THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 287 JR]

BETWEEN

L.C.

APPLICANT

AND

K.C.

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 14th day of January, 2019.

1. The applicant seeks an order of *certiorari* quashing an order of the District Court made on 5th March, 2018, purporting, by way of clarification of a previous order made on 2nd October, 2017, to appoint the respondent to be joint guardian of their son with retrospective effect to the date of his birth. She seeks an order pursuant to O. 84, r. 7(b) of the Rules of the Superior Courts staying the operation of that order. In addition, she seeks an order restraining the District Judge from hearing further applications in respect of the child pending the determination of these proceedings.

2. On 2nd October, 2017, the respondent secured an order pursuant to s. 6A of the Guardianship of Infants Act 1964, as amended, ("*the Act of 1964*") appointing him joint guardian of their child. That is not, however, the order which is the subject of this review. In circumstances outlined hereunder, the respondent secured another order, or a variation of the order of 2nd October, 2017, on 5th March, 2018. This is the order under challenge. It is stated on its face to have been made pursuant to the cohabiting provisions of the Children and Family Relationships Act 2015 ("*the Act of 2015*") whereby the respondent was appointed to be joint guardian of the child with effect from the date of his birth in [date redacted].

3. The applicant and the respondent never married but had been in a relationship which, according to the applicant, had broken down prior to the birth of their son. The respondent does not accept this and states that the relationship continued for a period thereafter. The applicant, who is an Irish citizen, removed the child from the jurisdiction on 28th August, 2017. She has since married a citizen of the United States and recently has had a child with him.

4. The applicant maintains the parties had agreed to terminate their relationship three days prior to discovering that she was pregnant. While they attempted to work on the relationship during the pregnancy this was not successful.

5. The affidavit to ground this application for judicial review was sworn on behalf of the applicant by her solicitor, Ms. Jennifer O'Brien, something which counsel for the respondent commented upon during the course of the proceedings. I will deal with this later in the judgment.

6. It is therein averred that on [date redacted] the day after the child was born, the applicant moved to live with her parents in a different county and continued to reside with them until she permanently relocated to the United States in August, 2017. It is averred that the applicant did not cohabit with the respondent for 12 consecutive months from 18th January, 2016, and in particular for three consecutive months after the birth of the child.

7. The respondent denies that the relationship between the parties broke down prior to the birth of the child on [date redacted]. He asserts that they were in an intimate and committed relationship from February, 2015 and that they cohabited until June, 2017. He disputes that the parties agreed to terminate their relationship some three days before the applicant discovered that she was pregnant, at which time they were living in rented accommodation in Dublin. They agreed to continue the relationship and to reside together until the birth of the child. They moved to a house in the country owned by him. He does not accept that the applicant moved to live with her parents in another county at the time when she says that she did. In support of his position he points to the fact that the parties had a lease on the house in Dublin which was due to end in September, 2016. They requested the landlord to extend the lease until such time as the applicant gave birth in a nearby hospital, to which the landlord agreed.

8. On 8th October, 2016, the respondent moved to his home in the country and the applicant joined him there on 1st November, 2016. They resided together in that home. He accepts that the applicant and the child went to stay with the applicant's parents for a number of days while improvements were being carried out to that property but he denies that she resided with her parents from 1st October, 2016 until she left the jurisdiction in August, 2017. The birth of the child was registered with the Registrar of Births, Deaths and Marriages in the respondent's local area in December, 2016. The address then provided by the applicant was that of the respondent. The applicant registered the child with a local general practitioner in that town and she applied for a G.P. visit card for the child. At all material times the address provided by the applicant to relevant authorities in Ireland in respect of her son was where the respondent's home was situated.

9. The respondent contends that on 20th June, 2017, the applicant obtained a passport for the child without reference to him. He argues that she falsely swore that she was the sole guardian of the child.

10. On 25th August, 2017 the respondent called to applicant's parents' residence to exercise his rights of access to the child. On 31st August, 2017, he contacted the applicant via social media to arrange for greater access. The applicant did not respond. On 31st August, 2017, the respondent was informed by the applicant that the child would not be available for access because she had gone on a brief holiday. He inquired as to when she planned to return but this inquiry went unanswered. He refers to certain text messages sent to him by her in mid-September, 2017, including a message on 15th September, 2017 where she stated *"just letting you know we are still away."*

11. On 19th September, 2017, the respondent's solicitor served on the applicant an application for guardianship by registered letter at the applicant's parents' address. He was notified on 29th September, 2017 that the registered letter had been signed for in error by the applicant's mother, and that the applicant no longer resided at that address. No forwarding address was provided.

12. On 2nd October, 2017, the District Judge accepted that the summons had been properly served upon the applicant and proceeded to make orders in respect of guardianship and access. The court also made an order preventing either party from removing the child from the jurisdiction without the prior written consent of the other or pursuant to court order.

13. When the applicant failed to return to Ireland, the respondent reported the matter to An Garda Síochána on 17th October, 2017. In early November, 2017, An Garda Síochána notified the respondent of their belief that the applicant was residing in [location redacted].

14. In November, 2017, the respondent contacted the Central Authority for Ireland to seek assistance in the institution of child abduction proceedings under the Hague Convention on the Civil Aspects of International Child Abduction for the return of the child to Ireland. He completed an application form on 6th November, 2017 to commence those proceedings. By letter of 28th December, 2017 the United States Department of State (WEP Abductions) requested the applicant to return of the child on a voluntary basis. On 11th January, 2018, the applicant's attorney in the United States informed the U.S. Department of State that she wished to resolve the matter without engaging in litigation.

15. At para. 16 of his affidavit sworn on 11th October, 2018, the respondent avers that to protect his position in relation to guardianship of the child, he decided to request the District Court to clarify the order made on 2nd October, 2017 to confirm that he had been the child's guardian as and from the date of his birth.

16. On 5th February, 2018 the respondent applied *ex parte* to the District Court to re-enter the guardianship proceedings. The application was made returnable to 5th March, 2018. By letter of 6th February, 2018, the Courts Service sent to the applicant a number of documents, including the original guardianship and access orders, an order granting the respondent leave to serve the proceedings outside the jurisdiction and the notice of application to re-enter the guardianship proceedings. This notice is addressed in more detail at para. 40 below.

17. Following exchange of further correspondence between the parties, the applicant agreed to facilitate access to the child in the United States. On 4th April, 2018 the respondent instituted proceedings in Atlanta pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("*the Hague proceedings*"). By that time, however, the applicant had moved to [location redacted], something which was unknown to the respondent prior to the institution of those proceedings.

18. In the interim, on 27th March, 2018, the applicant served a notice seeking an extension of time within which to appeal the order of 5th March, 2018.

19. On 17th April, 2018, the applicant instructed her solicitor to attend at the District Court to seek an adjournment of the application for leave to extend time within which to appeal. The respondent opposed the application to extend time and the District Judge refused to grant the reliefs sought. The refusal of the District Judge was appealed to the Circuit Court. This appeal was dismissed on 10th May, 2018.

20. The application for leave to seek judicial review was made ex parte on 16th April, 2018.

21. The respondent's solicitor has sworn an affidavit in support of the facts outlined by the respondent with particular reference to what occurred in the District Court on 2nd October, 2017. He did not represent the respondent on 5th March, 2018.

22. In his affidavit sworn on 5th July, 2018, the respondent exhibits a voluminous number of text messages exchanged between the parties, including those generated after they moved to his home and before, as he contends, their relationship ceased in June, 2017. He also exhibits a number of other documents including the child's birth certificate and documents concerning the registration of the child with his local general practitioner.

