THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 17

Record No. 2020/326JR

BETWEEN

LL

APPLICANT

- and -

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 16 January 2023

Introduction

1. This case concerns the applicant's challenge to various Orders of the District and Circuit Courts between 2015 and 2020. Broadly, the Orders concern the applicant's access to her four grandchildren, where a Care Order was made in 2015 in relation to the four children, removing them from the care of their mother, who is the applicant's daughter. The applicant represented herself in these proceedings.

Facts and Background

2. The four children in question have been in the care of the respondent since 10 July 2015 on foot of Interim and Emergency Care Orders ("ECO's") as well as a Care Order (the date of which was not provided in the course of these proceedings) made under sections 13, 17 and

18 of the Child Care Act 1991 (the "1991 Act"). The applicant was not in *loco parentis* in respect of the children and was not a respondent in the childcare proceedings.

3. Following the making of the above Orders, the applicant has continually sought access to her grandchildren. The position of the respondent during that period has been that it is open to facilitating access, but that it has concerns in respect of the applicant's ability and/or willingness to act protectively towards the children in circumstances where one of the children has made allegations of sexual abuse against a third party. In that context it submits that access can only be facilitated after a meaningful engagement on the part of the applicant with the respondent to address those concerns. The position of the applicant has been that the respondent has acted in a hostile manner, has failed to identify its concerns and has unlawfully failed to facilitate access to her grandchildren.

4. In bringing these proceedings, per her Statement of Grounds, the applicant seeks to challenge five separate decisions of the District Court and one decision of the Circuit Court. Chronologically, the reliefs sought are as follows;

    - A declaration that the Emergency Care Order of 10 July 2015 infringed her constitutional rights to her good name and fair procedures.
    - An Order of *certiorari* of the Order of District Judge Coughlan of 21 September 2017 prohibiting the applicant from contacting the guardian *ad litem* appointed to represent the views of her grandchildren.
    - An Order of *certiorari* of the Order of District Judge Coughlan of 25 January 2018 under s.47 of the 1991 Act prohibiting the applicant from contacting her grandchildren without the consent of the respondent and prohibiting contact with the guardian *ad litem*.
    - Two Orders of *certiorari* of the Orders of District Judge Jones of 15 November 2018 refusing applications for access made pursuant to s.37(2) of the 1991 Act.

- An Order of *certiorari* of the Order of Circuit Judge O'Malley Costello of 20 February 2020 affirming the decision of the District Court of 15 November 2018.

5. The respondent makes three preliminary objections to these challenges. First, it is argued that the applicant was not a party to the proceedings the subject of the 10 July 2015 hearing, and she lacks standing to challenge their constitutionality and that the proceedings are privileged. Second, it is submitted that she is out of time in respect of the decisions of the District Court. Finally, in respect of all the challenges, it is argued that in the circumstances of the case and the statutory regime under the 1991 Act, I should exercise my discretion to refuse judicial review as a more appropriate alternate remedy is available. Clearly, if these preliminary objections are successful then the entirety of the applicant's case falls away. As such I will analyse these objections in turn before addressing any remaining points.

The proceedings

6. On 20 May 2020, following an *ex parte* application for leave, the Court deemed the application opened and the applicant was directed to seek leave for judicial review on notice.
7. A Notice of Motion for leave was issued on 27 May 2020 accompanied by an affidavit of the applicant sworn on the same date with the applicant's grounding affidavit having been sworn previously on 19 May 2020. Paul Johnson, a manager with the respondent then swore an affidavit on 19 June 2020. This was followed by a further affidavit of the applicant of 12 August 2020. Paul Johnson then replied to that affidavit with his own on 15 October 2020. The applicant then swore three further affidavits of 21 October 2020, 15 March 2021 and 15 November 2021. The Statement of Opposition was then filed, dated 20 June 2022 before a further replying affidavit of the applicant was filed on 4 July 2022.
8. The case was initially before me on 30 May 2022 but was adjourned until 10 November 2022 when I heard the parties in the context of a telescoped hearing, i.e. both the leave and

the substantive application were heard simultaneously. Following the hearing, at my request, Paul Johnson filed a further affidavit on 21 November 2022 clarifying issues that had arisen during the course of the hearing. I also gave the applicant leave to submit written legal submissions in addition to her oral submissions on the day and these were received, alongside a further detailed replying affidavit on 1 December 2022. I note the respondent's position in the affidavit of Mr. Johnson of 21 November that its position is that it is not opposed to the applicant having access to the children, but this requires the applicant to engage with the respondent and take direction from social workers and access supervisors and that the applicant will consider the appropriateness of any request made by the applicant.

