Neutral Citation No. [2012] NIQB 68

Ref: STE8507

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 17/04/12

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

Marcail's (a pseudonym) application for Judicial Review

_____

STEPHENS J

Introduction

[1] These are judicial review proceedings brought by a mother, Marcail, against a Trust in relation to the decision made by the Trust on 29 March 2012 to permit a father, Fergus, to have unsupervised contact including overnight contact with his daughter Dona and to home tutor Dona. Fergus and Dona are notice parties to the proceedings.

[2] Ms McGrenera QC and Ms Devlin appear on behalf of Marcail. Mr Toner QC and Ms McKenzie appear on behalf of the Trust. Mr O'Donoghue QC and Ms Hannigan appear on behalf of Fergus. Mrs Farrell appears on behalf of Dona.

[3] I have anonymised this ex tempore judgment. The names used are not the real names of any of the individuals. Nothing should be reported which would identify any of the children or any member of their extended family. Any report of this judgment should make it known that the names used are not the real names of any of the individuals.

Sequence in relation to the application for leave to apply for judicial review

[4] The application for leave in relation to the judicial review proceedings was listed before me on 30 March 2012. They had initially been listed before another judge but at his instigation the papers were delivered to me by his tipstaff on the morning of 30 March 2012 with the suggestion that the matter should be in my list given my extensive involvement in related family proceedings. I agreed to the case being placed in my list. The 30 March 2012 was the last day of term and there was a considerable volume of judicial business. The decision made by the Trust on 29

March 2012 was to be implemented on 30 March 2012. I had been contacted on 29 March 2012 at a time when I had no papers and was informed that a matter in relation to the case of *Caitrin, Dona and Elliot* was due to be heard the next day. I suggested that until I could hear argument that the status quo should be maintained. That was a suggestion and not an order. In the event it involved unsupervised contact between Fergus and Dona being put back by the Trust for a short period of time. If the suggestion did not commend itself to any party then they were perfectly at liberty to put the other parties on notice and that may have prompted an emergency application on 29 March 2012. In the event the Trust accepted my suggestion and put back unsupervised contact for the short period necessary to allow a reasoned and considered approach to be taken on 30 March 2012. On 30 March 2012 Ms Hannigan on behalf of Fergus applied that I should recuse myself. It was agreed that the recusal application and the leave application should be listed for hearing on 16 April 2012 the first day of the new term. Skeleton arguments were directed. Ms Hannigan on behalf of Fergus submitted a skeleton argument which states that, and here I quote "The notice party believes that the learned judge is biased against him."

[5] Mr O'Donoghue who presented the oral argument on behalf of Fergus stated that his principal submission was that the test for apparent bias in *Porter v Magill* [2002] 2 AC 357 was met. Mrs Farrell on behalf of Dona supported the submissions made by Fergus. The recusal application was opposed by the Trust and by Marcail.

Legal principles in relation to the application to recuse

[6] The test which I seek to apply in relation to apparent bias is that set out in *Porter v Magill*. I start with a quotation from *In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700*

> "85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

In *Porter v Magill* Lord Hope, having quoted that passage from *In re Medicaments and Related Classes of Goods (No 2)* continued:

> "I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set

> out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[7] The application of that test has been considered in the context of family law proceedings where there is a need for judicial continuity and where the context is the changing dynamics of individuals within a family. In that context there may be a need to decide a number of issues over a number of years before the same judge. Lack of judicial continuity can do damage in the family law context. An example of the failure to provide judicial continuity is the case of *Re Glen* [2007] NI Fam. 24. Glen was five years of age and his parents had litigated in two jurisdictions before some fourteen different judges.

[8] In the case of *F (Children Contact: Change of Name)* [2007] 3 FCR 832 the principles in the family law context in relation to a recusal application were set out at paragraph [180] in the following terms:

> "(i) Justice must be seen to be done but that does not mean that judges should too readily accept suggestions of appearance of bias thereby encouraging parties to believe that they might thereby obtain someone more likely to favour their case.
>
> (ii) The fact that a judge had commented adversely on a party or witness or found them to be unreliable would not found an objection unless there were further grounds.
>
> (iii) A real danger of bias might well be thought to arise—
>
> (a) if there was personal friendship or animosity between a judge and any member of the public involved in the case,
>
> (b) if the judge was too closely acquainted with such a person,
>
> (c) if the judge had rejected the evidence of such a person or expressed views in such extreme or unbalanced terms such

as to throw doubts on their ability to approach the person or the issue with an open mind,

(d) if for those or other reasons they cause doubt in the ability of the judge to ignore extraneous matters or prejudices and bring an objective judgment to bear.

