THE HIGH COURT

[2014 No. 461 JR]

KAREN NYHAN

APPLICANT

AND

JUDGE DAVID RIORDAN

RESPONDENT

AND

ANTHONY NYHAN

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered the 8th day of April, 2016.

1. The applicant seeks an order of certiorari quashing the order of the respondent made on the 7th of May, 2014, whereby the applicant's motion seeking to enforce a maintenance order made on the 26th of May, 2008, was struck out.

2. The applicant and the notice party were married on the 20th of November, 1976. They obtained a decree of judicial separation on the 18th of October, 2001. On the same date they entered into an agreement in writing dealing with the financial arrangements between the parties. Pursuant to that agreement, the notice party agreed to pay the applicant maintenance in the sum of IR£250 per week (equivalent to €317.44). Pursuant to the terms of the agreement, a pension adjustment order was made whereby the applicant was to receive 50% of the notice party's pension for the period of reckonable service from the commencement date of the pension to the date of the agreement. On the 28th of April, 2003, the maintenance order was varied to €200 per week. On the 18th of May, 2007, the parties obtained a decree of divorce and on the 23rd of May, 2007, it was ordered that the maintenance would continue at the rate of €200 per week. On appeal to the High Court, the maintenance order was, on the 26th of May, 2008, varied to €220 per week.

3. On the 31st of October, 2011, the notice party retired from his employment on grounds of ill health and received a redundancy payment of €178,565.

4. On the 9th of December, 2011, the notice party ceased maintenance payments to the applicant. The notice party wrote to the applicant on the 13th of December, 2011, advising her that maintenance would cease as of that date and her pension share would be paid. The notice party received a lump sum of €87,350 on foot of his pension and a payment of €39,308 was made to the applicant. From December 2011, the applicant's entitlement pursuant to the commencement of the notice party's pension was €230 per month.

5. Approximately a year later on the 6th of December, 2012, the applicant's solicitors wrote to the notice party making complaint of the fact that he had ceased making payments on foot of the maintenance order and threatening a motion in the event that payments were not resumed and arrears paid. On the 17th of September, 2013, the applicant issued a motion returnable before the Circuit Court seeking enforcement of the maintenance order. On the 19th of November, 2013, the notice party issued a motion seeking to vary the maintenance order. Both motions came on for hearing before the respondent on the 7th of May, 2014.

The Hearing before the Respondent.

6. Both motions were heard on affidavit and the applicant's motion proceeded first. Counsel for the applicant opened the matter fully to the respondent setting out the entire history of the proceedings in detail. This was responded to by counsel for the notice party. Having heard opening arguments from both parties, the affidavits were opened to the respondent in full. Following hearing all the evidence, the respondent invited further submissions from counsel on both sides. He delivered his judgment as follows:

> "JUDGE: ok, I've got – the matters are gone into in sufficient detail at this point. I am satisfied, in the circumstances of this case, that there was not a separate flow of income, nor separate assets, which were answerable and the matter has been litigated on numerous occasions since the year 2001. The parties are now in reasonably advanced years and both suffer from ill health. I am satisfied that the original agreement by way of judicial separation and also of the matter confirmed upon divorce was structured in such a way that the maintenance was to cease on the commencement of the pension. The commencement of the pension, in and of itself, is always going to be a lesser figure anyway. In the circumstances, I am satisfied that there has not been default on the payment of the maintenance and accordingly I disallow the reliefs sought on the notice of motion of the applicant.
>
> With regard to the respondent's application, it doesn't arise, because it's subsumed into this present order. Ok."

The Arguments.

7. Ms. Callanan S.C. for the applicant submitted that the duration of a maintenance order is clearly provided for by s. 13 of the Family Law (Divorce) Act 1996. A periodical payment order continues for such period as shall be specified in the order and terminates not later than the death or remarriage of the spouse in whose favour the order is made. The coming into effect of a pension adjustment order made pursuant to s. 12 of the Family Law Act 1995 does not have the effect of terminating the maintenance order and insofar as this was the conclusion reached by the respondent, this amounted to an error of law which deprived the respondent of jurisdiction and meant that the order dismissing the applicant's motion was made without jurisdiction and must be quashed.

