THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 274 J.R.]

BETWEEN

S. O'N.

APPLICANT

AND

C. D.

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 26th day of July, 2018

1. This is an application for judicial review by way of a telescoped hearing. The applicant seeks an order of *certiorari* quashing the Order of His Honour Judge Keenan Johnson dated 9th March, 2017, granting a decree of Divorce pursuant to the provisions of s. 5(1) of the Family Law (Divorce) Act 1996, and other ancillary orders. He also sought a stay on the Order of the 9th March pending the determination of these proceedings.

Background

2. The parties to this application were married on 29th December, 2007. They have one child H. who was born on 13th February, 2009. C.D.'s daughter from a previous relationship S also resided with them. Unhappy differences arose in the marriage and the applicant left the family home in or about November 2011. The respondent issued judicial separation proceedings in Laois Circuit Court in January 2013. On 23rd February, 2016, a further civil bill was issued by C.D. seeking a Decree of Divorce, the couple at that stage having lived separate and apart for four of the previous five years from the date of the initiation of proceedings as required by the Family Law (Divorce) Act 1996. The parties attempted to reach an agreement by undertaking mediation but these efforts were unsuccessful and an order was made on 11th January, 2017 by her Honour Judge Flanagan directing that the proceedings be adjourned for hearing on a contested basis. In the interim, the applicant sought orders by way of judicial review directing the release of a s. 47 Report prepared by a Professor Sheehan and an order directing that Her Honour Judge Flanagan be recused from hearing the family law proceedings then pending. The applicant also obtained an order of *certiorari* quashing the decision of the Circuit Court dismissing his appeal against a barring order obtained against him by the respondent.

3. By Family Law Civil Bill dated 23rd January, 2013 the respondent in these proceedings, C.D. sought a decree of judicial separation under s. 3 of the Judicial Separation and Family Reform Act 1989 for various ancillary or related orders in respect of the family home, custody and access to their child H., maintenance, an order extinguishing the respondent's succession act rights in her estate, and various other reliefs including an order pursuant to s. 47 of the Act in respect of H. Affidavits of means and welfare were delivered in respect of H. and S. then aged twelve. The affidavit of means states that there was a joint mortgage in the sum €261,166.47 over the family home. An appearance was entered on 7th February, 2013. In his affidavit of means the respondent indicated that the family home was registered in the respondent's sole name and that the applicant and the respondent were joint mortgagees of the premises. The estimated value placed upon the family home by Mr. N. was €150,000.00. The mortgage was paid jointly by the couple.

4. S.O'N delivered a defence and counterclaim to the Family Law Civil Bill dated 21st February, 2013. While rejecting the basis for the judicial separation sought by C.D., he counterclaimed for a decree of judicial separation and sought custody of H. and access to S. He also sought an order pursuant to s. 10(1)(a)(ii) of the Family Law Act 1995 directing the sale of the family home and that the proceeds of sale or remaining debt after the discharge of the mortgages on the property be distributed equally between the parties.

5. On 18th April, 2013 when attending the Circuit Court in respect of a Barring Order Appeal by S.O'N. access terms were agreed between the parties following an allegation of breach by C.D. of access terms. By Notice of Motion dated 25th November 2013 returnable to 9th December S O'N sought custody of H. He claimed that C.D was in breach of the access agreement. C.D. claimed that she had sought changes in the terms of access and it was clear from the affidavits exchanged between the parties that each had an entirely different view of the behaviour of the other party towards each other and the children. Affidavits were exchanged outlining their respective grievances in considerable detail. In the concluding paragraph of his replying affidavit S.O'N indicated that he looked forward to the conclusion of the Circuit Court proceedings and the issuing of a decree of judicial separation and the probability of divorce at a future stage. He wished to finalise the details of his judicial separation by mutual consent including custody and access.

6. By order made 28th March, 2014 Her Honour Judge Flanagan directed that access be accorded to S.O'N with H. every Tuesday and Thursday between 5.00 and 8.00pm with SO'N to collect H. from the crèche at 5.00pm and C.D. to collect him from the SO'N's home at 8.00pm. Further access to SO'N was granted every Saturday from 10.00am until Sunday at 3.00pm until the final determination of the case. The matter was adjourned to Wednesday 2nd April, 2014 to allow time to agree an assessor for a s. 47 report.

7. On 2nd April, 2014 Her Honour Judge Flanagan directed the preparation of a s. 47 report by Professor James Sheehan in respect of all issues arising regarding access and custody to H. and directing that copies of all affidavits filed by the parties in relation to the issue of custody be forwarded to Professor Sheehan prior to the commencement of his assessment in May 2014. It was directed that the report be furnished to the Circuit Court office in Portlaoise and an application could then be made to the court concerning the release of same. On 7th November, 2014 the court directed the release of the s. 47 report dated 6th September, 2014 to the solicitor on record for C.D. The report was to be released to S.O'N. in the court office and he was directed not to take a copy away but was at liberty to see the report and make notes of its contents at a time to be arranged with the court office. It was further directed that no part of the s. 47 report should be disclosed or published to any other persons. Thereafter, S.O'N. applied to this Court for leave to apply for judicial review for an order of *certiorari* quashing this order and directing the release to him of the s. 47 report and an order that the respondent be recused from hearing any matter in which the applicant was a party to the proceedings. He also sought an order staying all proceedings in the matter pending the outcome of the judicial review proceedings. The application was adjourned generally with liberty to re-enter on 24th November, 2014. This report was received in evidence by His Honour Judge Johnson on 7th March 2017.

8. On 9th December, 2014 having been informed that an application had been made seeking leave to apply for judicial review by

S.O'N. , Her Honour Judge Flanagan made a further order directing the release of the s. 47 report to the respondent on terms that it was not to be released, disclosed in full or in part or published by the respondent to any other person. The court also noted an undertaking by S.O'N to notify the High Court of the inaccuracies contained in paras. 2 and 14(b) of his grounding affidavit which stated that the learned Circuit judge had not allowed him to be accompanied and assisted by a McKenzie friend. In fact, he swore a supplemental affidavit in the judicial review proceedings which clearly did not accept the inaccuracy of what was stated in his original affidavit but this is not a matter now in issue in these proceedings.

9. The case was then listed for mention on 18th December, 2014 before the Circuit Court.

10. A Family Law Civil Bill issued on 23rd February, 2016 seeking a decree of divorce and various other orders including an order directing that the present custody arrangements remain in situ and a variation in access arrangements. A pension adjustment order was also sought under s. 17 of the 1996 Act. In addition, an order was sought directing the sale of the family home, the net proceeds to be apportioned 50/50 and that such order be deferred until the child H. ceased to be a dependent within the meaning of the Family Law Act 1995. S.O'N. submitted an appearance which was said to be conditional and solely for the purposes of allowing the respondent to contest the validity of the proceedings by applying to have them struck out on the grounds of abuse of process. A motion to that effect was issued on 7th March, 2016.