23. The respondent asserts that these proceedings were instituted solely for the purposes of undermining the Hague proceedings in the United States.

24. While the applicant did not swear the original affidavit grounding the application to bring these proceedings, she has since sworn an affidavit on 8th August, 2018, confirming the facts as set out in Ms. O'Brien's affidavit. She reiterates that she resided with her parents from 1st October, 2016 until she left the jurisdiction in August, 2017.

25. She describes the provision of the respondent's address to the Registrar of Births, Deaths and Marriages as an administrative issue and contends that it should not be construed as an indication of intent. The child was at all times registered with her parent's local general practitioner. His paediatric appointments took place there. Whenever she visited the respondent's property she did not share a room with him. She states that the respondent informed her that he had no interest in being in a relationship with her, and could not envisage being intimate with her after the birth of the child. She states that she was the sole guardian of the child, and believes that she was entitled to swear the affidavit in the manner in which she did to obtain the child's passport. She asserts that she was entitled to move with the child to the United States on 28th August, 2017. She was in a relationship with a U.S. citizen who she met in July, 2014 and who she subsequently married on 17th November, 2017.

26. The applicant avers that she saw no reason to contest the application in the District Court in March, 2018, as she was then permanently living in the United States. She states that she was advised that the fact that the respondent had been appointed a guardian after what she describes as the lawful removal of the child, could not retrospectively make the removal wrongful. Further, she states that the question as to whether the District Court could lawfully exercise jurisdiction in respect of the child was not one that she was in a position to litigate at that stage, although this is not expanded upon. She believes that the impugned order could not have been made and that "*I took advice as to this proposed application and I was advised that the relief sought was not one which was known to law*". In support of these contentions she makes reference to the application of the respondent to the Central Authority in which he described his rights of guardianship as having been obtained by order of 2nd October, 2017.

27. The applicant also avers that the respondent relied on the impugned order in the United States proceedings and she believes that the effect of the order is to retrospectively render her removal of her child, not just wrongful under the Convention, but also such as to leave her open to criminal prosecution. She takes issue with the decision of the court in the United States and notes that orders made in the Hague proceedings are not subject to a stay, even where an appeal is pending, although the respondent disputes this. She believes that the determination of the validity of the District Court order is essential to the hearing of the appeal in the United States.

28. Following the ruling in the United States, the child was returned to Ireland and the parties have had access to the child in this

jurisdiction.

29. In a further replying affidavit sworn on 11th October, 2018, the respondent takes issue with many of the averments in the applicant's affidavit and highlights inconsistencies between the evidence on affidavit in these proceedings and her evidence before the court in the United States. He further points out that the court in the United States did not consider the District Court order to be preclusive or to be essential to the Hague proceedings. He also avers that the applicant made an application for an American passport for the child, without his knowledge.

Legislative history

30. To understand the nature of the dispute, something needs to be said of the legislative history conferring rights in respect of guardianship on fathers who are not married to the child's mother. Prior to the amendments introduced by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ("*the Act of 2010*"), and the Children and Family Relationships Act 2015, the rights of the father of a child born outside marriage were determined by the provisions of the Guardianship of Infants Act 1964, as amended by the Status of Children Act 1987 ("*the Act of 1987*") and the Children Act 1997. Under s. 6 of the Guardianship of Infants Act 1964 as originally enacted, and subject to certain provisions relating to testamentary and court appointed guardians, only a father who was married to the child's mother was considered a guardian of the child. In the definition section of the Act of 1964, s. 2, "*father*" was defined as excluding the natural father of a non-marital child.

31. Section 12 of the Act of 1987 amended s. 6 of the Act of 1964 by inserting an additional section, s. 6A, which conferred upon the father who was not married to the child's mother a *right to apply* for guardianship. Such father did not enjoy a defeasible right to be a guardian. In summary, therefore, the natural father of a child born out of wedlock did not have "*automatic*" rights to guardianship and in the absence of agreement was required to apply to court to be the child's guardian.

32. This position changed with the enactment of the Act of 2015. This Act conferred upon "*cohabitants*" automatic rights to guardianship in certain circumstances. The expression "*cohabitant*" is defined in another piece of legislation, being the Act of 2010, s. 172. Ms. Browne S.C. emphasises that the Act of 2015 incorporates s. 172(1) only, and not the entirety of s. 172, into that definition.

33. Also of significant relevance in this case is s. 43 of the Act of 2015 which, once again, amended the definition of "*father*" in s. 2 of the Act of 1964 and inserted a number of new sub-sections including what is now known as s. 2(4A). Consideration of the entirety of s. 43 facilitates some understanding of the current legislative position concerning rights to guardianship. This has been arrived at through a labyrinth of amendments in several pieces of different legislation, introduced at different times and directed at wider issues relating to various categories of legal relationships. Section 43 of the Act of 2015, in so far as is relevant to this case, provides as follows:-

> *"Section 2 of the Act of 1964 is amended—*
>
> *(a)…*
>
> *(ii) the substitution of the following definition for the definition of "father":*
>
> *" 'father' includes a male adopter under an adoption order but subject to section 11(4), does not include the father of a child who has not married that child's mother unless—*
>
> *(a) an order under section 6A is in force in respect of that child,*
>
> *(b) the circumstances set out in subsection (3) of this section apply,*
>
> *(c) the circumstances set out in subsection (4) of this section apply,*
>
> *(d) the circumstances set out in subsection (4A) of this section apply, or*
>
> *(e) the father is a guardian of the child by virtue of section 6D;",*
>
> *(iii) the substitution of the following definition for the definition of "parent":*
>
> *" 'parent' means—*
>
> *(a) subject to paragraph (b), a father or mother as defined by this subsection, and*
>
> *(b) in relation to a donor-conceived child, the parent or parents of that child under section 5 of the Act of 2015;",*
>
> *and*
>
> *(iv) the insertion of the following definitions:*
>
> *" 'Act of 2010' means the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ;*
>
> *'Act of 2015' means the Children and Family Relationships Act 2015;*
>
> *'civil partner' shall be construed in accordance with section 3 of the Act of 2010;*
>
> *'cohabitant' shall be construed in accordance with section 172(1) of the Act of 2010;*
>
> *'donor-conceived child' has the meaning it has in Part 2 of the Act of 2015;*
>
> *'enactment' means a statute or an instrument made under a power conferred by statute;*
>
> *'enforcement order' shall be construed in accordance with section 18A(1);*
>
> *'qualifying guardian', in relation to a child, means a person who is a guardian of that child and who—*

(a) is the parent of the child and has custody of him or her, or

(b) not being a parent of the child has custody of him or her to the exclusion of any living parent of the child;

'Minister' means the Minister for Justice and Equality;

'relative', in relation to a child, means a grandparent, brother, sister, uncle or aunt of the child;",

(b) in subsection (4) —
(i) in paragraph (c), by the deletion of "child," and substitution of "child, and", and

(ii) by the deletion of paragraph (d),

and

(c) by the insertion after subsection (4) of the following:
"(4A) The circumstances referred to in paragraph (d) of the definition of 'father' in subsection (1) are that the father and mother of the child concerned—

(a) have not married each other, and

(b) have been cohabitants for not less than 12 consecutive months occurring after the date on which this subsection comes into operation, which shall include a period, occurring at any time after the birth of the child, of not less than three consecutive months during which both the mother and father have lived with the child." (emphasis added)

34. The 18th January, 2016 is an important date because that is the date upon which relevant provisions of the Children and Family Relationships Act 2015 came into operation.

