THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 120

Appeal No. 2015/83

Ryan P.
Irvine J.
Hogan J.
BETWEEN/

R.L.

APPLICANT/APPELLANT

AND

HER HONOUR JUDGE HENEGHAN

RESPONDENT/RESPONDENT

AND

M.M.

NOTICE PARTY

JUDGMENT of the Court delivered on 12th day of June 2015

Introduction
1. This is an appeal against the judgment and orders made by the High Court on 25th and 31st July 2014, respectively. In orders made on the latter date the Court refused declarations and orders sought by the applicant by way of judicial review. Leave to bring judicial review was granted on 16th December 2013. The applicant sought to quash the order transferring primary residence of the child to the father. The applicant also sought a declaration that the impugned order of the Circuit Court was null and void.

2. The question for consideration by this Court is whether the High Court correctly applied the law in respect of the Guardianship of Infants Act 1964; the Courts Acts 1924 (as amended by s. 57 of the Courts of Justice Act 1936) and the precepts of procedural fairness that are required to be respected by decision making bodies, including courts.

Background
3. There is a history of some complexity involving the relationship between the applicant and the notice party, some of which is detailed in the judgment under appeal, but for this judgment, the essential facts can be simply stated. The applicant is the mother and the notice party is the father of a boy who is now aged almost five years having been was born on the 23rd August 2010. The mother and father lived together for a period of years before their child was born, but they split up in March 2011. Thereafter, the mother was the primary carer with the father enjoying access, as agreed (or as fixed by the District Court), and he paid maintenance. He is and has been in good regular employment as a long-distance lorry driver. The mother's employment history has been much less successful.

4. After separating in 2011, the mother began a relationship with a new partner, a woman who was living and working in London. She travelled over and back to visit her partner and sometimes brought the boy with her on her visits. The father consented to some, at least, of these excursions. The mother ultimately decided that she wanted to go to London with her son, thinking she would be able to obtain employment there. That would have made access for the father to the boy difficult and he was opposed to the idea of his son moving to London with the mother.

5. The mother applied to the District Court under s. 11(1) of the Guardianship of Infants Act 1964 ("the 1964 Act") for liberty to bring her boy to London. The father opposed the application and the Court refused permission. On appeal, the Circuit Court affirmed the order of refusal, but it did so in terms that gave the mother the impression that there was not an absolute bar to her plans and that the door to a further application was left somewhat open. After some time, the mother made another application, which was again refused by the District Court. That happened on the 7th May 2013. On the same occasion, the father applied for a variation by way of increase in his access to his boy, which was also refused. Both parties appealed.

6. The respective appeals of the mother and father against the District Court orders originally came before the Circuit Court on 21st November 2013. On that occasion the respondent Circuit Court judge set aside the 25th November 2013 in order to hear the appeal. The mother was unrepresented in the Circuit Court, but the father was represented by solicitor and counsel.

7. An issue also arose on 21st November 2013 as to whether Ms. L. had in fact unlawfully removed M. to the United Kingdom. Counsel for Mr. M. maintained that the child had been unlawfully removed out of the jurisdiction and that, as a consequence, proceedings under the Hague Convention had been commenced seeking the return of the child. Ms. L. denied that M. had been unlawfully removed and maintained that Mr. M. had in fact given his consent for these trips to the UK. Judge Heneghan then heard evidence from Mr. M. who maintained that he had given such consent for limited periods only. Judge Heneghan than stated that it appeared that M. had been unlawfully removed from the jurisdiction. Judge Heneghan made it clear, however, that she would not entertain the re-location application unless M. was brought before the Court on the following day.

8. The mother brought M. before the Court on the 22nd November in accordance with the judge's direction. The re-location application was itself heard on 25th November when the parties gave evidence and were cross-examined. It was put to the mother that she had given untrue evidence regarding her partner in the course of the earlier s. 11 application when she had denied that she was in a relationship. She may have been fearful of revealing to the Court that her partner was female. She admitted that she had given untrue evidence to Judge O'Donoghue in the Circuit Court earlier that year, but she stated that she had panicked when asked the question and that she apologised for this.

9. The mother further gave evidence that it might not be economically feasible for her to stay in Ireland, but that if forced to choose between a new life in London with a new partner and a job and M., she would, of course, choose M.

