**THE HIGH COURT**
**IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4.2° OF THE CONSTITUTION**

**[2018 No. 1129 S.S.]**

**BETWEEN**

**L.S.M. (A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND K.M.)**

**APPLICANT**

**AND**
**THE CHILD AND FAMILY AGENCY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 11th day of September, 2018**

1. The applicant's mother is a twenty-year-old woman who was in the care of the Child and Family Agency between the ages of thirteen and eighteen. Some of that time was spent in secure care. The concerns of the Child and Family Agency in relation to the mother are documented in the reports exhibited, and they include substance misuse, mental health issues, emotional and behavioural difficulties, risk-taking, physical aggression, self-harm and offending behaviour.

2. The applicant was born on 5th June, 2018. The applicant's father has not been involved in the proceedings. Between 11th June, 2018 and 29th August, 2018 the applicant resided with her mother in a mother and baby home. On 29th August, 2018, due to concerns on the part of the agency, an application was made to the District Court before Judge John King, who granted an emergency care order under s. 13(1) of the Child Care Act 1991 for an eight-day period. The agency then sought an interim care order. While under O. 84 r. 9 of the District Court Rules the application was required to be made two days in advance, the agency's reports were not furnished to the applicant's lawyers until 4th September, 2018. The application was made on 5th September, 2018 and came before Judge Aingeal Ní Chondúin. On that occasion oral evidence was heard from Ms. Marie O'Riordan, a unit manager of the mother and baby home, who was fully cross-examined on behalf of the applicant. Evidence then commenced from Dr. Calem De Burca, Head and Clinical Lead of Family Treatment and Assessment Services at the home, but time did not permit that to be completed.

3. I have had the benefit of the digital audio recording of the District Court hearing and what happened was that, at that point in the evening, Judge Ní Chondúin said "*I'm sorry, I'm not going to continue hearing, it is impossible to continue at this stage. I'm going to give it the earliest possible date*". There was then an exchange with lawyers, during which counsel for the applicant suggested that the applicant should be left with the maternal grandparents. Judge Ní Chondúin then replied "*I have concerns, but I have only heard one part of the story and I feel I have no choice but to issue an interim care order to the earliest possible date*". Counsel for the applicant then submitted that such an order was outside the court's jurisdiction because the proceedings had not been concluded and said "*I am not aware of any legal vehicle that allows for such a cause of action*". Judge Ní Chondúin then replied "*Well, if there isn't, there is always a first time. This is about a child. I'm not concerned about anybody else. The wellbeing of a child … I am going to grant the order and if you feel I have exceeded my jurisdiction, you know where the High Court is. Monday 17th September*".

4. The applicant now seeks an order under Article 40.4 of the Constitution for release from the custody of the agency. I have received helpful submissions from Ms. Sunniva McDonagh S.C. (with Mr. Pádraig Langsch B.L.) for the applicant and from Ms. Aoife McNickle B.L. for the agency.

**Reporting restriction**
5. At the outset of the proceedings I made an order under s. 45 of the Courts (Supplemental Provisions) Act 1961 that there be no publication of material tending to identify the applicant, her mother or other family members.

**Allegation of fundamental denial of justice due to late delivery of materials**
6. Ms. McDonagh's first complaint was that there had been a fundamental denial of justice within the meaning of the doctrine established in *S. McG v. Child and Family Agency* [2017] IESC 9 [2017] 1 I.R. 1. She submits that the failure to furnish all reports two clear days in advance was a breach of the District Court Rules and was in breach of the applicant's right to fair procedures in terms of dealing with the application. One factor in that regard is the fact that the applicant's counsel did not respond to this problem by seeking an adjournment to deal with the material; rather the application was to dismiss the proceedings. Therefore, the point that is now made in fact was not made to the District Court, namely that the applicant was so severely handicapped in defending the proceedings that that amounted to a fundamental denial of justice. In those circumstances in particular, the objection was something of a legalistic one and did not meet the fairly high benchmark of a fundamental denial of justice as set out in *S. McG*.

