

**THE HIGH COURT
JUDICIAL REVIEW
RECORD NO: 2005/474 JR**

BETWEEN:
LEGAL AID BOARD
Applicant

AND

DISTRICT JUDGE PATRICK BRADY
Respondent

AND

**THE NORTHERN AREA HEALTH BOARD, MG, THE HUMAN RIGHTS
COMMISSION**

Notice Parties

THE HIGH COURT

RECORD NO: 2006/ 652 SS

**IN THE MATTER OF SECTION 52 OF THE SUMMARY JURISDICTION
ACT, 1857 AS EXTENDED BY SECTION, 62(1) OF THE COURTS
SUPPLEMENTAL) PROVISIONS ACT, 1961**

AND

IN THE MATTER OF KG (A CHILD)

HEALTH SERVICES EXECUTIVE NORTHERN AREA

Applicant
AND

MG
Respondent

AND

**LEGAL AID BOARD, THE HUMAN RIGHTS COMMISSION, IRELAND
AND THE ATTORNEY GENERAL**

Notice Parties

Submissions on behalf of the Human Rights Commission

The Human Rights Commission (hereinafter "*the Commission*") submits the following submissions in relation to certain issues arising in the proceedings before this Honourable Court.

The Commission's functions are set out in the *Human Rights Commission Act, 2000* as amended. Section 8(h) empowers the Commission to apply to this Honourable Court and to the Supreme Court to be joined as *amicus curiae* in proceedings before the Court that involve or are concerned with the human rights of any person and to appear as such on foot of an order of the Court. The term "human rights" is defined in the Act of 2000 as meaning;

- "(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and
- (b) the rights, liberties or freedoms conferred on or guaranteed to, persons by any agreement, treaty or convention to which the State is a party."

The Commission is of the view that the proceedings herein raise certain fundamental issues pertaining to the protection of human rights. In that regard, it will address the question of the right, if any, of an adult such as MG to the benefit of a Guardian *ad Litem* if her legal representatives cannot take instructions from her without the assistance of a Guardian *ad Litem*, for the purpose of resisting an application such as that currently pending before the District Court and instituted by the Health Service Executive pursuant to the *Child Care Act, 1991*. The Commission shall thereafter consider whether MG has any right to have the expenses and fees of such a Guardian met by the State. Thus, the Commission will consider only the issues raised in Questions 3A, 8 and 9 of the agreed Issue Paper. In its submission, the Commission is working from the assumption that the interests of the infant child KG are represented by a Guardian *ad Litem* whose role and function differs from that of a Guardian *ad Litem* acting on behalf of a parent with a disability, see page 11 *infra*.

(a) MG's Right to a Guardian ad Litem

(i) The Constitution

The legal representatives acting on behalf of MG informed the District Court that, by reason of her psychological condition, they were unable to take instructions from their client. In such circumstances, the prospect arose that their client's rights would be interfered with at a most fundamental level by the making of a Care Order which she had no effective opportunity to resist. MG enjoys a constitutionally-protected right to provide the care for, and to have custody of, her daughter¹, KG who, in turn, has a corresponding right to care and company of her mother². In order to vindicate these rights, attaching to mother and daughter alike, and having regard to the constitutional presumption that KG's welfare is best met within the confines of her natural family³, MG must have access to the District Court in order to resist the application of the Health Service Executive pursuant to the *Child Care Act, 1991*. She must, like all parents, have every reasonable opportunity to present her case against the making of a care order, having particular regard to the fact that such an order has the effect of transferring parental responsibilities to the Health Service Executive and displacing the parent's role in a most fundamental manner. While the Irish courts have not addressed this issue in the context of proceedings under the *Child Care Act, 1991*, they have frequently insisted that the Constitution requires that persons in similar positions must enjoy all of the protections of natural and constitutional justice⁴. Such procedural rights cannot be diminished by virtue of MG's inability to instruct her lawyers in the ordinary course. In view of her mental disability, there is no reality to the exercise by MG of that right of access to the court unless she has the benefit of the assistance of a Guardian *ad Litem* who shall endeavour to present her wishes to the District Court.

¹ *The State (Nicolaou) v An Bord Uchtala [1966] IR 567; G v An Bord Uchtala [1980] IR 32; O'Flaherty J in O'C v Sacred Heart Adoption Society [1996] 1 ILRM 297.*

² While MG is the only Respondent to the proceedings before the District Court, it is not clear whether the family embracing MG and KG is a marital one, thus bringing the provisions of Article 41 of the Constitution into play. If it is, the presumption that the best interests of the child are best served within the confines of that marital unit must be considered. The Commission is anxious, however, to promote the provision of similar levels of protection to non-marital and marital families alike.