8. Ms. Farrelly S.C. for the notice party submitted that the respondent's order was made after a full hearing on the merits and was correct as a matter of law. The respondent in fact made no determination that as a matter of law, a maintenance order is terminated by the coming into effect of a pension adjustment order. The respondent's determination was limited to the facts of the case and expressed his view as to what the correct interpretation of the separation agreement originally made between the parties was. Even if it could be said that the respondent erred in construing the agreement between the parties, such error did not vitiate his jurisdiction but was one made within jurisdiction and not amenable to judicial review. If any error was in fact made by the respondent, the appropriate remedy was for the applicant to pursue an appeal to the High Court which was a full de novo hearing on the merits.

Discussion.
9. One of the applicant's primary complaints is that the respondent's determination in effect deprived her of a hearing on the merits at first instance which cannot be cured by an appeal and relied on the dicta of Denham J. (as she then was) in *Stefan v. Minister for Justice Equality and Law Reform* [2001] 4 I.R. 203 in which she said (at p. 218):

> "The original decision was made in circumstances which were in breach of fair procedures and which resulted in a decision against the appellant on information which was incomplete. The appeals authority process would not be appropriate or adequate so as to withhold *certiorari*. The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing."

10. It is undoubtedly true to say that the mere availability of an appeal, without more, cannot exclude the availability of judicial review where the decision in issue was clearly made without jurisdiction.

11. It is equally true to say however that the mere fact that a decision maker makes an error of law in arriving at a decision does not automatically give rise to a right to seek judicial review. The question is often characterised as whether the error was one made within or outside jurisdiction.

12. In this regard, the dicta of O'Brien LCJ of over a century ago has stood the test of time. In *R. (Martin) v. Mahoney* [1910] 2 I.R. 695 (cited with approval by the Supreme Court in *Buckley v. Kirby* [2000] 3 I.R. 431), he said:

> "To grant *certiorari* merely on the ground of want of jurisdiction, because there was no evidence to warrant a conviction, confounds, as I have said, want of jurisdiction with error in the exercise of it. The contention that mere want of evidence to authorise a conviction creates a cesser of jurisdiction, involves, in my opinion, the unsustainable proposition that a magistrate has, in the case I put, jurisdiction only to go right; and that, though he had jurisdiction to enter upon an inquiry, mere miscarriage in drawing an unwarrantable conclusion from the evidence, such as it was, makes the magistrate act without and in excess of jurisdiction." (at p. 707).

13. Were it otherwise, it seems to me that judicial review would in effect become a mere appeal on the merits. As Irvine J. remarked in *Burke v. Judge Anderson* [2010] IEHC 452:

> "[22.] An application for an order of certiorari cannot be used as a method to appeal decisions or rulings of a lower court or as a means of embarking upon a re-examination of the evidence or submissions made in the course of those proceedings."

14. In the present case, in my view it is clear from the respondent's determination that the conclusion he arrived at was based on a full consideration of all the evidence in the application before him. While he determined that the maintenance order ceased on the coming into effect of the pension order, that determination appears to have been arrived at, not on an interpretation of the meaning of the relevant statutory provisions, but on what he believed to have been the intention of the parties at the time they entered into the separation agreement. The applicant complains that the agreement is silent in this regard and accordingly the respondent's interpretation of it must be erroneous and can only be based on a flawed view of the legislation.

15. However, even if it could be said that the respondent misconstrued the separation agreement and the intention of the parties to be gleaned therefrom, such an error, if error it was, was clearly an error made within jurisdiction.

16. In my view therefore, the appropriate remedy for the applicant to have pursued was an appeal to the High Court and this application must accordingly fail.