THE HIGH COURT

[2017 No. 659 SS]

BETWEEN

C.G.

APPLICANT

AND

K.Q.

RESPONDENT

AND

ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Mr. Justice Binchy delivered on the 30th day of April, 2019

1. This matter comes before the Court by way of a consultative case stated by Judge Colin Daly of the District Court dated 16th June, 2017. The matter came on for hearing before this Court on 9th October, 2018.

2. The background to the case stated is that the applicant and respondent are the parents of two children. J., a boy, born on 20th June, 2009, and A., a girl, born on 15th March, 2012. The parties separated in the latter half of 2013, and the children continued to reside with the respondent, but the applicant had regular access to the children. The respondent also has a third child, who is not the child of the applicant, and who is not therefore subject to these proceedings. That child has at all times remained in the custody of the respondent.

3. On 8th February, 2017, the applicant brought forward an *ex parte* application before the District Court whereby he sought an order from the Court pursuant to s. 6A of the Guardianship of Infants Act 1964 as amended (the "Act of 1964"), as well as orders relating to the custody of and access to the children, pursuant to s. 11(1) of the same Act. The applicant swore a brief affidavit to explain the background to his application. In this affidavit, he averred that he had been informed by the gardaí that the respondent was then residing with a man who was facing serious criminal charges before the Special Criminal Court, and the gardaí had expressed concerns about the safety of the children of the parties. According to the applicant, the gardaí advised him to take appropriate steps to protect the interests of the children.

4. In his grounding affidavit, the applicant also averred that when he became aware of the alleged danger to the children he made contact with the respondent who agreed that the children could be placed in the care of the applicant, but that the respondent then subsequently indicated her wish for the children to be returned to her. The applicant then made the application to court with which this judgment is concerned, on 8th February, 2017.

5. When the matter came before the District Court, the District Judge formed the view that the applicant's grounding affidavit disclosed a significant risk to the welfare of the children and he made the following interim orders:-

> (i) liberty to issue summonses;
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> (ii) abridgment of time for service of the summonses;
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> (iii) a return date for the summonses of 16th February, 2017; and
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> (iv) the applicant to have day to day care and control of the children pending the full hearing of the matter.

6. The matter subsequently came on for hearing before the District Court on 16th February. The respondent appeared through solicitors and counsel, and applied for the order of the District Court made on 8th February, 2016, to be vacated. Counsel submitted that the District Court did not have jurisdiction, *ex parte*, to make the orders that it did on that date. It was submitted that there is no provision in the Act of 1964, whereby the District Court may make such an order on an *ex parte* basis and nor is there any provision in the rules of the District Court authorising the same.

7. The District Judge ruled that in the circumstances of the case, O. 39, r. 1(1) of the District Court Rules 1997 (the "DCR"), permitted him to make such an order. That rule provides:-

> "If the procedure for the conduct of civil proceedings is not prescribed by these Rules or by an enactment, or for any other reason there is doubt about the manner or form of the procedure, the Court may determine what procedure is to be adopted and may give directions."

8. Having regard to that rule and also to Article 42A.1 of Bunreacht na hÉireann, the District Judge was of the view that it was correct for him to make the order that he did on an *ex parte* basis, where the evidence disclosed a significant risk to the children. At the conclusion of the hearing of 16th February, 2017, at which no further evidence was advanced as regards the risk to the children and at which no member of An Garda Síochána was called to give evidence, the District Judge made the following orders:-

> (a) upon consent of the parties, the applicant was appointed guardian of the children;
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> (b) day to day care and control of the children to remain with the applicant for a further period of two weeks pending the outcome of the case in the Special Criminal Court; and
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> (c) the matter was adjourned to 2nd March, 2017.

9. The respondent's partner was subsequently, on 9th March, 2017, convicted of murder and sentenced to life imprisonment on 7th April, 2017.

10. The matter was further adjourned on a number of occasions, until, on 6th October, 2017, the Court ordered that the applicant was to have sole custody of the children, with access to the respondent to be on terms agreed. That order was, in turn appealed to the Circuit Court, and that appeal was awaiting a hearing date as of the date when these proceedings came on for hearing. In any case, the outcome of the appeal before the Circuit Court is not material to consideration of the questions sent forward by the District Judge.