9. The applicant seeks to challenge various decisions of the District and Circuit Court. As required by Order 84 rule 22(2A) of the Rules of the Superior Courts (the "RSC"), the respondent is not the District or Circuit judges but the other party to the proceedings in the Court concerned i.e. the Child and Family Agency. Given that I have found that the challenges to the various decisions of the District Court are out of time and in certain cases are moot given subsequent Court decisions, I have decided to refuse leave in respect of those applications.

10. In respect of the Circuit Court Order, no time or mootness point arises. Some, though not all, of the grounds raised in respect of this Order are arguable and I have granted leave where this is the case, although none have been successful substantively. Other grounds relate not to the Order but to various actions of the CFA in the course of the proceedings, which did not produce a decision subject to challenge by way of judicial review. No leave has been granted in respect of those complaints as no decision the subject of a challenge has been identified.

11. However, because the applicant is a lay litigant, I have in certain instances sought to explain why there is no basis for a substantive complaint in respect of various actions of the CFA.

Issues not canvassed in this judgment

12. Before going any further however there are two matters that must be addressed briefly. The first relates to the relief sought by the applicant at D(1) in her Statement of Grounds where she seeks an Order of *mandamus* compelling the respondent to facilitate access on specified terms. At the hearing, the applicant indicated that she was no longer pursuing it and as such I will not address it in this judgment.
13. Beyond this, in her affidavits and her legal submissions, the applicant has impugned hearings and decisions of the Circuit Court other than those of 20 February 2020 that were not identified as being the subject of challenge in her Statement of Grounds. In line with well-established jurisprudence, see e.g. *AA v Medical Council* [2003] IESC 70, I will not entertain any argument related to matters not pleaded.

Emergency Care Order of 10 July 2015

14. As has been identified, the hearing on 10 July 2015 concerned an *ex parte* application by the respondent for an Emergency Care Order under s.13 of the 1991 Act as amended, carried out pursuant to Rule 5(3) and Rule 2(5) of the District Court (Child Care) Rules 2015. In her Statement of Grounds, the applicant identifies that this decision infringed her constitutional right to fair procedures and her good name.
15. In summary, after hearing evidence from Mr. Johnson, social worker for the respondent, setting out the respondent's concerns for the safety of the applicant's grandchildren following a finding by a U.K. Court that one of the children had been sexually abused, that the family had given inconsistent accounts of the perpetrator's movements and access to

the children, and behaviour by the children's mother that in his opinion was not sufficiently protective, the Court was satisfied that the threshold for an ECO was met and agreed to make such an Order in respect of each of the four children. In addition to this, on the application of the respondent's solicitor, the Court made an Order under s.47 of the 1991 Act dispensing with the requirement for an authenticated note of the oral evidence to be served on the respondent to those proceedings.

16. That note has been provided to me in an affidavit of the applicant's daughter, the mother of the children, of 21 October 2020. The applicant raises arguments in relation to her good name being impacted by the terms of the note. The applicant also argues that her right to fair procedures has been infringed. In her submissions the applicant sets out that she was not afforded fair procedures where the respondent failed to notify her of any concerns prior to the hearing, failed to notify her of the hearing itself and where it failed to make an access arrangement where that route was open to it at the ECO hearing and where this was a contravention of their duty to facilitate access. Additionally, she submits that the failure of the Court to adjourn the hearing so that she could be on notice and so that she could attempt to defend herself vitiated her right to fair procedures. Finally, she argues that it was impermissible that an Order under s.47 of the 1991 Act was made precluding the release of the authenticated note of the judgment.

17. In respect of this ground the respondent argues that given the applicant is neither a parent of the children nor was she in *loco parentis* at the relevant time, she was not entitled to fair procedures by virtue of the fact that she was not a party to the proceedings and had no entitlement to be joined to them. Further, the respondent denies that it failed in its duty to facilitate reasonable access in circumstances where the District and Circuit Courts made Orders pursuant s.13 and s.37 denying the applicant access to the children.

18. As identified below, leave to bring an application for leave on notice was granted on 20 May 2020, i.e. over four and a half years after the decision of the District Court. The fact that the applicant only seeks a declaration in respect of the Order, as opposed to an Order of *certiorari* as she does in relation to other court Orders she challenges, does not mean she can circumvent the normal time limit applicable in judicial review. She is effectively asking the Court to consider whether fair procedures were applied in the District Court hearing, whether her good name was impugned and to grant a declaration that the procedures were unfair.

19. The normal three-month time applies in respect of such relief, just as it would if an Order quashing the Order of the District Court were sought. In this respect I refer to my observations on the time limits in judicial review, and the extension of same, below. I am satisfied that the applicant is significantly out of time to seek relief in respect of this Order and that no basis for an extension of time has been identified. In the premises, I do not propose to consider the challenge she raises to this Order.