10. The judge ruled as follows:

> "I have heard the evidence from Ms. L. in relation to the difficulties, financial and otherwise, that she would have and did have when she was leaving in Ireland. She should be in a position to continue with her life in London and…work in London if she chooses, but, taking all of the evidence in to account in this case, M. must remain in Ireland and in those circumstances I am going to affirm the order of the District Court and refuse the application to relocate the infant M to London, and, as a result of that decision, other matters now arise. Primary care arises, maintenance issues arise and access arise."

11. The Court ultimately affirmed the order of the District Court refusing the s. 11 application, but, critically, it also directed that M. should henceforth have his primary place of residence with his father in Ireland. Liberty in relation to access and maintenance was given. The effect of this order was, of course, that the mother was deprived of her status as the primary carer of M., so that hence forth she would have access rights only.

12. Ms. L. then commenced these judicial review proceedings seeking to quash the decision of the Circuit Court. That application was rejected by the High Court *(RL v. Her Honour Judge Heneghan* [2014] IEHC 664).

13. The High Court judgment was delivered on 25th July 2014 in which the Court made findings as follows.

> 1. The Circuit Court had the jurisdiction not only to determine the relocation issue, but also to determine any custody issue which arose as a result of a decision on the relocation decision and which had been signalled to the parties during the hearing as an issue (including the maintenance order).
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> 2. On the question whether there had been a breach of fair procedures and/or constitutional and natural justice it was held there was no unfairness since the applicant was alerted during the course of proceedings she faced consequences arising from her behaviour in relocating the child.
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> 3. It was also recognised that the applicant was afforded plenty of warning that she could have legal representation if she wished.
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> 4. The applicant's lack of candour by reason of an apprehension on her part that the Irish courts would not deal fairly with her was strongly criticised and the High Court confirmed even if any of the other grounds advanced were successful for the applicant her lack of candour was sufficient to bar any reliefs since judicial review is a discretionary remedy.

Issues on Appeal

14. The issues that arise for consideration on the appeal are as follows:

> 1. Was the learned Circuit judge entitled to remove the mother as primary carer of the child when that issue
>
> (a) Was not the subject of the appeal?
>
> (b) Had not been dealt with in the District Court?
>
> (c) Had not been sought by the father in the proceedings?
>
> (d) In the absence of any complaint in respect of the child's care by the mother?
>
> 2. Did the learned Circuit judge have jurisdiction under s.11 of the Guardianship of Infants Act 1964 to make the order in respect of custody of the infant?
>
> 3. If the Circuit judge did have jurisdiction under the 1964 Act and the Courts of Justice Acts 1924 -2013, did the procedure adopted in the Court infringe the constitutional rights of the mother and/or of the child –
>
> (a) In regard to fair procedures?
>
> (b) When the mother had not formal notice that her status as primary carer and person having custody of the child was in issue?
>
> (c) Was the mother in fact on notice?
>
> (d) When the mother was not legally represented in Court?
>
> (e) When the mother was deprived by the procedure of any right of appeal?

The right of appeal from the District Court to the Circuit Court

15. The right of appeal from the District Court to the Circuit Court is provided for by s. 84 of the Courts of Justice Act 1924 ("the 1924 Act") (as amended by s. 57 of the Courts of Justice Act 1936) which provides:

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

16. It is true that s. 84 of the 1924 Act does not provide that such an appeal is "by way of re-hearing", whereas by contrast these

precise words are contained in s. 38 of the Court of Justice Act 1936 in respect of appeals from the Circuit Court to the High Court. We do not consider, however, that this is of any particular moment so far as these proceedings are concerned. What is of importance is that the Circuit Court was hearing the matter in its *appellate capacity*. This meant that the Circuit Court could only affirm or vary or allow the appeal from the order of the District Court. It could not, under the guise of exercising an appellate jurisdiction, effectively exercise a first instance jurisdiction for the first time, especially as in that situation no appeal would lie from the exercise of that jurisdiction.

17. Yet that is what effectively has happened here. The question of whether the mother should continue to be the primary carer of M. was not embraced in any of the notices of appeal which were before the Circuit Court. Neither the father nor any other party had sought an order to alter the mother's status as the primary carer of M.

18. In these circumstances, the Circuit Court had no jurisdiction to make an order of this kind which lay outside the scope of the pleadings. It is true that in family law proceedings a certain latitude may be allowed to the parties with regard to the scope of pleadings and amendments thereto. The Court obtains its jurisdiction from the issue that is brought before it by the litigants for decision by means of originating summons or notice or pleadings. This serves the important purpose of defining the issues between the parties and ensuring that, in the words of FitzGerald J. in *Mahon v. Celbridge Spinning Co. Ltd.* [1967] I.R. 1, 3:

> "The trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words each side should know in advance, in broad outline, the case he will have to meet at the trial."

