was given to the effect that the declaratory relief as to the import and effect of s.23F(8) was not moot. In this regard the court was alert to the fact that there is a discretion vested in the court notwithstanding that the issue might be considered moot and furthermore in accordance with the judgment of MacMenamin J. in *Mc G.* aforesaid if the understanding of the relevant section by the CFA is incorrect this would result in a procedural flaw having ongoing affects not only potentially on the within applicant who is currently aged 16 but also on other cases and therefore a determination on the issue is in the interests of the proper administration of justice..."

26. I will now consider the two authorities relied upon by the applicant. Firstly, I refer to the comprehensive judgment of Faherty J. in *A.F. (a minor) suing by his guardian ad litem (David Kennedy) v. Child and Family Agency* (Unreported, 28 January 2019, O'Flaherty J.). As mentioned earlier, the application of A.F. was heard at the same time as another similar application by C.K. At para. 3 the court stated:-

"The core issue in both proceedings is whether the Child and Family Agency ("the CFA"), having made a determination through its National Special Care Referrals Committee ("the Referrals Committee") that the applicant children are at risk such that they require a special care placement, and then deliberately delay making the determination required pursuant to s. 23F(7) of the 1991 Act, without being in breach of its statutory obligations under the Act."

27. In this case the respondent acknowledged that a determination had not been made in either the case of A.F. or C.K. because there were no placements then available. In support of its decision the respondent relied upon an affidavit which, in content, is very similar to the affidavit relied upon in the instant case.

28. Faherty J. had to consider the interpretation to be given to s. 23F(7) of the Act of 1991. She stated:-

"125. The fundamental rule is that the Court is to give the words used in the relevant statutory provisions their ordinary and natural meaning. It is only if the intent of the Oireachtas is not discernible from the ordinary and natural meaning of the words that the Court should embark on other interpretative tools, for example a purposive or teleological approach. This principle applies to remedial social statutes as equally as to other statutes."

and at p. 52:-

"139. …applying the literal and ordinary meaning of the words in s. 23F(7), once the CFA is satisfied that there is reasonable cause to believe that the conditions set out in s. 23F(2)(a), (b) and (c) are met, and where the procedural requirements of s. 23F(3) – (6) have been satisfied, if the CFA is satisfied pursuant to s.23F(7) that there is reasonable cause to believe that the child requires special care it

must make the necessary determination. This is evidenced by the use of the word "shall" in s. 23F(7)…"

Faherty J. could have concluded her judgment at this point but, helpfully, considered the relevant section applying a purposive or teleological approach. In doing so Faherty J. considered four options put forward by the respondent.

29. The four options put forward by the respondent were as follows:-

(i) The Referrals Committee could defer consideration of all special care applications until a special care placement is available;

(ii) The respondent could proceed to make the requisite determination as soon as the Referrals Committee has deemed that a child meets the criteria for special care, but the respondent would hold off making an application to the High Court until a placement comes available;

(iii) As soon as the Referrals Committee has deemed that a minor meets the criteria for special care, the respondent should without delay make a determination in accordance with s. 23F(7) and, thereafter, again without delay make an application to the High Court for a special care order;

(iv) The respondent does not make a determination under s. 23F(7) in respect of any case until a special care placement is available.

30. In considering these options, Faherty J. stated:-

"185. In my view, whether adopting a literal or purposive approach, the CFA's statutory obligation where the pre-conditions of s. 23F(2)(a) - (c) are met and the procedural steps set out in s. 23F(3)-(6) complied with, is to make a determination as to whether the child in question requires special care. The emphasis is s. 23F(7) is the *requirement* for special care. To my mind, where, as in these cases, it is expressly acknowledged by the CFA that A.F.'s and

> C.K.'s circumstances require special care, I cannot accept that the policy of the CFA to defer the making of a determination under s. 23F(7) until a placement becomes available is consistent with the plain and ordinary reading of s. 23F, or indeed with the purpose of the 1991 Act or Part IV A thereof."

