

APPROVED

[2024] IEHC 278



THE HIGH COURT  
JUDICIAL REVIEW

2023 1212 JR

BETWEEN

B.

APPLICANT

AND

CHILD AND FAMILY AGENCY

RESPONDENT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 16 May 2024**

**INTRODUCTION**

1. This judgment is delivered in respect of an *inter partes* application for leave to apply for judicial review. The High Court (Hyland J.) by order dated 22 January 2024 directed that the leave application be heard on notice to the respondent. The leave application came on for hearing before me on 3 May 2024 and judgment was reserved to today's date.
2. These judicial review proceedings relate to the care and custody of a seven year old child. These proceedings are taken by the child's father. To protect the

NO FURTHER REDACTION REQUIRED

anonymity of the child, the family members will be referred to simply as “*the father*” and “*the child*”, respectively, rather than by their actual names. To avoid the risk of jigsaw identification, the names of the health care professionals, who are involved in the care of the child, have been omitted from this judgment. For similar reasons, the gender of the child is not referred to in this judgment.

3. The child currently resides with a foster family. The child’s birth mother is not involved in these judicial review proceedings.

### **LEGAL TEST GOVERNING LEAVE APPLICATION**

4. The legal test governing an application for leave to apply for judicial review has recently been considered by the Supreme Court in *O’Doherty v. Minister for lth* [2022] IESC 32, [2022] 1 I.L.R.M. 421. The Chief Justice, O’Donnell C.J., explained at paragraph 39 of the judgment that the threshold to be met is that of arguability:

“[...] The threshold is a familiar one in the law. It is, in essence, the same test which arises when proceedings are sought to be struck out on the grounds that they are bound to fail, or the test that is normally required in order to seek an interlocutory injunction. It must be a case that has a prospect of success (otherwise it would not be an arguable case) but does not require more than that. While, inevitably, individual judges may differ on the application of the test in individual cases at the margins, the test itself is clear. This test – it must be stressed – is solely one of arguability: it is emphatically not a test framed by reference to whether a case enjoys a reasonable prospect of success, still less a likelihood of success. Any such language obscures the nature of the test and may on occasion lead to misunderstanding, appeal and consequent delay.”

5. The Chief Justice also confirmed (at paragraph 40) that the same threshold test pertains irrespective of whether the application for leave is made *ex parte*, or, as in the present case, is made on notice to the respondent.

6. It follows, therefore, that in assessing the merits of the grounds of judicial review pleaded, the High Court must do so by reference to the low threshold of arguability.
7. The approach to be taken in respect of time-limits is somewhat different. Order 84 of the Rules of the Superior Courts indicates that the question of whether the leave application has been made within the time-limit prescribed is a matter which should normally be decided at the leave stage. If it is obvious that the leave application is out of time, then the judge hearing the leave application may properly refuse leave on this basis. This is so notwithstanding that the grant of leave does not necessarily preclude these issues from being revisited at the full hearing. In a complex case, the judge subsequently hearing the substantive application for judicial review may be prepared to revisit the question of delay having had the benefit of arguments from the respondent.

#### **PROCEDURAL HISTORY BEFORE DISTRICT AND CIRCUIT COURTS**

8. These proceedings are, nominally, directed to an order made by the Circuit Court on 20 June 2023. In fact, the principal cause of complaint to the father is an order made by the District Court on 29 April 2022. On that date, the District Court made an order, pursuant to section 18 of the Child Care Act 1991, which committed the child to the care of the Child and Family Agency until the child reaches their age of majority in 2034. It should be explained that there had been a series of interim care orders prior to the order of 29 April 2022. The effect of the latter order is that, subject to any further order, the child is to remain in the care of the Child and Family Agency until their eighteenth birthday. Save for a short period in 2019, the child has been placed with the same foster family since

shortly before their first birthday. The child had been returned briefly to their mother in 2019.

