Neutral Citation: [2014] IEHC 664

THE HIGH COURT

[2013 No. 959 J.R.]

BETWEEN

R. L.

APPLICANT

AND

HER HONOUR JUDGE MARGARET HENEGHAN

RESPONDENT

AND

M. McC.

NOTICE PARTY

JUDGMENT of Mr. Justice Henry Abbott delivered on 25th day of July, 2014

1. This judgment relates to an application for judicial review of a judgment which the respondent made in relation to the custody of the child, who is the son of the applicant and notice party and was born on 23rd August, 2010. The relationship between the applicant and the notice party broke down in or about March, 2011 and the notice party subsequently initiated guardianship, custody and access proceedings. The applicant unsuccessfully applied to the District Court, and later to the Circuit Court for leave to relocate to England with the infant.

2. By notice of appeal dated 21st November, 2013, the notice party appealed the order of the District Court refusing to vary access. The applicant also appealed the order of the District Court (Judge Brennan) refusing to grant her leave to relocate the infant to London. These appeals came on for hearing before the respondent, Judge Heneghan, on 22nd November, 2013. As the notice party's appeal was not dealt with by Judge Heneghan by reason of the absence of an order of the District Court, the appeal of the applicant in relation to the refusal to grant leave to relocate proceeded. Upon the matter first coming before Judge Heneghan for hearing on this basis on 22nd November, 2013, it emerged that the child could not be produced in court. The notice party had made allegations that the child had been unilaterally removed by the applicant to London and there had been Hague proceedings in London, which had been adjourned pending the outcome of the Irish proceedings. Judge Heneghan stated to the parties that there had been cases where one parent had unilaterally removed the child of the parties from the jurisdiction where a change in custody to the other parent had been warranted. On that basis, the matter came on for an urgent hearing on 25th November, 2013. At the conclusion of the hearing before Judge Heneghan on 25th November, 2013, the following order was made:-

> (1) Affirm the order of the District Court.
>
> (2) Refuse the application to transfer the child to London.
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> (3) Direct (child) to a primary place of residence with his father as and from 26th day of November, 2013.
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> (4) The respondent to pay €100 per week to the appellant.
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> (5) (Child's) passport to be handed over to the respondent with (child) on 26th day of November, 2013, at 1.00pm in Carlow.
>
> (6) Liberty to apply re access and maintenance if not agreed between the parties.

Leave Granted

3. The applicant was granted the following reliefs by way of judicial review:-

> (1) An order of *certiorari* by way of application for judicial review quashing the order of the respondent made on 25th November, 2013, transferring primary residence of the child to the notice party.
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> (2) An order of prohibition by way of application for judicial review preventing the Circuit Court on appeal making any further order in the appeals before it on foot of the notice of appeal dated 14th May, 2013 and 18th May, 2013.
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> (3) A declaration that the determination and order of the respondent made on 25th November is null and void for the reasons set out hereunder.

In the amended statement required to ground the application for judicial review the applicant, having set out the history of the case already referred to herein, continues at para. 3 as follows:-

> 3. On 25th November, 2013, the respondent sitting in Dundalk Circuit Court heard the applicant's appeal against the order of Judge Brennan made in Drogheda District Court on 9th May, 2013, refusing the applicant's application to relocate from Ireland to the UK.
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> 4. By way of background, several applications were made to the District Court seeking orders in respect of the child. The applicant sought orders for leave to relocate to London with the child. The notice party made various applications pursuant to the Guardianship of Infants Act 1964, including an application for guardianship and orders for directions pursuant to s. 11 of the Act (Guardianship of Infants Act 1964).
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> 5. The application to relocate to London with child was refused in the District Court on 9th May, 2013. The applicant appealed this refusal to the Circuit Court which appeal was listed for 21st November, 2013.
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> 6. The court set 25th November, 2013, aside to hear the matter. On 25th November the applicant was unrepresented and further, her partner who was prepared to give evidence in support of the application, was not available.

7. The applicant was sworn in and the court took her through the history of the case. The applicant's evidence took into account her current situation and proposals for her potential move to the United Kingdom.

8. The applicant never indicated to the Circuit Court that her intention was to return to London regardless of the outcome, nor was that ever her intention. The issue before the court as far as the applicant was concerned was whether she would have primary care of child in Ireland or whether she would be allowed relocate. Whilst matters concerning access were the subject of various court applications, the child's father typically had access every second weekend (including overnight access) and holiday access during summer vacation.

9. In the District Court M.C. (the father) had made an application for variation of an order made on 12th February, 2013. This order had been refused. A notice of appeal of the refusal to vary the access order dated 18th May, 2013, was served on the applicant's solicitors by letter dated 18th May, 2013.

10. M.C's (father's) appeal against the refusal to vary the order of 16th February, 2012, was listed before the Circuit Court on 25th November, 2013, but the court indicated it could not hear this appeal as the father could not produce the original order he sought to vary. The court granted leave to apply at a later date. The two matters then listed before Dundalk Circuit Court that day were:-

(i) whether the s. 47 report should have been considered by the District Court;

(ii) whether or not the applicant could relocate to England with the child.