35. The most relevant subsections of the Act of 2015 to this case are s. 43(a)(ii), s. 43(a)(iv) and s. 43(c) – remembering at all time that these subsections make amendments to the definition section of the Act of 1964, being s. 2 of that Act.

36. Section 6A now provides:-

"(1) The court may, on an application to it by a person who, being a parent of the child, is not a guardian of the child, make an order appointing the person as guardian of the child.

(2) Without prejudice to other provisions of this Act, the appointment under this section of a guardian shall not, unless the court otherwise orders, affect the prior appointment (whether under this or any other enactment) of any other person as guardian of the child."

37. Section 6F is also highly relevant. It provides:-

"(1) A person specified in subsection (2) may apply to the court for a declaration under this section that a person named in the application is or is not a guardian by virtue of the circumstances set out in section 2(4A) or 6B(3) of a child named in the application (in this section referred to as the 'child concerned').

(2) An application for a declaration under this section may be made, in relation to a child concerned, by–

(a) a guardian of the child concerned, or

(b) a person seeking a declaration that he or she is not a guardian by virtue of the circumstances set out in section 2(4A) or 6B(3) of the child concerned.

(3) An application for a declaration under this section shall not be made in relation to a child concerned other than–

(a) where the application is made by a person referred to in subsection (2)(a), on notice to each other guardian of the child and the person named in the application in relation to whom the declaration is sought, and

(b) where the application is made by a person referred to in subsection (2)(b) on notice to each guardian of the child.

(4) The court may direct that notice of any application for a declaration under this section shall be given to any such other persons as the court thinks fit and where notice is so given or where notice is given under subsection (3) to any person the court may, either of its own motion or on the application of that person or any party to the proceedings, order that that person shall be added as a party to those proceedings.

(5) Where on an application for a declaration under this section it is proved on the balance of probabilities that a person named in the application is or is not a guardian by virtue of the circumstances set out in section 2(4A) or 6B(3) of the child concerned, the court shall make the declaration accordingly."

38. It is the applicant's case that the order of 5th March, 2018 has potential consequences for whether it was lawful for her to remove the child from the jurisdiction in August, 2017 without the respondent's consent. On the applicant's case, the respondent was not a guardian of the child when she left the jurisdiction in August, 2017. The respondent claims that he was.

The order of 2nd October, 2018

39. The applicant did not answer the original notice of application or did the applicant attend at the District Court on 2nd October,

2017 when an order was made under s. 6A. The relevant District Court Rules, which make provision for the forms to be used, were made under S.I. No. 17 of 2016. Form 58.1 of the Rules is stated to be the appropriate form to be used in an application to be appointed a guardian under s. 6 A of the Act of 1964 as amended.

The February notice of application
40. Having discovered that the applicant removed his child from the jurisdiction, the respondent applied ex parte to the District Court on 5th February, 2018 seeking leave to re-enter the proceedings and to serve on the applicant a further notice. Leave was granted by the District Judge. This notice is stated to have been served on the applicant in accordance with the permitted mode of service. Significant emphasis was placed upon this notice during the hearing of this case. It is dated 6th February, 2018 and is in form described as "Form 58.1". It is entitled "*Guardianship of Infant Acts, 1964 to 1997, Section 6A, Notice of Application by a Father to be Appointed a Guardian*". The notice proceeds as follows:-

> *"TAKE NOTICE that the above-named applicant … being the father of:*
>
> [M.C.C.] *born on* [date redacted]
>
> *a child,*
>
> *whose father and mother have not married each other and have not made declaration under section 2(4) of the Act*
>
> *will RE-ENTER THE MATTER at the sitting of the District Court to be held at* […] *on the 5TH MARCH 2018 at 10.30 a.m*
>
> *REQUESTING THE JUDGE TO SPEAK TO THE ORDER OF THE 2ND OCTOBER 2017 PURSUANT TO THE GUARDIANSHIP ACT AND TO ADD TO THAT ORDER 'THAT THE SAID* [K.C.] *BE APPOINTED A GUARDIAN AS AT THE DATE OF BIRTH OF* [M.C.C.] *BORN ON* [DATE REDACTED]."'

41. It is a contention of the applicant that the District Judge did not have jurisdiction to entertain the application or to make such an order. In fact, she states that so convinced was she that the court had no such jurisdiction that, on legal advice, she did not respond to it.

42. By letter of 6th February, 2018 from the Courts Service, the applicant was furnished with copies of the orders of 2nd October, 2017, and 5th February, 2018. These were served on her in [location redacted]. The hearing having proceeded on 5th March, 2018, the applicant received a copy of the impugned order of 25th March, 2018.

The order of 5th March, 2018

43. This order is entitled "*Guardianship of Children Acts, 1964 to 1997, section 6A, Order appointing father to be a guardian"*. The form used is Form 58.2, which is the form stated in the rules to be appropriate when the court makes an order appointing a person to be a guardian under s.6A. It is clear, therefore, that on its face, this order purports to be made under s. 6A of the Act but in terms, which it is to be observed, do not coincide with the wording of the notice of application:-

> *"THE COURT being satisfied that notice of application herein has been duly served upon each guardian of the child and having heard the evidence of the applicant and being satisfied that the welfare of the child requires the making of this Order;*
>
> *HEREBY APPOINTS the above-named applicant* [K.C.] *to be a JOINT guardian of the said child* [M.C.C.] *WITH EFFECT FROM* [DATE REDACTED] *PURSUANT TO THE CO-HABITING PROVISIONS OF THE CHILDRENS AND FAMILY RELATIONSHIPS ACT 2015."*

Prospective nature of an order made under section 6A
44. It seems clear that an order made under s. 6A is prospective in operation and does not operate in a retrospective manner. There was no great argument about this on the hearing of this application.

The applicant's case
45. It is the contention of the applicant that the District Judge did not have jurisdiction to make an order pursuant to s. 6A with retrospective effect. It is further contended that the District Judge effectively made a declaration pursuant to the provisions of s. 6F of the Act of 2015, with retrospective effect to the date of the birth of the child, something which it is alleged he did not have jurisdiction to do on an application under s. 6A of the Act.

46. The legislative amendment brought about by the Act of 2015 came into force on 18th January, 2016 and it is the applicant's case that as the child was born after that date, there is no basis upon which the respondent could be deemed or declared to be a guardian as of the date of birth. The Act of 2015 had been in force for nine months at that time. Under the relevant section of the Act, a natural father is entitled to acquire automatic guardianship rights only at the end of a consecutive 12 month period of cohabitation which must include three consecutive months residing with the mother and child. It is submitted, therefore, that it is not legally possible for the respondent to acquire automatic guardianship rights as of the date of this child's birth. This may only be done pursuant to an application for a declaration under s. 6F of the Act of 1964 or by agreement and it is argued that entitlement to rely on s. 6F does not arise on the facts. The order of 2nd October, 2017, it is contended, was an order appointing the respondent as guardian pursuant to s. 6A of Act of 1964 and was not a declaratory order within the meaning of s. 6F, which order can only be made in favour of a father who is not already a guardian.

47. The applicant also contends that incorrect District Court application forms were used. It is further argued that given the wording of s. 2(4A), which makes specific provision that the period of cohabitation must include a period of not less than three consecutive months during which both the mother and father have lived with the child, that the respondent could never be declared to be a guardian as of the date of birth of the child.