11. Arising out of the facts above, all of which are agreed, the District Judge stated the following case for determination by this Court:-

> "In exceptional circumstances and having being satisfied there appears to exist a significant risk to a child/children and having regard to the Rules of the District Court and Article 42A of the Constitution, does the District Court have jurisdiction to make an *ex parte* order pursuant to sections 6A and section 11 of the Guardianship of Infants Act 1964, notwithstanding the general principle that the application should be on notice to all interested parties?"

Is the question moot?
12. This question was raised in the written submissions of the respondent. However, the respondent did not pursue the argument at the hearing of the matter, and nor did the notice party. Nonetheless, because the determination of this question can no longer have any bearing on the dispute between the parties, it is desirable that I should address the question, however briefly.

13. In their written submissions on this issue, counsel for the applicant drew my attention to the case of *The Director of Public Prosecutions v. Buckley* [2007] IEHC 150, and [2007] 3 I.R. 745, wherein Charleton J. stated at para. 4:-

> "It seems to me that the relationship between the District Court and the High Court in these cases is similar to that expressed by Finlay C.J. in *Dublin Corporation v. Ashley* [1986] I.R. 781, in relation to a consultative case stated from the Circuit Court to the Supreme Court, where this opinion was expressed at 785:-
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> > 'The purpose and effect of a consultative case stated by a Circuit Court judge to the Supreme Court is to enable him to obtain the advice and opinion of the Supreme Court so as to assist him in reaching a correct legal decision. Having regard to that purpose and relationship which exists between the two courts, it would, in my view, be quite inappropriate for the Supreme Court, for any reason of procedure, to abstain from expressing a view on an issue of law which may determine the result of the case before the learned Circuit Court Judge.'"

14. In the case of *Doyle v. Hearne* [1987] I.R. 601, the Supreme Court had to consider whether or not it was precluded from deciding a consultative case stated from the Circuit Court in circumstances where not all the evidence had been heard. The Court concluded that it should do so and stated the following at p. 609:-

> "In addition, the Section contains a provision of fundamental importance to the relationship between this Court and the Circuit Court and to the nature of the assistance which this Court can give to Judges of the Circuit Court on questions of law. Having reached a view that that assistance is in a sense more flexible and more expansive than was previously decided, it seems to me that I am bound to express it. I would therefore hold that this Court should enter upon a consideration of the question raised to it in the Case Stated and should determine it."

15. While these cases and the passages quoted do not assist in relation to the question of mootness, they are helpful in the views expressed as to the purpose of a consultative case stated. As to mootness, it is very well-established that in general terms, the courts should decline, in principle, to decide moot cases. However, there are exceptions. The authorities establish that those exceptions include cases where there is a possibility that the issue between the parties, while moot, may arise again in the future. Another issue is where there is a question of exceptional public importance at issue, although it is apparent from the decision of the Supreme Court in the case of *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274, that that in itself is not sufficient to determine a case that is otherwise moot. There must be other factors.

16. Such a case was *Kovacs v. Governor of Mountjoy Women's Prison* [2016] IECA 108, where Finlay Geoghegan J. considered that the question to be determined was one of exceptional public importance, and in addition was of the view that the question at issue was one of systemic relevance to Article 40 applications and that the determination of the question was, therefore, in the interests of the due and proper administration of justice.

17. I am satisfied that the question before the Court in these proceedings is one of exceptional public importance, involving as it does the natural and imprescriptible rights of children that are recognised by Article 42A of Bunreacht na hÉireann and the constitutional imperative set out in Article 42A.4.1, that, in the resolution of *all* proceedings concerning the adoption, guardianship or custody of, or access to any child, the best interests of the child shall be the paramount consideration. Additionally, it is in the interests of the due and proper administration of justice that the question be answered because it has a potentially systemic relevance to District Judges who are likely to be faced with this question again in the future. If the question is not determined by this Court by way of consultative case stated, there is a risk that it may never be determined at all by the High Court because the issue will always become moot following upon the final determination of the application at the *inter partes* hearing. Accordingly, I turn now to address the arguments of the parties.

Article 42A of Bunreacht na hÉireann and Relevant Legislation
18. Before addressing submissions of the parties, it is desirable to set out such provisions of Article 42A of Bunreacht na hÉireann and of the Act of 1964, as are relevant to the question posed by the District Judge.