11. The learned Circuit Judge was exercising her appellate jurisdiction only in respect of the matters set out in the appellant's notice of appeal. No questions were asked of the applicant in relation to a change of custody. The applicant did give evidence as how unhappy she would be if she could not relocate and how precarious her financial and housing situation would be. However, she never gave evidence that she intended moving to London without Child. Indeed, this was never her intention.

12. It is clear from the order that the Circuit Court judge dismissed the appeal but went on to direct a transfer of primary care from the applicant to the child's father.

13. Throughout the applicant's evidence she was at pains to refer to her plans as proposals and that they were dependent on the outcome of the appeal and subject to the court granting her leave to relocate to London. She had no prior notice at all that it was the court's intention to make a decision transferring primary care to child's father. As a result, she did not and was not in a position to adduce any evidence relevant to this issue. Neither had she prepared, nor did she cross examine the child's father about any matters relevant to this issue, for example, his current employment which necessitates extended periods away from home. Indeed, she would have obtained legal representation if she had thought something as serious as a change in primary care had to be decided.

14. No opportunity was given to the applicant to adduce any evidence regarding the effect of such a fundamental change on the child's circumstances. The applicant's understanding at all times was that the only issue before the court was that the applicant would stay in Ireland exercising care of the child or, alternatively, she would be permitted to move to England with him.

15. The decision of the court will have a profound effect on the welfare of the child as the applicant has been his primary carer all his life and his father to date has had access every second weekend.

16. No evidence was adduced as to the means and needs of either party. Further, no application for maintenance had been before the District Court or on appeal to the Circuit Court. The Circuit Court had no jurisdiction to make an order directing M.C. to pay the weekly sum of €100 and/or further, had heard no evidence on which such figure could be ordered. Further, the applicant was unaware prior to and in the course of the hearing that the court intended making a maintenance order and had no opportunity to adduce any or any relevant evidence.

Having thus expanded on the facts, the applicant set out in para. 2 of the grounds the following legal grounds upon which relief is sought:-

(a) The respondent acted in excess of her jurisdiction in deciding an issue which was not the subject of an appeal, that is, the transfer of the custody or primary residence of the child from the applicant to the father.

(b) The respondent decided an issue not the subject of an appeal without affording the applicant an opportunity to meet the case or to obtain legal advice or representation.

(c) Even if (which is denied) the respondent had jurisdiction to decide the said issue, the respondent failed to inform the applicant in advance of her intention to determine such an issue, thereby failing to apply the tenets of natural and constitutional justice.

(d) Even if (which is denied) the respondent had jurisdiction to decide the said issue, having heard the evidence, the respondent failed to indicate to the applicant of her intention so to do and to adjourn the matter to enable the applicant to seek legal advice or representations or to take further action to protect the interests and those of the child.

(e) Such further or other grounds as this Honourable Court may deem fit.

(f) The respondent acted in excess of her jurisdiction in making an order directing father to pay to the applicant the weekly sum of €100, an issue which had not been before the District Court subject to the appeal in the Circuit Court.

(g) Even if (which is denied) the respondent had jurisdiction to make a maintenance order, she failed to indicate in advance or at all her intention to so make an order, thereby depriving the applicant of an opportunity to adduce any relevant evidence.

Statement of Opposition

4. In para. 2 of the statement of opposition the notice party sets out the facts as he claimed them to be as follows:-

> (1) The notice party resided at a property in D. owned by the applicant with the applicant and the child together as a family unit for seven months after the child's birth. In or about March, 2011, the notice party was forced to vacate the said property due to the breakdown of the relationship between the notice party and the applicant, and refers to the notice party's appeal standing adjourned to the next session of the Dundalk Circuit Court. The order made by the respondent on 25th November and the fact that the child has settled in well, is happy and secure, surrounded by members of his immediate and extended paternal family and that he has his own bedroom and a large garden in which he can play, and that pending the hearing of the judicial review on 23rd January, 2014, an interim access order was agreed between the parties on 20th December, 2013, such that access rotates every four days between the applicant and the notice party.

5. In para. 3 of the statement of opposition the notice party states as follows:-

The matters pleaded at para. E3 of the statement of grounds are admitted, save to add the following:-