³ *N v The Health Service Executive (Unreported, Supreme Court, 13th November 2006, per Hardiman J*

⁴ See, for example, *MQ v Gleeson [1998] 4 IR 85* regarding the procedural obligations imposed by the Constitution upon the then-Health Board in the course of its investigation into alleged child abuse. The alleged abuser must be afforded all of the requirements of natural and constitutional justice in the course of such an investigation.

(ii) The European Convention on Human Rights

According to the well-established case-law of the European Court of Human Rights, “the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life”⁵ and any domestic measures hindering such enjoyment will amount to an interference with the right as protected by Article 8 of the European Convention on Human Rights.

Article 8 provides;

- “1. Everyone has the right to respect for his private and family life, his home and correspondence;
2. There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 8 thus provides for the right to *respect* for one’s family life and private life. It will be seen that once family life or private life is demonstrated, any interference with or restriction on that right must be justified under Article 8.2, in that it must be;

- “in accordance with the law”;
- for one or more of the specified aims in Article 8(2);
- “necessary in a democratic society” in order to secure the necessary aim. Thus the interference with or restriction on the right must be in response to a pressing social need and be no greater than is required in order to address the said social need, i.e., it must meet the requirements of the proportionality test.

The Court has acknowledged that the concept of “private life” is wide in ambit and in ***Niemetz v. Germany***⁶ the European Court of Human Rights stated that:

“...it would be too restrictive to limit the notion [of private life] to an ‘inner circle’ in which the individual may live his own personal life as he

⁵ *W v United Kingdom* (1988) 10 EHRR 95

⁶ (1992) 16 EHRR 97 at paragraph 29

chooses to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.”

The above *dictum* was endorsed by Finlay-Geoghegan J in the recent decision of ***Bode v The Minister for Justice***.⁷

Thus, while the Article places a negative obligation upon States Parties to refrain from activities which interfere in an undue manner with the private and/ or family life of an individual, it also imposes an obligation upon such States, by means of positive measures if necessary, to afford individuals the opportunity to exercise the rights in question. Equally, the Article imports a notion of fair procedures which is ancillary to the wider purpose of ensuring respect for private and/ or family life. Thus, the Court has held that certain procedural safeguards are implicit in Article 8 in order to ensure respect for private and/ or family life and has concluded that decision-making processes, administrative and judicial, must be fair and afford due respect to the interests protected by Article 8. In ***W v United Kingdom***, the Court stated that what falls to be considered is whether;

“the parents have been involved in the decision-making process to a degree sufficient to provide them with a requisite protection of their interests.”⁸

The European Court of Human Rights has thus recognised that procedural fairness requires the opportunity to make submissions and demands that parents shall have access to relevant documentation⁹ in order to ensure effective representation in relation to all decisions affecting their children. As the Court noted in ***Venema v The Netherlands***;

“It is essential that a parent be placed in a position where he or she may obtain access to information which is relied on by the authorities in taking measures of protective care or in taking decisions relevant to the care and custody of a child. Otherwise, the parent will be unable to participate effectively in the decision-making process or put forward in a

⁷ Unreported, 14 November 2006

⁸ *Supra*, n.5; at paragraph 64

⁹ *McMichael v United Kingdom* (1995) 20 EHRR 205; *Moser v Austria*; [2006] Application 16423/02, Judgment of the 21st September 2006; *P., C. and S. v. the United Kingdom*, (2002) 35 EHRR 31; *Venema v. the Netherlands*, (2003) 1 FLR 552

fair or adequate manner those matters militating in favour of his or her ability to provide the child with proper care and protection.”¹⁰

Although State Parties to the Convention must be afforded some “margin of appreciation” in relation to the precise form of procedural requirements to be adopted, the European Court of Human Rights has noted in **C v Finland**¹¹ that;

“while the authorities enjoy a wide margin of appreciation, in particular when deciding on custody....[a] stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed.”