19. This principle is fractured when the court makes an order which was not sought by either party and where that order cannot be regarded as consequential or ancillary to the issues which were before the court.

20. In the course of the appeal counsel for the father, Ms. Clissman S.C., laid considerable emphasis on what she submitted were the special features of s. 11(1) of the 1964 Act. Specifically, it was contended that an application under s. 11(1) of the 1964 Act necessarily raised issues regarding the custody of the child, so that by making any application under the sub-section the mother must be taken to have been on notice that her status as the primary carer of the child might ultimately be at issue.

21. Section 11 (1) of the 1964 Act (as amended) provides that

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

22. Section 11 (2) of the 1964 Act further provides:

> "The court may by an order under this section –
>
> (a) give such direction as it thinks proper regarding the custody of the child and the right of access to the child of his father or mother;
>
> (b) order the father and mother to pay towards the maintenance of the child such as weekly or other periodical sum having regard to the means of the father and mother, the court considers reasonable."

23. It is clear from the language and structure of s. 11(1) that the jurisdiction of the court is conditioned by the nature of the application which has been made. Accordingly, the reference to "may make such order" is governed by the words "may apply to the court for its direction on any question affecting the welfare of the child." The court does not, accordingly, have a free standing jurisdiction to make orders which are divorced from the scope of the actual application to the court in the manner for which the father contended.

24. In the present case, the only applications actually before the court were the application on the part of the mother to re-locate to the UK and the application on the part of the father for increased access rights in respect of M.

25. It is true that the court is empowered to act of its own motion in proceedings arising under s. 11 of the 1964 Act, but that is regulated by statute. Thus, s. 20 of the Child Care Act 1991 ("the 1991 Act") provides that in such s. 11 proceedings the District Court may, of its own motion or on the application any person, adjourn the proceedings and direct the Child and Family Agency to undertake an examination of the child's circumstances. Critically, however, even where this occurs and the court acts on its own motion in the manner permitted by s. 20 of the 1991 Act, all persons likely to be affected by such an order will have formal notice of same and must be given the opportunity of preparing and advancing their own case in advance of any such application.

26. We do not doubt, of course, that there may be exceptional cases where the court might have to act immediately in order to safeguard the immediate welfare of the child so that an interim order might be required. Nothing of the kind arose here. Even then, where the court was required by circumstances to intervene in such a fashion, it would nonetheless be obliged to ensure that fair procedures were subsequently observed and the interim order made for the shortest possible period: see generally *DK v. Crowley* [2002] IESC 66, [2002] 2 I.R. 716.

27. For all of these reasons, therefore, we are of the view that the Circuit Court acted without jurisdiction in purporting to make an order which was entirely divorced from the scope of the pleadings. The Circuit Court judge did not have a free standing jurisdiction to make an order of this kind which was simply not before the court and which could not be fairly regarded as ancillary or consequential upon the appeal from the refusal to grant leave to re-locate the child of which it had seisin.

The issue of fair procedures

28. This entire issue is also closely linked to the issue of fair procedures. In *The State (Irish Pharmaceutical Union Ltd.) v. Employment Appeals Tribunal* [1987] I.L.R.M. 36 the Tribunal had ordered, following an unfair dismissals hearing at which all parties had been legally represented, that the dismissed employee should be re-engaged. It was common case that the entire hearing had been directed to the question of the employee's possible entitlement to damages, as neither party had raised an issue as to possible re-engagement.

29. The Supreme Court held that the Tribunal had violated the principle of *audi alteram partem* in that the employer had been given no advance notification that the prospect of re-engagement was being considered and had accordingly received no opportunity of making appropriate submissions as to its appropriateness. As McCarthy J. said ([1987] I.L.R.M. 36, 40-41):

> "…it is argued for the Tribunal and the employee that the employer and its legal advisers were aware of the powers of the Tribunal…; consequently, they had adequate and ample opportunity to call such evidence and to make such representations as they saw fit on the appropriate redress, if and when the question arose. Such an argument might be sustainable if the redress sought were not specified other than being under the Act and the 'run' of the hearing had been at large. Such was not the case. The hearing was directed towards two substantial issues, the dismissal and a remedy by way of compensation. That part of the determination of the Tribunal….which prescribed re-engagement as the appropriate redress, was one made without affording the other party, the employer, any adequate or real opportunity of meeting the case. Consequently, it was in breach of that fundamental principle which the employer calls in aid."

