

THE HIGH COURT

[2015 No. 1796 SS]

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND 1937

AND IN THE MATTER OF JMCg AND JMCg, CHILDREN

AND IN THE MATTER OF THE CHILDCARE ACTS 1991 TO 2013

BETWEEN

SMCG AND JC

APPLICANTS

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 17th day of November, 2015

1. This is an inquiry into the lawfulness of the detention of the two children named in the title hereto, a boy aged fourteen and a girl aged five. By District Court order made pursuant to s. 17(1) of the Childcare Act 1991 (the "Act") (as amended) on the 29th October, 2015, the children were taken into the care of the Child and Family Agency for a period of 29 days. The children have been placed with foster parents and continue to have contact with their parents.
2. The first applicant is the mother of the children with whom they were living at the time of the order, and the second applicant is their father. The application was brought by the applicant, and the father of the children was named as notice party. In the course of the hearing before me counsel on his behalf sought to be joined as co-applicant and I made that order in recognition of the fact that he had sought to engage with the District Court hearing by which the children were taken into care, and because he has had ongoing frequent contact with the children since he and their mother ceased living together.
3. The parents of the children are not married to each other, and this has the consequence that it is the mother alone who may assert constitutional rights to the care and custody of her children. The father's rights stand as a matter of common law and statute.
4. Both parents were separately represented by solicitor and junior and senior counsel, as was the Child and Family Agency ("the Agency").
5. A preliminary objection has been raised by the Agency with regard to the appropriateness of the Article 40.4.2 procedure in childcare matters, or more specifically in the circumstances giving rise to this application. A second preliminary objection is that the applicants wrongly seek to rely on asserted breaches of their constitutional rights to fair procedure, and that as a matter of first principle an application for an inquiry under Article 40.4.2 must be grounded on the alleged breaches of the rights of the person alleged to be in unlawful detention. It is argued that the parents of the children may not seek this inquiry on foot of an alleged breach of their rights, and that should such an approach be permitted the court could find itself faced with a conflict between those interests of the parents, and the best interests or welfare of the children.

Background

6. An application for interim care orders in respect of the two children was listed before the Dublin Metropolitan District Court on Thursday 29th October, 2015. This was the first time an application had been made to take them into the care of the Agency. The mother obtained legal aid for the purposes of the application only on the morning of the hearing, the 29th October, 2015, and because she did not have the benefit of a legal aid certificate in the days before the appointed date for hearing it was not possible for her solicitor, Mr. Cahill, to meet her in advance of the hearing or to obtain copies of the relevant paper work from her or on her behalf.
7. At approximately 10 am on the morning of the hearing the solicitor acting for the Agency furnished detailed social work reports in respect of the children to the solicitor acting for the mother, and approximately three quarters of an hour later he furnished the other reports on which the Agency intended to rely, being medical reports in respect of the children. In all 20 pages of expert reports were furnished, and it is fair to observe that the social work reports in particular contained a significant amount of detail with regard to the care of the children and to the engagement by the relevant social workers with the children since the first referral to the Department of Social Welfare in June, 2013. The report recommended a particular course of action on very detailed grounds and by reference to specific dates and events on which matters of concern were said to have come to the attention of the social workers.
8. The case was called in the list sometime around 10.30 am and Mr. Cahill met his client immediately after the call-over with a view to discussing the contents of the social work reports, taking her instructions in relation to the factual matters therein detailed, and in general with regard to the application. The evidence is that Mr. Cahill had approximately fifteen minutes in which to conduct this discussion and take instructions from his client.
9. Mr. Cahill prudently sought to discuss the matter with the solicitor acting for the Agency and he, having taken instructions from his client, acceded to a request to consent to the matter being adjourned for a period of a week.
10. At 11.30 am the matter was called again before the District Judge and an application for an adjournment was made on consent, the District Judge being told that the parties had had discussions with regard to the duration of the adjournment and that they had agreed that an adjournment for one week would be appropriate.

