THE COURT OF APPEAL - UNAPPROVED

Court Of Appeal Record No: 2024/72
High Court Record No.: 2021/1063JR
Neutral Citation No. [2024] IECA 192

Binchy J.
Pilkington J.
Allen J.

BETWEEN/

V.B.

APPLICANT/
APPELLANT

- AND -

TUSLA, THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered *Ex tempore* on the 11th day of July 2024

1. This is an appeal from a judgment of the High Court, delivered on 8th February last, whereby Gearty J. dismissed the application of the appellant for orders of *certiorari* by way of judicial review to quash five orders of the Circuit Court made by His Honour Judge Ó Donnabháin on 25th June 2021, and 38 orders of the District Court made by several judges of that Court at different times over a period between November 2020 and May 2021. The latter orders were the subject of the appeals dealt with by His Honour Judge Ó Donnabháin in the Circuit Court on 25th June 2021. The orders concerned were made within the framework of childcare proceedings originally initiated by the respondent in the District Court in order to bring the appellant's three children into the care of the respondent.

Inevitably, the proceedings have been traumatic for the appellant and I have little doubt that they have taken an enormous emotional toll upon her. Be that as it may, the careful and detailed statutory scheme that has been put in place in order that the designated authorities may address the needs of children whose welfare cannot for one reason or another be adequately provided for in the home environment has checks and balances designed to ensure, as best as is humanly possible, that the needs and rights of children and parents alike in such matters are fairly and fully considered in any orders that the court may be called upon to make in such applications.

2. While all three of the appellant's children were taken into the care of the respondent, these proceedings are concerned only with the youngest of the appellant's three children, the other two having already attained their age of majority. It is of some relevance also to note that the child with whom these proceedings are concerned attained majority in mid-2022. While the appellant originally sought leave to apply for a much wider range of reliefs, and did so as against five respondents, including Tusla, by order of the High Court (Meenan J.) of 14th February 2022, the appellant was given leave to serve a notice of motion solely upon the respondent herein seeking leave to apply by way of application for judicial review for the reliefs described above only. The appellant did not appeal that order of the High Court.

3. Many of the orders of the District Court which the appellant appealed to the Circuit Court, and which gave rise to most of the orders made by His Honour Judge Ó Donnabháin on 25th June 2021, were concerned with adjournments of an application brought by the appellant to vacate a care order made by the District Court in 2017 in respect of the appellant's youngest child. The appellant was opposed to those adjournment applications for the simple reason that she wanted the care order vacated sooner rather than later, and her child returned to her care. The other orders made by the District Court which the appellant appealed were orders refusing applications made by the appellant for the transcript of the

DAR of various District Court hearings, an order vacating witness summonses issued by the appellant and a refusal on the part of one of the judges concerned to accede to an application to recuse himself from the proceedings. There was also an adjournment of an application brought by the appellant relating to an alleged breach by the respondent of the care order.

4. As already mentioned, the appellant's appeals from all of the foregoing orders of the District Court came before His Honour Judge Ó Donnabháin on 25th June 2021. In a very short hearing lasting approximately four minutes, His Honour Judge Ó Donnabháin struck out the appeals. He did so in circumstances where the appellant's application to discharge the care order (pursuant to s. 22 of the Childcare Act, 1991) as well as the balance of a hearing of the appellant's application in respect of an alleged breach of the terms of the care order, were listed for hearing in the District Court just four days later, on 29th June 2021. Those matters proceeded to a full hearing and determination on that date. The appellant was represented by solicitor and counsel at that hearing, and I mention this because the appellant did not secure legal aid for the purposes of these proceedings in which she appeared as a litigant in person. The District Court (Judge King) held against the appellant concluding that there had been no breach of the care order and that the appellant failed to satisfy the requirements for the discharge of same. The appellant appealed that decision, and her appeal was dismissed by the Circuit Court on 23rd November 2021. The appellant was again represented by solicitor and counsel at this hearing. I should emphasise however that neither this decision nor the decision of Judge King made on 29th June 2021 are the subject of any challenge in the within proceedings.