Delay

20. As outlined above the respondent objects to the applicant's challenge to the remainder of the decisions of the District Court on the basis that they are out of time. By contrast, the decision of the Circuit Court of 20 February 2020 is within time and the substantive arguments in respect of that hearing are discussed below. The respondent identifies that Order 84 rule 21(1) of the RSC limits the time within which leave can be sought for judicial review to three months from when the grounds for the application first arise and further that Order 84 rule 21(2) of the RSC provides that where the relief sought is an Order of *certiorari* in respect of a judgment or Order, the date from which the grounds first arise shall be taken to be the date of that judgment or Order.

21. In those circumstances the respondent argues that the time to institute judicial review proceedings expired in respect of the Orders as follows; (i) 21 November 2017 for the Order of 21 September 2017 (ii) 25 April 2018 for the Order of 25 January 2018 (iii) 15 February 2019 for the Orders of 15 November 2018. I note that the calculation for the Order of 21 September 2017 appears to be incorrect but regardless I accept that 21 December 2017 is similarly significantly out of time.

22. The respondent then goes on to draw my attention to Order 84 rule 21(3) with respect to the power of the Court to extend the time to bring an application for leave;

> *"(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:*
>
> > *(a) there is good and sufficient reason for doing so, and*
> >
> > *(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:*
> >
> > > *(i) were outside the control of, or*
> > >
> > > *(ii) could not reasonably have been anticipated by the applicant for such extension."*

23. The respondent contends that there is no reason to extend the time in this case for two reasons. Firstly, it is argued that, as is set out above, the power of the Court to extend time arises only in circumstances where there is an application for such an extension. The decision of Noonan J. in *Duffy v Road Safety Authority* [2015] IEHC 579, is referenced in this regard, particularly where the Court held that:

> "*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".

24. The respondent further submits that no explanation for the delay in instituting the proceedings or reasons justifying an extension were given by the applicant in the Statement of Grounds or her first four affidavits between 27 May 2020 and 15 March 2021. The respondent notes that this was despite the issue of delay being raised in two affidavits of Paul Johnson of 19 June 2020 and 15 October 2020. The respondent therefore contends that despite the applicant being a lay litigant there was ample time for her to apply for leave to amend her pleadings to include an application for an extension. In circumstances where she did not, the respondent submits that the Court should follow *Duffy* and find her out of time in respect of the Orders identified. Given that *Duffy* itself related to a litigant in person and where no action on this point has been taken by the applicant despite significant opportunity to do so, there is clearly significant weight to the argument that she must be considered out of time by operation of law.
25. Despite this conclusion, in light of the difficulties court procedure necessarily poses for those not professionally trained, and the fact that the applicant has, in very recent affidavits, sought to justify the delay, I will consider those arguments. Order 84 rule 21(3) permits an extension where there is good and sufficient reason for the extension and the circumstances leading to the delay must have been outside the applicant's control or could not reasonably have been anticipated by her. In *De Roiste v Minister for Defence* [2001] 1 IR 190 Denham J., as she then was, set out a number of factors that bear on the question of whether or not there is good reason for an extension:

"*(i) The nature of the order or action the subject matter of the application;*

(ii) The conduct of the Applicant;

(iii) The conduct of the Respondent;

(iv) The effect of the Order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed.

(v) Any effect which it may have taken place on third parties by the order to be reviewed.

(vi) Public policy that proceedings related to public law domain take place promptly except when good reason is furnished."

I turn now to address the arguments in respect of each Order in turn.

Order of 21 September 2017

26. There is a significant difficulty both for the applicant and for the Court in relation to the challenge to this Order in that the Order has not been provided to the Court by either party. The applicant identifies that, following a number of attempts to contact the guardian *ad litem*, on 21 November 2017 the solicitor for the guardian informed her that given she was in contact with her grandchildren's daughter she must be aware that she was in breach of a court Order made on 21 September 2017 directing that she would have no contact with the children or the guardian *ad litem*. The applicant argues that she did not receive any notice of a hearing on 21 September 2017 and asked for the solicitor for the guardian *ad litem* to forward her a copy which was not done. She submits she was informed variously that she could collect this Order at the District Court, that there was no Order and that it was a verbal Order. The transcript of the hearing on 25 January 2018 details that District Judge Coughlan had made a direction "*before Christmas*" that the applicant in these proceedings refrain from breaching the *in camera* rule and from contacting the guardian. I am therefore satisfied that such an Order existed though its exact terms are not before me.