11. However, the District Judge refused to grant the adjournment and directed that the matter should proceed. Mr. Cahill attempted to explain the difficulties giving rise to his application for an adjournment, and also indicated to the Judge that his brief conversation with Mr. C the father of the children led him to the view that he too required representation, and that his degree of literacy was such that it did not seem likely he could properly represent himself.

12. Mr. C the father of the children supported the application for the adjournment and informed the District Judge that he had made application for legal aid some days previously, and had been assured that his application was being treated as one of priority. He explained that he suffered from a degree of illiteracy and from significant physical ailments, and was unable to deal with the application without legal assistance.

13. The District Judge did permit Mr. Cahill to take further instructions from his client after the matter was called at 11.30 but the evidence is that no more than five minutes were given for that purpose, and that Mr Cahill says he was unable to fully read through the reports with the mother and take instructions in relation to the detailed matters contained therein in that time.

14. The matter then proceeded to a hearing over four hours after which the District Judge made an order taking the children into the care of the Agency for the statutory period of 29 days.

15. Noonan J. by order of the 6th November, 2015 ordered the respondent in accordance with Article 40.4.2 of the Constitution to certify in writing the grounds of the detention and the certificate of Ms. Soye, social worker, dated the 10th November, 2015 identifies the basis of detention as the interim care order under s. 17(1) described above.

Arguments

16. The respondent makes a number of principled objections to the application and asserts in particular that the procedure provided under Article 40.4.2 is not appropriate to deal with the complex and factually diverse circumstances that arise in childcare proceedings. It is not asserted that an inquiry may never be warranted in a challenge to an order taking a child into care, but rather that the correct approach is that in general judicial review is a more suitable procedural means by which a decision of a district judge under the Act may be challenged. It is argued more specifically that the complaints giving rise to these proceedings are of a type most commonly found in applications for judicial review.

17. It is argued in particular that there a number of features of the procedure provided by Article 40.4.2 which make it particularly unsuitable for the challenge at hand, as the result of a determination of a judge following an inquiry is either to order or refuse a release, and that even when an order has been found to be invalid, it may not always be appropriate to order an immediate release into the care and custody of a parent or other person as the case may be. It is argued in that context that a more nuanced approach would often be required by which regard could be had to the individual factors which are to be weighed in assessing the best interests of the child or children and how they might appropriately be met.

18. It is submitted that disquiet has been expressed in a number of recent decisions of the High Court with regard to the appropriateness of the procedure and counsel for the respondent points to the *dicta* of Peart J. in *W v. The Health Service Executive* [2014] IEHC 8 at para. 59:

"I would wish to add my own voice to those in favour of not pursuing what is essentially a challenge on the merits to the making of a care order in the District Court by way of an application for release under Article 40.4.2 of the Constitution. First of all, there is the right of appeal to the Circuit Court where the unsuccessful party wishes to appeal on the merits. That appeal is by way of a complete re-hearing. But where the complaint relates to the process by which, or the fairness of the hearing leading to, the order being granted, that is best dealt with by way of judicial review."

19. Peart J. referred to the ex tempore judgment of Birmingham J. in *Courier v. The Health Service Executive* (Unreported, High Court, 8th November, 2013) where he quoted from a judgment of Mumby J. in the English High Court in *S v. The London Borough of Haringey* [2003] EWHC 2734 (Admin) to the effect:

"Applications for habeas corpus are to be deprecated where care proceedings are afoot and where the purpose of the application is to challenge the exercise by the local authority of its powers. The proper form for such challenges is within the care proceedings."

20. Birmingham J. expressed "unease" about the appropriateness of Article 40 as a method of dealing with issues around childcare. At p. 14 of the transcript of the judgment of Birmingham J. he said the following:

"Article 40 is a very powerful remedy. It is of the essence of the Article 40 procedure that matters are dealt with expeditiously. However, when the issue is whether a child or properly be in the care of the HSE, the situation is quite different because there the emphasis should be on ascertaining what is in the child's best interest, and asserting that may take some time. It may perhaps involve obtaining expert reports in some cases."