> I. Both the applicant's appeal of the order of Judge Brennan dated 9th May, 2013, and the notice party's appeal of the order of Judge Brennan dated 9th May, 2013, were listed for hearing on 21st November, 2013.
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> II. On 21st November, 2013, the applications were opened whereupon the respondent, having learned that the child was in London and having heard evidence as to whether, in the absence of the court's consent, the notice consented to same ordered the return of the child to the jurisdiction by 1.00pm on Friday 22nd November.
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> III. The parties appeared before the Circuit Court on 22nd November, 2013. The applicant appeared in court without the child. Ultimately, the child who had been brought back from the UK was brought to the court at approximately 2.40pm. At the applicant's request that the matter be heard urgently, the applicant was facilitated with an early hearing date and the applicant's appeal against the order of Judge Brennan of 9th May, 2013, refusing the applicant leave to relocate to London was heard on Monday 25th November, 2013, in Dundalk Circuit Court.
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> IV. Matters pleaded at para. E4 of the statement of claim are admitted, however; the following sets out the history of the applications to court by both the applicant and the notice party herein in respect of their son, the child:-
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> i. An application regarding guardianship and access issued from the District Court on 18th May, 2011, on behalf of the notice party.
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> ii. These two applications came before the court in June, 2011. The applicant was represented by the Legal Aid Board and an interim agreed access order was agreed in June, 2011 and the matters were adjourned to September, 2011 whereupon further access and guardianship were agreed and further adjourned to the December sittings.
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> iii. In the intervening period, an application issued on 29th November, 2011, on behalf of the applicant, under s. 11 of the Guardianship of Infants Act 1964, seeking a direction on the question affecting the welfare of the infant, the child, permitting the applicant to leave Ireland with the child to reside fulltime in England.
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> iv. On 6th December, 2011, a further interim agreed access order was made between the parties and the matter was adjourned to 7th February, 2012.
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> v. An application issued on behalf of the notice party for custody pursuant to which was listed for hearing in February, 2012.
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> vi. The matters of the applicant's application to relocate and the notice party's application to increase access and/or custody came on for hearing on 7th February, 2012, before Judge Brennan in Drogheda District Court. Judge Brennan reserved judgment to 16th February, 2012, whereupon the court refused the applicant leave to remove the infant, from the jurisdiction. The court further ordered joint custody.
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> vii. The notice party did not appeal the decision of Judge Brennan granting him joint custody.
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> viii. The order of Judge Brennan refusing leave to relocate to England was appealed by the applicant by notice of appeal dated 21st February, 2012, to the Circuit Court.
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> ix. The appeal was first listed for hearing on 6th June, 2012, whereby his Honour Judge Griffin ordered the preparation of a s. 47 report to be completed by Mr. Raymond McEvoy. Access was agreed between the parties and the appeal was adjourned.
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> x. The appeal was then listed for hearing on 12th December, 2012, in Trim Circuit Court, but was not reached on that day and was adjourned.
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> xi. The matter was ultimately heard on 26th February, 2013, before his Honour Judge O'Donoghue in Dundalk Circuit Court whereupon the applicant's appeal of Judge Brennan's order to refuse the applicant leave to relocate to England was again refused. The said order recites (*inter alia*) the following:-
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> > "Refuse application. Mr. M's mother willing to mind child while Ms. L seeks work in England, then Ms. L can reapply."
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> xii. In March, 2013 the notice party issued an application to increase access, which application was returnable to the District Court on 7th May, 2013.
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> xiii. On 3rd May, 2013, the applicant's new solicitors, Messrs. Mason Hayes & Curran, served the notice party's solicitor with Circuit Court proceedings seeking, *inter alia*, leave to relocate to London with the infant (the child).

xiv. On 7th May, 2013, the applicant's solicitors sought an adjournment of the notice party's application to vary access in the District Court to enable the applicant's relocation application to be heard in the Circuit Court. The application was successfully resisted by the notice party. The applicant's solicitors then attempted to serve a District Court application on the notice party on 7th May, 2013, the service of which was not accepted. The applicant's solicitors applied to Judge Brennan for short service of same and were refused, however; he said that he would put same on the court file. The applicant's legal team indicated in court that they would not be proceeding with the Circuit Court proceedings. The matter was listed for hearing on Thursday, 9th May, 2013.

xv. On 9th May, Judge Brennan determined that he would hear the notice party's application to increase access as same was properly before the court, and insofar as the opposition to same was the applicant's proposed relocation to London that would be heard. The applicant herein made admission in the course of the hearing before Judge Brennan to having perjured herself under oath at the hearing before His Honour Judge O'Donoghue on 26th February, 2013. On 9th May, 2013, Judge Brennan dismissed the applicant's application pursuant to s. 11(1) of the 1964 Act regarding relocation of the child with the applicant to London, England.

xvi. On 9th May, 2013, Judge Brennan also dismissed the notice party's application to increase access.

xvii. A notice of appeal was filed on behalf of the applicant on 14th May, 2013, in respect of (1) the judge's refusal to grant relocation orders in favour of the respondent such that the child relocate to London subject to access arrangement, and (2), appeal against the District Judge's refusal to consider the s. 47 report.

xviii. A notice of appeal was filed on behalf of the notice party on 18th May, 2013, in respect of the judge's refusal of his application to increase access.

xix. In or about June or July 2013, the applicant removed the child, out of the jurisdiction to London without the consent of the notice party and an application pursuant to s. 11(1) of the Guardianship of Infants Act 1964 – 1997, issued on 1st August, 2013, which was made returnable to a vacation sitting on 15th August, 2013. Following a hearing of this matter on 15th August, 2014, Judge Hamill made order. The applicant confirmed in court that she was working in London and would again be removing the child from the jurisdiction on 19th August, 2013. Judge Hamill put the applicant on notice that her removal of the child out of the jurisdiction was without the notice party's consent, that the notice party's legal team took the view that such removal was in breach of court orders, that application may be brought in that regard and that she, the applicant here, was not to say in the event of such application that she was not aware of the notice party's position.