27. The arguments specifically in relation to delay are identified in her affidavit of 21 November 2021. At paragraph 3 she avers that the reason for her delay in seeking judicial review was that she felt that the solicitor for the guardian was attempting to intimidate her, and that when they did not forward the Order to her as requested, she doubted its existence and its enforceability when not served on her. She further submits that a solicitor acting for the respondent informed her at one point that they had no record of the Order.
28. The position of the respondent is, straightforwardly, that the applicant was made aware of the terms of the Order on 21 November 2017 and has not given good or sufficient reason to warrant an extension or that the reasons for the delay were beyond her control. I will treat time as starting to run from 21 November 2017 when the applicant was indisputably informed of the Order.
29. It is obviously entirely wrong that any person should be considered to be bound by an Order without that Order being provided to them. The fact that no real efforts appear to have been made to communicate the terms or effect of the Order to the applicant was deeply unsatisfactory. However, in the circumstances, I do not believe that I should grant leave in respect of the grounds relating to this Order. The real substance of this point appears to be that the Order was non-existent or somehow unenforceable without her being aware of it. But the applicant had been alerted to it by a solicitor in the proceedings by letter of 21 November 2017. From that date on, she could have sought a copy of the Order to allow her to judicially review it. No explanation is given as to why she did not do so. In the circumstances, I am satisfied that the applicant did not have any good or sufficient reason for her delay in challenging the Order until leave was sought in May 2020 in these proceedings.
30. There is also the additional issue of mootness. An Order was made by the District Court on 25 January 2018 that set out explicitly that she was not to contact the guardian or the

children without the leave of the Court. The Order of 25 January 2018 therefore overtook the Order of 21 September 2017, and as such an Order of *certiorari* for the former would necessarily be futile. Judicial review and its various remedies are discretionary, and it is the practice of this Court not to exercise that discretion in vain.

Order of 25 January 2018

31. On 25 January 2018 the respondent sought an extension of the Interim Care Order which was ultimately acceded to by District Judge Coughlan. In the currency of that hearing the Court was reminded, as I note above, of its previous Order directing that the applicant not contact the guardian or the children without the leave of the Court and was asked to "*reiterate*" that Order in writing to the applicant. The Court also acceded to this request, which appears from the transcript to have been made with the consent of the applicant's daughter's solicitor, and the Order was made pursuant to s.47 of the 1991 Act. There was a breach of fair procedures in that the applicant was not notified of this hearing in advance and was not heard on the day in question. This is entirely unsatisfactory, and the respondent ought to have explicitly drawn to the attention of the District Judge that the applicant had not been notified in relation to the hearing insofar as it concerned her access to the children and that her views were not before the Court.
32. However, again in the exercise of my discretion I do not believe I should grant leave both because the applicant is significantly out of time and because the Order is now moot since it was overtaken by the Orders of November 2018 (which in turn were overtaken by the Circuit Court appeal against those Orders).
33. In respect of her delay in seeking leave against the Order of January 2018, in her affidavit of 15 November 2021 the applicant avers that the Order was oppressive and intimidated her, it restricted her ability to live her life for fear of the consequences of coming into contact with her grandchildren. She avers that she considered there was a "*sinister plot*"

between the District Court and other parties to smear her as a danger to the children and she feared arrest following further false allegations. She goes on to aver that she resolved to sell her house and move from the locale to obviate these fears. She then states that she intended to make an access application to the District Court once she had her house ready for sale. She submits she had a legitimate expectation that the District Court would facilitate her access to her grandchildren and as such an application to this Court for review was unnecessary at that time.

34. The respondent submits that a belief that the Order was obtained as part of some campaign against her is not good or sufficient reason to grant an extension. Beyond this it is argued that while the reference to "legitimate expectation" is inapt, it does demonstrate the fact that the applicant identified and sought out an appropriate alternative remedy in bringing an application for access under s.37(2) of the 1991 Act. It is therefore argued that where she has made a conscious decision not to seek judicial review in favour instead of an access application, and where there is no good or sufficient reason for delay, no extension can be warranted.

35. Turning first to the argument that the Order in question was oppressive, intimidatory and part of a concerted campaign against the applicant, and that this is a ground for an extension of time, I must reject these arguments. First, a subjective interpretation that an Order is unfair or draconian in some way is not a basis for failing to move to challenge it in a timely fashion. Indeed, a principal function of judicial review is to remedy just the type of putative impropriety the applicant alleges. For that reason, the argument that there was a "*sinister plot*" including the District Court, to deprive the applicant of various rights, to my mind, would suggest that recourse to judicial review should be exercised as soon as it was available, not nigh on two years after the expiry of the time limit under Order 84, the Notice

of Motion being issued on 27 May 2020, and the expiry date being *prima facie* 25 April 2018.

36. This objection is all the more significant where, as the respondent highlights, the applicant avers that she made a conscious decision to seek an alternative remedy in bringing a s.37(2) application before the District Court. As such I can see no good or sufficient reason outside of the control of the applicant that prevented her from seeking judicial review within time and I refuse to grant an extension in respect of this Order.
37. Finally, as noted, the challenge is now moot due to the fact that the Order was replaced by the Orders made in November 2018 pursuant to her s.37(2) challenge and for that reason also I refuse leave.