21. Counsel for the applicants rely on the judgment of O'Malley J. in *KA v. The Health Service Executive* [2012] 1 IR 794 where she ordered the release of two children on the basis that they were not lawfully in the custody of the HSE on foot of extensions of interim care orders made pursuant to the provisions of the Childcare Act 1991 (as amended). She came to that decision because she considered that the extension orders were invalid in the absence of evidence on foot of which they could be properly made. The respondent had argued that the matter was not appropriate to the jurisdiction of the Court under Article 40.4.2 and O'Malley J. rejected that argument.

Discussion

22. I accept the argument of counsel for the applicants that there is a long history in the jurisprudence of our courts of the use of the procedures provided in Article 40.4.2 in matters relating to the welfare of children. Two Supreme Court cases of note are *Re: Tilson* [1951] IR 1 where the Court made a direction for the return of the children to their mother and did so under its jurisdiction in Article 40.4.2 and *The State (D & D) v. Groarke* [1991] IR 305 where the Court ordered the return of the child to the custody of its parents when it had determined in proceedings under Article 40.4.2 that the order by which they were taken into the care of the Health Board was unlawful.

23. The procedure was also used in the judgment of the Supreme Court in *N v. The Health Service Executive* [2006] 4 IR 374, a case concerning a child who had been placed for adoption by parents who were at that time unmarried and subsequently married before the adoption order was made.

24. No disquiet was expressed with regard to the appropriateness of the remedy by the Supreme Court in either of these cases, nor by O'Malley J. in *KA v. The Health Service Executive* and it is clear that an argument of unsuitability was made to her.

25. I consider that as the weight of authority is in favour of the proposition that an inquiry may be warranted in childcare matters, I will leave to another court a more full consideration of the extent to which the disquiet expressed in the cases mentioned may need to inform the jurisprudence. I also note that the Supreme Court jurisprudence is not mentioned in the judgment of Peart J nor in the *ex tempore* ruling of Birmingham J.

26. The primary ground on which the respondent claims that the procedure under Article 40.4.2 is inappropriate for the complex and sensitive factual and welfare issues that arise in childcare proceedings is what might be called the bluntness or absolute nature of the order that can result therefrom. However, the source of this disquiet can readily be dealt with by adopting the careful approach of the Supreme Court in *N v. HSE*, by which a phased return of the children was considered more appropriate, *O'Malley J. in KA v. The Health Service Executive* invited the parties to make submissions as to how the interest of the children would be dealt. A similar approach was found in *The State (D & D) v. Groarke*.

27. In a different context, the Supreme Court in *FX v. Clinical Director of the Central Mental Hospital* [2014] IESC 01 also addressed the question whether the Court could put a stay on an order for release under Article 40.4.2 once it had determined that the detention of a respondent was unlawful. While the Court came to the view that there was no provision in the Constitution for a stay, it did accept at para. 79 that a jurisdiction did exist "*in the process of controlling the release, for the purpose of protecting the person who is incapable of protecting themselves*".

28. Thus I consider that a blunt order for immediate release to a finding of invalidity is not the necessary or inevitable response to a finding that an order for detention is invalid. The engagement of the court with the immediate interest or welfare of the children following the making of an order for release has been shown to be jurisdictionally possible, and indeed must now be regarded as constitutionally mandated by virtue of the provisions of the new Article 42A of the Constitution.

29. Furthermore, I consider that the argument that the High Court is not equipped on an inquiry under Article 40.4.2 to engage with the highly sensitive nature of the welfare of young children is misplaced, particularly when one considers the extent to which the procedures have been used in matters concerning the liberty of persons suffering from a mental disability, and the protection afforded by the Article, as noted in the judgment of Hogan J. *FX v. Clinical Director of the Central Mental Hospital* [2012] IEHC 271 is a "singular" one, and a reflection of the "*Constitution's unrelenting commitment to the protection of personal liberty*".