19. Article 42A was adopted by referendum in 2012. Article 42A.1 provides:-

> "The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."

20. Article 42A.4.1 provides:-

> "Provision shall be made by law that in the resolution of all proceedings –
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> > i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

ii concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration."

21. Section 6A(1) of the Act of 1964 provides:-

> "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."

22. Subsection 11(1) of the Act of 1964 provides:-

> "Any person being a guardian of an infant may apply to the court for its direction on any question affecting the welfare of the infant and the court may make such order as it thinks proper."

23. Subsection 11(4)(b) of the Act of 1964 provides:-

> "The right to make an application under this section regarding the custody of the child and the right of access thereto of his or her parents shall extend to a parent who is not a guardian of the child and for this purpose references in this section to the parent of the child shall be construed as including such a parent."

24. Subsection 11(10) of the Act of 1964 provides:-

> "An application under subsection (1) shall be on notice to each other person who is a parent or guardian of the child concerned"

25. Section 6A of the Act of 1964, in its present form was substituted by s. 48 of the Children and Family Relationships Act, 2015 (the "Act of 2015"). Subsection 11(4) of the Act of 1964 was substituted by ss. (10) of the Act of 1964 was inserted by section. 53 of the Act of 2015, with effect from 18th January, 2016.

26. Order 58 of the DCR governs aspects of District Court procedure concerning custody and guardianship of children. Order 58, rule 4(1) provides that applications under s. 6A should be made on notice to the other parent and to any other guardian.

27. Order 58, rule 5 deals with applications seeking the court's directions in respect of child welfare. Order 58, rule 5(1) provides that an application under s. 11 of the Act of 1964 should be preceded by the issue and service of a notice in form 58.17 of the DCR upon each other person who is a parent or guardian.

28. Order 58, rule 9 of the DCR governs the service and lodgement of documents. It provides that notice of proceedings under s. 11 of the Act of 1964, may be served upon the person to whom it is directed, at least fourteen days before the sitting of the court to which it is returnable, or at least two days in the case of proceedings which are certified as being urgent under O. 58, r. 2(2).

29. Order 39 of the DCR which is relied upon by the applicant and was relied upon by the District Judge in the making of the initial *ex parte* order is set out at para. 7 above.

30. The applicant acknowledges that both the Act of 1964, and the DCR, establish a general rule that applications made pursuant to the Act of 1964 should be made on notice to the parents or guardians of a child. While O. 58, r. 2(2) provides for a procedure whereby proceedings may be certified as urgent, this makes no reference to a significant risk to a child, and requires a minimum notice period of two days. It is the applicant's case that when properly interpreted by reference to Article 42A of Bunreacht na hÉireann, s. 11 of the Act of 1964 permits applications to be made and determined *ex parte* where there is a significant risk to the child. Further, and/or in the alternative, the applicant submits that in circumstances where significant risk to a child is not addressed by s. 11 of the Act of 1964, or by the DCR, the District Judge was correct in utilising O. 39 of the DCR to adopt a procedure permitting for an application to be made *ex parte*. His decision to do so was required by Article 42A in order to protect the welfare of the child, which is of paramount importance. This is the core submission of the applicant, and all other submissions of the applicant are, in effect, made in support of this submission.

31. The applicant refers to the well-established principle whereby legislation must be interpreted and applied so as to ensure its compliance with the Bunreacht na hÉireann. In this case, in order to achieve that requirement, it is submitted that the District Judge was correct to adopt a procedure, availing of O. 39 of the DCR, to make an *ex parte* order in order to protect the welfare of the child as required by Article 42A of Bunreacht na hÉireann.

32. The applicant relies upon the case of *S.McG v. Child and Family Agency* [2017] 1 I.R. 1, in which case the Supreme Court was required to consider the application of s. 23 of the Childcare Act 1991, following upon a determination that orders made by the District Court pursuant to s. 17 of the same Act had been made contrary to Article 40 of Bunreacht na hÉireann. Section 23 of the Act of 1991, provides the Court with powers to make orders to safeguard the welfare of children in circumstances where a care order previously made under the Act of 1991 has been declared invalid. In the course of his judgment, MacMenamin J. stated at para. 46:-