xx. In October, 2013 application was made to the central authority in respect of Hague Convention proceedings. These proceedings came before the High Court of Justice Family Division in the jurisdiction of England and Wales on 1st November, whereupon Wood J. made a location order and directions, and on 8th November, 2013, whereupon the court determined that such proceedings should be adjourned pending the outcome of the applicant's appeal of the decision of Brennan J. on 9th May, 2013, listed to be heard on 21st to 22nd November, 2013, at Dundalk Circuit Court.

xxi. Following the orders of Her Honour Judge Heneghan of 25th November, 2013, the applicant consented to the discontinuance of the Hague Convention proceedings on 6th December, 2013.

xxii. The order of Her Honour Judge Heneghan of 25th November, 2013, left the issues of maintenance and access to be agreed between the parties and in the event of that no agreement was reached, liberty to apply was given. The notice party's solicitor wrote to the applicant on 25th November, 28th November, 2nd December, 4th December, 5th & 6th December, regarding the notice party's access and maintenance proposals. The respondent responded by email of 29th November, 3rd December and 6th December and failed to indicate her consent or otherwise to any of the proposals. The applicant was then put on notice that the matter was listed before Her Honour Judge Heneghan on 17th November at 12.30pm.

xxiii. By email and fax at approximately 18.30 and after close of business on Monday, 16th December, 2013, the notice party's solicitors received the applicant's judicial review papers.

xxiv. The parties appeared before Her Honour Judge Heneghan on 17th December, 2013, who declined to make any orders in respect of maintenance or access in the light of the judicial review proceedings. Her Honour Judge Heneghan stated in respect of her order of 25th November, 2013, that she:-

(1) Made her order pursuant to s. 11 in the interests of the welfare of the child.

(2) Recalled putting it to the applicant in evidence that when asked what she would do she (Her Honour Judge Heneghan) refused her application, the applicant said that she would have to give up custody.

6. In the reply, the respondent sets out a number of matters on which he relies to indicate that the applicant misled him and the court dealing with the matter of various occasions. Further affidavits were exchanged dealing with the merits of the case which may be summarised on the basis that the parties did not succeed in establishing a mediational approach.

Finding of Facts by This Court

7. Having considered the affidavits and the transcript, it is necessary for the court dealing with the judicial review to find the facts upon which the decision of the court is based.

8. They are as follows:-

(1) The applicant, although appearing as a personal litigant, was asked by the learned Circuit Judge if she wished to have legal representation and she decline same.

(2) The applicant continued to represent herself during the hearing of the action.

(3) The learned Circuit Judge indicated on two occasions that an issue in the case would be whether the custody and primary care of the child would be changed from the applicant to the respondent.

(4) The first of such warnings occurred when it was clear to the court that the child had not been produced and could have been in London, but at a time when the hearing had, in fact, commenced. The second occasion was during the course of protracted evidence in the hearing.

(5) The applicant protested at the end of the hearing that she did not realise that custody was an issue, but these protests are groundless when it is considered that during the course of the hearing she introduced criticisms of the respondent's forebears in relation to bad, if not violent behaviour indicating that she had no doubt but that custody was at issue and exhibited an antagonistic approach which might be more neutrally described as a non-mediative approach, which would not be conducive to a court concluding that there was a prospect of successful relocation.

Submissions on Behalf of the Applicant
Jurisdiction of Circuit Court on Appeal from District Court

9. The applicant submitted that the Circuit Court hearing on appeal from the District Court may only exercise the jurisdiction exercised by the District Court. The District Court is a creature of statute. It was established under s. 5 of the Courts (Establishment and Constitution) Act 1961. Section 33 of the 1961 Act confers jurisdiction on the District Court. It is a court of summary jurisdiction. Order 58 of the District Court Rules provides the procedure whereby the application for a Direction as to welfare of the infant is instituted. Form 58.17 is the relevant form which requires the applicant to specify the particular order the applicant seeks from the court. Order 54 regulates an application for maintenance. The applicant's counsel argued that, for example, where the appeal is from the entire of the order made or dismissed in the court below, the appellate court would be in the same position as the District Court, however; Form 101.1 specifically provides for an appeal from a part of the order only. It states that the appeal can be "from so much of the decree/dismiss/order(s) made by the judge as declared." This stated as an alternative to an appeal from the entire of the order by the use of the word "or".

10. The notice of appeal is the foundation of jurisdiction of the Circuit Court. Order 101 states that every appeal in the Circuit Court from a decision of the District Court shall be by notice of appeal (Form 101.1 or 101.2 Schedule D). As the statute makes no provision for the appellate court deciding any other issue than the subject of the appeal, it was submitted on behalf of the applicant that the appellate court has no power to do so.

11. Even if this Court determines that the Circuit Court should determine any other issue, it was submitted on behalf of the applicant that this could only have been done in relation to an issue canvassed for determination in the District Court, but not subject to appeal. Even then it was submitted that such a step could only be taken with the special leave of the court, on application to it by one or other of the parties for extension of time for appeal and/or to amend the notice of appeal.