5. It is apparent from the very truncated summary above that the latest decision (or more accurately, decisions) that the appellant wishes to quash are those made by His Honour Judge Ó Donnabháin in the Circuit Court on 25th June 2021. It is expedient at this juncture to make it clear that, as correctly found by Gearty J. in the court below, the District Court orders that

the appellant impugns in the proceedings ceased to be of any relevance following their appeal to and adjudication by the Circuit Court. In the judgment under appeal, the judge addressed this issue as follows:-

> *"Before considering the arguments relating to time and substance, I am satisfied that it is appropriate to confine my review of events to the Circuit Court Orders of 25th June, 2021 as these effectively replaced the District Court Orders when the latter were unsuccessfully appealed by the Applicant. This precise point was traversed by Hyland J. in the Applicant's case in 2023, cited above, and the same conclusion was reached in that case. The Circuit Court orders now supersede the District Court orders."*

6. The reference to the decision of Hyland J. relates to other proceedings brought by the appellant, also by way of judicial review, against the respondent, the Commissioner of An Garda Síochána and the Minister for Justice whereby the appellant sought to challenge various acts of the first and second respondents in those proceedings going back to 2013. As in these proceedings, the appellant sought to challenge orders made in the District Court, that had been the subject of appeals brought by the appellant to the Circuit Court, and which had been determined by the Circuit Court. At para. 12 of her *ex tempore* judgment in those proceedings, Hyland J. held that the "*effect of an appeal is to replace the order appealed against with the order of the Appeal Court. In other words, where a person appeals against an order and the Appeal Court takes it up and makes a new order, that replaces the original order*". For that reason, Hyland J. in those proceedings refused the appellant leave to bring proceedings by way of judicial review of the matters challenged in those proceedings.

7. While the appellant in her notice of appeal has purported to appeal from the entirety of the decision of Gearty J., nowhere in her grounds of appeal or in her submissions does she claim that the High Court judge erred in her decision to confine her consideration of the application to the five orders of the Circuit Court made on 25th June 2021. I am satisfied

that the High Court judge was correct to do so, and the remainder of this judgment will therefore focus upon the orders of the Circuit Court only.

8. The appellant first filed her application for leave to issue judicial review proceedings on 13th December 2022. She moved her application before Meenan J. on 17th January 2023. This is six months and 23 days from the date upon which the orders she challenges were made by the Circuit Court. On the face of it, that is almost four months outside the time limit of three months for the issue of such proceedings, as provided for by O. 84, r. 21(1) RSC. While O. 84, r. 21(3) of the Rules provides for applications to extend the time within which an application for leave may be brought, no such application was made by the appellant in this case.

9. Instead, when this issue was raised in the court below, the appellant made submissions to the High Court judge that she had understood that the time limit ran from the date of perfection of the orders of the Circuit Court. She submitted to the judge that she had written on several occasions to the Circuit Court office requesting the perfected orders, and, through no fault of hers, the orders were not perfected until 21st September 2021.

10. The judge considered relevant authorities as to the date from which time runs for the purposes of O. 84, r. 21(1) and in particular she considered the judgment of Murray J. in this Court in *Arthropharm (Europe) Limited v. The Health Products Regulatory Authority* [2022] IECA 109 and she quoted the following passage from that judgment:-

> *"…if time is not fixed to run from the point a decision is made or takes effect, any alternative needs to be accommodated within the language of the relevant rule. Second, and related to this, if publication is to be the trigger for the running of time, there must be some basis, if not in Order 84, then in the particular regulatory regime governing the decision in question for concluding not merely that publication but also the particular mode of publication relied upon, has this effect. Third, it is to*

be borne in mind that irrespective of when time begins to run, the court has a discretion to extend time which, one would expect, would be exercised in such a manner as to take account of the fact (where the issue arises) that the applicant neither knew nor could have known of the impugned decision when it was made."

11. Gearty J. then proceeded to observe that there is no reference in Order 84 to the date of perfection of the Order, but rather the time limit is set by reference to the date of the judgment or order challenged. At the hearing of this appeal, the appellant confirmed her awareness of Order 84. The judge found as a fact that the appellant was aware of the contents of the orders impugned from the date on which they were pronounced in the Circuit Court. The appellant does not, and could not, dispute this finding of fact since she was in court when the Circuit Court judge made the orders. Accordingly, the judge held that time began to run immediately.