11. By order made 8th April, 2016 in respect of those proceedings, the case was adjourned to the County Registrar's call over list on 20th April, 2016 at Portlaoise to fix a date for hearing. S.O'N. was directed to file an up-to-date affidavit of means in advance of the next hearing date. A notice to trustees had already been served by the applicant, C.D. dated 23rd February, 2016 in relation to the relief sought under s. 17 of the Family Law (Divorce) Act 1996 in respect of a pension adjustment order and S.O'N. was directed to serve a similar notice. It was indicated that "both parties [were] to agree the terms of the pension orders with the trustees of the respective schemes". In his affidavit of means sworn 19th April, 2016 S.O'N. reiterated the fact that the family home was registered in his sole name and that the applicant and respondent were joint mortgagees. It also restated that the estimated value of the property was €150,000.00. In her affidavit of means C.D. indicated the family home was worth approximately €180,000.00 and that the mortgage with Ulster Bank in respect of the family home was €239,121.01.

12. A further motion brought by SO'N dated 6th January 2017 sought numerous reliefs including an order that the divorce application should now be heard on a contested basis but nevertheless granted, but on the basis that day to day custody of H be granted to S O'N.

13. By further order made 11th January, 2017 Her Honour Judge Flanagan directed that S.O'N. lodge a defence and counterclaim for the divorce proceedings within a period of six weeks. All other motions were adjourned to the hearing of the action. The proceedings were adjourned for hearing on a contested basis to Portlaoise for March, 2017.

14. In the defence and counterclaim filed in respect of the divorce application, the respondent admitted that the marriage between the applicant and respondent had broken down to the extent that no normal martial relationship had existed between them for at least one year prior to the institution of the proceedings, that they had lived separate and apart since November 2011, they had been separated for a period of four out of the proceeding five years and there was no prospect of reconciliation between them. In a nineteen page counterclaim, S.O'N. sought a decree of divorce. He also sought an order that the applicant and respondent remain joint guardians and joint custodians of the child H. and sought an order that H. reside with him at his home with access to C.D. each Tuesday and Thursday from 8.00pm and every alternative weekend from Friday after school to Sunday at 6.00pm. He set out his detailed requirements in respect of various holiday periods.

15. The applicant also sought an order directing the sale of the family home including household chattels and that the proceeds of sale be divided between them equally and that any negative equity debt arising be shared equally between them. There were two other properties and he sought orders that each party would retain their respective rights in those properties. The latter relief was granted as set out in paragraphs 8 and 9 of the challenged order. The applicant sought an order for a pension adjustment order as per agreements of the applicant and the respondent with the trustees of their respective schemes. As set out below this was also the subject of a later order made by consent within the terms of and rendered possible by the decree of divorce. He also sought an order for the mutual extinguishment of succession rights which was granted at paragraph 14 of the order in suit. It was acknowledged in the defence and counterclaim by the respondent that the application for divorce would be determined on a no fault basis.

16. In para. 19(a)(2)(nn) of the counterclaim over twelve pages, S.O'N. set out in detail the reasons why he sought an order directing that H. live with him.

17. In an affidavit of 4th January seeking a variation of the access terms pursuant to a Notice of Motion dated 4th January 2017 because of changed circumstances C.D. stated that though the applicant had agreed to vary the access terms in April 2016 she alleged that he reneged on this and thereafter refused to negotiate about same. She stated that she had raised the variation of the access schedule at mediation. The court notes that in the grounding affidavit of the motion dated 6th January, 2017 which had been adjourned to the hearing of the action the applicant set out in detail the terms of the previous agreement said to have been reached in respect of access which he alleged had been breached by C.D. He refutes C.D's claims and states that they attended mediation on four occasions from November 2016 to January 2017 in respect of this issue without success. He claimed the mediator could not continue because C.D. had made this further application to court. He also stated that because of her behaviour he withdrew his agreement to the terms of April 2016 and sought strict compliance with the order of 28th March 2014.

The Hearing

18. The proceedings were heard by His Honour Judge Johnson on 7th and 9th, March 2017. The applicant represented himself during the hearing. The respondent was represented by solicitor and junior counsel. The matter was heard by the learned judge over approximately three hours on 7th March. At the outset of the hearing the learned judge indicated that he had read the pleadings and addressed both parties indicating that he wished to determine what issues existed between them. It quickly became clear that the parties disagreed concerning the arrangement for the family home, custody and access to H. and maintenance. During the hearing the judge embarked on a detailed and lengthy engagement on these issues with the parties. As reflected in the transcript made available to the court, the hearing was opened by counsel for C.D., Mr. O'N. responded with his own opening arguments and C.D. was then called to give sworn evidence. An agreed formula was reached in respect of custody. The court made orders in respect of three properties having considered all of the papers in the case and submissions made in relation thereto. The applicant agreed to pay one half of all expenses in respect of H. He was already paying a sum of €45 per week in respect of maintenance for H. Counsel for C.D. sought an increase in that figure to €100.The court having considered the evidence adduced in respect of income and outgoings in the affidavits submitted and submissions made directed that SO'N pay €60 per week. The matter was adjourned to the 9th March to finalise the orders.

19. At the beginning of the hearing on 9th March, Mr. O'N. made a statement to the court regarding the manner in which the learned judge conducted the hearing. He complained that he did not get an adequate opportunity to state his case and that he was "railroaded" into agreeing to arrangements in respect of H and the family home to which he did not agree, but felt powerless to oppose. He stated that the judge conducted the hearing like a mediation rather than a contested trial. The applicant proposed that the court set aside its rulings in respect of H and the family home and rehear the divorce proceedings without these perceived shortcomings. The court rejected the complaints of the applicant, in particular the assertion that he did not give the applicant a fair hearing. In particular the judge emphasised that he had given the applicant time to consider suggestions made at every stage of the hearing. The learned judge stated that fault had no role in respect of the determination of the proceedings. He stated:-

> "You determine these proceedings on the basis of what each party brought to the marriage, what each party took from the marriage, what's left there and then you divide it as equitably as possible having taken all factors into account. I read the pleadings in this case before I came out to sit. So I have the full context and the full background to it. And to re-open matters that happened in the past is not going to make any difference to the ultimate outcome of the case. And that is the reason why it is pointless embarking on this idea of laying blame or fault at one particular door..."

The judge stated that the applicant had been given every possible opportunity and assistance to put his case in the course of the hearing.

20. The judge declined to rehear the proceedings at which point the applicant chose to absent himself from the court. The order granting a Decree of Divorce to C.D. and S.O'N. and ancillary orders were made in his absence.