30. This principle also applies by analogy with the present case. No proper notice had been given to the mother that by reason of the making of this application to re-locate to the UK she might thereby be deprived of her status as the primary custodian and carer of M. Nor had she any objective reason fairly to suppose that the refusal of the court to sanction the re-location of the child under s. 11(1) of the 1964 Act might have such drastic consequences. There is no obvious link between the decision to refuse the permission to re-locate on the one hand and the *de facto* loss of custody on the other. One could readily envisage why a court might decide to refuse to give such sanction to re-locate abroad because, for example, it might affect the father's access rights. This, however, does not mean that the court could go further and strip the mother of her status as the primary carer.

31. An issue arose in the course of the hearing in the Circuit Court as to what the mother would do in the event that the Court refused her application to relocate. The respondent understood the mother's attitude to be that she would still go to London even if that meant leaving her son behind. The mother disputes that this was either her attitude or her evidence.

32. In our view, this was not a point on which the decision should have turned. The issue at that stage was entirely hypothetical. Presumably, the Circuit Judge asked the question because she thought it was relevant to her decision on the relocation application. A party might give an answer to such a question that was designed to assist his case or a person might respond without seriously reflecting on the implications, particularly if he or she was not aware of what was in the questioner's mind. Even if the answer represented the settled intention of the party at the time, that attitude would have to be reconsidered in light of new circumstances. To decide an issue of custody on the basis of an answer to such a hypothetical question in the context of an application that was not concerned with custody is contrary to fairness as well as rationality and justice. It is therefore unnecessary for this Court to address, much less to resolve, an issue that should not have been considered as adding weight to the scales on one side or the other. Unfortunately, the High Court fell into the same error in this respect as the Circuit Court.

33. The decision of the Circuit Court, therefore, amounted to a clear breach of fair procedures. The mother had no fair warning or opportunity to address in advance the question of whether she should remain as the primary carer of the child.

Whether discretionary relief should be withheld by reason of the mother's conduct

34. It is accordingly clear that, for the reasons just stated, the order in question was one which was made without jurisdiction and the circumstances in which it came to be made amounted to a breach of fair procedures. In ordinary circumstances there would be no question but that the order should be quashed. There remains for consideration the High Court's finding that the mother was not entitled to relief for the additional reason that she had exhibited a lack of candour in her presentation to the court which justified the withholding of discretionary relief by way of judicial review. That question remains for discussion.

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.

36. It is not in dispute that at an earlier stage of the proceedings the mother lied insofar as she denied the existence of her new partner in response to a question posed by His Honour Judge O'Donoghue in February 2013. She later apologised for that inaccurate statement and explained that she panicked in the heat of the moment.

37. One must naturally disapprove of the fact that the mother lacked candour in the manner in which she gave that evidence. It is important to stress, however, that the mother corrected the position at the hearing in November 2013, so that the Circuit Court was fully aware of the true position. There was no question of the Court having been misled by the deceit of one of the parties, so that no order has, in fact, been tainted by this deceit.

38. In this respect it must be stressed that so far as the issue of candour is concerned the courts' principal objective is to uphold the integrity of the judicial process rather than, *as such*, to effect some form of punishment on the defaulting party who has been less than candid with the court. As Hogan J. said in *O. v. Minister for Justice* [2012] IEHC 1 in the context of whether *an ex parte* order should be set aside for want of full disclosure on the part of the applicant:

> "It is true that….the court retains a discretion not to vacate the injunction, the failure to make appropriate disclosure notwithstanding. This would not, however, be an appropriate case in which such a discretion should be exercised, since the non-disclosure here goes to the very heart of the order which the court made *ex parte*. The exercise of the set aside jurisdiction in a case such as the present one is not intended to be punitive although, of course, different considerations might well apply where a litigant acted *mala fide*. Nor is the jurisdiction to be exercised in a formalistic or mechanical fashion: it is rather essentially restitutionary in nature. In other words, by setting aside the original order the court is acting in the interests of two fundamental constitutional values, namely, the integrity of the administration of justice itself (as reflected in Article 34.1) and the importance of fair procedures (as reflected in Article 34.1 and Article 40.3.1).
>
> By thus setting aside the original order, the court thereby seeks to restore the *status quo ante* insofar as it is feasible to do so. This does not mean that the court cannot grant the applicant further relief (cf. the comments of Glidewell L.J. in *Bowmaker Ltd. v. Britannia Arrow Holdings Ltd.* [1988] 3 All E.R. 178). *It does mean, however, that in the event that the court were to grant an applicant further injunctive relief, it would do so now afresh in circumstances where it has been armed with all the relevant facts and where it is not now operating under a misunderstanding or misapprehension as to*

those facts." (emphasis supplied)