12. The judge examined the explanations offered by the appellant for failing to act within three months from 25th June 2021. She noted that the explanations were not on oath and she explained the differences between explanations offered on oath, and those made by oral submission, and the significance of those differences. It appears that the appellant submitted that she was under a lot of pressure with this litigation and other associated litigation in which she was involved, all of which took up a lot of her time, and that she had received legal advice to the effect that time ran from the date of perfection of the order. So far as the former explanation is concerned, the judge noted that the submission does not address the question of whether or not she had control of any, or all of the proceedings in 2022 (I think that the reference here to 2022 may be erroneous and should be to 2021) and nor did it suggest that it was unforeseeable that she would be so busy with the litigation as to prevent her applying to review the impugned orders in time. So far as the latter explanation was concerned, the judge held that she could not consider it because it had not been given in

evidence, and for that reason the respondent could not consider it or reply to it by way of replying affidavit or by way of cross examination of a deponent.

13. Moreover, the judge noted that following upon the decision of Hyland J. in the related proceedings to which I have referred above, the appellant was aware of the need to apply for an extension of time, and notwithstanding that awareness, she had failed to advance such an application. To that I would add that the appellant was on notice that the respondent maintained that she was out of time to apply for leave to issue these proceedings by way of para. 20 of the replying affidavit sworn on behalf of the respondent by Ms. Michelle Cronin of Comyn Kelleher Tobin Solicitors on 29th April 2022.

14. The judge referred to the submission of the respondent that an extension of time may not be granted where an application for an extension has not been advanced. In this regard, the respondent had referred the court to the decision of Noonan J., then in the High Court, in *Duffy v. Road Safety Authority* [2015] IEHC 579, and the judge referred to the following passage from that judgment:-

> *"In Shell E & P Ireland Ltd v. Philip McGrath & Ors [2013] IESC 1, the Supreme Court held that the time limits contained in Order 84 of the Rules of the Superior Courts have the same status as time limits to be found in primary legislation. Thus, in the absence of compliance with those time limits, the application for relief must, as a matter of law, fail. No discretion arises in circumstances such as here, where there is no application for an extension of time and even if there were, no obvious grounds for granting such an extension arise".*

15. At this point in her judgment, the judge then proceeded to examine the substance of the claim. She did so having regard to the decision of Murray J. in *Arthropharm*, but it is clear that the exercise upon which the judge embarked from para. 6 onwards of her judgment, as regard the substance of the application, is only required within the context of an

application to extend time for leave to bring judicial review proceedings, which does not arise here. Accordingly, while I agree with the analysis and conclusions of the trial judge under this heading, I see no need to analyse or consider the same for the purposes of this judgment, and, in any case, as will become apparent from what follows, the appellant does not, in her grounds of appeal, raise any issues regarding the analysis and conclusions of the judge in this or any other part of the judgment under appeal.

16. The judge concluded that the main explanation offered by the appellant for her delay – that she was very busy with court hearings – did not justify a delay of over three months. She concluded that there was no formal application to extend the three-month time limit stipulated by Order 84, and that the appellant must have understood that not only was there a three-month time limit, but that she was required to seek an extension of time if she was late with her application. She further concluded that the appellant did not refer to any circumstances which would justify an extension of the strict three-month time limit, and nor did she offer any evidence to the court in this regard. She observed that any person who was legally represented would not be permitted an extension of time on the same facts, and it would not be fair to treat the appellant differently. At para. 9.5 she held:-

> *"As I cannot find circumstances to justify the delay, let alone evidence of same, it is not appropriate to extend the time. I also take the view that her case was not only considered fairly in the Circuit Court, the issues were considered again and within days by the District Court and that decision was appealed to the Circuit Court: the Applicant was heard on both occasions… ."*

For these reasons the judge refused the relief sought.