48. The applicant also maintains that it was on foot, or with the aid, of this order that the respondent instituted child abduction proceedings in the United States. She alleges that the order which is impugned is entirely prejudicial to her rights as the mother of her child to have him live with her in the country of her choice.

The respondent's reply
49. It is the contention of the respondent that there is no defect, error of law, breach of fair procedures or other imperfection which justifies the making of the orders sought in these proceedings. He places particular emphasis on the fact that although the applicant was on notice of the hearing on 5th March, 2018, she chose not to engage legal representation or to attend that hearing.

50. The respondent submits that as a matter of fact on the date of the impugned order of 5th March, 2018, he fulfilled the necessary criteria under s. 2(4A). This was accepted by the District Judge and is reflected in the order which he made and which records *"having heard the evidence of the applicant".*

51. It is argued that the order should not be read in a narrow way as suggested by the applicant; that it is evident from the face of the order that the District Judge was cognisant of s. 2(4A) and was therefore cognisant of the fact that the period of cohabitation had to include a period of three months after the birth of the child. On a correct reading of that order, the District Judge, having heard the evidence, was satisfied that the respondent as of that day qualified under the automatic guardianship provisions and that he has been his guardian since birth.

52. The respondent submits that it is important to inquire into what would have happened had the applicant had engaged with the proceedings. It is submitted that it is entirely conceivable, had objection been taken, that the District Judge either would have deemed the application under s. 6A to be an application under s. 6F, or he might have amended the application. Order 45E of the Rules of the District Court gives wide powers of amendment to the District Judge. It provides, *inter alia*:-

> *"…all amendments must be permitted as are necessary for the purpose of determining the real questions in controversy between the parties".*

That obligation is mandatory, not discretionary. Alternatively, the District Judge might have directed that a new application be made. It is submitted by the respondent that the applicant, by her conduct, precluded any of those outcomes.

53. The applicant now accepts that the respondent is a guardian and it is submitted that no purpose will be served in granting the reliefs sought. Following the determination of the child abduction proceedings in the United States, these proceedings are moot.

54. In the event that the order is invalid on its face or otherwise, it is submitted that as the remedies available on an application for judicial review are discretionary, the applicant is precluded by her conduct from entitlement to the relief claimed. It is alleged that she has been guilty of misrepresentation and non-disclosure of material facts, particularly at the time of the ex parte application and in the proceedings. Reliance is placed on the following:-

> (i) The respondent has been registered as the father of the child.
>
> (ii) The child had been registered with a general practitioner in the county where the respondent resides.
>
> (iii) The failure of the applicant to disclose to the court that access had in fact been exercised by the respondent.
>
> (iv) A false affidavit was sworn for the purpose of obtaining a passport for the child.
>
> (v) The applicant failed to disclose to the respondent her plans to bring the child to the United States even though he was at the time, exercising rights of access to the child. In fact it is suggested that she misled him in this regard and thereby deprived him of the opportunity to bring an early court application before she left the jurisdiction.
>
> (vi) The applicant's non-disclosure that she had ample notice of the application made to the District Court on 5th March, 2018.
>
> (vii) The failure of the applicant to disclose a move from one state to the other within the United States.
>
> (viii) The applicant failed to disclose to the High Court that she had applied for an extension of time within which to appeal the order of the District Court.

The respondent also submitted that the statement of grounds was misleading in stating that the applicant had not been served before the making of the order on 2nd October, 2017. I have considered the statement of grounds in some detail and it is not entirely clear to me that the applicant did in fact go so far as to state that she had not been served, as a matter of fact.

55. It is clear that the substantive dispute between the parties is whether the respondent, at the time the applicant left the jurisdiction with her son, had automatic rights of guardianship, or simply the right to apply for guardianship.

The Hague proceedings
56. An order was made for the return of the child by the [location redacted] District Court on 1st June, 2018. This followed hearings on 30th and 31st May, 2018. Neither party suggests that this decision is binding on this Court, although the respondent maintains that it should be recognised as a decision as a court of competent jurisdiction.

57. The presiding judge, Judge Kay, explained her understanding of Irish law to be that an unmarried father obtains rights of guardianship if he has cohabited with the child's mother for at least 12 consecutive months, three of which occur at any time after the birth of the child during which the father and mother lived with the child. She noted that this amendment was effective prospectively from 18th January, 2016.

58. Having reviewed the evidence, Judge Kay was satisfied that the respondent had established that a cohabitating relationship existed between the parties from September, 2015 until the applicant removed her belongings and those of the minor child from the respondent's home in June, 2017. Thereafter, the respondent exercised rights of access. Judge Kay was not persuaded by the evidence of the applicant, which she found to be contradictory and to be contradicted by documentary evidence. Judge Kay disbelieved the applicant and felt that she had lied to the respondent on numerous occasions.

59. Judge Kay did not regard the District Court orders made in Ireland as having preclusive effect but it does appear from the text of her decision that she found the impugned decision and order persuasive. She concluded the removal of the child was in breach of the Hague Convention and informed the applicant that she had the right to seek a stay on the return order, but that a request ought to be made to the appropriate court. Written reasons were published by Judge Kay on 5th June, 2018. In the course of her written

reasons, reference was made by Judge Kay to s. 172 of the Act of 2010. Ms. Browne S.C. for the applicant submits that if in fact an issue arose regarding the interpretation of Irish law then that issue should have been referred back to an Irish court for determination; and that there remains a live issue on any appeal to the courts in the United States.

The validity of the order of 5th March, 2018

60. An application under s. 6A may be made by a parent who is not a guardian of the child. Section 6F provides that a person may apply to the Court for a declaration under that section that a person named in the application is or is not a guardian by virtue of circumstances set out in ss. 2(4A) or 6B(3) of a child named in the application.

61. *Prima facie* an application under s. 6A can only be made by a parent of a child who is not already a guardian. On the other hand, an application under s. 6F may be made by a person who is already a guardian of the child or by a person seeking a declaration that he or she is not a guardian of the child by virtue of the circumstances set out in ss. 2(4A) or 6B(3) concerned.

62. Section 6F(3) is an important provision in the context of the circumstances of this case. If in truth, the respondent purported to make an application for a relevant declaration under s. 6F, then the Act makes clear that he was obliged to place the applicant on clear notice of such application.

63. It is true that s. 6F(4) provides that the court may direct that notice of any application for a declaration shall be given in a manner that the court thinks fit, but it does not appear to me, however, that this absolves the applicant for such declaration from placing another guardian of the child on notice of the application pursuant to s. 6F(3)(b), a section which is mandatory in its terms.

64. Section 6F(5) is also relevant in that it provides that where on an application for a declaration under the section it is proved on the balance of probabilities that the applicant is or is not a guardian by virtue of the circumstances set out in s. 2(4A) of the child concerned, the court shall make the declaration accordingly. Thus, once the court comes to the conclusion that there is sufficient evidence, on the balance of probabilities, it does not retain discretion and must make the declaration sought.

65. It appears to me that the validity of the making of an order under s. 6F is predicated on the service of a clear and valid notice and placing a child's existing guardian on notice that an application for a declaration is being sought.