39. That objective has been secured here since, for the reasons just stated, it cannot be said in the present that when hearing the s. 11 application in November 2013 the Circuit Court was acting on some false or incomplete basis. Quite the contrary: it had been armed with all the relevant facts and the Court was fully aware of the fact that the mother planned to travel to London in order to set up home with her new partner.

40. All of this is relevant to the question of whether the courts should refuse to quash an otherwise *ultra vires* order by reason of this false evidence. It is, of course, absolutely plain that a litigant can forfeit his or her right to discretionary relief by reason of a lack of candour: see, e.g., *The State (Vozza) v. O'Floinn* [1957] I.R. 227 at 249-252, per Kingsmill Moore J.

41. In that case the applicant himself was an Italian of humble origins with little education, but who had been living in this State for some period. He sought to quash a conviction for larceny, contending that he had not been properly informed by the District Court of his right to jury trial.

42. While different judges took different views of the matter, the evidence suggested that Mr. Vozza had quite possibly concealed the extent of his knowledge of English in the affidavits presented in judicial review proceedings in the High Court: see, *e.g.,* the discussion of this in the judgment of Davitt P. at [1957] I.R. 227 at 233-234. While that may well have been so, it is implicit in the various judgments of the Supreme Court that this was ultimately irrelevant to the question of whether the District Court had in fact informed him of his right to jury trial on this indictable charge in the manner required by the Criminal Justice Act 1951. As Kingsmill Moore J. put it ([1957] I.R. 227 at 240:-

> "On the really important matter - the failure to comply with the provisions of the Criminal Justice Act, 1951 - I can find no evidence of lack of candour, exaggeration or error."

43. Since his ensuing conviction was held to be bad in law by reason of such a failure to comply with these statutory requirements on the part of the District Judge in question, it was quashed by the Supreme Court which held - if only by implication - that he was not be deprived of his right to relief by reason of an alleged lack of candour in relation to an issue which was not central to the ground on which he has succeeded.

44. As Hogan J. put the matter in *Oboh v. Minister for Justice* [2011] IEHC 112:

> "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."

45. Applying these principles to the present case, it can safely be said that the mother's earlier misconduct was wholly irrelevant to the order which was subsequently made by the Circuit Court. The earlier untruth had been acknowledged and the mother had apologised for her conduct. It had absolutely no bearing on the order which is impugned in the proceedings, which, adopting the words of Kingsmill Moore J. in *Vozza*, is the "really important matter".

46. In these circumstances, there are no grounds for suggesting that the mother's lack of candour should serve to prevent this Court from quashing an order which was plainly made without jurisdiction. Any other conclusions would mean that this Court should allow an *ultra vires* order which so gravely affected the interests of the mother and the well-being of her son to stand, even though the mother's lack of candour ultimately bore no relation at all to the order in question.

Conclusions

47. In summary, therefore, the Court is of the view that this appeal should be allowed for the following reasons:

48. First, contrary to the submissions of the father, s. 11(1) of the 1964 Act does not confer on the court a free standing jurisdiction to depart from the terms of the application actually made or to grant a substantive relief which was qualitatively and appreciably different from that which was actually sought by the parties.

49. Second, the Circuit Court fell into error in the present case in granting relief which materially strayed beyond the scope of the pleadings and in respect of which the mother had no proper advance notice. This also amounted to a breach of fair procedures.

50. Third, even though the mother was less than candid with the Circuit Court at an earlier stage of these proceedings, that false evidence had been acknowledged and corrected by her. While one may regret and deplore this lack of candour, it played no role whatever in the Circuit Court's decision of 25th November 2013. As this lack of candour was irrelevant to the order actually made, it would not be appropriate for this Court to refuse to quash an otherwise *ultra vires* order on this ground.