

## THE HIGH COURT

[2002 No. 123 M]

BETWEEN

Y.N.R.

APPLICANT

AND  
M.N.

RESPONDENT

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

**Judgment of Mr. Justice O'Higgins delivered the 3rd day of June, 2005.****The Facts**

The applicant and the respondent are French citizens. On 22nd June, 1978, the applicant and the respondent entered into a contract of marriage in the jurisdiction of the French courts. This contract established marriage settlement for the separate ownership of property as between them. On 26th June, 1978, M.N. and Y.R. were married in France. On the date of the marriage both parties were domiciled and habitually resident in France.

M.N. and Y.R. came to Ireland in 1998 and established their residence in County Cavan. In 2002 the applicant returned to France on a permanent basis and has resided there continuously since then.

On 22nd November, 2002 M.N. filed a petition for divorce on the grounds of fault pursuant to Article 242 of the French Code Civil in the Tribunal de Grand Instance in Strasbourg, France. The petition came before a family court judge on 26th November, 2002. On 23rd December, 2002, the French court fixed a hearing date in its proceedings for 4th February, 2003. On 23rd December, 2002, Y.R. the applicant instituted family proceedings by way of special summons in the High Court in Ireland.

When the hearing came before the French court on 4th February, 2003, both parties were legally represented. The applicant in these proceedings, Y.R., contested the jurisdiction of the French court to hear the case. The French court in its ruling dated 25th March, 2003, held it had jurisdiction to hear the proceedings under the provisions of Brussels II. That decision remains unappealed. On 26th June, 2003, the French court made a ruling of non-reconciliation and directed the second stage in the divorce proceedings to proceed. The French court has ordered an expert analysis of the financial affairs of the parties and has appointed an independent expert to discharge that function. In the French proceedings Y.R. has counterclaimed for divorce on the grounds of fault and sought a variety of financial orders from the French courts, including a payment of €100,000, while also reserving her position in relation to the expert audit being carried out by the French court in relation to financial matters.

By notice of motion dated 13th October, 2003, the respondent brought an application to this Court to declare that it has no jurisdiction in the matter in circumstances where the French Court has seisin of the case. Under the provisions of Article 11 (2) of the Regulation when the jurisdiction of the court first seised of the proceeding is established, "*the court second seised shall decline jurisdiction in favour of that court*". Article 17 provides that "*The jurisdiction of the Member State of origin may not be reviewed . . .*"

An order under the provisions of Order 60 of the Rules of the Superior Courts dated 23rd January, 2004 was served on behalf of the applicant on the Attorney General. In the Order 60 notice the applicant contends that the EC Regulation 1347/2000 and the 2001 Regulations are invalid and have no force in Ireland, having regard –

"to the provisions of the Constitution of Ireland, the method and manner in which the said Regulations were promulgated, that the Regulations contravene clear public policy of the State requiring the making of proper provision in the context of any judicial separation or dissolution of marriage and that the matrimonial property of the parties relevant to the making of proper provision within the State."

**The applicant's submissions**

1. The applicant contends that the reliance on Brussels II is constitutionally impermissible within the jurisdiction of the Courts of Ireland and/or *ultra vires* the lawful authority of the State. She contends that Brussels II unlawfully amends, fetters and/or restricts the 18th Amendment to the Constitution of Ireland promulgated by the People of Ireland in the form of Article 41.3.2. It is submitted that it is impermissible for regulations brought into force by a mere resolution of the Dáil on a Seanad to amend by implication the 18th Amendment to the Constitution which was adopted by the people of Ireland following a referendum.

2 The applicant contends that because of the fact that the main seat of the marriage is within this jurisdiction that it is not permissible for respondent to proceed with the divorce petition in France.

3 The applicant submits that matters of interpretation of Community Law, arise which may require this Court to make a reference to the European Court of Justice for a preliminary ruling under Article 234 of the EC Treaty.

4. The applicant contends that even if Brussels II is constitutionally permissible, the French Court does not have the jurisdiction to determine the property right of the parties. It is submitted by the applicant that this Court is the only court that can consider the property consequence of the marital breakdown as governed by the provision of Irish law insofar as they relate to the lands, bank accounts and other property within the State. The applicant fears that the French Court may be under a misapprehension as to the extent of its powers in relation to the extent of its jurisdiction concerning the property rights of the parties.