Order of the Circuit Court

21. The order of the Circuit Court recites that the matter having come before the court on 7th and 9th March and the court having read the pleadings filed and heard oral evidence from the applicant and the respondent and what was urged on behalf of the applicant by counsel and what was urged by the respondent in person and having the read the report and recommendations made by Professor Sheehan in his report 6th October, 2014 pursuant to s. 47 of the Family Law Act 1995 states:-

> "By consent *the court Doth make the following orders*:
>
> 1. An order pursuant to the provisions of s. 5(1) of the Family Law (Divorce) Act, 1996, granting the applicant and the respondent a decree of divorce.
>
> 2. An order pursuant to s. 14 of the 1996 Act directing that the respondent transfer his entire legal and beneficial interest in the … (family home) to the applicant.
>
> 3. An order pursuant to s. 15(a)(i) of the 1996 Act conferring a right on the applicant to reside in the family home for her lifetime to the exclusion of the respondent.
>
> 4. An order directing the applicant to make all reasonable and best endeavours to have the respondent removed from the mortgage on the family and to furnish all correspondence evidencing same, when requested or required. The respondent to cooperate fully with the mortgage provider, if required. The applicant's endeavours to have the respondent removed from the mortgage on the family home to be reviewed and the expiration of two years from the date of this order if the respondent has not been removed from the said mortgage on or before the expiration of the period of two years from the date of the within order.
>
> 5. An order directing the applicant to fully indemnify the respondent in relation to any or all mortgage arrears and/or negative equity in respect of the family home.
>
> 6. An order directing the applicant to discharge the entire monthly mortgage repayments on the family home from the date of the making of the within order. There is to be an automatic sale of the family home if either of the following occur:
>
> a. if the mortgage provider forecloses on the family home: or
>
> b. if the applicant is in arrears in respect of the mortgage for a period of six months;
>
> 7. An order directing that the joint Permanent TSB account … be closed by the parties.
>
> 8. A declaration that the respondent has no legal or beneficial interest in the property situate at [property A].
>
> 9. The declaration that the applicant has no legal or beneficial interest in the property situate at [property B].
>
> …
>
> 15. An order pursuant to the provisions of s. 14(5) of the 1996 Act, permitting the County Registrar to execute all documents, including any deed or instrument necessary to affect any transfer of property, or any documentation necessary to transfer the mortgage out of joint names in the event of either party refusing or neglecting so to execute within a period of 21 days of having been called upon to do so or in the event of either party refusing or neglecting to comply with the within terms of any order of the court. …"

The properties described above as 'A' and 'B' were properties in which each had their own respective interest and entitlements: both parties were agreed that this position should be maintained.

22. The issues of maintenance and custody and access to the child H. were addressed at paras. 10 to 13 inclusive of the order. They provided that the applicant and the respondent would have joint custody of H. with day to day care and control vested in the applicant and access to the respondent as set out in paragraph 10. There followed a detailed statement of the terms upon which access was to be exercised. It is appropriate having regard to the extensive care taken by the learned trial judge in dealing with this matter to set out that part of the order in full. It is particularly important to note that the terms of the access were discussed at great length with the applicant in the case who consented as recorded in the order and indeed in the transcript to the terms formulated in the order. The terms of access were:-

"(a) On a weekly basis, commencing in the week beginning the 13th March, 2017;

Week 1:

Wednesday – The respondent is to have overnight access from 4:30pm until Thursday morning. The respondent is to collect H. on Wednesday at childminder, or at the applicant's home. The respondent is to drop H. off on Thursday morning, either at the school bus outside the applicant's home or at the applicant's home, if he is leaving early for work. On a Holy day, H. stays with the respondent for the duration of access;

Friday to Sunday – The respondent to have weekend access from 4:30pm on Friday till 6:00pm on Sunday. The respondent is to collect H. on Friday at the childminder, or at the applicant's home. The respondent is to drop H. back to the applicant's home on Sunday evening;

Week 2:

Wednesday and Thursday – The respondent is to have overnight access with H. on Wednesday and Thursday evenings. The respondent is to collect H. at the applicant's home at 4:30pm on Wednesday and return H. to the bus stop outside the applicant's home or the applicant's home.

The applicant is to have weekend access in week 2;

Week 3:

Wednesday – The respondent is to have overnight access from 4:30pm until Thursday morning. The respondent is to collect H. on Wednesday at the childminder, or at the applicant's home. The respondent is to drop H. off on Thursday morning, either at the school bus outside the applicant's home or at the applicant's home, if he is leaving early for work. On a Holy day, H. stays with the respondent for the duration of access;

Friday to Sunday – The respondent to have weekend access from 4:30pm on Friday till 6:00pm on Sunday. The respondent is to collect H. on Friday at the childminder, or at the applicant's home. The respondent is to drop H. back to the applicant's home on Sunday evening;

Week 4:

Wednesday and Thursday – The respondent is to have overnight access with H. on Wednesday and Thursday evening. The respondent is to collect H. at the applicant's home at 4:30pm on Wednesday and return H. to the bus stop outside the applicant's home or the applicant's home.

The applicant is to have weekend access in Week 4:

(b) Mid-term breaks

The applicant and the respondent should have equal access during mid-term breaks. The applicant and the respondent are to alternate February and October access each year, commencing as follows:

H. should be with the respondent from Friday when the school breaks up in the October mid-term (starting October 2017) with H. being returned to the applicant on the following Friday at 6:00pm for the week-end prior to school recommencing.

H. should be with the applicant when school breaks up in the February mid-term break (starting February 2018) with H. remaining with the applicant until school recommences.

(c) Easter Holidays

The 16 day holiday period to be divided in two periods of 8 days with the applicant always having the first block of 8 days and the respondent the second block of 8 days. The applicant's period to commence on the Friday that school closes, to the following Saturday at 5:00pm when H. should go to the respondent until the following Sunday at 5:00pm.

(d) Summer Holidays

Each parent to have H. for three blocks of one week during the summer, commencing in the summer of 2017. Thereafter each parent shall have one block of two weeks and one period of one week each. The remaining period of the holidays when H. is not in school is to be divided equally between the applicant and the respondent.

(e) Christmas Holidays

The Christmas holidays is to be divided equally between the applicant and the respondent once the three day holiday period has been taken out of the equation. H. is to be with the applicant on Christmas Eve, save for a four hour period from 1:00pm to 5:00pm when he should be with the respondent. On Christmas Day, H. is to be with the respondent from 1:30pm until Stephens Day at 2:00pm when he is to be returned to the applicant.

(f) Telephone access

H. is to have a telephone call with either parent on any full day when he does not see the other parent. The call is to be

initiated by the parent who is caring for H. on that day.

(g) Local professional

The applicant and the respondent are to seek the assistance of a local professional whom they can attend together for a period of time with a view to establishing a minimally satisfactory relationship as H.'s parents.

(h) Communion 2017

H. is due to make his first holy communion on Saturday 13th May, 2017. On that day, both parents will attend mass and the celebrations at the hall thereafter. After the celebration/tea party in the hall, the respondent shall have access with H. overnight and to drop H. off at the applicant's home at 11:00am the following morning (i.e. 11:00am on Sunday morning)."