31. This cannot be considered as anything other than a clear statement of the law. However, notwithstanding the judgment given by Faherty J. in the case of *A.F.*, although a determination was made under s. 23F of the Act of 1991, no application was made to the High Court for a special care order under s. 23F(8) as there was no placement available. This was the subject of the second authority which I will now refer to.

32. In *A.F. (A Minor) v. Child and Family Agency & ors* [2019] IEHC 435, O'Regan J. considered the provisions of s. 23F(8). O'Regan J. referred to the judgment of Faherty J. and stated that the respondent had argued that the Oireachtas was aware, when implementing s. 23F, of significant difficulties encountered by the respondent in recruiting staff for the purposes of providing special care facilities. O'Regan J. stated:-

> "25. The argument aforesaid was unsuccessful before Ms. Justice Faherty and that order has not been appealed. Nevertheless, the same arguments are made before this Court in respect of subs. 8."

33. Having considered the arguments of the respondent in respect of the obligations imposed by s. 23F(8), O'Regan J. stated:-

> "29. … Rather, I am of the view that in accordance with the respondent's own guidelines the subsection requires some element of expedition in making the application to the High Court and any delay in the making of such application should be referable to the process of proceeding with the application before the High Court (for example some delay in the swearing of the requisite affidavit) and should not be referable to circumstances entirely unrelated to the Applicant

or the determination that a need for special care exists as made by the C.F.A., namely, the availability of a fully staffed placement and prioritisation of an individual applicant for such placement.

30. The fact that it may be in ease of a High Court list system not to make such application until a fully staffed placement is available and an applicant will be afforded priority in respect of that placement is not in my view a relevant consideration in or about an understanding of the true meaning and intent of subs. 8 (see the Interpretation Act 2005)."

and

"**Conclusion**

33. In conclusion in all of the circumstances I am satisfied that the deliberate and intentional policy of the respondent not to take any steps to apply to the court as per the mandate incorporated within subs.8 at a time when the requirements of subs. 1 to subs. 7 of s. 23F have been fulfilled (based on available placement and priority status) is inconsistent with the meaning of subs. 8. Further in circumstances where there has been a full compliance with subs. 1 to subs. 7 with a failure to take any step whatsoever in fulfilment of the mandated requirement of subs. 8, for a period of nineteen days, without any timescale or explanation connected to the process of such application proffered for the making of the application to the High Court, is unlawful."

34. In the case of the applicant, given the decision of the Committee as per the letter of 14 December 2022 referred to above and the absence of a "material change in circumstances" (as referred to in the notice to admit facts), the CFA was under a statutory duty to make the determination referred to in s. 23F(7). Having made that determination, the CFA was obliged

to make an application to the High Court for a special care order under s. 23F(8). The absence of a placement did not relieve the CFA from these obligations. This is clear from the wording of the relevant sections of the Act of 1991 as found in the judgments of Faherty J. and O'Regan J.

35. It is clear from ss. 23F(7) and (8) and the provisions of s. 23H in relation to the making of special care orders that the central determining factor is what is in "the best interests of the child". There is no statutory provision to the effect or by implication that the failures of others to provide resources for the provision of placements should be visited on a child requiring the making of a special care order.

36. I have reached the same conclusion as did Faherty J. and O' Regan J. as to the interpretation of s. 23F of the Act of 1991. It, therefore, follows that the applicant's case of potential unconstitutionality of the relevant section does not arise.

Conclusion

37. By reason of the foregoing, I will make the following declarations:-

(i) A declaration that the decision and/or policy of the CFA to defer the making of a determination under s. 23F(7) of the 1991 Act by reason of the non-availability of a placement is unlawful.

(ii) A declaration that, having made a determination under s. 23F(7) of the Act of 1991, a failure to make an application to the High Court for a special care order under s. 23F(8) by reason of the lack of availability of a placement is unlawful.

38. As this judgment is being delivered electronically, I will put this matter in for mention on 16 June 2023. Any applications concerning costs should be made by submission (not more than 2,000 words) to be filed no later than 9 June 2023.