The Requirements of Fairness and Reasonableness

12. It was submitted on behalf of the applicant that there is a fundamental requirement that the District Court or the Circuit Court on appeal act fairly, and that the hearing complies with the rules of natural justice. *The State (Healy) v. Donoghue* [1976] 1 I.R. 325 and the judgment of Baron J. in *State (Hoolahan) v. Minister for Social Welfare* (Unreported, High Court, Baron J., 23rd July, 1986) were referred to. It was submitted that the basis principles of fairness applicable to the appeal in this case are as follows:-

- A person should be aware of a complaint made against them and have an opportunity to prepare his case and an opportunity to present his defence.
- Sufficient time would be allowed to a person to require a defence.
- An appropriate hearing must be had during which the defence may be presented.
- A person is entitled to be represented.
- A person is entitled to be informed of his or her rights.

13. The *dictum* of Denham J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, while reviewing an administrative decision that "*the rights of the person must be impaired as little as possible"* was quoted. The requirement that the court would act reasonably requires that the court could take account only of matters which were relevant and material to the issue before it for determination. In further oral submissions, counsel for the applicant drew the court's attention to the difference in the wording of the Rules of the Superior Courts relating to Circuit Court appeals showing that the appeal was by way of rehearing and allowing for additional evidence to be introduced.

Legal Submissions on Behalf of the Notice Party
Response to Applicant's Outlying Submission in relation to Jurisdiction of Circuit Court on Appeal from District Court

14. It was submitted on behalf of the notice party that the applicant sought to make a distinction between appeals from the District Court to the Circuit Court and appeals from the Circuit Court to the High Court on the basis of the wording of ss. 37 and 38 of the Courts of Justice Act 1936 (which section governs appeals from the Circuit Court to the High Court), and which includes the wording at s. 38:-

> "(3) That every appeal under the section shall be heard and determined by one Judge of the High Court and shall be heard by way of rehearing of the action a matter in which the judgment or order the subject of such appeal was given and made."

And emphasises that this wording "by way of rehearing" is not included in s. 84 of the Courts of Justice Act 1924 (as amended by s. 57 of the Courts of Justice Act 1936) which provides:-

> "An appeal shall lie in all cases other than criminal cases from any decision of a (judge) of the District Court to the judge of the Circuit Court within whose circuit the court in which such decision is given as situated and the decision of the judge of the Circuit Court on any such appeal shall be final and conclusive and not appealable."

15. It was submitted that the applicant had referenced no authorities in support of the proposition that, in the District Court appeal

system, the statute makes no provision for the appellate court deciding any other issue than the subject of the appeal. The notice party further submitted that this view was incorrect on the basis of the views of (1), Karl Dowling and Brendan Savage, *Civil Procedure in the District Court*, (Dublin, 2009), p. 213 para. [13-01] and Margaret Cordial and Eamon Marray, *Consolidated Circuit Court Rules*, (Dublin 2001) paras. [41-03] and [41-04] which state:-

> "Either party to civil proceedings may appeal the decision of the District Court Judge. There are two types of appeal:-
>
> (a) a full de novo hearing in the Circuit Court;
>
> (b) an appeal on a point of law to the High Court (governed by O. 62 of the Rules of the Superior Courts)."
>
> A de novo hearing in the Circuit Court involves a complete rehearing of the case with all questions of law and fact open to review and either party being entitled to introduce fresh evidence…when hearing an appeal from the District Court, the Circuit Court is bound by the jurisdictional limits of the District Court. Any order made by the District Court must be one which the District Court would have had jurisdiction to make. The decision of the Circuit Court Judge is final and conclusive and not appealable."

16. Similarly, the notice party's submission refers to James V. Woods, *The District Court Practitioner: Remedies*, (Limerick, 1987) p. 287 where it is stated:-

> "An appeal to the Circuit Court lies to challenge the order of the District Court on the merits. The appellant obtains a hearing of the case de novo. All questions of law and fact are open to review and either party may call fresh evidence…. The Circuit Court judge may confirm, vary or reserve the order of the District Court or may substitute his own order for that of the District Court."
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> Further, it was submitted that in Alan Shatter, *Shatter's Family Law,* 4th Ed., (Dublin, 1997) at p. 108, para. [2.25] that:-
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> "The Circuit Court may conduct a full rehearing of a family law case initiated in the District Court upon an appeal being made to it by either party to the proceedings…The High Court may, in addition here and determine appeals on a point of law (known as a case stated) from the District Court…appeals to the Circuit Court…by way of an oral rehearing of the relevant evidence in the case appealed."

It was submitted then on behalf of the notice party that it is the accepted position that an appeal from the District Court to Circuit Court is a *de novo* hearing. That is to say that while the notice of appeal might identify the grounds upon which the appellant appeals, the judge hearing the appeal is not confined only to determine the matters raised in the notice of appeal.

Jurisdiction of the District Court and Circuit Court in matters to which Section 11 of the Guardianship of Infants Act 1964, as amended, relate

17. Jurisdiction in respect of the proceedings under the Guardianship of Infants Act 1964, as amended, is conferred on the Circuit Court and the District Court, sections 5 and 13. Section 5 of the said Act, as amended, states as follows:-

> "(1) Subject to subsection (2) of this section, the jurisdiction conferred on a court by this Part may be exercised by the Circuit Court or the District Court.
>
> (2) The District Court and the Circuit Court, on appeal from the District Court, shall not have jurisdiction to make an order under this Act for the payment of a periodical sum at a rate greater than €150 per week towards the maintenance of a child.
>
> (3) The jurisdiction conferred by this Part is in addition to any other jurisdiction to appoint or remove guardians or as to the wardship of infants or the care of infants' estates."