Equally, a parent’s right to have contact with, and to provide care for, a child constitutes a “civil right” for the purposes of Article 6 of the European Convention on Human Rights. That article guarantees a right to a fair trial and states that;

“in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Thus, in **P. C and S v United Kingdom**¹², the Court held that the continuation of the hearing of care order and freeing for adoption applications when the applicant parents were unrepresented constituted a violation of Articles 6 and 8 of the Convention. Likewise, in **Keegan v Ireland**¹³ the inability of a natural father to challenge before the Adoption Board or a court the adoption of his child was found to constitute a violation of Article 6.¹⁴ Equally, without the benefit of a Guardian *ad Litem*, MG will be denied the opportunity to appear before the District Court in anything but form.

Indeed, the effective protection of parents in a position akin to that of MG demands that they be afforded such benefits *promptly* and requires that the proceedings themselves be conducted in a prompt and efficient manner, having particular regard to the fact that the child in question, as has occurred in KG’s case, may be placed

¹⁰ *Supra*, n. 9

¹¹ [2006] Application 18249/02, Judgment of the 9th May 2006

¹² *supra*, n.

¹³ (1994) 18 EHRR 342

¹⁴ See paragraphs 59-60.

with other parties pursuant to an interim care order. Such a placement, of course, may bring additional factors such as the child's bonding with new carers into play and may thus further impact upon the parent's right to respect for family life. As the European Court of Human Rights recognized in **Kutzner v Germany**;

"When a considerable period of time has passed since the child was first placed in care, the child's interests in not undergoing further *de facto* changes to its family situation may prevail over the parent's interest in seeing the family reunited."¹⁵

In the case where the parents of the child had intellectual disabilities, the Court found the interference with the applicant's family life was "not proportionate to the legitimate aims pursued" and constituted a violation of Article 8.¹⁶

(iii) The United Nations Convention on the Rights of the Child

The Commission also refers to the United Nations Convention on the Rights of the Child¹⁷, which promotes a rights-focused approach to all issues pertaining to the lives of children. Thus, it seeks to ensure, for example, that a child who is capable of forming his or her own views shall have the right to express those views in all matters affecting the child¹⁸ and provides that the best interests of the child shall be a primary consideration in all actions concerning children¹⁹. Alongside this promotion of individual rights, however, the Convention seeks to protect the interests of the family which it recognises as the fundamental group of society which should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community²⁰. Most importantly, it provides at Article 9(2) that;

"In any proceedings [which may entail the separation of a child from his or her parents against his or her will], all interested parties shall be given an opportunity to participate in the proceedings and to make their views known."

Reference is made to the judgment of Finlay-Geoghegan J in **Nwole v Minister for Justice**²¹ wherein the Court concluded that those provisions of the *Refugee Act*,

¹⁵ (2002) 35 EHRR 653, at paragraphs 66- 67

¹⁶ At paragraphs 81-82

¹⁷ Ratified by Ireland in 1992

¹⁸ See Article 12. The weight which shall be given to such views shall be determined by reference to the age and maturity of the child.

¹⁹ See Article 3

²⁰ See Preamble.

²¹ Unreported, High Court, 31st October 2003.

1996 which pertained to children must be construed, and its operation applied by the authorities, in accordance with the above Convention.

(iv) The United Nations Convention on the Rights of Persons with Disabilities

The principles of the Convention on the Rights of the Child are in conformity with the recently adopted Convention on the Rights of Persons with Disabilities. That Convention was adopted by consensus vote in the General Assembly of the United Nations on the 13th December 2006, will be open for signature on 30 March 2007 and will enter into force after it has been ratified by 20 States.²²

Many of the principles set out in the Convention are instructive for present purposes. Under the heading "Respect for home and the family", Article 23(4) thereof provides that:

"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. *In no case shall a child be separated from parents on the basis of a disability of either the child or one of the parents.*"[Italics inserted]

Article 12, which refers to "Equality before the law" provides that;

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures *to provide accesss by persons with disabilities to the support they may require in exercising their legal capacity.*"[Italics inserted]
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such

²² The Commission played a lead role among national human rights institutions in the adoption of the convention, having rresponsibility for co-ordinating the input into the convention of the European Grouping of National Institutions. It played a lead role in negotiations on the text. This was the first time in negotiations on human rights treaties that national human rights institutions were represented on the drafting committee of a United Nations convention.

safeguards *shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person*, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests."*[Italics inserted]*

Thus, the Commission is of the view that proceedings conducted before the District Court without the provision to MG of the services of a Guardian would not be in keeping with the requirements of the Constitution, the European Convention on Human Rights nor would they meet the standards espoused in the Convention on the Rights of the Child nor indeed of the Convention on the Rights of Persons with Disabilities.