17. I should also mention that the respondent had resisted the application on the grounds that the proceedings are moot, following upon the youngest child of the appellant attaining the age of majority. However, Gearty J. rejected this argument, noting that in the related

proceedings, Hyland J. had rejected the same argument because the child was entitled to an "aftercare plan" pursuant to s. 45 of the Childcare Act, 1991. The respondent did not cross appeal from this conclusion of the High Court judge, and I mention it only so as to observe that it may well be that this argument would benefit from more detailed argument on another occasion. It strikes me that, even allowing for the conservative approach of the Superior Court to mootness, it is difficult to see how interlocutory orders of the kind challenged by the appellant in these proceedings can have any relevance at all following upon the determination of the substantive proceedings, such as to amount to a "*live controversy*" of the kind discussed by the Supreme Court in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49.

18. Before departing from the judgment of the High Court, I should mention that the High Court judge was so concerned by the submission of the appellant that the Circuit Court judge had given only perfunctory consideration to her appeals, that she listened to the DAR recording of the hearing and referred to this in her judgment. Having listened to that hearing, the judge expressed the view that the Circuit Court judge dealt with the appeals appropriately, noting, at para. 6.3 of her judgment that "*It was the work of a few moments*" for the Circuit Court judge to hear what the appeal related to, and she considered that his approach was understandable having regard to the fact that the orders under appeal were to be considered again, four days later at the full hearing of the substantive proceedings in the District Court.

19. The reference in the judgment to the DAR gave rise to a request on the part of the appellant to be provided with a transcript of the DAR of the Circuit Court proceedings. That was provided and made available to this Court for the purposes of this appeal.

20. In her notice of appeal, the appellant sets out eleven grounds. Regrettably however, none of these grounds of appeal address the analysis or the conclusions of the judgment

under appeal so far as they relate to the proceedings being out of time. Nor do the very lengthy submissions of the appellant engage with the same. The closest that the appellant comes to addressing the judgment of the High Court is to make a general complaint that the judge failed to address her affidavit evidence. However, the relevance of her affidavit to the conclusions of the judge is not in what the affidavit says, but rather in what it does not say, which is to explain, on oath, why she failed to move her application within the period stipulated by Order 84.

21. At the hearing of this appeal, the appellant laid great stress on the fact that she is a lay litigant, and that she has suffered from an inequality of arms in these proceedings. However, I agree with the trial judge that, as has been held on many occasions, the Rules of the Superior Courts apply to all litigants, represented or not.

22. Unfortunately for the appellant, there is no escaping the fact that her application was made well outside the time stipulated by Order 84. The fact that it was out of time was drawn to her attention by the replying affidavit of Ms. Cronin, to which I have referred, and furthermore, the appellant would have been aware of the time limit, and its significance, from the decision of Hyland J., to which Gearty J. referred in her judgment. Notwithstanding all of this, the appellant failed to make any application for an extension of time. That, in itself, was fatal to her application for leave, for the reasons discussed by Gearty J. and in particular having regard to the decision in *Duffy v. Road Safety Authority*, referred to by Gearty J. at para. 5.5. of her judgment.

23. In spite of that, the judge did in fact embark upon a consideration of the explanations offered by the appellant, but found them to fall well short of the threshold set by O. 84, r. 21(3) which deals with applications for extension of time. More than that, perhaps out of consideration for the appellant, and in particular her complaint that she had not received an adequate hearing in the Circuit Court, Gearty J. embarked upon a consideration of the

substance of the issues that the appellant wished to raise in the proceedings, which was not, in my view, strictly necessary. Having done so however, she concluded that, on the substance of the reliefs sought, the appellant would not have had a strong case.

24. The appellant has failed to identify any error on the part of the judge in what was a detailed and comprehensive decision on the application before her. In my view, the judge considered the application before her by reference to the appropriate authorities and by reference to the evidence before her and the conclusion that she reached is unimpeachable. I would therefore dismiss this appeal.

25. Finally, I recall that at the commencement of the hearing of this appeal, the Court drew to the attention of the parties that under s. 31 of the Child Care Act, 1991, it is an offence for a person to publish any matter which is likely to lead members of the public to identify a child who is or has been the subject of proceedings under Part III, IV or VI of the said Act. For that reason, it is appropriate that this judgment, as with the judgment under appeal, should be published in anonymised format.