9. The District Court order of 29 April 2022 had regulated the access arrangements between the child and their father (the applicant in these judicial review proceedings). These access arrangements were to be in place for a period of twelve months. Thereafter, access was to be at the discretion of the Child and Family Agency. In practice, this meant that access would be subject to the provisions of sections 18 and 37 of the Child Care Act 1991.
10. The District Court order had provided, *inter alia*, that the father was to have supervised access for two hours every two weeks and was to be provided with a supervised outing and activity six times per year. Such outing/activity was to be for a period of three to four hours.
11. The District Court order of 29 April 2022 had been made following a two-day hearing. The father was represented by solicitor and counsel at this hearing. Although not stated on affidavit, the father explained at the hearing before the High Court that one of the authors of the parental assessment report referenced under the next heading below had given oral evidence to the District Court. It seems that the evidence was to the effect that this individual supported the views of the Child and Family Agency. The father is critical of what he sees as an unjustified change of mind on the part of the author. The father is also critical of the fact that the other two authors of the report did not, seemingly, give evidence before the District Court.
12. The father brought an appeal against the District Court order of 29 April 2022. Regrettably, there was a considerable delay in the appeal coming on for hearing. The appeal did not, ultimately, come on for hearing before the Circuit Court until

20 June 2023.

13. The High Court has been provided with a copy of the transcript of the hearing before the Circuit Court. It seems that this transcript had been procured by the father. It is referred to in the judicial review papers but has not formally been exhibited. With the consent of both parties, a copy of same was handed in to the High Court at the hearing before it on 3 May 2024.
14. It is apparent from the transcript of the hearing before the Circuit Court that the father had been represented by solicitor and counsel. Counsel on behalf of the father indicated, at the outset of the hearing, that her client was not appealing the full order of the District Court. Rather, the issues in the appeal had narrowed to those in relation to access arrangements. The District Court order had regulated access for a period of twelve months. As explained above, after the expiration of this period, access was to be at the discretion of the Child and Family Agency in accordance with the provisions of sections 18 and 37 of the Child Care Act 1991. Counsel on behalf of the father applied for what was described as an “*incremental increase*” in access to comprise three hours of unsupervised access every two weeks.
15. The decision of the Circuit Court was that any application in respect of further access arrangements should be made to the District Court. The formal order of the Circuit Court records that the appeal was struck out and that the care order, which had been made by the District Court on 29 April 2022, was affirmed.

## JUDICIAL REVIEW PROCEEDINGS

16. The father instituted these judicial review proceedings on 23 October 2023. As discussed under the next heading, the Child and Family Agency contend that the proceedings are inadmissible by reason of delay.
17. Although the father had been represented by solicitor and counsel in the District Court and the Circuit Court, he appeared as a litigant in person before the High Court in these judicial review proceedings. In consequence, the pleadings in these proceedings are not in the format in which they would have been had they been prepared by a qualified lawyer. It is proposed to consider, first, the essence of the father's complaint as set out in (i) his written submissions of 10 November 2023, and (ii) his oral submissions at the hearing on 3 May 2024, before turning to consider the amended statement of grounds of 26 January 2024.
18. The essence of the father's complaint is that the care order made by the District Court on 29 April 2022 is unlawful in that it purports to detain the child without any consideration of the father's ability to care for his child and without any consideration for maintaining a family life between the father and his child. It is further submitted that the "*forcible separation*" is causing psychological harm and emotional damage to the child.
19. The father also submits that the access arrangements prescribed by the District Court order of 29 April 2022 were unreasonable. The father makes a number of points in this regard. First, it is said that the access arrangements are inconsistent with those prescribed by the Circuit Court in an earlier order of 1 July 2021. The father says that this order allowed him a period of three and a half hours of *unsupervised* access.
20. Secondly, it is said that it is unreasonable to restrict the father to *supervised*

access. The father contends that to confine him to supervised access is in breach of his rights as a natural father and legal guardian and is to the detriment of the welfare of his child. The father placed much emphasis in this regard on a report dated 9 September 2021. This report is entitled “*Parental Capacity Assessment*”. The authors of the report are identified, on the title page, as a named social worker and two named psychologists. As explained, one of the authors of the report gave evidence before the District Court.