Part 3 of the 1964 Act, as amended, deals with enforcements of rights of custody and in s. 13 thereof "court" is defined as meaning the Circuit Court or the District Court. Shatters' Family Law states, under the heading of Jurisdiction of the District Court, that "it (the District Court) possesses an original jurisdiction conferred of that the Circuit Court to determine disputes under the Guardianship of Infants Act 1964 relating to guardianship, custody and access to children." It was submitted that the Circuit Court on hearing the appeal was bound by the jurisdictional limits of the District Court. It was submitted that O. 58, r. 5(2) of the District Court provides for the position. It was submitted that, consequent upon Brennan J. refusing the applicant's application in May 2013, the District Court had jurisdiction to make "such order as it thinks proper" as per s. 11(1) of the Guardianship of Infants Act 1964. Consequently, the Circuit Court appeal before the respondent could similarly proceed to make "such order as it thinks proper." It was submitted that form of notice of appeal cannot alter the ambit of the judicial discretion under s. 11 of the Guardianship of Infants Act 1964. Reference was made to David Dodd, *Statutory Interpretation in Ireland*, (Dublin 2008) at para. [1.18] as authority for the proposition that rules such the District Court Rules are reserved for judicial or other procedural matters. Reliance was placed on the State in *O'Flaherty v. O'Floinn* (judgment of Kingsmill Moore J.) [1954] I.R. 295. It was submitted that the District Court Rules have no power to alter the ambit of the Guardianship of Infants Act 1964, as amended. Counsel for the notice party did not accept that there was any conflict between the 1964 Act and the District Court Rules but rather suggested that the position contended for on behalf of the applicant was incorrect. The allegation that the respondent acted in excess of her jurisdiction, the notice party submissions again referred to s. 11(1) of the Guardianship of Infants Act 1964, relating to directions of the court "on any question affecting the welfare of the child" and the court making such order "proper." The power of the court to make orders regarding custody and right of excess to the child and for maintenance is provided for in s. 11(2) referred to. The applicant and the notice party were guardian of the child and thus were in a position to apply for these reliefs. The application for relocation brought to the District Court was and could only be heard under the 1964 Act, as amended. Attention was directed to the definition of welfare of the child in s. 2 of the 1964 Act and the provisions of s. 3 which provide that:-

> "Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration."

18. The detailed analysis of Walsh J. in *O'S. v. O'S.* [1976] 109 ILTR 57, was referred to. In the lengthy written submissions reference was made to the consideration of the welfare of the child as the first and paramount consideration in *G. v. An Bord Uchtála* [1980] 1

I.R. 32 at 76 *per* Walsh J., and to the comments in Jim Nestor, *An Introduction to Irish Family Law*, 4th Ed., (Dublin 2011 at p. 328, and to the views expressed in Louise Crowley, *Family Law* (Dublin, 2013) at [4-40] where there is a reference to the court taking "a broad look at the child's circumstances and make the orders that will best provide for the totality of their needs." The submission further referred to the relocation criteria set out in the judgment of Flood J. in *E.M. v. A.M.* (unreported, High Court, Flood J., 16 June 1992) and the application thereof by MacMenamin J. in *U.V. v. V.U.* [2011] IEHC 519. Further reference was made to the judgment of Quirke J. in *Herron v Ireland and Others* (unreported, High Court, Quirke J., 22 February 1999, and its litigation history from High Court to Supreme Court where the 1964 Act was considered.

19. In relation to *audi alteram partem* the submissions referred to the work in Hilary Biehler, *Judicial Review of Administrative Action, A Comparative Analysis*, 3rd Ed., (Dublin 2013) at p. 300 where the dicta of McCarthy J. commenting in *International Fishing Vessels Ltd v. Minister for the Marine (No.2),[*1991] 2 I.R. 93 that:-

> "Neither natural justice nor constitutional justice requires perfect or the best possible justice, it requires reasonable fairness in all the circumstances…it is now taken for granted that the concept of natural justice is "necessarily an imprecise one which may differ significantly from case to case" and that "procedures which might afford a sufficient protection to a person concerned in one case, and so be acceptable, might not be acceptable in a more serious case".

Biehler's further reference to *Banks v. Secretary for State for Environment and Food and Rural Affairs* [2004] EWHC 416, per O'Sullivan J where it is stated:-

> "It was not sufficient merely to allow the claimants to make representations. In order to be able to make meaningful representations the claimants had to be told what concerns they had to answer."