Orders of 15 November 2018

38. On 15 November 2018 District Judge Jones refused two separate applications for access to her grandchildren, made by the applicant under s.37(2) of the 1991 Act. The applications were for all four of her grandchildren with two named in each Order. The only argument identified by the applicant for her delay in bringing an application in respect of these Orders is that she instead decided, given judicial review is a procedural remedy which could not yield an access Order, that an appeal to the Circuit Court would be more appropriate to achieve her goal of gaining access. The fact that things did not work out the way she hoped in the Circuit Court appeal cannot not be used as a reason to permit her to revisit the Order she appealed against by way of judicial review at this stage. In any case, any judicial review of that Order would be an entirely empty exercise where an appeal was brought against that Order and the Order of the Circuit Court of 20 February 2020 considered below, replaces the District Court Order. Accordingly, I refuse to extend time to challenge the decision of the District Court.

Appropriate Alternative Remedy

39. I have refused leave in respect of each of the applicant's challenges to the Orders in question, except for the Order of the Circuit Court of 20 February 2020. As such, in respect of the third preliminary objection raised by the respondent, addressed in this section, I will analyse its application solely to the Circuit Court Order. Despite this caveat the respondent's objection on this ground is a necessarily broad one. It is argued that the within proceedings are an attempt to disturb or contest the substance of the decisions of the District and Circuit Courts and that this lies outside the ambit of judicial review.

40. The respondent identifies that there is a statutory mechanism in place regulating access; s.37(1) of the 1991 Act provides, *inter alia,* that the respondent will provide reasonable access to persons with, in the opinion of the respondent, a *bona fide* interest in the children. Under s.37(2) any person dissatisfied with access arrangements can apply to the Court which has the power to "*make such order as it thinks proper regarding access to the child by that person*". Conversely per s.37(3), on the application of the respondent the Court may, if it considers it necessary to do so to safeguard or promote the welfare of the children, make Orders authorising the respondent to refuse persons access to the children.

41. The respondent contends that this mechanism has been specifically recognised by the Supreme Court as an alternative remedy to judicial review, quoting at length the comments of McKechnie J. in *FG v CFA* [2018] IESC 28. In that case a parent's challenge to access arrangements was ultimately unsuccessful on grounds unrelated to the within proceedings but McKechnie J. identified that s.37 provided an alternative remedy that does not have a *prima facie* limit as to the frequency with which it can be utilised and he noted that while

some change of circumstance would be necessary, the passage of time itself would qualify. He accepted that it was open to the trial Judge in that case to refuse judicial review where such a suitable alternative remedy was available. McKechnie J. then went on to discuss how in the context of a matter where the factual substance of the case was the subject of significant dispute, "*section 37 represents not only an alternative remedy, but a palpably superior remedy*".

42. The respondent thus submits that where the applicant has failed to identify a legal error, excess of jurisdiction or breach of fair procedures, judicial review cannot avail her and cannot be sought to remedy dissatisfaction with the decisions of the District and Circuit Courts.

43. This argument clearly speaks to the latitude within which I may exercise my discretion to refuse judicial review and much of the commentary of McKechnie J. in *FG* applies directly to this case, particularly the discussion at para. 113 of the merits of a full s.37 hearing as opposed to judicial review.

44. I must therefore consider the applicant's arguments in respect of the 20 February 2020 hearing to decide whether they are amenable to judicial review, or whether they are so amenable but nonetheless more appropriately, in my discretion, resolved by way of the s.37 procedure available to the applicant.

Order of 20 February 2020

45. On 20 February 2020 District Judge O'Malley Costello affirmed both Orders of the District Court of 15 November 2018 refusing the applicant access following her application under s.37 of the 1991 Act. The Court has before it a transcript of the *ex tempore* decision of the Court but not a transcript of the hearing. The applicant identifies that at the callover prior to the hearing, Judge O'Malley Costello allocated a full day to the hearing as she wanted

to examine how the system worked. The case was therefore clearly given considerable time by the Circuit Court Judge.

46. In her decision, Judge O'Malley Costello identified that her decision turned on whether it was in the best interests of the children that they would have access to the applicant. She set out that she must "*look at it entirely from their point of view*" and that while they have a right to see their extended family this has to be balanced against what is best for them. In this regard she felt that the report of the guardian and the evidence was very helpful in establishing the wishes and interests of the children. The Judge notes that the evidence suggests that at present it would appear that it was in the children's best interests that the applicant not have access to the children but that this was not a fixed position, and that access could be facilitated with the appropriate preparations.
47. The Court states that even in cases where children are in care and a family member has gone abroad for a period or there has simply been a passing of time it may be appropriate for some preparation to be gone through but that in circumstances where issues of sexual abuse pertain "*the children are even more vulnerable*". The Court identifies that they have been placed in the care of the respondent and are not with foster families and that they need help in dealing with their past, additionally the applicant had not seen them for four years.
48. This led Judge O'Malley Costello to conclude that the position of the guardian and the respondent was the correct one and she affirmed the Order of the District Court to the effect that no access could take could take place until the applicant abided by the recommendations of the guardian that (i) she meet with the respondent, (ii) that she engages with the preparatory work identified by the respondent including independent assessment and (iii) that access after these requirements were met could still be subject to supervision. The Judge went on to specify that the respondent would enjoy broad discretion over that access and directed that "*there is to be no attempt by [the applicant] to contact the children*

directly, either by attending at their home…or in any other way and that all contact has to be made through the Child and Family Agency".