(b) The Function of the Guardian ad Litem

The task of the appointed Guardian *ad Litem* acting on behalf of MG is to bring his or her skills to bear in order to determine the wishes and instructions of the adult party and to relay same to the Court. Thus, the Guardian *ad Litem* must advocate on behalf of the adult in a manner which respects the dignity of the adult and which best vindicates the party's right of effective access to the Court. It is submitted that the constitutional rights to self-determination and autonomy²³, coupled with the guarantee of equality before the law, require that the role of the Guardian *ad Litem* acting on behalf of an adult litigant, be limited to the above. Thus, it is argued that, as a general rule, the role of a Guardian *ad Litem* acting on behalf of an adult is more limited than the dual role played by a Guardian *ad Litem* acting on behalf of a child who relays the wishes of the child, having due regard to the child's age and understanding, to the court and also informs the court of his or her views regarding the best interests of the child. The Commission recognises, of course, that there is a spectrum of disability and that while some persons regarded as incapable of giving instructions to lawyers may

²³ See, for example, the judgment of Denham J in *In the matter of a Ward of Court (withholding medical treatment) (No.2)* [1996] 2 I.R. 79.

be able to do so in a successful and fulsome manner to a suitably qualified professional appointed to act as Guardian *ad Litem*, others may suffer from such severe disability that no such instructions can be gleaned. In those circumstances, it may be appropriate for the Guardian to inform the Court of the steps that have been taken in order to ascertain the views of the person in question and thereafter to indicate what he or she perceives to be in that person's best interests.

(c) Ensuring the Right of access to a Guardian ad Litem

Can a District Judge, who must of course act in conformity with the terms of both the Constitution and the European Convention on Human Rights, take steps to ensure the vindication of the right in appropriate circumstances to a Guardian *ad Litem*, on the basis of existing legislation and court rules?²⁴ The parties to the proceedings have identified a number of possible bases for the power of a District Judge to appoint a Guardian *ad Litem* on behalf of an adult party in circumstances akin to those arising herein. In that regard, Rule 7(8) of the District Court rules envisages that a person of unsound mind may defend by his or her "committee or Guardian *ad Litem*" although that Order does not confer upon the District Judge any specific power to appoint such a person. Reference has also been made to Section 47 of the Child Care Act, 1991 which provides that;

"Where a child is in the care of [the Health Service Executive], the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order."

²⁴ If a District Judge does not have the power to so appoint, then in the ordinary course, the avenue of proceeding to the High Court to challenge the absence of mechanism for appointment of such a Guardian would lie. In this type of case, however, MG would not be in a position to instruct her solicitors to institute the appropriate High Court proceedings and so, it would appear that the case stated mechanism employed by District Judge Brady may represent the only route by which such issues may be addressed in the superior courts. This route runs the risk of delay in the determination of both the child's and the mother's rights which may, depending on the length of the delay, the child's age and other relevant circumstances in the case, constitute a violation of Article 8 of the European Convention on Human Rights; *supra* page 8.

A fundamental premise of the Act of 1991 is that the welfare of the child is best served if he or she is with his or her parents²⁵; if same cannot be achieved, an Order of the District Court altering that relationship may be secured. It is therefore entirely consistent with that approach that the welfare of the child is promoted if his or her parents have an opportunity to argue in an effective manner that their child ought to remain in their care. To that extent, the terms of Section 47 may embrace the appointment of a Guardian *ad Litem* for a parent considered to be lacking legal capacity or if not so lacking, considered to be lacking the ability to give clear instructions.

In that regard, it should be noted that the courts have made it clear on a number of occasions that the above term is to be afforded a generous and broad interpretation: ***The Eastern Health Board v District Judge McDonnell [1999] 1 I.R. 175*** and ***Western Health Board v K.M. [2002] 2 I.R. 493***. In the latter case, McGuinness J, delivering judgment for the Supreme Court noted that the issue before the Court in that case was the proper construction of Section 47 of the Act of 1991 and added that it was accepted by both parties that the section must be viewed within the context of the Act as a whole.²⁶ McGuinness J. continued that;

“There can be no doubt that [the Act of 1991] is a remedial social statute, and was seen to be such by all who were affected by its provisions. Its social and remedial importance was accepted by all, including this court and more particularly the District Court... I would therefore accept the submission of the respondent that the construction of the Act of 1991, as a whole, should be approached in a purposive manner and that the Act should be construed as widely and as liberally as can fairly be done. This does not, of course, imply that Section 47 can be looked at apart from its context in the general framework of the Act, or that the widely drawn terms of the section mean that the District Court is simply at large in the orders it may make pursuant to the section.²⁷”

²⁵ Section 3(2) of the Act provides that in the performance of its function to promote the welfare of children in its area who are not receiving adequate care and protection, the Health Service Executive shall have regard, *inter alia*, to the principle that it is generally in the best interests of a child to be brought up in his own family.