It was submitted that the *audi alteram partem* had been aided by the fact that the applicant was involved in several court applications and was represented in proceedings in relation to custody and relocation of the child, and had the benefit of legal advice from the solicitors representing her. The affidavit of the notice party sworn on 14th January, 2014, confirmed that the applicant on 21st November, 2013, stated she was happy to represent herself and that she was alerted by the respondent to the possibility of custody transferring by reference to previous cases on similar facts. It was stated that the applicant's response when asked by the respondent what she would do if the respondent, as the Circuit Court judge dealing with the appeal was minded to refuse the applicant leave to relocate with the child, and the applicant's response thereto in relation to custody consequences was a clear indication that the applicant had notice of not only relocation, but also custody being at issue at the hearing. At no time throughout 21st November, 2013, 22nd November, 2013 or 25th November, 2013, the period over which the hearing took place, did the applicant seek an adjournment of the proceedings to enable her to seek legal representation. It was further submitted that a change in custody arrangements was directly indicated as far back as February, 2013 when O'Donoghue J. in the Circuit Court, refusing the applicant's application on appeal on 26th February, 2013, directed that the applicant had two options. That is to say that the applicant could either:-

> (1) establish herself here in Ireland, or;
>
> (2) leave the child with the notice party and the notice party's mother while the applicant goes to London to establish herself there and, in the event of having established herself, she could reapply to the court.

20. The comments of the applicant in response to questions from the judge in relation to refusal of relocation, as referred to by the notice party in his affidavit sworn on 14th January, 2014, and as borne out by the transcript, state that:-

> "Life would be utterly hopeless, and (the child) and I would have a very bleak future in that event I might be forced to give up custody of (the child), which would be extremely harmful and detrimental to (the child's) wellbeing."

The applicant had the opportunity to call witnesses and to cross examine if she wished and was offered this opportunity by the judge.

Discretionary Bars to Relief
21. The notice party's counsel rely on the statement in Anthony M. Collins and James O'Reilly, Civil Proceedings and the State, 2nd Ed., (Dublin, 2004), at p. 127 that:-

> "Relief by way of judicial review may be refused by reference to a number of well established discretionary bars which include:
>
> (a) Delay.
>
> (b) The availability of alternative remedies.
>
> (c) Futility, and
>
> (d) The applicant's conduct."

Futility
22. The court was directed to paras. 3 and 34 of the second affidavit of the notice party averring that the applicant has, since the making of the order for leave to bring these proceedings, continued to live and work in London. It was submitted that where the applicant has previously *de facto* relocated the child of the parties' to London without either the leave of the court, or the leave of the notice party and where she has not sought in the intervening time period to establish a home for herself and the child in Ireland, it was submitted that the court should refuse the relief sought as same would be a pointless exercise such that, if successful, primary care would revert to the applicant at a time when she is living and working in London and the court has not given her leave to relocate with the child.

Conduct
23. The notice party submitted that Fennelly J. in *DeRoiste v. Minister for Defence*, [2001] 1 I.R. 190, stated that:-

> "Afortiori, a lack of candour or a suppression of material facts in the evidence presented before the court will ground a refusal to grant relief."

The attention of the court was drawn to the applicant's statements of grounds, which grounded the application herein as follows:-

> A. At para. E13 it is stated that "she had no prior notice at all that it was the court's intention to make a decision transferring primary care to the child's father. As a result she was not in a position to adduce any evidence relevant to this issue."
>
> B. At para. E11 she set out that "no question was asked of the applicant in relation to a change in custody" and continued that "she never gave evidence that she intended moving to London without the child".

It was further drawn to the court's attention that, following an exchange of affidavits in response to the matters averred by the notice party, the applicant's supplemental affidavit sets out at para. 22 as follows:-

> "I did not understand the comment of Judge Heneghan regarding the removal of a child from the jurisdiction as being an indication that she was about to embark on a custody hearing."

It was further stated that the applicant subsequently averred to the fact that she did not recall Judge Heneghan asking her what she (the applicant) would do if Judge Heneghan was minded to refuse the applicant leave to relocate with the child but "did not understand the judge to have it in mind that if she refused relocation that she then make an order transferring custody." The notice party submits that at para. 28 the applicant subsequently averred that "it is my recollection that I answered in a similar fashion to the way I had set out in my position paper that I might have to rather than I would certainly have to give up custody".

24. As refusal of an order for judicial review for lack of candour was raised subsequently by counsel for the notice party, counsel on behalf of the applicant brought the attention of the court to the treatment of "falsehoods" contained in the applicant's asylum application and his grounding affidavit by Hogan J. in his judgment in the case *Frederick Stanley Oboh & Ors v. Minister for Justice, Equality and Law Reform and Attorney General and Human Rights Commission,* [2011] IEHC 102. The judgment deals with the relevance of falsehoods in judicial review in paras. 5 onwards. She also referred to the judgment of Kearns P. in the case of *McDonagh v. Watkim & Anor*, [2013] IEHC 582..She submitted that, although these judgments acknowledge the possibility of an order for judicial review being refused by reason of untruths, in neither of these cases was the order actually refused and that it seems that the courts are slow to exercise their discretion to do so. She further submitted that in a judgment of the High Court (O'Malley J.) the separate interest of an infant might be taken to override any grounds for the court exercising its discretion to refuse judicial review on the paramountcy principle.