Arguments of the applicant

49. The applicant raises a significant number of arguments in respect of this decision. Many of the complaints are made against actions taken by the CFA rather than against the Order of 20 February. I am obliged to refuse leave to challenge actions of the CFA as the applicant has not sought to quash any such decisions in these proceedings. Separately, where she does challenge aspects of the Order of 20 February, many of these complaints are challenges going to the merits of the decision of the Circuit Court. Such challenges are outside the parameters of judicial review and complaints in that regard are best dealt with, as identified by McKechnie J. in *FG v CFA*, by issuing proceedings under s.37 if there has been a change of circumstances or an efflux of time.
50. In her legal submissions and at paragraphs 124 and 125 of the Statement of Grounds the applicant impugns the evidence of the social worker for the respondent and the guardian *ad litem* given at the hearing. This is not a basis for impugning the Order of 20 February. First, it is not a complaint about the legality of the Order but rather a merits-based challenge to the evidence given. That position combined with the availability of the s.37 mechanism, as in the context of *FG* discussed above, leads me to refuse leave in respect of these grounds.
51. There are numerous complaints made at paragraphs 126 to 129 of the Statement of Grounds that I deem as failing to meet the threshold for leave as identified in *G v DPP* [1994] IR 374. As the Court in that case set out, *inter alia*, the facts averred to if proved must amount

to a stateable ground which in turn provides an arguable case in law for the relief sought. Paragraph 127 amounts essentially to a bare claim that the Order was irrational as it conflicted with what was said at the hearing. Having reviewed the Order and the transcript of the decision, I can see no basis for that conclusion and thus reject it.

52. At paragraph 128 it is stated that the Order of the Court of 30 May 2019, which set out that the completion of the guardian *ad litem's* report was not to be conditional on the applicant liaising with the respondent, can be contrasted with the decision impugned here, which requires that she interact with the respondent. No recognisable legal argument is made out here, it is perfectly consistent that a pre-hearing Order facilitating a guardian *ad litem's* report would have different conditions to that on access. I therefore refuse leave on this ground.

53. Paragraph 129 takes issue with the fact that although the respondent agreed to change the social worker which was then incorporated into the pre-hearing Order of the Circuit Court of 30 May 2019, the original social worker was promoted and remained involved in the case. This is a complaint against the actions of the CFA and does not constitute a challenge to the Order. It is common case that the requirement of the Order of the Circuit Court of 30 May 2019 that a new social worker be appointed, was complied with. A complaint about the original social worker remaining involved does not amount to an argument that would form the basis for quashing the decision of the Circuit Court of 20 February.

54. At paragraph 131 an argument is made that the applicant had a legitimate expectation that the Circuit Court would grant her access. I cannot grant leave in respect of this ground. It is simply not a feature of an adversarial legal system that one could have a "legitimate expectation" that a court will come to a particular conclusion. The applicant has, as the respondent notes, failed to make out any of the elements of such a claim and as such it must fail.

55. Paragraphs 132 and 133, together set out the argument that it was irrational for Judge O'Malley Costello to direct that the applicant seek access through the respondent where the applicant had adduced evidence of the "*implacable hostility*" of the respondent. Despite an allusion to the "irrationality" of the decision, this argument is clearly a substantive complaint as to the conclusion of the Circuit Court and as such it is not appropriate for judicial review.

56. At paragraph 134 an argument is made that the applicant has suffered unfairness due to delay, on the part of the respondent, the guardian and the Court. I can only consider the delay in obtaining a hearing date. It is certainly regrettable that it took from November 2018 until February 2020 for the appeal to be heard but the level of delay here is not egregious. Unfortunately, the reality of limited judicial resources with the knock-on consequences for availability of appeal dates, means that the validity of the Order is not called into question by the delay here.

57. This leaves the omnibus of grounds set out at paragraph 130 which can be classified into two broad strands, the first relates to the involvement, conduct and position of the guardian *ad litem*, the second may be characterised as purely procedural objections.