> "A lawful application of s.23 renders it imperative, first, to ensure full compliance with the letter of Article 40.4.2. In such rare cases, the correct sequence of orders must be properly observed. In order to maintain the integrity of Article 40, a court may not make an order under s. 23, unless and until it has held that the order of the District Court or Circuit Court is invalid. To hold otherwise would unlawfully inhibit the Article 40 of its full effect. Section 23 enjoys the presumption of constitutionality, and may be invoked in 'any proceedings'. The effect of an order for release 'forthwith', under Article 40, is that the child, the subject matter of the invalid court order, is at liberty. But, a finding of invalidity, and a consequent order for release, once made, does not debar the court itself, or an applicant in that behalf, *thereafter*, from seeking to protect and vindicate the welfare rights of children under Article 42A of the Constitution, in exceptional circumstances, such as arose in this appeal. In such a case, therefore, where a child is the subject matter of an order under Article 40, a court which has made an order of invalidity, *after* ordering the release of the child, may lawfully then, and only then, invoke or rely on the provisions of s. 23 of the 1991 Act. The provisions of that section now find their constitutional basis in the provisions of Article 42A of the Constitution, maintaining the best interests of the child as the paramount consideration."

33. In para. 45 of his judgment, MacMenamin J. stated:-

> "I would emphasise that the availability of this statutory s. 23 mechanism arises only because of the special status of this form of proceedings involving child welfare, and because of the existence of Article 42A of the Constitution."

34. The applicant also relies upon a decision of Baker J. in *A. O'D. v. Judge Constantine G O'Leary & ors* [2016] IEHC 555, in which she considered the right of a child to have decisions regarding its guardianship and custody pursuant to s. 11 of the Act of 1964 taken in the interests of its welfare. Noting the earlier decision of Finlay Geoghegan J. in *F.N. and E.B. v. C.O., H.O. and E.K.* [2004] 4 I.R. 311, which acknowledged the right of the child under Article 40.3 to have its wishes taken into account as a matter of constitutional justice, Baker J. commented at para.90:-

> "That decision was given before the amendment to the Constitution which has resulted in Article 42A which puts the welfare and interests of the child clearly within the sphere of constitutional, and not merely common law or statutory rights. That new Article must be seen as enhancing the rights of the child, and add more weight to the approach described by Finlay Geoghegan J."

35. It is submitted that these comments make clear that the effect of Article 42A is to require the courts to interpret legislative provisions concerning child welfare so as to prioritise the welfare and interests of the child. It fundamentally re-orients any piece of legislation in favour of the protection of the welfare of the child, enhancing the protection, those rights would have had prior to the enactment of Article 42A.

36. It is submitted that in order to fulfil the requirements of Article 42A in respect of the welfare of the child, and the obligation to ensure that the best interest of the child are the court's paramount consideration, it is necessary to interpret s. 11 of the Act of 1964 so as to permit the District Court to make orders on an *ex parte* basis, as the District Judge did in this case.

37. It is submitted that if *ex parte* applications of the kind made in this case, and granted by the District Judge, are not permitted, even when there is a significant risk to the child, then it cannot be said that the rights of the child are effectively protected and vindicated as required by Article 42A of Bunreacht na hÉireann.

38. It is submitted that the Supreme Court, in *S.McG* acknowledged that where there is a significant risk to the child, Article 42A dictates that the right of the child must take precedence over the procedural rights of the parents. Reliance is placed upon the following passages from the decisions of Dunne J. and O'Donnell J. respectively:-

> "It is clear therefore that in some instances the requirement to take steps to protect children may take precedence over the rights of parents to fully participate in such hearings." (p. 30)

> "… if it is considered that the matter is urgent, a court can sometimes proceed on an *ex parte* and contingent basis, even when the other side is represented and giving the right to have a full *inter partes* hearing within a short time." (p. 12)

39. While acknowledging that the Child Care Act of 1991 (the "Act of 1991") provides public law remedies to the courts to make *ex parte* orders in childcare matters, it is submitted that, regardless as to whether the context is public or private law, the constitutional hierarchy between the welfare rights of the child and the procedural rights of parents remains constant. In each instance, the substantive welfare rights of the child must be prioritised over the procedural rights of the parents, so long as safeguards exist to ensure those procedural rights are protected in the longer term. In this case, the District Judge applied such safeguards by returning the matter for an *inter partes* hearing within eight days, which is the maximum permissible period of an emergency care order made pursuant to s. 13 of the Act of 1991.