21. The father contends that he had not been furnished with a copy of the report in advance of the District Court hearing in April 2022. The Child and Family Agency has explained, on affidavit, that whereas the social work reports, guardian *ad litem* reports, and other professionals’ reports were furnished to the father’s then legal representatives, there may have been some delay in furnishing the parental capacity assessment report as the father had changed his legal representation around the relevant time. At all events, a full copy of the report has since been exhibited by the Child and Family Agency in these proceedings.
22. Turning to the content of the parental capacity assessment report, the father draws attention to the fact that the report contains, at §5 thereof, a positive assessment of three supervised access visits which had been observed by one of the authors of the report in June and August 2021. The father also draws attention to a tentative recommendation, at page 34 of the report, to the effect that the need to increase access and assess the possibility of reunification (of the child and father) could be reviewed if certain benchmarks had been met:

“[...] While it is acknowledged that access between [the father and child] was observed to be enjoyable for both, it appeared to be quite repetitive. [The father] would benefit from an approach whereby he is offered emotional support to improve on his reflective functioning as a parent in the lead up to, during and after each access visit.

Following this, if [the father] can engage meaningfully during access visits, take on feedback, continue to engage in social and therapeutic supports, and demonstrate a 12-month period of stability, including consistency at access, the need to increase access and assess the possibility of reunification can be reviewed.

The foster carers will also require additional support should access increase in the future, as it has been reported that [the child] displays emotional and behavioural difficulties after access. Additionally, it should be made clear that [the child] is in a foster placement, and that [the child] needs to be given permission, and encouraged by them, to have a relationship with [the child's] father.”

23. It should be noted, however, that this recommendation is prefaced by an earlier statement of opinion to the effect that the father cannot meet the complex needs of the child on a regular and consistent basis at this time. This opinion was based on the authors' view that the father had not demonstrated a long enough period of consistency at access; had not demonstrated an ability to sustain relationships with professionals (which the child is said to need both now and in the future); and had limited insight into the complex needs that the child has. See page 32/33 as follows:

“However, [the father's] parenting history has meant that [the child] has experienced domestic violence, parental substance misuse, mental health issues and inadequate parenting, leading to [their] removal into the care system on [date in 2017]. The father's previous history of substance abuse, difficulty maintaining relationships with professionals, lack of support, acrimonious interpersonal relationships, and mental health issues are risk factors for future inadequate parenting. Additionally, it is concerning that he has continued to vape CBD oil and that he has at times disengaged from access services. [The father] did not demonstrate sufficient insight into the reasons for [the child] been removed into care, [their] experiences in the intervening years, or what [their] needs are currently.

It is evident that [the father] is genuine in the love and warmth he shows to the child and wishes for [them] to be returned to his care. [The child] has experienced huge



instability in [their] life to date, and it is imperative that [the child] now experience predictable care and routine. Furthermore, the father has never had [the child] in his sole full-time care and as such has limited insight into [their] needs.”

24. It is further stated that, in the opinion of the authors, the risks of reunification are currently too high for the child. Reference is made to the relatively short period of stability in terms of the father’s addiction and his attendance at access. The report recommended that the child remain in their current placement for a period of two years and that this should be reviewed after a twelve month period.
25. Turning, then, to the statement of grounds, the principal reliefs sought in the amended statement of grounds of 26 January 2024 include, first, an order of “*mandamus for full custody of*” the child. It appears that the father seeks to have the High Court award him custody of his child. Secondly, an order vacating the order of 20 June 2023. This is described in the amended statement of grounds as a District Court order. In fact, the only order made on 20 June 2023 had been that of the Circuit Court affirming the earlier order of the District Court of 29 April 2022. The father also seeks orders directing that there be investigations and inquiries into, variously, the respondent’s solicitor, a number of named social workers, and both the District Court and Circuit Court judges.

## **DISCUSSION AND DECISION**

26. These judicial review proceedings are, nominally, directed to an order made by the Circuit Court on 20 June 2023. The proceedings were not, however, instituted until 23 October 2023.
27. The Child and Family Agency have formally made the objection that the proceedings are inadmissible by reason of delay. More specifically, it is said

that the application for leave to apply for judicial review was not moved within the three month time-limit prescribed under Order 84, rule 21 of the Rules of the Superior Courts. The father's response to this objection is to say that he had difficulties in obtaining a copy of the formal Circuit Court order.