Can the applicants rely on an alleged frailty of process of their procedural rights?

30. The second principled argument made by the respondent is that the applicants may not found their application for the release of the children on the grounds that either or both of them were denied fair process in the hearing by the District Court.

31. No response of substance is made by the respondent to the argument that the applicants were denied fairness of process, but it is argued that the complaints are those of the denial of the rights of the parents, and not those of the persons in detention.

Discussion

32. It is clear that the issues at stake in the childcare application were of fundamental importance to the applicants as parents, and to the place where their children would continue to live. The fact that the Agency did not consider the children to be at immediate risk is apparent from the fact that the solicitor for the Agency was prepared to, and did in fact, consent to the adjournment of the application for a period of one week. The District Judge has full jurisdiction to regulate the procedures in her own court, and it is well established as a matter of law that a superior court will not interfere with the discretion of another court in granting or refusing to grant an adjournment. However, the matter before the District Judge was not a mere matter of her acceding to an application for an adjournment, but was made to her on specific grounds and on the basis that neither applicant was in a position to defend the application, in the case of the first applicant because she had not had an opportunity to fully instruct her solicitor or consider the social work and medical reports furnished that morning by the Agency. The second applicant had no representation at all, and pointed out to the court that his literacy was such that he could not meaningfully engage with the process at all.

33. I consider that the fact that the application for an adjournment was made on consent ought not to have been ignored by the District Judge in the context of the stated and accepted proposition that each of the applicants required further time to more properly prepare their response to the case and to consider the documentary evidence tendered in support of the application.

34. Having regard to the nature of the application as a result of which the children could be, and were in the events, taken from the daily care and custody of their mother, the requirements of fair procedure were particularly onerous, and this had been acknowledged by all parties. Each of the parents had an entitlement to be given an opportunity to fully vindicate their rights, in the case of the mother her constitutional right to the custody of her children, and in the case of the father his established rights of access and his right to continue to enjoy an ongoing relationship of frequent and close contact with them.

35. I consider that the rights of the parents to fair process were not fully respected by the District Judge.

36. The respondent raises the objection that the applicants may not rely on a failure to respect their rights to fair process to establish that the detention of their children was unlawful. The Agency argues that the logic of this argument places the parents in a direct conflict of interest with their children, and that the court can accede to an application under Article 40.4.2 only if the rights of the children are shown to have been infringed.

37. This argument in my view is conceptually flawed. The Constitution presumes that the welfare of children is primarily to be found within the family, or in the case of unmarried parents to be found in the custody care and company of their mother. This is clear in a number of cases for example *G v An Bord Uchtala* [1980] 1 IR and the terms of the Constitution itself, and is so well established as not to require repeating.

38. Because of the constitutional position of the mother, the welfare of a child must always be considered as intrinsically bound up with the relationship of that child to his or her mother and a court when considering questions of the best interest or welfare of a child must also take into consideration the nexus of the relationship between mother and child, or, where relevant, the nexus created by the relevant family unit as understood in the constitution.

39. In *DOH v HSE* [2007] IEHC 175 Abbot J accepted that the word "custody" was not to be conflated with private law definitions and understandings of the word, and for the purposes of s. 4(2) of the Act of 1991 the parent having custody is not necessarily to be taken in a literal sense. While the rights of the father of the children are not entitled to constitutional protection, the evidence points

unequivocally to him having rights of custody in that broad sense, although it cannot be argued that the family unit as envisaged by the constitution can be said to encompass unmarried parents who do not live together.

40. I consider that the interests of the parents, or of an unmarried mother of children, while they may not always coincide with the interest 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.