40. It is submitted that Article 42A is expressly directed at both public and private law proceedings concerning the welfare of the child and that in both such proceedings, the best interests of the child are the paramount consideration. A child in private law proceedings cannot be subject to a lower level of protection than a child the subject of public law proceedings.

41. It is also submitted that public law remedies in the context of child care should be a last resort used, only in the most extreme of cases. Parents and children are entitled to have these matters determined without being required to involve third parties such as the Child and Family Agency or the gardaí, which is unnecessarily intrusive. The applicant submits that he raised valid concerns as regards the safety of the children, and that if the Court required the application to be made on notice, this would give rise to inevitable delays, which would be contrary to the best interests of the children. It is further submitted that Article 42A requires that private law remedies should be no less than those available in public law, and that in acting as it did, the District Court was not making law, but merely giving effect to Article 42A through the DCR.

42. For all these reasons, it is submitted that the Act of 1964 and the DCR must be interpreted so as to permit a procedure of the kind adopted by the District Judge in circumstances where the Act of 1964 and the DCR are silent on the procedure to be adopted in cases of significant risk to the child, provided that any order made is proportionate to the risk involved, is limited in duration, and shortly followed by an *inter partes* hearing, as occurred in this instance. Alternatively, it is submitted that Article 42A required the District Judge in this case to adopt an alternative procedure to that contained in s. 11 of the Act of 1964 and the DCR in circumstances where there was a significant risk to the child.

43. The applicant also relies on the case of *R.C. v. C.C.* [1997] 1 I.R. 334, in which case the High Court granted a divorce on the basis of the direct effect of Article 41.3.2 of Bunreacht na hÉireann in circumstances where the remedy of divorce was not yet available because the legislation providing for it had not been commenced.

44. Finally, it is submitted that in England, the rules of family procedure permit of the making of *ex parte* orders as regards where and with whom a child should live, in cases of extreme urgency, and subject to stringent safeguards of the kind applied by the District Judge in this instance, whereby the order was limited in duration and was served on the respondent within 24 hours.

Submissions of the Respondent

45. Firstly, the respondent makes the point that at the *inter partes* hearing of this matter, the information averred to in the grounding affidavit of the applicant was not admitted in evidence by the District Judge, as it was deemed to be hearsay. Nor did the applicant call any witnesses to support the averments made by him in his grounding affidavit. As regards the respondent, the only evidence that the applicant gave was that she was a good mother and he had no concerns regarding her parenting. The applicant's evidence was that his concerns as to the safety and welfare of the children arose only from his perceived concerns about third parties allegedly linked to the partner of the respondent, but no evidence was given in respect of these concerns. Nor was the partner of the respondent residing with the respondent, although he did visit the dwelling house.

46. If the gardaí had the kind of concerns averred to by the applicant, then the gardaí had a clear and unambiguous duty under the Act of 1991 and also the Children First Guidelines to liaise with the Child and Family Agency and to take such steps as were considered necessary, pursuant to the provisions of the Act of 1991.

47. The District Court, as a court of limited jurisdiction, does not have the power to make orders other than those permitted by statute. The respondent refers to the decision of the Supreme Court in *Whelan v. Kirby* [2005] 2 I.R. 30, para. 22 in which Geoghegan J. stated:-

> "A court of summary jurisdiction is a creature of statute and at common law can only make orders permitted by statute. But that common law principle is subject in this jurisdiction to the overriding requirement of fair procedures under the Constitution."

48. It is submitted that the District Judge acted in breach of the mother's and children's constitutional rights in transferring custody care and control of the children to the applicant in the absence of jurisdiction and without complying with fair procedures and the standards of natural justice. It interfered with an agreement between the parents as regards custody and access to the children without any evidence as to the alleged potential risk, and that the District Judge formed an opinion as to "significant risk" in an arbitrary manner without reference to any legal criteria.

49. As regards the Act of 1964 and Article 42A of Bunreacht na hÉireann, the former was amended and updated in the light of the latter. If, therefore, the Oireachtas had wished to include a mechanism for *ex parte* applications in private law proceedings, it would have done so when amending the Act of 1964 in 2015.