28. An applicant seeking judicial review is expected to comply with the three month time-limit. The absence of a copy of the order of the lower court being reviewed will not normally constitute a good and sufficient reason for delaying the institution of the judicial review proceedings. If the applicant has not been able, despite diligent efforts, to obtain a copy of the order, then they should institute the proceedings within the three months prescribed notwithstanding the absence of the order. The applicant should continue to chase up a copy of the order and to exhibit same *subsequently* in the judicial review proceedings.
29. There are, however, a number of aspects of the present proceedings which indicate that it would be unsatisfactory to dismiss the proceedings on a time-limit point. First, the proceedings relate to the care and custody of a very young child who has been in care for most of their life. Secondly, there is some suggestion in the papers that the father may have been frustrated in obtaining a copy of the Circuit Court order. Thirdly, the application for leave has been fully argued before the High Court. It is appropriate, therefore, to consider the merits of the application for judicial review *de bene esse* notwithstanding that the proceedings appear to be out of time.
30. Turning, then, to the merits, there is nothing in the papers before the High Court which would justify any interference with the order made by the Circuit Court. The father had been represented by solicitor and counsel at the hearing before the Circuit Court on 20 June 2023. It is apparent from the transcript that the

appeal against the full care order was withdrawn, and the appeal narrowed to the question of whether the access arrangements should be modified. In all the circumstances, the decision and order made by the Circuit Court on 20 June 2023 was lawful. It was entirely reasonable for the Circuit Court to conclude that matters would best be progressed by the father making an application for access pursuant to section 37 of the Child Care Act 1991 before the District Court.

31. There is nothing in the judicial review papers which would justify the setting aside of the Circuit Court order, still less is there anything to suggest that there had been any judicial misconduct on the part of the Circuit Court judge which might justify inquiry.
32. As noted under the previous heading, the father also seeks to rely upon an *earlier* Circuit Court order of 1 July 2021. The father says that this order allowed him a period of three and a half hours of *unsupervised* access. It is alleged that the (different) Circuit Court judge dealing with the matter on 20 June 2023 acted in breach of their judicial colleague's earlier order of 1 July 2021.
33. It is apparent that the father misunderstands the effect of the Circuit Court order of 1 July 2021. The father interprets the order as directing that he was to have *unsupervised* access to his child. This is not, in fact, what the order says. Rather, the only effect of the order was to increase the amount of time in respect of which the applicant was to have supervised access to a maximum period of three and a half hours. The order of the Circuit Court of 1 July 2021 has to be read in conjunction with the District Court order of 12 April 2021 appealed against and the earlier care orders. Moreover, the order of the Circuit Court was always time limited. It was made in the context of an interim care order which subsequently expired. It follows, therefore, that the Circuit Court order of 1 July 2021 has

long since been overtaken by events. It certainly does not fetter the discretion of the District Court or the Circuit Court to make further orders.

34. For these reasons, then, leave to apply for judicial review in respect of the Circuit Court order of 20 June 2023 is refused.
35. As appears from the narrative under the previous heading, the essence of the father's complaint is, in truth, directed to the care order made by the District Court on 29 April 2022. It is not open to the father to seek to challenge this order now in these judicial review proceedings for the following reasons.
36. First, the appropriate remedy for a party who is aggrieved with an order of the District Court is to bring an appeal to the Circuit Court. This is what the father did. The appeal against the care order was then withdrawn at the hearing on 20 June 2023. Having pursued and then withdrawn his statutory appeal, the father cannot now seek to challenge the District Court order by way of an application for judicial review.
37. Secondly, any application for judicial review in respect of the District Court order of 29 April 2022 is time-barred. Whereas the High Court has been prepared to allow some leeway to the father in respect of the delay in his challenge to the Circuit Court order, it would be inappropriate to extend time to allow judicial review proceedings to be taken in respect of a District Court order made more than two years ago. This is especially so where, as explained immediately below, there is an adequate alternative remedy open to the father.
38. Thirdly, judicial review of an order of a lower court will not normally be granted in circumstances where there is an adequate alternative remedy available to the aggrieved person. Here, there is an adequate alternative remedy available to the father under the Child Care Act 1991. Section 37 of the Child Care Act 1991

provides, *inter alia*, that the Child and Family Agency is obliged, subject to the other provisions of the Act, to facilitate reasonable access to a child by his or her parents. Any person who is dissatisfied with access arrangements made by the Child and Family Agency may apply to the District Court and that court may make such order as it thinks proper regarding access to the child by that person. Thereafter, there is a right of appeal to the Circuit Court. Section 22 of the Act allows for the variation or discharge of a care order. Again, there is a right of appeal to the Circuit Court.