23. The order then recites that the respondent must discharge maintenance in the sum of €60.00 per week in support of H. commencing in the week beginning 13th March, 2017 to be paid by direct debit into the applicant's current account. The applicant and the respondent are to discharge the cost of all reasonable and vouched school, medical and dental expenses on a 50/50 basis. They are to discharge all other extra expenditure on an equal basis as agreed. The respondent is to maintain private health insurance for H. while he remains dependent. This was agreed by the applicant

24. The order recites at para. 13 that mutual "nil" orders are made pursuant to s. 13 of the 1996 Act concerning spousal maintenance also agreed by the applicant.

25. An order was also made pursuant to the provisions of s. 18(10) of the 1996 Act declaring that neither party shall on the death of the other be entitled to apply for an order making provision for the surviving spouse out of the estate of the other and any legal right or intestacy under the Succession Act should be extinguished. This order was sought by both parties in the course of the proceedings.

26. The order also recites that the case was adjourned to the next session for the making of pension adjustment orders. The court also directed that His Honour Judge Johnson retain seisin of the matter and the court directed that either party was at liberty to re-enter the matter before the court in the event of any breach of or non-compliance with the terms of the order.

27. On the 27th March 2017 SO'N sought leave to apply for judicial review of the Circuit Court Order and was directed to do so by way of Notice of Motion (Noonan J.). An application for a stay on the order was refused.

28. The case was re-entered before Her Honour Judge Flanagan on 6th October, 2017. It was adjourned to the County Registrar's call over list on 22nd November at Portlaoise to be listed before His Honour Judge Johnson because he had seisin of the case in accordance with the order. The matter was then adjourned to the 28th March, 2018 by the County Registrar with liberty to the parties to apply to the learned judge in the meantime. The matter was re-entered before His Honour Judge Johnson on 18th January, 2018 at Portlaoise Circuit Court. This resulted from correspondence between the parties in the course of which in a letter dated 13th December, 2017 Mr. O'N. indicated to C.D.'s solicitors that he was most anxious to have the pension adjustment order made by His Honour Judge Johnson on the re-entry date.

29. On 18th January, 2018 His Honour Judge Johnson made an order which recites that a decree for divorce pursuant to s. 5(1) having been granted on the 9th March, 2017 and having read the pleadings and documents filed and heard the evidence adduced and what was offered by the legal representatives of the applicant and the respondent who appeared in person, the court made an order pursuant to s. 17(2) and s. 17(3) of the Family Law (Divorce) Act 1996 in the terms attached thereto. This was the pension adjustment order which was envisaged in the penultimate paragraph of the order made on 9th March. This application was made by consent at a time when the applicant was seeking to quash the Circuit Court Order and the application for leave to apply for judicial review was in train.

Grounds upon which leave is sought

30. In his statement required to ground the application for judicial review, the applicant advances five grounds of review which are summarised as follows:-

1. That the trial judge acted in breach of the applicant's Constitutional and Natural Law rights to fair procedures by failing observe the principle of *audi alteram partem*;

2. The judge acted in breach of fair procedures by allowing the respondent to introduce evidence, namely a draft settlement agreement deriving from previous mediation proceedings, which was likely to sway the judge in favour of the respondent's claim and which the judge ought to have known was inadmissible;

3. The order of 9th March 2017 is wrong on its face insofar as it states that the order was made by consent, which the applicant denies;

4. That the judge misdirected himself as to the terms of ss. 20(1) and 20(2)(i) of the Family Law (Divorce) Act 1996;

5. That the judge failed to adhere to the provisions of ss. 5(2), 11(b) and 15(1)(f) of the Family Law (Divorce) Act 1996.

Leave to Apply for Judicial Review

31. The test an applicant must satisfy in order to be granted leave to apply for judicial review was set out by the Supreme Court in *G v. DPP* [1994] 1 I.R. 374. It was held that the burden on an applicant is a "light" one, that they must have a "stateable case". Denham J., as she then was, stated at pp.381-382:-

"The burden of proof on an applicant to obtain liberty to apply for judicial review under the Rules of the Superior Courts O.84, r.20 is light. The applicant is required to establish that he has made out a stateable case, an arguable case in law. The application is made … to a judge of the High Court as a judicial screening process, a preliminary hearing to determine if the applicant has such a stateable case. This preliminary process of leave to apply for judicial review is similar to the prior procedure of seeking conditional orders of the prerogative writs. The aim is similar - to effect a screening process of

litigation against public authorities and officers. It is to prevent an abuse of the process, trivial or unstateable cases proceeding, and thus impeding public authorities unnecessarily.

Even though the ambit of judicial review has widened in recent years the kernel of the reason for this filtering process remains the same".

32. The respondent submits that leave should be refused as the applicant has not reached the threshold for the grant of leave as stated above.

Ground 1 *Audi Alteram Partem* and Adequacy of Hearing

33. The applicant contends that the circuit court judge acted contrary to the principle of audi alteram partem by failing to afford the applicant a proper and/or adequate hearing. The applicant argues that this occurred in a number of ways. In his statement of grounds and legal submissions the applicant states that the judge refused to allow the applicant to give evidence under oath, despite allowing the respondent to give evidence under oath during the hearing. He submits that "[a]s the respondent's evidence was given on oath, while the Applicant's evidence was not, it is reasonable to assume that greater weight was accorded to the veracity of the respondent's evidence. Uncontradicted sworn evidence is normally accepted by a judge as being reliable." The applicant contends that he was unable to contradict the respondent's sworn testimony except by way of interjection during her testimony. He complains that those interjections did not have the same weight as the respondent's sworn evidence "might have had". Linked to this complaint is the complaint that the judge deprived the applicant of his right cross-examine the respondent in a meaningful way while she was giving evidence. The applicant submits that as a result he was unable to challenge her on the issues of:-

(i) the purchase of the family home;

(ii) whether the respondent's partner was living with her in the family home;

(iii) the respondent's allegation that the applicant had threatened her;

(iv) the respondent's assertion that she practiced her religion.

The applicant also complains that the judge limited his ability to test the evidence of the respondent by refusing the applicant's request for an adjournment to allow him to "provide to the court irrefutable documentary evidence that the respondent had committed perjury while giving evidence under oath". This alleged perjury refers to the respondent's denial of an allegation put to her by the applicant that she breached an access order thereby denying him access to H. The applicant complains that conversely when it was alleged by counsel for the respondent that he had understated his income, the court adjourned proceedings so that he could produce a recent wage slip to the court. The applicant relies on *Borges v Fitness to Practise Committee of the Medical Council* [2004] 1 I.R. 103.

34. The applicant also states that "[d]espite the fact that the applicant had prepared and submitted a full and lengthy Defence and Counterclaim, he was not permitted to present the details of same to the Court, "either on the witness stand or at all." The applicant also contends that the judge conducted the hearing unfairly by refusing to allow the applicant to present legal arguments and case law during the hearing. The applicant complains in particular that he was prevented from making legal submissions on the issue of the primary custody of H., the court stating:-

> "The position is that the Court has a section 47 report prepared by Professor Sheehan and in that report Professor Sheehan has said that in his professional opinion H's best interests are served by him residing with his mother, you know, and that's the best evidence the court has, Mr. O'N, I'm not trying to cut you short."