66. In my view, that is not what happened in this case. Looking at the sequence of events, the applicant was appointed a guardian pursuant to s. 6A on 2nd October, 2017. His notice of application of 6th February, 2018 was stated to be made under s. 6A. The respondent sought to re-enter the matter and to request the judge:-

> *"…to speak to the order of the 2nd October 2017 pursuant to the Guardianship Act and to add to that order 'that the said [K.C.] be appointed a guardian as of the date of birth of that [M.C.C.] on the [DATE REDACTED]."'*

67. While what was sought here was not, in truth, an order under s. 6A, the notice of application did not, of itself purport to be anything other than an application to amend an order already made under s. 6A. Section 6A, in my view, does not empower a court to make such an order retrospectively or to make it effective from a particular date. An order under s. 6A speaks prospectively from the date upon which it is made. There is no reference in s. 6A to the cohabiting provisions of the Act of 2015, to which Act reference is made in the impugned order. Therefore, it appears to me that District Judge, in purporting to amend, clarify or speak to the terms of the order of October, 2017, in a manner which went beyond the provisions of s. 6A, and in purporting to alter the rights of the parties in such a potentially fundamental manner without clear advance notice, erred to the extent that I must conclude the order made is *ultra vires*.

68. In so far as it may be contended that the District Judge had the power to amend the application, even if this is the case, there is no evidence that such amendment was applied for or that that the applicant was put on notice of such application to amend. The impugned order does not refer to any such application having been made or granted. I do not believe that the powers of amendment under the District Court Rules could or should be exercised in a manner that fundamentally alters the nature of the claimed statutory entitlement, being a right and entitlement conferred by the Act of 2015 which did not exist before that time, particularly without clear notice to a potentially affected party that that is what was being done. The relief under s. 6A is a right and entitlement given to a natural father *to apply* to become a joint guardian; and not one directed at declaring or otherwise finding that he was "automatically" entitled to rights of guardianship.

69. In any event it does not appear to me that the fact that the court may or may not have a jurisdiction to amend a notice of application or order, is sufficient to save the order from the frailties which are evident on its face.

70. In the circumstances, I have come to the conclusion that the order made by the District Judge on 5th March, 2018 is therefore invalid.

71. Quite apart from an analysis of the statutory provisions under which the order was purportedly made, it also seems clear that the requisite notice provisions were not complied with in accordance with the mandatory requirements of s. 6F(3) and thus this is another reason why the order is open to challenge.

72. I therefore find that the order of 5th March, 2018 is invalid and I must now consider further important points which have been raised. The first relates to the fact that the grounding affidavit was not sworn by the applicant, the second to mootness and the third to the manner in which the Court ought to exercise its discretion to grant the reliefs sought in the light of the stated and alleged conduct of the applicant.

Requirement of the applicant to personally swear the affidavit

73. It is submitted on behalf of the respondent that the grounding affidavit should have been sworn by the applicant, rather than her solicitor, as she was best placed to give evidence in relation to the extent of cohabitation. The decisions of *P.O'T. v. Child and Family Agency* [2016] IEHC 101 and *McNamee v. DPP* [2016] IEHC 101 are relied upon by the respondent.

74. The respondent argues that although the applicant did subsequently swear an affidavit on 8th August, 2018, her account of cohabitation was vague. The respondent compares this with the positive assertion in the applicant's solicitor's affidavit that the parties did not cohabit for 12 consecutive months after 18th January, 2016 and did not cohabit for three consecutive months after the child's birth on 30th September, 2016. The respondent questions whether the applicant would have been granted leave to apply for judicial review had the application been grounded on the affidavit of the applicant.

75. In response, it is submitted on behalf of the applicant that the circumstances in *P.O'T.* differed significantly from those before the Court in these proceedings. It is submitted that the applicant was living outside the jurisdiction at the time the *ex parte* application for leave was made, and that she has subsequently sworn an affidavit. It is submitted that there was never an issue raised in relation to the solicitor's affidavit at an earlier stage and that no application was made by the respondent to set aside leave on the basis that the court had acted on hearsay evidence. The applicant further states that the court was aware at the time of the leave application that it was acting on the affidavit of the applicant's solicitor and therefore on hearsay evidence. It is submitted that there was nothing in the grounding affidavit that was in any way false or misleading.

76. In *P.O'T.*, Humphreys J. considered an application for leave to apply for judicial review in respect of allegations of child sexual abuse made against the applicant. The application was grounded on the affidavit of the applicant's solicitor, and the applicant had not sworn an affidavit. Humphreys J. stated:-

> *"34. The applicant in this case did not swear the grounding affidavit himself. He did not set out on oath his own full version of events, still less the extent of his unsupervised access to children at all material times since the matters complained of, or the precise date on which he ceased to engage in the coaching of children, and his current level of unsupervised access to children, if any, his reasons for not co-operating in full with the inquiry or his attitude to any inspection or verification of these averments on behalf of the agency if required. More fundamentally, he did not personally verify the statement of grounds. The application for leave is grounded on an affidavit of his solicitor.*
>
> *35. The Rules of the Superior Courts (Judicial Review) 2011 clearly require pleadings in judicial review to be verified by an affidavit of the parties personally. Form No. 14 in Appendix T, as required by O. 84 r. 20(2)(b), requires that the affidavit begins: 'I, AD., [applicant]* [respondent]* in these proceedings, make oath and say as follows …' (obviously with the inapplicable word marked with an asterisk to be deleted as appropriate).*
>
> *36. The other effect of an affidavit being sworn by a solicitor rather than an applicant is that it therefore constitutes hearsay. A court at the leave stage is not bound to admit hearsay evidence and, in the absence of consent, acquiescence or lawful exception, is not entitled to do so at the full hearing. For examples of the difficulties this can create see Dunne v. D.P.P. [2002] IEHC 27 (Unreported, High Court, 23rd March, 2011) per Kearns P., O'Leary v Minister for Transport [1999] IEHC 49 (Unreported, High Court 26th November, 1999) per Kelly J (as he then was). A claim of prejudice is classically a matter that is hearsay in the mouth of anyone else and can only be made by the applicant personally.*
>
> *37. Leaving aside the special cases where a party is a corporate entity including a corporation sole, or an office-holder where it is not possible or appropriate for this requirement to be literally enforced, a court faced with an application for leave grounded on an affidavit sworn by the applicant's solicitor, rather than by the applicant personally, would, where a personal affidavit is in fact necessary, be entitled to refuse relief, or to adjourn the application pending the swearing of the necessary affidavit, or to grant leave premised on or subject to the filing of that affidavit in due course. However in the present case, I have already canvassed this question with Mr. Colgan, who informs me that the applicant is not putting in any further affidavits."*

Later in his judgment he stated:-

> *"38. A party is of course entitled, as it were, to throw down a challenge to the court to decide an application on the basis of papers as crafted by that party, and is entitled to resist any invitation by the court to consider supplementing those papers in any way. In this case that invitation has been offered to, and expressly declined on behalf of, the applicant. While a gauntlet can of course be thrown down, a party cannot complain too strongly if it is then taken up by the court. In the present case, I consider that the applicant should have personally sworn the grounding affidavit because:*
>
> > *(i) that is what O. 84 and form No. 14 in Appendix T require;*
> >
> > *(ii) the court has an autonomous obligation to uphold the provisions of statutes or statutory instruments (see Art. 34.6.1° of the Constitution) independently of how strongly an objection is pressed by a respondent;*
> >
> > *(iii) the respondent has specifically drawn attention to the foregoing elements of O. 84 as inserted by S.I. 691 of 2011;*
> >
> > *(iv) the applicant's solicitor's affidavit is hearsay in essential respects;*
> >
> > *(v) a claim that he has been prejudiced by the alleged lack of natural justice must be made by him and not by someone on his behalf;*
> >
> > *(vi) to grant leave on a hearsay affidavit in these circumstances would undermine the integrity of the hearing to be ultimately conducted;*
> >
> > *(vii) it is well established that an applicant must 'engage with the facts' per Hardiman J. in Scully v. D.P.P. [2005] 1 I.R. 242 (at p. 252); per O'Donnell J. in Byrne v D.P.P .[2011] 1 I.R. 346 (at p. 352); to do so he must personally engage in a context such as this;*
> >
> > *(viii) the court has an autonomous duty under Article 42A to safeguard the rights of children in the State including children that could potentially be subject to present or future abuse if the complaint is well-founded;*
> >
> > *(ix) the upholding of that duty may require disclosure and undertakings that can only be given effect to by the applicant personally;*
> >
> > *(x) a respondent must have the right to apply for the cross-examination of a deponent. This right would be significantly curtailed if not set at nought if the relevant witness were to hide behind a paid professional engaged on his behalf, or indeed any other person.*
>
> *39. Given that the applicant has expressly stated through his lawyers that he is not going to swear an affidavit, the*

appropriate course in the circumstances is therefore to refuse the application."