58. Turning firstly to the arguments with regard to the guardian, grounds (e), (f), (h), (m) and (o) in essence disclose the same complaint, also addressed in the legal submissions, that the content of the report was impartial, biased against the applicant and failed to take into account her proposals or the views of the children. These arguments are not made against the Order but rather as against the CFA. I have already explained why such complaints cannot be ventilated in these proceedings. To the extent that the applicant is criticising the Court for taking the report into account given its contents, although the applicant's complaints exceed the leave threshold, they are not in my view well founded for the reasons set out below.

59. The applicant complains that her views were not included in the report. However, she has failed to identify why as a matter of law they were required to be. If one looks to s.27 of the 1991 Act, specifically s.27(1), which sets out the power of the Court to procure reports, the Court can "*by an order under this section give such directions as it thinks proper to procure a report from such person as it may nominate on any question affecting the welfare of the child*". The Order of the Circuit Court of 30 May 2019 directing that the report be made sets out, *inter alia*, the following:

> *"The Court Doth Order*
>
> *...*
>
> *2. Direct [the guardian] to report to the court with regard to the proposal of access by the Applicant and general welfare as to the children at this time. [the guardian] shall provide an insight into the voice of the children in these proceedings. All parties concerned are to co-operate with [the guardian] with the preparation of the report."*

60. In my view, this Order requires the guardian to give their insight on the proposed access and the general welfare of the children while also encompassing their views. The other relevant parties are simply required to co-operate with the guardian to this end. In her legal submissions the applicant argues that the guardian cannot carry out an assessment of the best interests of the children without first consulting with the family of the children. Leaving aside the generality of that proposition, on the facts of this case, I do not accept that it was necessary for the guardian to have the views of the applicant specifically to ascertain the views of the children or to report on their welfare. In his report, exhibited to the affidavit of Paul Johnson of 21 November 2022, the guardian identifies that prior to completing his report he had read a significant amount of background material, met each of the four children, attended during access periods and had met with a number of family members.

61. It is perhaps illustrative to note that the views of many of those relatives are not included in any explicit manner in the report, and in my view that is entirely acceptable. I see no basis for concluding it is required that he include the specific views of the applicant, particularly in circumstances where that family member has not had a significant level of interaction with the children for several years. Moreover, it is clear that the applicant had ample opportunity to make her views known to the Court and therefore was not disadvantaged in this respect.
62. The argument that the views of the children were not included runs into similar difficulty. In circumstances where the guardian's report quite clearly reports those views in plain terms in a dedicated section, I must reject this argument.
63. Beyond this, as per the requirements of s.27, the content and form of the report is ultimately a matter for the Judge in question. The applicant has identified no other ground to impugn the report other than those addressed above. Accordingly, I see no basis for relief on these grounds.
64. This brings me to grounds (g) and (n) where the applicant impugns the fact that the guardian is unregulated and further argues that he is a paid agent of the respondent respectively. This is not a challenge to the Order of 20 February, and it cannot be ventilated in these proceedings.
65. I turn now to the procedural arguments found at paragraph 130 of the Statement of Grounds. Grounds (a) and (b) set out that the Court limited the applicant's evidence to establishing why her grandchildren should see her and she was precluded from adducing evidence of the respondent's refusal to grant her access in the past. In contrast it is submitted that the evidence of the respondent and the guardian was admitted in its entirety. The respondent in its Statement of Opposition pleads that the applicant was afforded a full opportunity to be heard and that it was correct for Judge O'Malley Costello to give the

applicant, as a litigant in person, guidance as to what evidence was particularly relevant to the application. The respondent also sets out that Judge O'Malley Costello made it clear to the applicant that it was a matter for her as to how she wished to run her case.

66. There is no transcript before me of the hearing of the Circuit Court of 20 February 2020. However, where the application under s.37(2) for access empowers the Court to vary, discharge or make any such Order as it thinks proper regarding access to the child by an applicant, there is an obviously broad discretion afforded to the Court. Focusing the applicant's evidence on why her grandchildren should see her is appropriate given the task of the Court i.e. to consider the question of access having regard to the best interests of the children. In that context, and in line with the ordinary practice of the courts, I accept that it would be entirely proper for a judge to indicate to a litigant in person the most relevant evidence to focus their attention on.

67. That principle does not of course allow for the arbitrary or impartial exclusion of evidence but in circumstances where the applicant's ground discloses evidential guidance appropriate given the nature of the hearing, and where there is no direct evidence identifying relevant evidence that the applicant was restrained from providing, the applicant has not made out a ground of arbitrary or impartial exclusion. The burden of proof rests with the applicant in this respect. Accordingly, I grant the applicant leave in respect of this ground but reject it.

68. At ground (i) the applicant makes an analogous argument to the two grounds I have just discussed in respect of her questioning of particular witnesses having been curtailed. For the same reasons, I refuse relief on this ground for the same reasons as the foregoing paragraph.