50. The respondent places reliance upon the decision of the Court of Appeal in *N.K. v. S.K.* [2017] IECA 1. In that case, the Court had to consider whether or not, in the light of Article 42A of Bunreacht na hÉireann, the Court could infer that a power subsisted in the Act of 1964 to exclude a parent from the family home on the general ground that the child's best interests so require, where there was no finding of any actual or potential misconduct on the part of that parent. At paras. 81 and 82 of its judgment, the Court stated:-

> "81. The basic point remains, however, that despite the breadth of generality of Article 42A.4 and the corresponding legislation designed to give it effect (i.e., the 1964 Act, as amended by the 2015 Act), there is nothing in the 1964 Act which sanctions the exclusion of a parent from the family home on the general ground that the child's best interests so require where this is divorced from any finding of any actual or potential misconduct on the part of that parent. One may put this another way by saying yet again that if the Oireachtas had intended that the courts could take this step by the making of an order under s. 11 of the 1964 Act, clear and express words to this effect would have been necessary.
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> 82. In these circumstances it is unnecessary to decide whether legislation which sought to give effect to the best interests provisions of Article 42A.4 could sanction the exclusion of a spouse from the family home in the absence of any finding of parental misconduct or future threat to the safety or welfare of the other spouse and children. It is sufficient to say that, once again, there is nothing in the 1964 Act (as amended by the 2015 Act) which admits of the making of an order of this far reaching kind."

51. It is submitted that the applicant's arguments that there cannot be a lesser remedy available in private law than that available in public law is misplaced. The remedies are not mutually exclusive, and there is protection afforded by the Act of 1991, and in particular ss. 12 and 13 of that Act, should there be an immediate risk to a child. Section 12 confers powers on An Garda Síochána to remove a child to safety where a member of the Force has reasonable grounds for believing that there is an immediate and serious risk to the health or welfare of the child, and that it would not be sufficient for the protection of the child to await the making of an application for an emergency care order. Section 13 makes provision for the making of applications for emergency care orders and the placing of a child under the care of the Child and Family Agency (the "CFA") for a period of up to eight days.

52. Section 20 of the Act of 1991 then provides a link between both public and private law proceedings. It provides, inter alia, that in any proceedings under s. 7, 8, 11, 11B or Part 3 of the Act of 1964…or in any other proceedings for the delivery or return of a child, it appears to the court that it may be appropriate for a care order or a supervision order to be made with respect to the child concerned in the proceedings, the court may, of its own motion or on the application of any person, adjourn the proceedings and direct the CFA to undertake an investigation of that child's circumstances. In s. 20(2), it is provided that where proceedings are adjourned and the court gives such a direction, the court may give such directions as it sees fit as to the care and custody of, or make a supervision order in respect of, the child concerned pending the outcome of the investigation by the CFA. This gives the court an express statutory power to make directions and orders in the context of applications under the Act of 1964.

53. However, in proceeding as it did to make orders otherwise than pursuant to statutory powers or the rules of court, the Court acted in breach of fair procedures and in breach of the constitutional rights of the mother. Not only that, the making of such orders on an *ex parte* basis might, in particular circumstances, actually place a child at risk, insofar as the orders are made, not just without hearing the other side, but without any input from an independent third party such as the gardaí or the CFA. It is denied that the orders made by the District Judge were proportionate to the risk involved in this case, in circumstances where the evidence on which the applicant grounded his application was later deemed to be inadmissible, and was not supported in any way. The Court had other options open to it, pursuant to s. 20 of the Act of 1991, that could have been utilised without trespassing on the constitutional rights of the respondent and the children. Article 42A of Bunreacht na hÉireann confirmed the rights of the child, but it does not confer additional powers on the District Court, absent legislation, to act outside the functions, procedures and jurisdiction prescribed by legislation.

54. The respondent distinguishes the case of *S.McG* which the respondent says was a very unique case pertaining to Article 40 of the Constitution. Moreover, the respondent relies on the following conclusions of the Court at para. 33:-

> "I would hold that what occurred in the District Court was a fundamental denial of justice, and of the constitutionally implied right to fair procedures. Fair procedures, especially in the circumstances, required that both parents be legally represented, and time given to take instructions, and comply with other procedural steps necessary… The effective representation of parents is not only a vindication of their own rights, but of the children's rights."