Litigant in Person

25. Although counsel for the applicant clarified that she did not rely on the fact that the applicant was a personal litigant before Judge Heneghan, I was concerned that on reading the papers in the case there had been some references to a possibly disadvantaged position of the applicant in that regard. I asked the parties to draw to the attention of the court any Irish authorities relating to the appropriate standard for the hearing of a case where a personal litigant, having been given the option to obtain legal advice, persists in continuing to pursue their case. The judgment of Clarke J. in *A.C.C. Plc. v. Frank Kelly* [2011] IEHC 7, drawing on a very extensive paper published by Master Bell sets out the standard. In a quite independent judgment of the Supreme Court in the case of *R.B. v. A.S.*, [2002] 2 IR 428 Keane C.J., on behalf of the court, sets out the same standard. The standard is as follows: If a person, having been alerted to the fact that they may get legal representation if they wish and nonetheless continues to present themselves before the court on the basis that they are prepared and ready to deal with their case and take such steps as are appropriate to represent their interests.

Decision

1. Format and Scope of Appeal

> I am satisfied that, notwithstanding the apparently limited wording of the District Court and Circuit Court Rules, the appeal before the Circuit Court was a rehearing. Having regard to the extensive statutory mandate provided by s. 11 of the Guardianship of Infants Act 1964, as amended, and the paramountcy principle, I am satisfied that this statutory mandate determines the jurisdiction of the Circuit Court hearing, the appeal in this case. The Circuit Court Judge, therefore, had jurisdiction not only to determine the relocation issue, but also to determine any custody issue which arose as a result of a decision on the relocation decision and which had been signalled to the parties during the hearing as an issue. The maintenance decision is consequential and, in any event, on the basis that the order stands, is subject to review by the respondent.

2. Fair Procedures and Natural and Constitutional Justice

> I am satisfied, having read the transcript, that the learned Circuit Court Judge did not transgress any of the rules requiring fair procedures and constitutional and natural justice. On two occasions she alerted the applicant that she faced consequences arising from her behaviour in relocating the child. The discussions relating to arrangements made in the past and suggestions for the notice party's family and the notice party to take care of the child, coupled with what may only be described as gratuitous tax on the notice party's forebears in terms of their character, sets the scene for the run of the case dealing not only with relocation but also the consequences of refusal of relocation for care and custody of the child. Lest there be any doubt about the matter, I am also satisfied that the learned Circuit Judge gave plenty of warning to the applicant that she could have legal representation if she wished. The applicant herself knew about the advantages and opportunities for legal representation as she had a number of legal representatives in regard to multiple applications to the Circuit Court and the District Court in relation to relocation and/or access. The applicant was not at a disadvantage by reason of her being a personal litigant.

3. Futility

> I do not accept the submissions made on behalf of the notice party that as it appeared that the applicant was now residing and working part-time in London while taking up access in this jurisdiction for the infant, that the granting of judicial review would be futile. It would seem that such behaviour (if proven) on the part of the applicant would be taking up the opportunity provided by Judge O'Donoghue with a view to a subsequent application for relocation. It is, therefore (if it occurred or is occurring) a neutral event in relation to this application.

4. Lack of Candour, Untruths

> Notwithstanding that the case law brought to the attention of the court by the parties in the case that the courts have

been reluctant to use a lack of candour as a ground for refusing judicial relief while at all times emphasising the importance thereof, I am satisfied that, having regard to the longstanding (if now somewhat controversial) stream of authorities from *Poel v. Poel* [1970] 1 W.L.R. 1469, to *Payne v. Payne* [2001] EWCA Civ 166 in the English courts, to the more qualified authorities of the judgments of Flood J. and MacMenamin J. referred to above, that relocation would be refused on any view of the law, either on a *pre-Payne* or a *post-Payne* basis. Hence, if by any chance at all, I am incorrect in the view that there was no breach of fair procedures or natural or constitutional justice in the hearing by the respondent, the relief of judicial review should be refused. Having regard to the centrality of the need for a mediational and cooperative approach between separated parties regarding future co-parenting arising from a relocation, the lack of candour in such cases becomes even more important than it was in the authorities put before the court by their counsel. I have absolutely no sympathy with the applicant's excuses for various levels of lack of candour by reason of an apprehension on her part that the Irish courts would not deal fairly with her, by reason of the fact that she had now established a same sex relationship with a new partner. There is not a scintilla of support for this view from any of the activities and judgments of the court for the last decade or more, where the matter most significantly came to the attention of this Court and the Supreme Court in the sperm donor case. Where the applicant may have been misled by reason of her connections with English law is by reason of the toxic affect of the proposition in *Poel* as affirmed in *Payne*, that the custodial parent could selfishly pursue their interest in location without having regard to the interest of the child. The judgment of MacMenamin J. has clarified (if clarification were needed) that this position is not accepted in Ireland and the paramountcy principle or the best interests of the child is the ultimate criterion by which all the circumstances, including the desire of the custodial parent to relocate are considered. Indeed, the term "custodial parent" has become somewhat of a misnomer in the context of what, in modern times, the courts seek to achieve as a mediating and cooperative system of co-parenting in the context of relocation of the child.

26. Accordingly, the application is dismissed and I shall hear the submissions of counsel in relation to such consequential orders in relation to the continuing adjourned hearing before the respondent as suggested in the order sought to be quashed.