69. Moving to ground (d) the applicant impugns the fact that she did not receive the guardian *ad litem's* report in advance of the hearing and only received it on the day in question. The

respondent in the Statement of Opposition notes that both the respondent and the guardian were constrained in providing material to the applicant by the *in camera* rule and past breaches of that rule by the applicant. In the affidavit of Paul Johnson of 21 November 2022, this interpretation of the *in camera* rule is said to be in line with the decision of the High Court in *MS v Gibbons* [2007] 3 IR 785. In that case Murphy J. held that the operation of the *in camera* rule could be distinguished in the case of, *inter alia*, legal professionals and litigants themselves. The former being officers of the Court and subject to potential professional disciplinary action, could be provided with confidential reporting. In contrast, litigants themselves were subject to no such sanction and were therefore entitled only to supervised reasonable access e.g. in court on the day of the hearing. As this is completely analogous to the instant case and I see no argument that would lead me to consider departing from the judgment of Murphy J., I refuse relief on this ground.

70. At (c) the applicant takes issue with the fact that the respondent did not inform her in advance of the evidence they were going to rely upon at the hearing. The respondent submits that there could be no question but that the applicant was aware of the case against her in circumstances where she attended the hearing on 15 November 2018. The applicant was legally represented at that hearing and it is clear from Mr. Johnson's affidavit of 21 November 2022 that it was a fully contested hearing.

71. In addition to this I note that Mr. Johnson, who gave evidence for the respondent at both hearings, avers in his affidavit of 21 November 2022, that as this was an appeal and the respondent's position had not changed, no new social work report was prepared and instead he gave oral evidence in line with his evidence in the District Court. It should also be noted that in her legal submissions the applicant notes that Mr. Johnson's evidence was "*mostly the same as he gave at the District Court*". In the circumstances, the applicant has failed

to establish that she was unaware of the evidence she was to face on appeal. As such, I refuse to grant relief on this ground.

72. The grounds set out at (j), (k), and (l) identify that a number of witnesses summoned by the applicant failed to appear at the hearing. It is not specified, except for one witness, who these persons are other than stating most of them are staff of the respondent and her grandchildren's foster carers. Similarly, it is not identified if this failure was addressed at all during the hearing or how it was dealt with by Judge O'Malley Costello. As has been identified numerous times throughout this judgment, judicial review is a discretionary, procedural remedy. Nothing in these grounds discloses any decision made by Judge O'Malley Costello, let alone a positive action or negative failing in respect of these witnesses, that is impugned. A bare statement that certain witnesses failed to appear does not amount to a ground on which leave could be given.

73. At subparagraph (p) the applicant argues that Judge O'Malley Costello failed to provide a written judgment. In circumstances where the *ex tempore* judgment given at the hearing set out clearly the reasons for the refusal I can see no basis for the argument that a written judgment is necessary. Accordingly, I refuse relief on this ground.

74. Finally, the applicant has identified a number of arguments in her legal submissions. Principal among these is the argument that in light of the decision of Judge Hogan in *JG v Judge Kevin Staunton* [2014] 1 IR 390 where the Court, in an obiter comment, noted that it did not accept that s.47 of the 1991 Act would provide a basis for a direction that parents undergo a parental capacity assessment. The terms of the s.47 power are clearly analogous to the power under s.37(2) and as such this argument has some weight but regardless, it and all the others included in the submissions, are wholly outside the pleadings. As such, in line with the approach identified in *AA* discussed above already, I dismiss these arguments in their entirety.

Relief in respect of Article 8 of the European Convention on Human Rights

75. In her Statement of Grounds, the applicant identifies at paragraph 6 that she seeks relief in the form of a declaration that the decisions refusing her access to her grandchildren are incompatible with the ECHR. In her legal submissions, it is specified that this relief is in respect of the Orders of 25 January 2018, 15 November 2018 and 20 February 2020. In each case it is argued that the refusal to grant access was incompatible with the ECHR as the threshold to intervene in family life under Article 8(2) was not reached. The respondent identifies in the Statement of Opposition that it is accepted that the applicant has family life rights under Article 8 of the ECHR but that the applicable sections of the 1991 Act, in particular s.37, balance the rights of the applicant with the best interests of the children and were correctly applied by the Circuit and District Courts. It is further identified that the applicant has made no challenge to any of the operative provisions of the 1991 Act.
76. In circumstances where I have addressed each of the decisions of the District and Circuit Courts impugned by the applicant and where I have found no reason to disturb those decisions, and further where no challenge is made to the operative provisions, I will grant leave but substantively reject this argument.

Conclusion

77. Because the applicant has failed to obtain leave in respect of her challenges to the District Court Orders of 10 July 2015, 21 September 2017, 25 January 2018, 15 November 2018 and has failed in her substantive challenge to the decision of the Circuit Court of 20 February 2020, she is not entitled to any of the reliefs sought in her Statement of Grounds. I therefore refuse her application.