Submissions of the Notice Party

55. The notice party makes three principle submissions. Firstly, s. 11(10) of the Act of 1964 requires that applications made pursuant to s. 11(1) of that Act are made on notice. While the period of notice is not specified, the DCR also require that such applications are

made on notice, and specifies a notice period. That notice period is fourteen days and the rules provide for abridgment of same in circumstances of urgency. The District Court as a court of limited jurisdiction does not have any inherent jurisdiction to make the *ex parte* order that it made in this case.

56. Secondly, while Article 42A of Bunreacht na hÉireann provides that, in proceedings concerning the adoption, guardianship or custody of, or access to any child, the best interests of the child shall be a paramount consideration, and while the factors to be considered in this regard have been set out in s. 31 of the Act of 1964, considerations as to fair procedures and natural and constitutional justice within those proceedings are bound up with the best interests of the child, as are the constitutional rights of the family/guardians of the child, rights which now co-exist with Article 42A and have not been obliterated by it.

57. Thirdly, in a case such as this, there is an interaction between principles of constitutional justice, children's rights under Article 42A (which itself requires a fair procedure as a component of children's rights) and the constitutional position of guardians and the Oireachtas has elected to mandate a notice requirement in respect of applications pursuant to the relevant sections of the Act of 1964, reflecting such interaction and balancing of rights.

58. Insofar as the District Judge relied on O. 39 of the DCR, it is not permissible to utilise general provisions such as those set out in O. 39 to confer jurisdiction on the District Court in circumstances in which the express statutory provision and the rules applicable denies such jurisdiction. Article 42A cannot be interpreted as conferring jurisdiction on the District Court where such jurisdiction does not clearly exist. Section 11(10) of the Act of 1964, has a presumption of constitutionality and reflects that which the legislature considers appropriate in respect of applications to which it applies. There is no reasonable basis for asserting that a requirement of notice does not fully accord with the best interests of a child in the context of such applications, and particularly so when the provisions of Article 42 are balanced with other constitutional considerations including principles of constitutional justice. Furthermore, all of this must be viewed in the context of the provisions in the rules for abridging the usual notice period in notice period in circumstances of urgency.

59. The notice party also relies upon the decision in this Court (Baker J.) in *SMCG & Anor v. The Child Safety Agency* [2015] IEHC 733, wherein she stated at para. 41 as follows:-

> "I am of the view that a court in determining whether to deprive a mother of the custody and company of her children will fully recognise and respect the interests and rights of those children only by fully respecting the procedural and substantive rights of the mother in the course of that litigation."

60. As to statutory interpretation, the notice party refers to the decision of this Court (Haughton J.) in *Martin v. The Data Protection Commissioner* [2016] IEHC 479, when, in determining a case related to whether the respondent enjoyed an inherent power to hold an oral hearing, Haughton J. stated as follows:-

> "56. In the absence of an express power, the court should be slow to find that there was an inherent power to hold an oral hearing. In *Director of Consumer Affairs v. Bank of Ireland* [2003] 2 I.R. 217, in considering the powers of the Director of Consumer Affairs pursuant to s. 149 of the Consumer Credit Act 1995, Kelly J. (as he then was) at pp. 237-238 stated:-
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> > 'The purpose of statutory interpretation is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. The intention, and therefore the meaning of the statute, is primarily to be sought in the words used in it.
> >
> > The plaintiff is a statutory officer and is therefore strictly confined to the functions and powers conferred upon her under the Act. She has no inherent power. But she may have powers which, although not expressly conferred, may be regarded as incidental to or consequential upon those which the legislature has expressly authorised.'"

Decision

61. These proceedings raise a net issue: whether or not the District Judge had power to make an *ex parte* order granting the applicant day to day control of the children of the parties pending an *inter partes* hearing of the matter, which he directed should take place eight days later?

62. Counsel for the applicant posed the question: what should the District Court do faced with evidence of the kind presented, *ex parte* by the applicant in this case? Undoubtedly, the District Judge felt himself in something of a dilemma and considered that the best interests of the child required an approach similar to that prescribed by s.13 of the Act of 1991, as regards emergency care orders.

63. However, there are several difficulties with the course that he followed. In the procedures set out under the Act of 1991, whether under s. 12 of the Act which empowers the gardaí to remove a child to safety where a member has reasonable grounds for believing that there is an immediate and serious risk to the health or welfare of the child, or under s. 13, which empowers the District Court to make emergency care orders upon the application of the CFA, for substantially the same reasons as those referred to in s. 12, there is the involvement of an independent third party *i.e.* the gardaí or the CFA. This independence of function offers a key safeguard for the best interests of the child.