77. In *McNamee v. DPP* [2016] IEHC 286, the applicant sought leave to apply for judicial review seeking the prohibition of his criminal trial. Humphreys J. noted as follows:-

> *"There are clearly established reasons why an applicant in judicial review proceedings must normally swear the grounding affidavit himself (see analysis by Baker J. in Elkhabir v. Medical Council [2016] IEHC 93 (Unreported, High Court, 12th February, 2016)), including the following which appear relevant in the present context:*
>
> *(i) that is what O. 84 and form No. 14 in Appendix T require;*
>
> *(ii) the court has an autonomous obligation to uphold the provisions of statutes or statutory instruments (see Article 34.6.1° of the Constitution) independently of how strongly an objection is pressed by a respondent;*
>
> *(iii) the applicant's solicitor's affidavit is hearsay in essential respects;*
>
> *(iv) a claim that the applicant has been prejudiced by vagueness of the offence must be made by him and not by someone on his behalf;*
>
> *(v) to grant leave on a hearsay affidavit in these circumstances would undermine the integrity of the hearing to be ultimately conducted;*
>
> *(vi) it is well established that an applicant must 'engage with the facts' see further below); to do so he must personally engage in a context such as this;*
>
> *(vii) a respondent must have the right to apply for the cross-examination of a deponent. This right would be significantly curtailed if not set at nought if the relevant witness were to hide behind a paid professional engaged on his behalf, or indeed any other person."*

78. Humphreys J. refused the application for leave. He held that the case was not one of the exceptional instances where the general rule could properly be dispensed with "*such as where the facts deposed to and relied on in the proceedings are more properly within the knowledge of some person other than the applicant*". Humphreys J. further noted that despite being on notice of an issue in relation to the deponent of the grounding affidavit, the applicant took no steps to seek to file an affidavit of his own.

79. It is relevant to observe therefore that *P.O'T*. was decided at the leave stage of the proceedings, which was on notice to the respondent, and counsel for the respondent "*expressly drew attention to the requirement to swear the affidavit personally*". Furthermore, counsel for the applicant indicated to the court that the applicant did not intend to file any further affidavits.

80. In this case, however, leave has been granted and the applicant has subsequently sworn and filed an affidavit. It is submitted that the applicant was outside the jurisdiction at the time of the application. However, it is not clear why she could not have come back to this jurisdiction to complete the necessary forms and swear to the appropriate affidavits.

81. Nevertheless, I must take into account that leave was in fact granted on the basis of the application and affidavits then before the Court, no application has been made to set aside the granting of leave, the applicant has since sworn an affidavit in the proceedings, and this has been responded to by way of further affidavit sworn by the respondent. On balance therefore, in the particular circumstances of the case it would appear unjust to dismiss the application on this ground at this stage.

Are these proceedings moot?

82. It is submitted by the respondent that because the child has been returned to Ireland the proceedings are moot. The respondent states that there is no purpose in the granting of the reliefs sought and that following the determination of the child abduction proceedings in the United States, there is now no live issue between the parties. If there is a live issue it is whether the respondent was a guardian when the applicant moved the child to the United States, something which does not turn on the order.

83. The applicant submits that the impugned order is not spent or of limited duration. It constitutes a determination of the legal and enduring rights of the parties in respect of the child. It is submitted that the consequences of the order are indeterminate and far reaching and that it has the potential to have adverse consequences, and already has had adverse consequences for the applicant.

84. Reliance is placed on a number of decisions including *O'Brien v. Personal Injuries Assessment Board* [2007] 1 I.R. 328 and *Goold v. Collins* [2004] IESC 38. Of assistance in the summation of the relevant principles is the decision of Ní Raifeartaigh J. *in A.Q. v. K.J. (otherwise K.A.) and Ors.* [2016] IEHC 721 where, in considering an issue under the Passport Act 2008, she stated:-

> *"In circumstances where the impugned District Court order has not been formally cancelled, discharged or annulled by any subsequent decision or event, the key question appears to me to be whether the impugned District Court order continues to have any force or effect, as contended for by the father, or is spent, as contended for by the mother. This involves a consideration, not only of the terms of the order on its face and its legal effect having regard to the provisions of the Passport Act, 2008, but also a consideration of how the fact of its having been made in the past might impact upon the parties in the future. In this regard, I take into account the decision in the O.O. case that an order may have an 'enduring effect' in practical terms which may render the issues relating to it not moot, even though the order itself has been executed and/or has discharged its immediate purpose. In that case, the measure in question was a deportation order which had led to the children's grandmother being removed from the jurisdiction; in that sense, the order had been executed and could not have any further direct effect, but the Supreme Court held that the practical or enduring effect of the order was one of long-term and continuing impact upon the grandmother's ability to return to Ireland at any time after her deportation and therefore the issue of its validity was not moot."*

85. Ní Raifeartaigh J. also considered the rationale of the doctrine of mootness as approved in *Goold*. The first rationale of the policy is that the court's competence to resolve legal disputes is rooted in the adversarial system. The second is based on concerns of judicial economy, and the third is the need for courts to be sensitive to the effectiveness of judicial intervention. The court, in exercising its discretion, as in that case in deciding whether the appeal was moot, should determine the extent to which each of these factors is present. She concluded, on the facts of that case, that the District Court had acted without jurisdiction in circumstances where the entire family lived in Pakistan at the time of the application to the District Court. That being so, it appeared to her that the points relating and the absence of a *legitimus contradictor* and the preserving of judicial resources did not lean

against the father.

86. In this case, if the Court is to refrain from intervening on the ground of mootness, given that an application to extend the time within which to appeal that order has been rejected both in the District Court and the Circuit Court, the order of the District Court will remain on the record. Although Judge Kay expressed the opinion that the order of the District Court in Ireland did not preclude her from determining the issues in the United States, it is an order which may have potential consequences, intended or unintended, in relation to the rights of the parties in respect of their child, either in this jurisdiction or elsewhere. Testament to this is the stated reason of the respondent in deciding to apply for the order in the first place and the stated desire of the applicant to have it set aside. Whether they are correct or incorrect, the influence which this order may have on any future application are not at all clear at this time. In those circumstances, even if the consequences are potential or even only possible, in my view it cannot be said that the effect of the existence or continuation of the order which pronounces specifically on rights of guardianship is moot. It may be that these issues will be further addressed in the future, but that is not to say that the order does not have the potential to have continuing legal effect if it is allowed to stand.