35. The applicant states that as he disagreed with the wishes of the respondent as regards the family home and custody of H, a contested hearing was the appropriate procedure to resolve these issues. He submits that "during the course of the proceedings Judge Johnson departed from this procedure. He changed his role, back and forward, from that of a Judge to that of a mediator and in doing so, compromised his judicial function to hear and determine a dispute". The applicant states that the effect of this was that his consent to the solutions arrived at during the hearing was not valid consent as he felt that he had no choice but to agree with the proposed orders as he was "put under duress, or overbearing pressure, by Judge Johnson to agree to his proposal as, if he did not agree, the proposal would be imposed anyway". He states that he was not given an opportunity to consult with someone or given time to reflect on the proposed orders. He states that at no point in the hearing of the 7th March did he actually state that he gave consent to the proposed orders and that upon having time to reflect on the proposed orders discussed, he revoked his consent at the first available opportunity, on the second day of the hearing on the 9th March. It is submitted that the Family Law (Divorce) Act 1996 does not provide for a judge to act as a mediator during contested divorce proceedings.

36. Counsel for the respondent submits that there was no breach of the applicant's right to fair procedures, in particular his right to be heard. It is submitted that the applicant participated in and received a full and fair hearing in respect of the issues that fell to be determined by the court.

37. The nature of the right to be heard was considered by the Supreme Court in *Dellway Investments Ltd. v. NAMA* [2011] 4 I.R. 1. Denham J stated, at p. 227:-

> "The right to be heard is a fundamental right in procedural justice. The fact that the right is a procedural right does not diminish its importance. The right requires fairness in procedures. It may vary from process to process. As Barron J. stated in *Flanagan v. U.C.D.* [1988] I.R. 724 at pp. 730 and 731:-
>
> > 'Procedures which might afford a sufficient protection to the person concerned in one case, and so be acceptable, might not be acceptable in a more serious case.'
>
> So what is sought is fairness, which will depend on all the circumstances of a case, and vary from one type of procedure to another.
>
> In *Doupe v. Limerick County Council* [1981] I.L.R.M 456 at p. 463 Costello J. stated:-
>
> > 'The rule of [*audi alteram partem*] does not require that every administrative order which may adversely affect rights must be preceded by a judicial-type hearing involving the examination and cross examination of witnesses. It

requires that adequate notice of the case which an applicant has to meet be given to him, and that an adequate opportunity be afforded to answer any objections which may be taken to his application. And it is clear that the requirements of the rule may be fully satisfied by the adoption of quite informal procedures. In some cases, an applicant may be entitled to make his submissions orally, in others a written submission will meet the requirements of the rule.'

Thus the right to be heard requires an analysis of the Act and the circumstances to determine what type of hearing is appropriate".

38. It has been recognised that certain proceedings, including family law proceedings or those concerning the welfare of children, are not entirely adversarial in nature (see *State (D. and D.) v. Groarke* [1990] I.R. 305; *Southern Health Board v. CH* [1996] 1 I.R. 219). In *Health Service Executive v. O.A.* [2013] IEHC 172, O'Malley J. stated, in the context of childcare proceedings, that:-

"… child care proceedings under the Child Care Act 1991 may not be directly analogous to most other forms of litigation. It is certainly the case that the judge's function is different, in that he or she must adopt a more inquisitorial role and reach a conclusion based on the welfare of the child beyond all other considerations.

However, that is not to say that it is wholly unlike other litigation. The concept that 'there are no winners or losers' is an appropriate one for the attitude of the professional staff at the HSE and its lawyers but it asks a degree of detachment that is very unlikely to be shared by a parent. The procedure is, as a matter of fact, adversarial. Furthermore, although the proceedings may often be more accurately described as a process than a unitary hearing, there may well be individual issues decided along the way in favour of one side or another."

In *A.M.W. v. S.W.* [2008] IEHC 452, which concerned a discovery application in judicial separation proceedings, Abbott J., stated:-

"The quasi-inquisitorial role referred to by Thorpe L.J. [in *Parra v. Parra* [2003] 1 F.L.R. 942], has been traced in the English context to the approach of the old ecclesiastical courts when dealing with the matrimonial jurisdiction, but in this jurisdiction it has more affirmatively a modern constitutional provenance. Article 41.3.2 of the Constitution provides as follows:-

'A court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that:-

i. at the date of the institution of proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,

ii. there is no reasonable prospect of reconciliation between the spouses,

iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law,

and

iv. any further conditions prescribed by law are complied with.'

From the use of the words 'where but only where' in Article 41.3.2. there is no doubt that the court cannot solely rely on the outcome of an ordinary adversarial process as it is obliged to do in other litigation … Hence the obligation of the court, of its own motion, to enquire into all relevant facts which may touch upon the adequacy and propriety of provision to be made or made in a divorce case."

39. The respondent submits that the applicant was accorded a full and fair hearing by the learned judge. He had a full opportunity to put his views and submissions to the court and fully engaged with the court over the course of the hearing. It was for the court to determine its procedures in a way best calculated to deal efficiently and fairly with the issues presented in the case and in accordance with its duty to determine the issue of proper provision. In addition, the applicant acquiesced in the procedure adopted and agreed with the terms of the order which was ultimately made based on the rulings made by the learned judge following the applicant's indication of his consent to the making of the relevant orders or submissions on evidence that was based on documented fact concerning property and maintenance. Furthermore, the applicant relied upon the validity of the order when making an application by consent to His Honour Judge Johnson for a pension adjustment order in January 2018 and was precluded from now seeking judicial review thereof.

40. Counsel for C.D. initially outlined the three issues which C.D. to be decided by the court in respect of the divorce application on 7th March. The judge then requested that S.O'N. state his position in respect of the three issues namely, the family home, custody and maintenance stating:-

"Mr. O'N, I just want you to set out what your position is and if you deal with it in same sequence as Ms. De Bruin set it out it will be easier for me to follow it. So if we just deal with the property first and then we can come to the issue of access and custody."

Mr. O'N. duly addressed the court in relation to the arrangement for the family home, which he wished to be sold. After these submissions the judge made inquiries from counsel for C.D. on C.D.'s ability to discharge the mortgage repayments on her own. Mr. O'N complained that the arrangement sought by C.D. would leave him exposed to repay the mortgage, including the negative equity on the house in the event that C.D. defaulted on repayments. The court then noted that under the arrangement proposed by C.D., Mr. O'N would be removed from the mortgage and if C.D. defaulted on repayments for a period longer than 6 months this would leave Mr. O'N unexposed to financial risk as liability for the mortgage and the consequences of negative equity would rest solely on C.D. Mr. O'N responded that he has already been exposed to cost in relation to the house prior to the marriage and proceeded to raise the issue of C.D's partner's residence in the house and the possibility for C.D. to live in her rental property with her children, including H. The judge endeavoured to return to the issue of property, stating:-

"JUDGE: Well, if we just – if we stick with the property –

MR O'N: Sorry, yes, continue with that yes.