The respondent and the notice parties take issue with the contentions of the applicant. By way of preliminary objection they contend that the applicant has no locus standi to argue the constitutional issues in that she has not established a sufficient basis in fact to enable her to do so. They also argue that the applicant should be precluded from arguing the constitutional issues by virtue of nature of her participation in the French proceedings. I will deal with these preliminary points first.

One of the main contentions of the applicant was because the main 'seat' of the marriage was in Ireland it is not permissible for the respondent to pursue divorce proceedings in France. However in the affidavits before the Court the applicant has clearly established

that the parties lived in Ireland most of the time for the greater period of the marriage and that the "seat of the marriage was in Ireland". In those circumstances she has in my view established a sufficient factual basis on which to argue her constitutional case. A second preliminary issue arises. The respondent and the notice party claim that the applicant is precluded from obtaining the relief sought by her in circumstances where the applicant has not only taken part in the French proceedings but she herself has counterclaimed for divorce and financial relief in this proceedings. Moreover in an affidavit dated the 18th November, 2003, authorised by her and sworn on her behalf the first sentence in para. states as follows:-

"In the premise my client is therefore willing to exceed to the respondents' petition for a divorce but only insofar as it relates to the question of divorce which is currently before the French Courts."

In my view it quite inconsistent not only to accede to a divorce petition in France but also to counterclaim for divorce in that country and at the same time to maintain in these proceedings that the granting of that petition is impermissible because the seat of the parties' marriage was in Ireland. She is in effect acceding to and counterclaiming for reliefs in the French Court while at the same time alleging that those reliefs are unconstitutional. In those circumstances, I consider that, the applicant is precluded from making the constitutional case that she wishes. Therefore I find it is unnecessary to decide on the merits of the case. However, in deference to the arguments made and for the purposes of expedition the event of a different conclusion being arrived at elsewhere I consider it appropriate to make some observations on the contentions of the applicant as set out above. -

(1) Regulation 1347/2000 (Brussels II) was brought into force by a resolution of the Dáil and Seanad. It was argued that it amended by implication the provisions of Article 40 of the Constitution following a referendum. The applicant submitted that this was not permissible.

The provisions for divorce in the Irish Constitution are set out in Article 41.3.2 which was inserted following a referendum. The European Council Regulation No: 1347/2000 (Brussels IIA) on the jurisdiction and recognition and enforcement of judgments in Matrimonial Matters and of Parental Responsibilities were not adopted by referendum but by the approval of a proposal put before both houses of the Oireachtas. It is argued that the regulations effectively amend Article 41.3.2 of the Constitution and counsel submits that "a mere resolution of the Dáil and Senate cannot be construed as overruling the will of the people" as expressed in the referendum. The applicant submits that the Brussels II Regulation does not apply in Ireland. I cannot agree with the applicants contention for the following reasons:

(i) The people of Ireland by referendum voted to amend the Constitution to include Article 29.4.5 and Article 29.4.6 of the Constitution. Under Article 29.4.5 the State was empowered to ratify the Amsterdam Treaty and Article 29.4.6 enabled the State to exercise the options or discretions contained in the Amsterdam Treaty (including the options to opt in to Title IV measures). It was however expressly provided that any such exercise had to be subject to the prior approval of both Houses of the Oireachtas.

The Brussels II regulation was adopted by the Council under Title 1V of the EC Treaty as amended. Title IV provides for the taking of measures "in the field of judicial co-operation in civil matters having cross border implications including the recognition and enforcements of decisions in civil and commercial cases". That Title IV was inserted into the EC Treaty by the Amsterdam Treaty. Under Protocol No. 4 to the Amsterdam Treaty it was provided that Ireland and the United Kingdom would not participate in the adoption of measures pursuant to Title IV unless they specifically decided to opt in to those proposals. There was a procedure for so doing.