(iv) A judge should resist the temptation to recuse himself simply because it would be more comfortable to do so as for instance when the litigant appears to have lost confidence in the judge.

(v) The test remains, having considered all the circumstances bearing on the suggestion that the judge could be biased, whether those circumstances would lead a fair minded and informed observer adopting a balanced approach to conclude that there was a real possibility that the tribunal was biased."

[9] I pause to make an observation that it is preferable that judicial review applications which relate to family law matters or which arise in the context of decisions under the Children (Northern Ireland) Order 1995 are heard by a judge with experience of family matters. I have been referred to the decision of Keith J in *E W and B v Nottinghamshire County Council* [2009] EWHC 915. That was a claim for judicial review relating to two children in need. The original claim brought on their behalf alleged that the defendant Nottinghamshire County Council had failed to comply with its obligation under Section 71 of the Children Act 1989 to safeguard and promote their welfare by failing to produce core assessments which properly assessed their needs and identify how those needs should be met. I agree with the observations made by Keith J at paragraph [27] where he stated:

"I turn to the core assessments prepared on 28 January 2009. Those core assessments *were* compiled with the domains and dimensions laid down by the Framework in mind. Since those assessments were completed because of the allegation (which the Council now accepts was well-founded) that the original core assessments were deficient, one would have expected that the utmost care would have been taken to ensure that they at least would survive judicial scrutiny. It is here that the experience of a judge of the Family Division would have been helpful. Such a judge would have been able to recognise from his or her own experience of core assessments relating to the welfare of children whether these core assessments were of the quality which are conventionally regarded as satisfying the requirements of the Framework. For my part, I have concluded that they do.

> Again, some of EW's and BW's needs are expressed in general terms, but that is because their needs are such that it is difficult to be more precise, and that feeds into such lack of precision as there may have been in identifying precisely how those needs are to be met."

[10] I consider that it is preferable that a judge with experience of family law should hear this judicial review application. However the overriding consideration is that the judge should be impartial and there should be no apparent bias. Accordingly it is preferable that this matter should be heard by a judge with family law experience but the first determination is whether I should recuse myself either on the basis of actual or apparent bias.

[11] In approaching the legal principles I consider what the effect is on the fair-minded and informed observer and not the effect on a disappointed litigant. In that respect I refer to paragraph [8] of *Howell and Others v Lees Millais and Others* [2007] EWCA Civ. 720

> "The mere fact that a judge has decided a case adversely to a party or criticised the conduct of a party or his lawyers will rarely if ever be a ground for recusal. However, a real danger of bias might be thought to arise if there were personal friendship or animosity between the judge and a member of the public (see eg Locabail at [25]. The same would, I think, be true if there were personal animosity against a firm of solicitors or his partners."

[12] In considering the legal principles I have also borne in mind the passage of time between the events relied on and again I would refer to paragraph 9 of the decision of *Howell and Others v Lees Millais and Others* in which it is stated that the passage of time between the events said to give rise to the apparent bias and the hearing or trial is a relevant factor. This is apparent both from paragraph 7.2.3 and 25 of *Locabail* [2000] 1 All ER 65 where the court comprising of Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott Vice Chancellor said:

> "The greater the passage of time between the event relied on and showing a danger of bias and the case in which the objection is raised the weaker other being equal the objection would be."

[13] I also refer to the passage in *Locabail* [2000] 1 All ER 65 at paragraph [25] page 77H onwards which states:

> "By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between

> a judge and any member of the public involved in the case, or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of an individual were an issue to be decided by the judge he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; … ."

The submissions on behalf of Fergus

[14] I turn to consider the submissions on behalf of Fergus. Mr O'Donoghue submits that I have given a series of judgments in which I have made factual findings which are adverse to Fergus and that as a result of the number of those findings and the recent nature of my last judgment a fair-minded and informed observer would conclude that I am too involved and that the prospect of finding in favour of Fergus would appear to be improbable to such an observer. Mr O'Donoghue referred me to passages from some of my earlier judgments and I set out the passages to which he referred.