JUDGE: just so that we get a handle on that first and then we can move on to Professor Sheehan's report. So, your proposal then in relation – you're going to stay in the house that you're in that's half owned by your mother; is that right?

MR O'N: Correct.

JUDGE: All right. And then the issue in relation to your pensions and policies, well I think we can park those for the moment and we'll probably be able to get some resolution to that hopefully down the way. Now, in relation to custody and access, what do you say in relation to Professor Sheehan's report?"

The applicant then proceeded to address the court in relation to the s. 47 report of Professor Sheehan and variation of the then custody order made in March 2013. The applicant submitted that primary custody of H should be granted to him. In relation to the s.47 report, Mr. O'N stated:-

"MR O'N: … in relation to Professor Sheehan… and his report… at the time H was five years of age, he was at school. He is in third class now. If you work your way back you'll see that he was in school at that particular point in time but, you know, if you take case law in B v. B Judge Burt said that… a child of tender years is up to seven years or eight years of age and H has passed this stage. So … in relation to that that's a point I'd like to make in relation to that piece of case law, judge …

JUDGE: Yes. But the position is that the court has a s. 47 report prepared by Professor Sheehan has said that in his professional opinion H's best interests are served by him residing with his mother… and that's the best evidence the court has, Mr. O'N, I'm not trying to cut you short.

MR. O'N: I understand, judge.

…

MR. O'N: but my issue is… like I say, if you take from my defence in counterclaim I have listed out a list of things that the applicant constantly, constantly does over the last five years to undermine my relationship with H… what's in the best welfare of H is paramount, that's all I want… but there has to be some protection from what has gone on.

JUDGE: Yes. Well can I say to you it's quite clear to me from reading the pleadings that it's a hugely acrimonious breakup between you and C… hugely acrimonious from both sides and there has been allegations thrown from one side to the other…

The hearing then diverted to Mr. O'N detailing various difficulties and incidents between him and C.D. prior to the hearing and the court recommending that the parties rise above their differences for the sake of H's best interests. The court enquired as to whether opportunities to partake in a parenting programme had been explored. This was one of the recommendations of the s. 47 report.

41. C.D. was then called to give evidence. She gave evidence in relation to the family home, her capacity to maintain the mortgage on her own, H's educational needs and maintenance she had received from S.O'N. It was adduced in evidence that in the s.47 report Professor Sheehan stated in relation to S.O'N's wish for sole custody, that in his view post assessment, such a transition for H would not at all be in his best interests. The court embarked on a detailed discussion of custody and access. While the applicant did not formally cross examine C.D. he made interjections at various points during her examination in chief in relation to her practice of religion and whether she brought H to mass on Sundays; the issues of driving H between his parents' homes, school, and activities; and C.D's pension arrangements. Eventually the court suggested an arrangement for custody and access between the parties. The court then rose for a period in order for the parties to reflect on this suggestion and consult with whomsoever they wished. When the judge returned counsel for C.D. stated that C.D. was agreeable to the court's suggestion. The court enquired as to S.O'N's attitude to the court's suggestion to which S.O'N replied "Yes. Well, your suggestion is not unreasonable.". Further issues in respect of custody or access with H on Holy Days, school holidays and dropping H onto a bus to attend school were raised by S.O'N at this juncture. The court therefore made various enquiries from both parties in respect of these issues. Reference was made to Professor Sheehan's report during these discussions which was not objected to by the applicant. Following the resolution of these issues the court stated (at p. 50 of the Transcript):-

"JUDGE: Okay. So that's fine…So, that's – so you both have joint custody and that's the way access is going to work out, okay. And I think it's that's fair and as reasonable as we can be… So, are we happy to move on from that?

MR O'N: Yes."

At page 44 of the Transcript the judge made a detailed suggestion to the parties regarding access to H. There was a short adjournment to enable the parties to reflect on the suggestion. When the parties returned to court both signalled what I am satisfied was their clear and considered acceptance of the suggestion made. Mr.O'N sought some further adjustment which was then discussed. Then the terms proposed by Prof. Sheehan in respect of school holidays were discussed and both parties expressed their happiness with those terms. In further exchanges S.O'N made allegations of breaches of previous access orders on the part of C.D., which she denied. S.O'N requested an adjournment to retrieve emails which he stated would prove that C.D. breached the said orders. The court denied this request as it did not appear to the court to be relevant at that stage and because the order and any breaches of the order could be the subject of an application to the court. Further submissions were made by the applicant about his work schedule and the mechanics of collecting H from school or childminders. When these issues had been ventilated the court requested counsel for C.D. to draft the order in the format of a schedule the judge then stated "And that schedule I'll check to see that it's correct and I'll send it to you to make sure that you're happy with it and then we'll make it a part order, okay. You're clear on that?" S.O'N replied in the affirmative.

42. The court is satisfied that the issue of custody and access was ultimately the subject of agreement and consent on foot of which the judge made his ruling. Ample opportunity was given to the applicant to consider the terms of the proposed order to which he actively contributed. I am completely satisfied that the order made reflected that informed consent. Consequently issues concerning cross-examination and fair procedures do not arise in relation to this issue.

Maintenance

43. The court then proceeded to address the issue of maintenance, stating "…So now we have moved on… That's custody and access dealt with… Next thing when we're dealing with H is maintenance…". Mr. O'N then addressed the court on the maintenance he paid to C.D. and contributions he has made towards H's clothes, medical bills and dental bills. The issue of maintenance was ventilated largely in the same format detailed above. The judge stated:-

"JUDGE: … for starters now can we just agree one thing, and I think you're all agreed on this, you share school costs,

camp costs, medical costs, dental expenses 50/50; is that right?

C.D.: Yes.

JUDGE: You're agreeable to that?

MR O'N: No. I haven't –

JUDGE: No but I am saying from now on, I am just – we are moving on now, S -

MR O'N: Right okay.

JUDGE: … and this is going into the future.

MR O'N: Right, okay…

JUDGE: You are happy enough to pay –

MR O'N: I have no issue paying half of H's costs."

It was agreed that there would be a nil maintenance order applied in respect of both spouses. The remaining issue was the amount of periodic maintenance payable by the applicant in respect of H. At that time he was paying €45 per week. C.D sought €100 per week. There was a dispute as to whether the applicant's income had increased over time. Though evidence was heard from C.D. on this issue and not from the applicant he made extensive submissions on the matter during the hearing and had a detailed exchange with the court thereon. The court indicated that it was disposed to make an order for the payment of €60 per week. The court was satisfied on the basis of the affidavits of means submitted to assist the court on this matter that this was a reasonable figure and clearly acted on the figures relied upon by the applicant in reaching its conclusion. I am not satisfied that the complaint now made in respect of this issue has any merit having regard to the reality of the figures upon which the determination was made. In essence the absence of evidence from the applicant favoured him in that he was not cross-examined about issues concerning shares and his actual income.