39. The reasons for which the District Court and Circuit Court represent the proper forum for adjudication upon care orders have been explained by the Supreme Court in its judgment in *F.G. v. Child and Family Agency* [2018] IESC 28 (at paragraphs 110 to 113) as follows. The court adjudicating upon a care order and access arrangements must be able to consider all relevant circumstances so as to evaluate the current position, and critically, of course, the situation of the children. This can only be achieved by a full hearing, unrestricted by the legitimate and well-known restraints of the judicial review process. In cases, such as the present one, an application under section 37 of the Child Care Act 1991 represents not only an alternative remedy, but a palpably superior remedy.
40. It would not be possible for the High Court, in the context of these judicial review proceedings, to adjudicate properly on the questions of custody and access. These require a fact-specific inquiry into the particular circumstances of the child and their father. This is best done by the District Court and the Circuit Court. It is apparent from even the limited materials which have been put before the High Court that the family situation in this case is a complex one. A fair resolution of the needs of both the child and father can only be achieved

following a detailed hearing. The father already has had the benefit of one such hearing before the District Court. Importantly, the father had the benefit of solicitor and counsel at that hearing. The father now has the opportunity to make a fresh application to the District Court and to seek revised access arrangements. The father may bring to the attention of the District Court his current circumstances.

41. Finally, as to the complaints made in relation to the various social workers, leave to apply for judicial review is refused on these grounds also. First and foremost, there is nothing in the papers before the court which indicates that there was any wrongdoing or impropriety on the part of the social workers. Secondly, and in any event, the High Court does not have a free-ranging jurisdiction in judicial review to supervise the professional conduct of social workers. For similar reasons, leave to apply in respect of the relief sought against the Child and Family Agency's solicitor is also refused.
42. The father has sought an order directing that he be furnished with a transcript of the hearing before the District Court in April 2022. The High Court has jurisdiction, pursuant to Order 84, rule 27(2A) of the Rules of the Superior Courts, to direct the production to it by the registrar or clerk of a court of the record of the proceedings before that court. Such a direction will, however, normally only ever be made in circumstances where a transcript is necessary for the purpose of the High Court resolving judicial review proceedings pending before it. No such direction is necessitated in the present case where leave to apply for judicial review is being refused.

## CONCLUSION AND PROPOSED FORM OF ORDER

43. For the reasons explained, the application for leave to apply for judicial review is dismissed in its entirety. As the applicant/father is a litigant in person, it may be helpful to him to reiterate that he has a statutory right, under section 37 of the Child Care Act 1991, to apply to the District Court to seek more extensive access arrangements in relation to his child. The District Court, and the Circuit Court on appeal, are the proper forum in which to pursue his claim for enhanced access arrangements.
44. As to the legal costs of these judicial review proceedings, my *provisional* view is that there should be no order, i.e. each side should bear their own costs. Whereas the applicant/father has been unsuccessful in these proceedings and might, in principle, be subject to a costs order on this basis, it should be recalled that an application for leave to apply for judicial review is normally determined on the basis of an *ex parte* application. Had this happened in the present case, then there would have been no costs exposure to the applicant/father in that the leave application would have been refused without the Child and Family Agency having incurred any legal costs. The leave application was directed to be heard on notice in order to ensure that the court was fully apprised of all of the issues arising. This should not, however, in the unhappy circumstances of this case, have an adverse costs consequence for the applicant/father.
45. If the Child and Family Agency wish to contend for a different form of costs order than that proposed, they should file short legal submissions by 10 June 2024. The applicant/father will have a period of fourteen days thereafter to respond. A costs ruling will then issue (if necessary).

*Appearances*

The applicant appeared as a litigant in person

April Duff for the respondent instructed by the Child and Family Agency's Legal Department