87. I therefore do not accept that the issue is moot or that the application for judicial review should be refused on this basis.

Refusal on discretionary grounds
88. In *State (Abenglen Properties Limited) v. Corporation of Dublin* [1984] I.R. 381, O'Higgins C.J. stated at p. 392 et seq:-

> *"From this emergence three centuries ago of the means by which the Court of King's Bench controlled the judicial process of lower courts, the remedy of* certiorari *has been developed and extended to reach far beyond the mere control of judicial process in courts as such. Today it is the great remedy available to citizens, on application to the High Court, when any body or tribunal (be it a court or otherwise), having legal authority to affect their rights and having a duty to act judicially in accordance with the law and the Constitution, acts in excess of legal authority or contrary to its duty. Despite this development and extension, however,* certiorari *still retains its essential features. Its purpose is to supervise the exercise of jurisdiction by such bodies or tribunals and to control any usurpation or action in excess of jurisdiction. It is not available to correct errors or to review decisions or to make the High Court a court of appeal from the decisions complained of. In addition it remains a discretionary remedy."*

89. The respondent submits that there are many reasons why this Court in the exercise of its discretion ought to refuse the relief sought. He highlights what he describes as acts of deceit, prevarication and nondisclosure in relation to the applicant's actions as a matter of fact, and also in respect of actions taken within the proceedings.

90. In this context it is relevant to consider the applicant's decision not to attend or be represented at the District Court. She avers that she was advised that the fact that the respondent had been appointed a guardian after her removal from the jurisdiction could not retrospectively make the removal wrongful. She was at that stage living permanently in the United States. The respondent submits that when, as appears to be the case, the applicant decided to ignore both the initial guardianship application and the notice of application to speak to the order of the court, she played a high stakes game. It may be that had she answered those applications, procedural matters could have been addressed, and if appropriate, relevant applications made to the court with the outcome potentially being determined in the context of findings of facts and on the merits.

91. It is accepted in the applicant's submissions that she was served with the impugned order on 23rd March, 2018. Ms. Browne S.C. submits that non-attendance in court cannot be deemed to be conduct which might result in the court exercising its discretion against the granting of the relief, or to be a waiver of rights and that there was no obligation on the applicant to attend court, particularly where the advice to her was that what was sought in the application to re-enter was invalid. Nevertheless it appears to me that although it is not contended that the applicant was obliged to attend court, by failing to answer the application and process until such time as it became apparent that an order had been made which had the potential to adversely affect the legality of the removal by her of her son to the United States, she ran a considerable risk. She explains that her actions, or inactions, in this regard were due to her belief and the advice received that the order sought was not one which could be granted as a matter of law. Her averment that she relied on legal advice in this regard, it appears to me, must be taken into account.

92. It is further submitted by the respondent that the court was not informed during the ex parte application for leave to seek judicial review that the applicant had lodged a notice of extension of time within which to appeal the District Court order. It is contended that this is a failure to make full and fair disclosure of all the relevant facts, which an applicant is obliged to do on an application for judicial review. It is submitted that the existence of a pending application is a relevant fact which should have been disclosed at the leave application.

93. The applicant replies by stating that neither at the date of application nor at any relevant time was there an appeal pending before the Circuit Court in respect of the order which was made, as the application to extend the time within which to appeal had been refused. Her counsel informed this Court that it was not considered to be a relevant factor when leave was being sought, but that if the extension of time had been granted, the applicant would have come back to court to inform the court of such development. It is also pointed out that the respondent opposed the application for extension of time both in the District Court and on appeal. It is submitted that the fact that there may have been an application before the court to extend the time within which to appeal was immaterial to the application before this Court and is not relevant to the grounds of challenge.

94. It is also averred by the respondent that certain relevant facts were not disclosed, including the registration of the child with a general practitioner in the respondent's area, the regular access enjoyed by the respondent, and the making of regular maintenance payments. The respondent submits that the applicant positively deceived him in relation to the intended course of action and by so doing effectively deprived the respondent of any real opportunity of objecting to his son's departure from the jurisdiction. Other facts relied upon in this regard including alleged deception in relation to the application for the child's passport. It is submitted, the applicant should not have applied for an American passport without the respondent's consent because the respondent's consent should have been sought before the making of an application or for travel documents in that regard.

95. The applicant contends that there are no factual matters raised by the respondent which even if they could be proved, would amount to misconduct or lack of good faith such as might disentitle her to relief. It is also submitted that there has been exaggeration by the respondent in this regard. She contends that many of the allegations of misconduct are answered by her belief and her contention that the respondent did not enjoy guardianship rights before 2nd October, 2017. Details concerning the child's general practitioner, access and maintenance are no more than information of a background nature which were unnecessary to address in the context of the challenge to the impugned order. The fact that she brought the child to the United States, she submits, is not something which can adversely affect the exercise of the discretion of the Court. It was clearly within her rights as his mother to change the residence of the child in such circumstances. She insists that she was doing no more than exercising her right to freedom

of movement, and that such right to freedom of movement applies even where there is an access order in being.

96. Ms. Browne S.C. submits that historically, where an appellant suffered from a public wrong, the remedy should issue *ex debito justitiae*. This is particularly so in circumstances where the public wrong continues to affect the applicant and where the refusal of the order sought would have serious consequences not only for the applicant and the respondent but also for the child. Mr. de Blacam S.C. maintains that on the basis of authorities such as *De Róiste v. Minister for Defence* [2001] 1 I.R. 190, that the court retains discretion in such cases.

97. Reliance is placed in this regard on the decision of the Court of Appeal in *R.L. v. Her Honour Judge Heneghan* [2015] IECA 120, which concerned an appeal of the judicial review of certain orders made in the Circuit Court in respect of guardianship, custody and access. In the High Court the judge refused relief on the grounds of lack of candour, the applicant having lied under oath in a previous application before the Circuit Court. The Court of Appeal considered whether discretionary relief should be withheld by reason of the applicant's lack of candour. The court referred to the decision of Hogan J. in *Oboh v. Minister for Justice* [2011] IEHC 102 where he stated:-

> *"The lack of candour must be relevant to the question of relief. In other words, the mere fact that a litigant has been guilty of lack of candour cannot in itself disentitle an applicant to relief. Discretionary relief is not withheld on this ground as a form of punishment or because judges are personally offended or feel slighted by such contumelious behaviour on the part of the litigant in question. It is rather that the court, being desirous to uphold the integrity of the system of administration of justice may withhold relief where it is satisfied that the litigant has told an untruth which, if it had been otherwise accepted by the court, would have materially influenced the disposition of the proceedings."*

98. The parties agree that on an application such as this, being one for judicial review, I am not expressly enjoined by the Constitution or by any statute enacted thereunder to regard the best interests of the child as being the paramount consideration. Indeed, it is difficult to see how that might be determined in the context of a process based review such as this. Nevertheless as the issue concerns the rights of parents in respect of their son and potentially the best interests of the child now and in the future, it seems to me that considerations which may ultimately touch and concern the best interests of the child is a factor to which I ought to have regard in the determination of the court's discretion and how that might be exercised.