²⁶ At p.502

²⁷ At p.510

Thus, it may be argued that the District Court does indeed enjoy a power under this broad section to appoint a Guardian *ad Litem* for a parent in MG's position and found to be lacking in capacity and the section ought to be so interpreted having regard to the requirements of the Constitution, the European Convention on Human Rights and the relevant United Nations Conventions.

(d) Meeting the Cost of the Guardian ad Litem

Both the Constitution and the European Convention on Human Rights must be interpreted in a manner that guarantees rights that are not only theoretical or illusory but are practical and effective. As MG is in receipt of legal aid, it would appear that there is no reality to the vindication of her right to a Guardian *ad Litem* unless the fees and expenses of such a Guardian *ad Litem* are met and thus the issue of the obligation of the State to meet same must be considered.

A Guardian *ad Litem* should ensure the vindication of MG's right to *effective access*²⁸ to the courts, a right considered in the following cases which address the issue of civil legal aid. The courts have clearly recognised therein that the rights of the applicants in question could not be secured without both the assistance of a lawyer and the provision of legal aid to meet the former's costs. It is submitted that the needs of an adult lacking in legal capacity in cases such as those arising pursuant to the Act of 1991 must be of equal if not greater magnitude and may only be met by the provision of a Guardian *ad Litem* who shall endeavour to determine the wishes of the adult in question and by the payment in appropriate cases, such as the proceedings involving KG, of the cost of such a Guardian.

As the European Court of Human Rights found in ***Airey v Ireland***²⁹, both the Article 6(1) and Article 8 rights of the Applicant, a victim of domestic violence, had been violated because of the absence of legal aid enabling her to access the courts and institute appropriate proceedings. In that case, it was the combination of the applicant's circumstances, the nature of the case, a complex procedure and the

²⁸ In the context of the ECHR, the European Court of Human Rights has repeatedly stated that the rights protected by the Convention are practical and effective, not theoretical or illusory; in *Airey, infra*, the Court noted that this was particularly applicable to the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.

²⁹ (1979) 2 EHRR 305.

absence of any legal aid that led to the breach of Article 6. Where such a breach arises, Article 1 of the Convention, which provides that each Contracting Party “shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention” may impose positive obligations upon the State, such as a duty to enact legislation designed to ensure the effective exercise of the right in question.

A number of Irish decisions have invoked the constitutional requirements of fairness and justice in support of the assertion that a party to civil proceedings may have a right to legal aid, where the proceedings shall affect fundamental interests of the party concerned. Thus in ***Stevenson v Landy and others***³⁰, Lardner J concluded that the Applicant who sought to defend wardship proceedings instituted by the then Eastern Health Board was entitled to legal aid in view of the gravity of the proceedings before the Court. The Order sought by the Health Service Executive herein is of equal if not greater import as far as the interference with MG’s constitutional right to provide care for and to have custody of her daughter and those of her daughter to receive her mother’s care and to have her mother’s company is concerned.

The approach of Lardner J was endorsed by Kelly J in the recent ***O’Donoghue v The Legal Aid Board and others***³¹. Although that decision is based upon the constitutional requirements of access to the courts and fair procedures, Kelly J. noted that his findings were entirely in conformity with that of the European Court of Human Rights in ***Airey***³².

The Commission is therefore of the view that MG enjoys the right to a Guardian *ad Litem* for the purpose of assisting her in making her views known to the District Court regarding the application of the Health Service Executive to take KG into its care and that in order to vindicate the rights of MG pursuant to the Constitution and the Convention in a practical and effective manner, the State must meet the cost of providing a Guardian *ad Litem* in circumstances such as those at issue herein.

Nuala Egan BL

³⁰ Unreported, High Court, 10 February 1993.

³¹ [2004] IIEHC 413.

³² The judgment of the European Court of Human Rights in *Steel and Morris v United Kingdom* (2005) 41 EHRR 403 is also of relevance in this regard.