Family Home

44. The learned judge then returned to the issue of the family home. He stated:-

> "Now, a suggestion, and I am only throwing this out as a suggestion and think about this, is that supposing you give C what she wants and you are then finished with the mortgage and you have an indemnity from her from it. Now, the protection on that that you need which I am suggesting is that if – you will be a party to the mortgage so you will know if the mortgage goes into arrears and what I am saying is that we could formulate the order in such a way that if the mortgage went into arrears for six months or more the property would have to be sold and the mortgage paid off … the protection for that is that you are not going to be lumbered with a massive mortgage debt because after six months … the house [would] be sold, mortgage will be paid off and whatever is left will be divided equally but it might be very equal."

Mr. O'N was not agreeable to this proposition. He made submissions to the court in relation to C.D's subsequent relationship, his contributions to the house prior to and during the marriage and interactions between him and C.D's partner and whether he was living with C.D. in the family home.

45. During the course of further exchanges SO'N indicated that he did not want to be "involved" in the family home. The court made great effort to ensure that the applicant understood the financial implications of the order suggested in respect of the family home and the primary consequence that he would be relieved of liability for the mortgage and liability in a property that was in serious negative equity. The judge emphasised that it was up to him whether he took on board what he was being told. Mr O'N expressly agreed that they should both keep their respective interests in the two other properties 'A' and 'B'. It is clear that Mr O'N was unhappy with the orders proposed by the judge in respect of the family home but on the basis of the materials available the judge considered that the orders which he proposed and ultimately made were fair and reasonable. (pp 66-69). It is clear that they worked to Mr O'N's benefit. It is correct to state that no oral evidence was received from the applicant on this issue but the financial facts and reality in respect of the properties were clearly established and not in issue. The court did not consider it relevant to its determination to embark on what were historical issues rooted in the applicant's continuing pain and anger with his former spouse's behaviour ranging from complaints about her operation of access arrangements to her then relationship.

46. By the time of the hearing the applicant and the respondent both sought a decree of divorce. The court could only grant the decree if satisfied that proper provision was made for the spouses and H. The requisite proofs concerning the breakdown of the marriage and the time based conditions for the decree were established and there was no issue about that order. Both parties also agreed and acknowledged that the court should make mutual orders extinguishing the other's Succession Act rights and that pension adjustment orders should be made as part of the proper provision elements of the court's determination. Both were satisfied that each should keep their respective interests in properties 'A' and 'B'.

47. There is a wide range of matters to be taken into account by the court in determining whether proper provision has been under s. 20 of the Act. The nature of the jurisdiction to be exercised by the court is by virtue of the jurisdiction conferred by the Constitution and under the act is not to be regarded as one which is to be exercised in every case in a traditional adversarial way. The court has the obligation to inquire into the relevant materials. The parties, of course , may seek to call evidence relevant to the issues and make submissions insofar as that may be relevant but the court is not to be used as a forum for trailing grievances which the court deems irrelevant to the live issues. The facts surrounding the value of the property, it's negative equity, the outstanding mortgage, the ability of C.D to discharge same, the unwillingness of SO'N to be involved with the property, his joint liability for the mortgage, the benefits accruing to him of being relieved of the liability of the mortgage, and their respective other property interests were not in issue in the proceedings. The differences focussed on what was to be done on those clear facts. The judge formulated an order in terms that addressed those facts and concluded that it did not make any reasonable sense that the family home should be sold with negative equity. C.D., H and S could reside there and steps could be taken to transfer the mortgage and property into her sole name. The alternative was to sell the family home leaving both parties with an equal liability for the outstanding debt. The learned judge concluded that his orders including that relevant to the family home constituted proper provision under the statute when considered with the other orders made: this enabled him to grant the decree of divorce.

48. It emerges from the transcript that the court was mindful not only of the fact that central to the dispute between the parties was H and his best and paramount interests, but also the fact that S.O'N was a litigant in person and was not represented by a solicitor or counsel. While the judge adopted an active role in these proceedings, it is evident from the transcript of the hearing that the court was anxious to ensure that the applicant had his say and voiced his concerns in respect of the three live issues of the hearing: the arrangement for the family home; custody of H and maintenance. The court at numerous points endeavoured to explain the orders that it was minded to make to the applicant in order that the applicant could understand what was being proposed and respond, a course of action that was entirely for the benefit of Mr. O'N, a litigant in person with no formal legal education or training, rather than to his detriment. While the court intervened on occasion in Mr. O'N's submissions this was done in order to maintain the focus of proceedings on the three live issues in the hearing and their resolution in accordance with legal principles. This was a highly acrimonious case in which issues such as the respondent's new partner and his residence at the family home, allegations of threats between the applicant and the respondent and her partner, the respondent's practice of her religion and allegations of breaches of court orders were sought to be introduced at the hearing. It is clear that at all material times the court allowed Mr. O'N to address it on his views in respect of the family home, custody of H and maintenance. This again is evident not only from the transcript but also the orders eventually made and in particular the terms of the order concerning H which have due regard to the wishes and concerns of Mr. O'N when balanced with the respondent's rights and wishes and having regard to the primary and paramount concern for H's best interests.

49. I am not satisfied that in the circumstances outlined above the learned judge erred in law in the manner in which he conducted the hearing and inquired as to the proper provision to be made in the case and the issue of custody. Though satisfied to grant leave to apply for judicial review on this ground I am satisfied that that I should refuse the order of *certiorari* for the reasons stated. The right to call evidence and cross-examine are of course an important feature of any trial process including matrimonial proceedings. The extent of the facility to be granted in respect of the right is also dependent on the purpose and relevance of the evidence sought to be adduced. In the circumstances of this case the learned judge clearly concluded that further evidence would not be of assistance or relevant to his determination given the extent of the material and evidence already submitted by the parties. On the basis of clear financial and documentary evidence which was largely uncontroversial he was entitled to invite and rely heavily on submissions in respect thereof to assist him in determining relevant issues. He was also of the view that evidence which the applicant wished to advance was focussed on attributing historical blame for perceived wrongs committed by C.D. which was unhelpful and irrelevant to the determination of the real issues in the case. I am satisfied that he acted within jurisdiction in the circumstances of this case.

Ground 2 – Admission of Draft Settlement Agreement
50. The applicant submits that Judge Johnson breached his right to fair proceedings during the hearing of the 7th March by allowing the respondent to introduce the draft settlement agreement that the parties compiled during mediation proceedings in evidence. He states that Judge Flanagan recused herself from hearing the contested divorce hearing on the basis that she had sight of the draft settlement agreement and stated that the draft settlement should not be put before the subsequent Judge hearing the divorce proceedings. The applicant therefore states that this document ought not to have been put in evidence before the court hearing the divorce proceedings and that this evidence was likely to sway the Court in favour of the respondent's claim. The applicant states that the court had a responsibility, having inadvertently had sight of the document, to discount it and say that he was discounting it. I am satisfied that there is no merit in this ground. It is quite clear that the ultimate order made in respect custody and access was by consent: there is no evidence to suggest that the learned trial judge considered, applied and/or adopted any draft agreement as alleged. I am satisfied that leave should not be granted on this ground.