64. In contrast, a court acting on the *ex parte* application of a parent runs the risk of making an order that may be not only not in the best interests of the child, but might be very much contrary to those interests. It is not at all inconceivable, for example, that an unscrupulous parent might prevail upon the court to make an order that is contrary to orders previously made in respect of a child, unknown to the court, and that, for example, that parent may then abscond with the child between the date of the *ex parte* order and the next return date, or otherwise act in a manner that is harmful to the child. Of course, none of that arose in this case and I say this merely to illustrate the potential for danger to the welfare of the child when a parent seeks, *ex parte*, relief of the kind sought in this case.

65. It is perhaps for reasons of this kind that the Oireachtas, when amending the Act of 1964 in 2015, chose to insert a notice requirement for the purposes of the applications made pursuant to s. 11(1), as it did, by means of section 11(10) of the Act of 1964. This amendment, and others, were made subsequent to the referendum that resulted in the insertion of Article 42A in the Constitution. The purpose of this amendment to the Act of 1964 (and other measures taken at the same time) was to give effect to Article 42A. In its wisdom, the Oireachtas has decided that notice of applications brought under s. 11(1) of the Act of 1964 must be given to the other parent and any other guardian of the child. This has also been reflected in the rules of the DCR.

66. While the applicant has relied upon the case of *R.C. v. C.C.*, that case is readily distinguishable for two reasons. Firstly, in that case, Barron J. was exercising the original jurisdiction of the High Court and accordingly was not subject to the restrictions placed upon the District Court which, as I have said above, is subject to limited jurisdiction prescribed by statute. Secondly, in that case, there was no legislation in place to give effect to the constitutional right relied upon by the applicant in those proceedings (the Family Law Divorce Act 1996 had been passed, but not commenced). In contrast, legislation has been passed to give effect to Article 42A of the Constitution, in particular the Act of 2015, and that legislation was in force at the time the applicant made his application to the District Court.

67. The arguments around remedies available in public law and private law are, in my opinion, more theoretical than real. In circumstances where one parent maintains that the other is in some way placing the child or children of the couple in danger, I can see little difficulty in the involvement of either the CFA or the gardaí in order that the safety of the child or children concerned may be secured in circumstances of urgency. The involvement of one or other such agencies assists the Court in providing it with the kind of independent verification that is required before the draconian step of removing a child from the custody of either parent is taken, even if that is only to be for a short period. I also think that the respondent is correct in the argument that the best interests of parent and child are interwoven and as such this necessitates adherence to fair procedures, in the interests of the child as much as the parent, before any such orders are made.

68. The question before me is not really one of statutory interpretation at all. The legislation itself is clear and unambiguous and presents no difficulty of interpretation. If I were to answer the question posed in the case stated in the affirmative, I would be deciding to do that which the legislature has declined to do.

69. As observed above, the District Court has limited jurisdiction, and its powers are prescribed by statute. It has no powers other than those conferred by statute, and it is not permissible to invoke the DCR in such a manner as to confer powers which are not derived from statute. Order 39 of the DCR is procedural only. So, therefore, if there was conferred upon the Court the power to make *ex parte* orders on applications such as the application made to the District Judge by the applicant, and there were no rules of procedure regarding the exercise of that power, then O. 39 would permit the Court to devise a procedure suitable to the circumstances of the case, and to give directions. But the rule cannot be used by the Court to assume a jurisdiction that has not been conferred upon it by statute.

70. In answer to the question posed by the applicant (what was the District Judge to do?), I think that the most appropriate course would have been to direct that the application be put on notice to the respondent and to adjourn the application to an early hearing date, perhaps as soon as in two days, in accordance with O. 58, rr. 2 and 9 of the DCR. If he considered it appropriate, he could, at the same time direct that the CFA be put on notice of the application and seek its views as regards the same, in accordance with s. 20 of the Act of 1991. In expressing this view, I am not being in any way critical of the District Judge, who was required to deal with the application before him there and then, and without the time or the benefit of the expansive arguments of counsel, available to this Court.

71. It follows from all of this that the question posed by the District Judge must, therefore, be answered in the negative.