Jurisdiction argument

45. Counsel for the first applicant makes the point that the order was made without jurisdiction. The evidence is that the applicants applied for an adjournment and the application was supported by the solicitor acting for the Agency. It is said the District Judge "directed" the Agency to proceed. I reject the argument by the first applicant that the District Judge in essence moved the application herself, and that once the solicitor for the Agency had accepted that the application could be adjourned for a week, that the direction of the District Judge that the case would proceed was in essence an impermissible step by her by which she directed the application and became formally the applicant. I consider this argument of the first applicant to be contrived, and the evidence does not point to the District Judge conducting the case herself, there is no suggestion that she called the witnesses and led them through their examination-in-chief, or that the solicitor for the Agency declined to accept her invitation or direction that he proceed. Therefore, I reject the argument by the applicants that the application is flawed in a procedurally fundamental way, in that it was not moved by the Agency as is required by s. 17(1).

Is judicial review an appropriate remedy?

46. The respondent argues that the appropriate remedy available to the applicants is to seek to quash the decision of the District Judge by way of judicial review. Having regard to the view that I take as to the frailty of the process afforded to the applicants by the District Judge in her determination of the issue before her, it cannot be doubted but that judicial review would be an appropriate remedy by which the parents of these children could have vindicated their rights.

47. Counsel for the respondent also points me to the decision of the Supreme Court in *FX v. Clinical Director of the Central Mental Hospital* where Denham J. at para. 65 pointed to the "exceptional" nature of the jurisdiction of the Court under Article 40, and that the route of the constitutional and immediate remedy of habeas corpus is not always the appropriate approach.

Discussion

48. The procedure set out in the Rules of the Superior Courts for the bringing of an application for judicial review does not in general envisage the speed or expedition met by an Article 40.4.2 inquiry. While I accept that a court can, and does in a suitable case, accelerate a hearing by way of judicial review, the process envisages the exchange of full affidavits and not the more truncated process available in an inquiry under Article 40.4.2. Furthermore, judicial review is a discretionary remedy and argument such as delay or other discretionary factors may have the effect that an applicant is denied a remedy albeit a certain procedural or other frailty has been identified in an order. No discretion is found in the procedure under Article 40 and once a court finds that an order of detention is invalid it must direct the release of the relevant person, albeit it may do so in a phased way. This is clear from the judgments of the Supreme Court in *State (D & D) v. Groarke and in FX v Clinical Director of the Central Mental Hospital* where the Supreme Court recognised that the discretion did not lie to grant a stay on an order, and that the practical effect of the stay could be achieved by a phased release. Thus whilst counsel for the respondent is correct to identify the absolute nature of the remedy available under Article 40.4.2, and that it ought not be lightly engaged, I consider that that absolute nature may be one of the factors which makes it particularly attractive from a procedural point of view, when the question engaged by the court is a single question relating to the validity of a detention, and the court does not require to consider factors which might engage its discretion.

Conclusion

49. I consider that the remedies of judicial review and the conduct of an inquiry under Article 40.4.2 may not always be mutually exclusive, and that the availability of a remedy by way of judicial review does not of itself preclude the court from engaging an inquiry under Article 40.4.2. A breach of constitutional rights is asserted and in this case I consider that the remedy is suitable and sufficiently flexible to meet the constitutional requirements of considering the welfare and interests of the children and the rights of their mother in particular to their care and custody.

50. I am satisfied that the order was not lawfully made and was made without affording an opportunity to the applicants to fully engage with the evidence. Because the question before the District Court related to the day-to-day relationship and care of the children by their mother, and the ongoing contact between the children and their mother, the frailty in the making of the order impacts on its validity in a way that failed to engage the welfare of the children and their place in a family unit.

51. Further, I accept the argument of the first applicant, as stated by O'Malley J. in *KA v. The Health Service Executive* there is an "inherent continuity" in the childcare process, that a flaw at an early stage in the process can have a detrimental effect on the process as a whole.

52. Accordingly, I will direct the release of the children and will hear counsel as to the means by which this may be achieved.