(a) In *Caitrin, Dona and Elliott Care Proceedings Fact-finding* [2010] NI Family 1 in which I gave judgment on 8 January 2010. At paragraph [153] and under the heading "Harm to the Children" I stated that:

> "I find that all 3 children have suffered and are likely to suffer significant harm by virtue of the care given to them by Fergus. Caitrin and Dona have not been receiving any education since September 2009. The relationship of all 3 children with their mother has been significantly affected particularly the relationship of Caitrin and Dona. They are and will all suffer from distorted development including the emergence of emotional and behavioural difficulties with personality deficits. They are all seriously damaged children."

(b) In *Caitrin, Dona and Elliott's Pseudonyms No. 5* [2010] NI Fam. 25 which judgment I delivered on 16 September 2010 and at paragraph [59] and under the heading "Further Conclusions in Relation to Dona" I stated:

> "Dona is at risk of significant harm in the future if she returned to the care of Fergus. The harm in care is now significantly less than the harm she would suffer if returned to the care of Fergus. She presently cannot live with Marcail. It would not be appropriate to make no order. I make a care

> order. In arriving at that decision I am satisfied for the reasons that I have given that a care order is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of Dona."

(c) In *Dona A Pseudonym No. 7 Application to Discharge a Care Order* [2011] NI Family 8 which judgment I delivered on 6 June 2011 under the heading "Application to Set Aside a Care Order" at paragraph [14] I stated:

> "The issues in this case were further refined after Fergus had given evidence. As will become apparent he remains an evasive individual who is a dishonest manipulator and who lacks any ability to work openly and honestly with the court or the social workers or the guardian. Mrs Keegan conceded that if I did not accept the evidence of Fergus, so that there was a sufficient stratum of reliability in it, then the application to discharge the care order could not succeed. I have approached that concession on the basis of factual findings that I have previously made, have considered again and make again in this application, that is that Dona has been significantly harmed by Fergus and still suffers from the significant harm inflicted by Fergus. I also find that the care presently being afforded to Dona by the Trust is motivated for her own good but unfortunately due to the harm inflicted on her by Fergus she is suffering harm in the care system. On that factual basis a major aspect of the application to discharge the care order is a balancing of the harm that would be inflicted on Dona if returned to Fergus as opposed to the harm that will be inflicted on her if she remains in care. To carry out such a balancing exercise the court has to be able to find a sufficient stratum of reliability in Fergus' evidence so that there is something to balance. For that reason I accept the concession made by Mrs Keegan as an appropriate concession."

(d) In my judgment dated 29 February 2012 headed *Dona A Pseudonym No. 8* [2012] NI Fam. 3 I made various observations at paragraphs [32] and [34]:

> "[32] *The likely effect on Dona of a change of her circumstances.* In effect it would be a placement with Fergus if Dona went to Country A. She would on the balance of probabilities move to reside with Fergus or a member of the extended paternal family or another individual at the instigation of Fergus. I consider that she would be subjected in these circumstances to ongoing abuse and this would have both a

> significant short and long term effect on her. There would be positives in that she would undertake education, but I consider that the balance comes down firmly against exposing her to abuse in a placement with Fergus in circumstances where as here he refuses and persistently has refused to cooperate openly and honestly with the child protection authorities or with the court or with any of the parties or indeed with his own children.
>
> [34] *Any harm which Dona has suffered or is at risk of suffering*. I have set out the harm which Dona has suffered in previous judgments. She has suffered, is still suffering and will suffer harm by the actions of Fergus. She is suffering harm in the care of the Trust but it is substantially less than the harm in the care of Fergus or in a placement in Country A which is in reality a placement with Fergus or at Fergus' instigation."

[15] In the light of those circumstances, being the extracts from those judgments, Mr O'Donoghue submits that a fair-minded and informed observer would conclude that there was a real possibility that in these proceedings the tribunal would be biased. Mr O'Donoghue also relied on various matters which have been set out in the skeleton argument. Furthermore Mr O'Donoghue submits that the judicial review application by Marcail relies on my earlier judgments contending that the conclusions in them have not been taken into account by the Trust or that the decision of the Trust is Wednesbury unreasonable given those findings. He submits that the judge whose decisions are being relied on in the judicial review application should not make a decision as to whether that judge's findings have been taken into account or whether the decision of the Trust is Wednesbury unreasonable in light of those findings. That the fair-minded and informed observer would consider that the family law judge was a judge in his own cause in the judicial review proceedings.