99. In *R.L.,* a case which concerned guardianship issues, the court stated at para. 35:-

> *"By way of prefatory comment, the Court wishes to observe that in the circumstances of this case by reason of the nature of the errors in respect of jurisdiction and procedure and the importance of the subject matter, the zone of discretionary decision-making is narrow. Refusal of relief in these circumstances could only be justified by some extraordinary and wholly exceptional circumstances that operated to tilt the balance of justice away from restoring to the applicant what was removed from her. It is also relevant to observe that the lack of candour did not arise in the instant proceedings for judicial review. Neither was there an allegation that in the Circuit Court proceedings before the respondent the applicant had withheld the truth or told lies. The matter relied on for this purpose was testimony given to the Court on a previous application. This Court considers that the bar for judicial review would be set too high if an applicant were to face refusal in the exercise of discretion because he or she admitted giving untrue testimony on some previous occasion. Obviously, the court does not wish to sanction the commission of perjury but it is important to put things in perspective and for Courts to direct themselves to material issues, including or perhaps particularly when exercising a discretionary power to refuse relief in circumstances otherwise calling for it to be granted."*

100. While the facts of that case were different than those in the case under consideration, I believe that the sentiments therein expressed have relevance to the circumstances of this case. Mr. de Blacam S.C. placed particular emphasis on the conduct of the applicant in effectively misrepresenting her intentions to the respondent with regard to the purpose of her travelling abroad in August and September, 2017. While the Court has sympathy with this contention, particularly in the light of the text messages to which reference has earlier been made, the fact is that this particular incident of alleged lack of candour occurred outside the four corners of the averments in these proceedings. The applicant has sworn at para. 10 of her affidavit that she moved to reside in the United States with her son on 28th August 2017. The extent to which such alleged inconsistencies between the impression which she conveyed and what she actually was doing at that time may well impact on her credibility in any future proceedings that may arise. Nevertheless, if there was a lack of candour in this respect, it was to the respondent and not the court on this application. Given the nature of the rights alleged to have been infringed and the nature of the errors as so found, the Court must be cautious in relation to the manner in which this allegation of lack of candour should influence the exercise of the Court's discretion.

101. I should also refer to *M.F. v. Superintendent, Ballymun Garda Station* [1991] 1 I.R. 189, by way of analogy, albeit in a somewhat different context to the issue on which it was opened to this Court, which was one of mootness. The applicant was the mother of five young children. The family unit had come to the attention of social workers for the Eastern Health Board. A social worker was sufficiently concerned about the welfare of the children to cause them to visit the applicant's house and, with the assistance of the Garda, to remove the children. The social worker obtained, *ex parte* in the District Court, a "*place of safety*" order pursuant to the provisions of the Children Act 1908, s. 20. Having retained a solicitor, the applicant applied to the District Court to stay the s. 20 order pending appeal but this was refused. On the same day she received, by registered post, summonses seeking "*fit person*" orders under s. 24 of the Act of 1908. She was informed by the social worker that the children were with foster parents but that she could have neither access to nor further information about them. She applied to the High Court for an order directing an inquiry under Article 40.4 of the Constitution as to the legality of the children's detention. In the High Court, the detention was declared unlawful. This decision was appealed. At the commencement of the hearing before the Supreme Court, the notice parties, the social worker and the Health Board, advised the court that in the event that the appeal was successful they would not seek to continue the detention proceedings in the District Court. Nevertheless, they challenged the finding made in the High Court that the District Judge did not have had jurisdiction to issue warrants under s. 24 as the children had already been detained under s. 20.

102. O'Flaherty J. in delivering a decision with which other members of the court agreed, observed:-

> *"In a ruling at the commencement of the hearing the Court re-affirmed the strictness of the rule against giving a decision on a moot point but recognised that cases concerning the care and custody of children and the protection of their rights are in a special and, possibly, unique category. Certainly they are special because they concern children and are possibly unique in that the fundamental rights of persons are in issue in litigation in which they are not represented. The absence of provision for such representation has been the subject of comment in this Court in the past but there is no provision, financial or otherwise, for it. In these circumstances, in my judgment, it is proper that this Court should give a decision which will be as helpful as possible to all those concerned with the welfare of children, including parents, social workers, gardai, other members of the judiciary, and the legal profession in general."*

103. The legality of the detention of children who were unrepresented and issues concerning care and custody, led the court to conclude that it should rule upon the matter albeit an issue of mootness arose. By analogy, it appears to me that the rights of the child in this case, potential and real, is a matter which I ought to have regard to in determining how to exercise the jurisdiction of the Court.

104. I believe that I should also have regard to the effect, or potential effect, foreseeable or unforeseeable, of the order on the respective rights of each of the parties to these proceedings if it is allowed to remain, or to be quashed. These rights, it seems to me, are inextricably bound up with the corresponding rights of the child and the extent to which the established and lawful rights of the parties may impact upon the child's rights.

105. I must also bear in mind that the exercise of the jurisdiction must not be such as for the purpose of punishing a party who may have been less than candid and that, in any event, such lack of candour must be something which might have materially influenced the disposition of the proceedings.

106. While it may have been better, at the leave stage, that the court ought to have been informed of the existence of a notice of application to extend time within which to appeal, having heard the explanation provided by counsel in a candid manner, I am not satisfied that it has been established that there was an intention to mislead the court. Therefore taking everything into account, including:-

a. the nature of the error which I find has been made in relation to the making of the impugned order,

b. the fact that it has the potential to impact upon the respective rights of the parties and of their child,

I must conclude that in so far as the exercise of my discretion is concerned, it should be exercised in a manner which does not conflict with the essential and fundamental finding in this case that the District Court order is invalid.

107. I wish to make an observation on a general allegation which has been made in the pleadings, but not so much at the hearing before me and one which was not pursued with great vigour, that the District Judge should be restrained from hearing any further application because of suggested bias on his part. The pleaded allegation is that because the District Judge made an order he clearly could not make, that this demonstrates objective bias on his part. I am satisfied that no grounds have been advanced which could substantiate this allegation. The fact that the District Judge may have made orders in this case which the applicant does not like, or which are adverse to her, cannot amount to bias as a matter of law. The Supreme Court in *Orange Ltd v. Director of Telecommunications (No. 2)* [2000] 4 I.R. 159 expressed the view that such bias could not be established from the nature of a decision made, as the allegation of bias had to be made on foot of circumstances outside the actual decisions made in the case itself. In this regard, Geoghegan J., who addressed the matter at some length, observed at p. 251 et seq:-

> *"It seems clear from the case law in Ireland and England that an allegation of bias must be made on foot of circumstances outside the actual decisions made in the case itself. I would accept that in a situation where there was an arguable case of bias based on traditional proofs the added factor of cumulative wrong decisions all one way might be tantamount to corroboration of alleged bias and be a relevant factor in that restricted sense in the proving of bias. But of itself and by itself it can never be evidence of bias.*

108. On the application of these principles, in my view, no basis in fact or in law has been established to support this allegation.

109. I therefore must grant the relief sought with the exception of the relief sought at para. D(e) of the statement of grounds. In so doing it should be recorded that the order of this Court goes no further than quash and to declare the order of the District Court of 5th March, 2018 invalid. Nothing in this judgment should be interpreted as involving a finding as to the entitlement of any party to successfully apply for, or to resist, any appropriate application under the Guardianship of Infants Act 1964, as amended. Whether and to what extent the obtaining of an order under s. 6A has any effect on any proposed application under s. 6F is not an issue on which this Court expresses a view, nor should it be taken to have done so, in any further proceedings.

110. Finally, in making the order in this case I wish it to be recorded that in my view the learned District Judge was left in an invidious position. I have already referred to the complicated and, indeed as counsel described before me, sometimes confusing legislative enactments and the history of those enactments, required to be considered. This Court had the benefit of the input of experienced teams of solicitors and barristers to assist it in arriving at its conclusions. The District Judge had no such support.