Ground 3 – A consent order
51. The applicant states that the recital in the order that it was made "by consent" is incorrect. As already noted most of the paragraphs in the order were the subject of his consent and I am not satisfied to conclude that leave to apply for judicial review should be granted because the paragraphs in respect of periodic maintenance for H and the family home are not stated to be outside the consent given. If the applicant wishes to have that aspect of the order amended he might make an application under the slip-rule. The order also misstates that oral evidence was received from the applicant: this is also incorrect. However, I do not consider that leave should be granted on this basis.

Grounds 4 and 5 – That the Judge Misdirected Himself in respect of the Family Law (Divorce) Act 1996.
52. The applicant submits that the Judge failed to comply with and/or misdirected himself in relation to the provisions of ss. 20(1) and 20(2)(i) of the Family Law (Divorce) Act, 1996 (Ground 4), and ss.5(2), 11(b) and 15(1)(f) of the Family Law (Divorce) Act 1996 (Ground 5).

53. Section 20 of the 1996 Act, insofar as is relevant in these proceedings states:-

> "20.(1) In deciding whether to make an order under section 12, 13, 14, 15(1)(a), 16, 17, 18 or 22 and in determining the provisions of such an order, the court shall ensure that such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent member of the family concerned.
>
> (2) Without prejudice to the generality of subsection (1), in deciding whether to make such an order as aforesaid and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters:
>
> …
>
> (i) the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it.

The applicant states that as Judge Johnson refused to allow the applicant to give sworn evidence of the respondent's conduct with regard to the family home's purchase, upkeep and current occupation or in relation to the alleged "pre-meditated and planned strategy" on the part of the respondent of removing him from the family home and moving her partner in, the Judge failed to comply with this obligation under this section of the Act. The applicant cites the transcript of the hearing on the 7th March where the judge stated: -

> "… to re-open matters that happened in the past is not going to make any difference to the ultimate outcome of the case. And that is the reason why it is a pointless exercise embarking on this idea of laying blame or fault at one particular door".

54. I am satisfied that the learned judge formed a clear view that it would not be unjust to disregard the conduct alleged by the

applicant against C.D. He was fully aware of its nature and extent as it was set out extensively in the pleadings and affidavits which he read. It is clear that he believed this material to be irrelevant to the issues which he had to determine and that no injustice would be done by disregarding it. On the contrary it is clear from the transcript that he considered that the issue of fault which is so much focussed upon by the applicant was not a matter which he considered to be of assistance in determining the issues in this case. He was entitled to take that view and acted within jurisdiction in so doing. I am not satisfied that leave should be granted on this basis or that if it were that the applicant could succeed on this ground.

55. The applicant also relied upon the following provisions. Section 5(2) of the 1996 Act states: -

> "Upon a grant of decree of divorce, the court may, where appropriate, give such directions under section 11 of the Act of 1964 as it considers proper regarding the welfare (within the meaning of that Act), custody of, right of access to, any dependent member of the family concerned who is an infant (within the meaning of that Act) as if an application had been made to it in that behalf under that section."

Section 11(b) of the Act states: -

> "11. Where an application is made to the court for a grant of a decree of divorce, the court, before deciding whether to grant or refuse to grant the decree, may, in the same proceedings and without the institution of proceedings under the Act concerned, if it appears to the court proper to do so, make one or more of the following orders: -
>
> …
>
> (b) an order under section 11 of the Act of 1964."

Finally, s. 15(1)(f) of the 1996 Act states: -

> "On granting a decree of divorce or at any time thereafter, the court, on application to it in that behalf by either of the spouses concerned or by a person on behalf of the dependent member of the family, may, during the lifetime of the other spouse or, as the case may be, the spouse concerned, make one of the following orders:
>
> …
>
> (f) an order under section 11 of the Act of 1964."

56. Section 11 of the Guardianship of Infants Act 1964 states: -

> "(1) Any person being a guardian of a child may apply to the court for its direction on any question affecting the welfare of the child and the court may make such orders as it thinks proper.
>
> (2) The court may by an order under this section: -
>
> (a) give such directions as it thinks proper regarding the custody of the child and the right of access to the child of each of his or her parents …"

57. Section 3 of the 1964 Act was amended by the s. 45 of the Children and Family Relationships Act 2015, which now provides: -

> "3. (1) Where, in any proceedings before any court, the: -
>
> (a) guardianship, custody or upbringing of, or access to, a child… is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.
>
> (2) In proceedings in which subsection (1) applies, the court shall determine the best interests of the child concerned in accordance with Part V."

58. Section 31(1) of the 1964 Act as amended by the Children and Family Relationships Act 2015 provides that the court shall have regard to "all of the factors or circumstances that it regards as relevant to the child concerned and his or her family". Section 31(2) provides a number of factors and circumstances which are referred in sub-section 1. The applicant submits accordingly that the court was therefore obliged to consider various factors when determining the best interests of H which included violence in the family home by a member of the child's household towards a parent of the child; the capacity of the "perpetrator of violence" to properly care for the child and the risk or likely risk the perpetrator poses to the child; their capacity to care for and meet the needs of the child and the refusal of a parent to communicate and cooperate on issues relating to the child.

59. I am satisfied having regard to the fact that the applicant consented to the terms of the custody and access terms which were ruled by the learned judge and became part of the order that this ground is misconceived. There was no failure to engage the relevant statutory provisions relied upon. The learned judge proceeded in accordance with those provisions in making the ruling recorded in the order. Furthermore, I am satisfied that the applicant is precluded by his conduct from challenging that part of the order by way of judicial review. His attempt to set aside the ruling on the 9th March was unreasonable. The applicant though not legally qualified is a very intelligent, articulate and knowledgeable litigant. His behaviour on the 9th March was in my view an attempt to disrupt the smooth implementation of those agreed terms. Persons who represent themselves must also be held to a standard of reasonable behaviour with regard to the conduct of litigation and their dealings with the court and other litigants who are also entitled to a fair hearing and a just result. The resources of the courts are finite and in this case considerable care, time and effort was devoted by the judge to this issue. The applicant made a fully informed decision to agree to those terms and offered no credible reason to the learned judge or to this court as to his sudden abandonment of terms which had been accepted as forming the basis of an order made in the best interests of H. I am not satisfied to grant leave on this ground.

60. On a more general point I am also satisfied that the applicant by his conduct in seeking by consent to have the pension adjustment order made in January 2018 approbated the order of the Circuit Court and clearly invoked the court's jurisdiction to do so

within and under the terms of the order which he seeks to challenge. I am satisfied that he has thereby waived or abandoned his entitlement to and is precluded from obtaining relief by reason of that conduct (see *M.Q. v. Judge of the Northern Circuit* (Unreported High Court, Mc Kechnie J. 14th November 2003 at para. 53).

Conclusion
61. For the reasons set out above I refuse the application