[16] At an earlier stage in this judgment I indicated that Mr O'Donoghue relied on various matters set out in the skeleton argument. I do not propose to deal with all of them in this judgment, but I make it clear that I have considered each of them both individually and cumulatively in combination with all the other matters set out by Mr O'Donoghue.

[17] Mrs Farrell agreed with but did not add to the submissions made by Mr O'Donoghue.

Findings in relation to the circumstances

[18] The test for recusal is two stage. The first stage is fact finding. Accordingly first I must ascertain all the circumstances which the fair-minded and informed

observer would wish to consider when being asked whether there was a real possibility that the tribunal was biased. What then are the circumstances?

[19] The circumstances include:-

(a) The passages in my previous judgments as set out by Mr O'Donoghue. Those are correct extracts from my judgments and they are part of the circumstances, but they are not to be taken in isolation or out of context;

(b) I have continually sought to persuade Fergus to engage openly and honestly with the Trust and that encouragement has been given on the basis that it will have a response. Fergus is aware from numerous interventions by me that positive change is a matter which this court will consider carefully. The fair-minded observer will therefore be aware that past decisions are not definitive for future decisions.

(c) I have made it clear on a number of occasions orally and also in writing that because Fergus has acted in a particular way in the past does not mean that he will continue to act in a particular way in the future. For instance at paragraph [23] of my judgment dated 29 February 2012 *Dona A Pseudonym No. 8* [2012] NI Fam. 3 I stated:

> "I have set out in detail Fergus's overriding objectives in a number of previous judgments. Those objectives include excluding Marcail from the life of all three children and leaving them in his sole care. I repeat what I indicated in an earlier judgment, that I do not assume that what occurred in the past necessarily remains the same in the present or will remain the same in the future. I have always encouraged and again encourage Fergus to participate openly and honestly with the Trust and in these proceeding. I remain willing to change my assessment of Fergus."

Another instance is at paragraph [33] of my judgment dated 6 June 2011 *Dona A Pseudonym No. 7 Application to Discharge a Care Order* in which I indicated that I had reviewed all the previous factual findings contained in my earlier judgments and maintained those findings insofar as they impacted on the present risk of significant harm to Dona.

(d) All the decisions at which I have arrived have been after hearing extensive evidence, detailed submissions and considering vast bundles of documents. They are considered decisions on the facts.

(e) All the decisions at which I have arrived will also have to be taken into account by any other judge who hears the judicial review application. For instance in deciding whether the decision of the Trust was Wednesbury

unreasonable any judge will have to take into account that at an earlier stage I had decided that Dona should reside with Fergus.

(f) Fergus has appealed a number of factual findings and the Court of Appeal has dismissed the appeal. The Court of Appeal gave written judgment on 20 October 2011. The court consisted of Lord Justice Higgins, Lord Justice Girvan and Sir John Sheil. I refer to but will not read out at this stage paragraphs [58], [60] and the concluding paragraph [66] of that judgment. The allegations of bias were rejected by the Court of Appeal and the Court of Appeal was of the view that the approach of the trial judge was meticulous.

(g) In *Caitrin, Dona and Elliot (Pseudonyms) (No. 4) (Care proceedings: Final hearing)* [2010] NIFam 8 I decided not to make a care order in respect of Caitrin and Dona and as a consequence of that decision they would have resided with Fergus. Accordingly in the past I have demonstrated a willingness to decide in Fergus's favour despite the adverse view I took then of his actions.

(h) I have never at any stage indicated that I would not change my approach to Fergus.