**Allegation of breach of fair procedures or want of jurisdiction due to issuing an order without hearing all evidence**
7. The essential submission made by Ms. McDonagh under this heading was that the District Court made an order without having completed a hearing of all of the evidence and that this was a fundamental breach of fair procedures and deprived the court of jurisdiction. Ms. McNickle responded to that argument with two submissions. The first was that s. 17 of the 1991 Act required the court to be satisfied of certain matters, the court was so satisfied, and therefore there was no issue. Unfortunately, that submission is dead on arrival because it takes no account of the principle in *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 (1970)104 I.L.T.R. 81. Where an Act requires something to be done or a condition to be satisfied, that means that the thing must be lawfully done or the condition lawfully satisfied. That in turn means that matters be carried out in accordance with fair procedures. But for the fact that the court ran out of time and felt required to make an interim order late in the day before all of the evidence could be heard with the balance to be adjourned to another date, this present application would be that jurisprudential rarity, the open-and-shut case.

8. That then brings me to the question of whether the court was entitled to make an order in circumstances where time had run out even before all of the evidence has been completed. Ms. McNickle's second submission was that the court was so entitled. I should note, contextually, that this was not a case where the court made an order on the basis of no evidence. The court had an amount of written evidence and had also had the benefit of full cross-examination of the first of the witnesses.

9. The pivotal authority in this context is the Supreme Court decision in *The State (Lynch) v. Cooney* [1982] I.R. 337 [1983] I.L.R.M. 89 in which the court at p. 365 held that, in the words of O'Higgins C.J., where there was "*no opportunity for debate or parley*" the requirements of fair procedures did not impose an obligation to hear from a party interested in the decision. From that decision a broader principle can be established, namely that where circumstances are such that the full operation of conventional fair procedures is simply impractical, due in particular to the decision-maker running out of time, a practical and pragmatic solution whereby a curtailed or modified form of fair procedures is applied is not in itself a breach of the principle. To hold otherwise and to require the

gold standard of fair procedures to be applied even if time was not available to do so would be to confer a windfall benefit on applicants, whether they were meritorious or not. The ultimate test of constitutions and laws is that things must be made to work.

10. Anticipating the doctrine of proportionality by a century and a half, Lord Macaulay commented in his *History of England* in 1848, in the context of a related situation where there was a technical difficulty caused by a delay before the adoption of a necessary parliamentary resolution, that "*This was one of those cases in which a government may be justified in deviating from the strictly constitutional course. But, when it is necessary to deviate from the strictly constitutional course, the deviation clearly ought to be no greater than the necessity requires*", (p. 78 of the 1979 Penguin Classics edition).

11. It appears that the learned judge did just that by making an order that lasted only a period of 12 days. Overall, Judge Ní Chondúin's order was pragmatic and, if I may respectfully say so, wise. In the light of the doctrine that arises from *The State (Lynch) v. Cooney*, although perhaps that doctrine had not been articulated in generalised form, that order cannot be regarded as entirely innovative, but if it was innovative, the point made by the learned judge is valid, namely that there is a first time for everything. Misunderstandings of the doctrine of precedent seem to lead some people to an erroneous conclusion that many things may be done but nothing may be done for the first time. On such an approach, innovations such as the *Mareva* injunction would never have got off the ground. Faced with the choice of innovation or injustice, a court can ill afford to spurn reasonable consideration for legitimately creative solutions. However, as I say, I do not regard the order as being fundamentally innovative. I regard it as being an order that a court is entitled to make if time runs out because under those circumstances the right to fair procedures is not breached by a truncated process. There is certainly no suggestion in this case that the late hour at which the learned judge felt obliged to deal with the matter in that way was a point in time at which there would have been a reasonable prospect of imminently concluding the hearing.

**Order**

12. What happens from here is a matter for Judge Ní Chondúin on 17th September, 2018 when the matter comes back for resumed hearing. I hope I am not misreading the transcript by detecting perhaps some possible frustration with the slightly legalistic nature of the mother's response to the application. From what I have seen, and of course I stand to be corrected, this situation is one that needs very active engagement by the applicant's mother, to develop her insight into the issues that are causing the difficulty. The applicant's mother also needs significant support and needs to be encouraged to accept that support. I would hope that the agency would be in a position to develop some access for the applicant's mother between now and 17th September, 2018 and indeed for the grandparents, particularly the maternal grandmother, who on the papers seems to have significantly more insight into the situation than the applicant's mother at the present and potentially could play a constructive role going forward, and who presumably would appreciate the benefit of some access herself.

13. So the order then will be:

i. that there be a s. 45 order as set out in the judgment; and

ii. that the application be dismissed.