[20] I do not propose in this judgment to go through all the matters set out in the skeleton argument. I take one as an illustration. It is suggested in some way that I was biased against Fergus because of my own motion I made a freezing injunction against him. That is not the full picture. The injunction was made I believe on 14 December 2010. It came about in the following circumstances. There were allegations by Fergus that Marcail had assets in country ~A~ which she was not revealing to the court. I had concerns that if those assets existed that they should be preserved so that they could be available for the benefit of the children. It also became apparent that Fergus had an account in the Isle of Man. He was not giving me information about that account. Again I had concerns that those assets were maintained potentially for the benefit of the children. I indicated to both Fergus and to Marcail that I was considering imposing an injunction on both of them to prevent them from disposing of their assets. I sought an undertaking to the court from both of them that they would not dispose of their assets. An undertaking was forthcoming from Marcail, there was no undertaking from Fergus. Ms McGrenera on behalf of Marcail then indicated that she would be applying for a freezing injunction against Fergus. I heard argument from all the parties in relation to that application. I granted the injunction. I directed Marcail to file an affidavit in support of the application. I required both parties to set out assets and income by 12 noon on the following Friday. I made arrangements for further arguments in relation to the weekly amount which was exempt from the freezing injunction against Fergus. I consider that a fair-minded and informed observer would consider that this was not one-sided action against Fergus but rather it was a considered and balanced decision. He had the right to appeal that decision and availed of that right. His appeal was dismissed. His appeal to the Supreme Court has been dismissed. A fair-minded and informed observer would consider this was a balanced approach to

both parties. That both parties had an opportunity to make representations and that though the matter was raised by me, out of concern for the children's future, an application was made by Marcail.

[21] Another matter raised in the skeleton argument is the suggestion that I made on 29 March 2012 that the status quo should be maintained until argument could be heard on 30 March 2012 is an ingredient that a fair-minded and informed observer would take into account. I consider that such an observer would take into account that it was not an order and that the delay was a matter of an hour or so. That the Trust had the assistance of legal advice, that my practice in the Division is that any application could be made at any stage during the day in the case of an emergency.

The Guardian Ad Litem

[22] A suggestion has been made that the retention of the Guardian Ad Litem in this case is an indication of apparent bias or prejudice on my part against Fergus. The Guardian Ad Litem was retained because of my request for assistance from the Official Solicitor in relation to potential breaches of court orders. There was an understandable reluctance in this family case on behalf of the Trust and the mother to be seen to be assisting in such an investigation. The Trust wish to maintain their relationship with the children and they also wish to maintain the potential to work with Fergus. Marcail would not wish to take any action that could have a potential consequence, or series of potential consequences, for the children's father. She wishes to maintain a relationship with her children. The guardian was not discharged because she was to be available to provide information to the Official Solicitor. I wished there to be a dispassionate investigation of these matters by the Official Solicitor with the assistance of somebody who is informed in these proceedings rather than information being given by the court to the Official Solicitor. I consider that the involvement of the Guardian has extended further than I initially anticipated in that she attended a Looked After Children review. I make it clear now that she should not attend further Looked After Children reviews. I will list the family case with a view to discharging the Guardian in the near future.

Conclusion

[23] Any judge hearing family cases has to take into account his previous factual findings. Doing that is not being a judge in one's own cause particularly where, as here, it is expressly clear that on each occasion the matter will be looked at afresh. An informed observer would know that as a general principle. An informed observer would also be aware of that on the particular facts of this case from what I have repeated on numerous occasions and from what I have stated in my judgments. That is that the matter would always be looked at afresh. I do not consider that an independent and informed observer would consider on the basis of any of the matters that have been raised in front of me that there is any apparent bias in this case. In arriving at that conclusion I have considered again the conduct

of the hearing on 30 March 2012. I do not consider that a fair-minded and informed observer would take anything out of it other than an attempt to identify the issues.

[24] Considerable care was taken by the court in relation to the question as to by whom and in exactly what manner Caitrin and Dona were informed as to the outcome of the various stages of the care proceedings and as to the reasons contained in my judgments. Expert advice was obtained in relation to this aspect which confirmed my initial view that both Caitrin and Dona should be carefully taken through the entire judgments by a person other than either of their parents. I wished to avoid either an inappropriate undermining of the authority of those decisions by one parent or any potential for an expression of a sense of justification on behalf of the other. The expert advice underlined how important it was for both Caitrin and Dona that the full judgments containing all the reasons should be made available dispassionately. As a general proposition harm can be caused to children by counsel adopting an allegation by a client of express bias which is unsupported by any material capable of analysis and which undermines the considered and reasoned conclusions of the court. Particular care should be taken by counsel in the family context. The suggestion, no matter how tangentially made, of express bias in this case should not have been made.

[25] I dismiss the recusal application.