The Government in exercise of the executive power of the State decided to exercise the option of taking part in the Regulation which became Brussels II. The proposal to do so was put before both Houses of the Oireachtas as required and the necessary approval was received under Article 29.4.6. 9 (The applicant no longer pursues his challenge to the manner in which this was done.) The people did not vote expressly on Brussels II or on Brussels IIA but they did vote on Article 29.4.5 and 29.4.6 of the Constitution and empowered the Government to proceed to exercise the opt in discretion. The Government exercised its discretion in the precise manner voted for by the people in the referendum. In my view the adoption of Brussels II and Brussels IIA was pursuant to a mandate given by the people of Ireland who voted on Article 29.4.5 and Article 29.4.6 of the Constitution. I cannot agree that the provisions of the Brussels II/IIA Regulations are in some way less valid than the divorce provisions in the Constitution because they were as a result of an enabling Constitutional amendment whereas the divorce provisions of the Constitution were enacted by direct referendum.

(ii) Article 41.3.2. provides for the conditions in which Irish Courts may grant a dissolution of marriage and provides for the conditions for so doing. Those conditions have not been altered in any way by the enactment of Brussels II, which does not affect at all the circumstances in which Irish courts may grant divorce. Article 41.3.2. of the Constitution which made provision for the dissolution of marriage did not deal at all with the topic of recognition and enforcement of foreign divorces which is the subject matter of Brussels II/IIA. The Regulation in turn does not purport in any way to regulate or modify in any way the substantive contention of Irish divorce law which did not deal with the question of which court could proceed with the case in circumstances where there were matrimonial proceedings in being in different countries a question which is at the heart of these proceedings. The terms under which this State would recognise foreign divorces has never required a referendum. Even prior to the abolition of the prohibition on divorce foreign divorces were recognised in Ireland at common law. The enactment of the Domicile and Recognition of Foreign Divorces Act 1986 which was the statutory basis for the recognition of foreign divorce did not require a referendum for its enactment. Following the enactment of Brussels II Regulations the conditions for obtaining a divorce in the State remain unchanged.

It is worth noting that the applicant is entitled in the same way as a citizen to avail of the 'proper provision' provided for in the Judicial Separation and Family Law Reform Act, 1989, a right to be held equal before the law under Article 40.1 of the Constitution. Moreover she has the same personal rights including the right to litigate and have access to the courts of Ireland. However the exercise of these rights are subject to being able to establish that here there is a conflict concerning jurisdiction that the Irish Courts are the appropriate counts to hear the proceedings. The Brussels II Regulation now superseded by Brussels IIA regulates the manner in which such conflict may be resolved. In the present case, by virtue of the Brussels II Regulations, the French Courts became first seised of the case because the proceedings in that jurisdiction were commenced first.

(iii) Under Article 249 of the EC Treaty as amended it is expressly provided:

*"that a regulation shall have general application. It should be binding in its entirety and directly applicable in all Member States."*

Both Brussels II and Brussels IIA are Regulations made by the Council of the European Union. They are the type of legislation specifically contemplated under Article 249. The stated grounds for the decision in the French proceedings accurately states the position applicable in this jurisdiction also. The relevant passage of the translation reads as follows:-

*"Whereas it should be pointed out in the first place that conflicts regarding international competence in the matter of divorce and judicial separation between jurisdictions of Member States of the European Union are resolved by Regulation CE No. 1347/2000 of the Council of 29 May 2000 relating to the competence, recognition and execution of decisions in matrimonial matters and in the matter of parental responsibility for joint children (cf. Official Journal of European Communities of 30 June 2000 L 160/9).*

*Whereas it should also be pointed out that Article 189 of EEC Treaty confers an obligatory and directly applicable nature with regard to the internal system of each Member State in relation to community Regulations, among which the above-mentioned Regulation of 29 May 2000 is included;*

*Whereas Article 11-2, of the above-mentioned Regulation of 29 May 2000 provides: Where applications for divorce, judicial separation or annulment of marriage, without the same object or the same cause, are made between the same parties in the courts of different Member States, the court to which the matter was submitted in the second place shall postpone ex officio making a ruling until the competence of the court to which the case was submitted first is established";*

The court accordingly decided that it was seised of the case.

(iv) Article 29.4.10 of the Constitution provides that:

*"No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by Institutions thereof, or by bodies competent under Treaties establishing the Communities, from having the force of law in the State".*

The Article provides Constitutional protection to Brussels II/IIA regulations on the grounds of the Irish Constitution and by virtue of that specific provision of the Irish Constitution. I cannot accept that any concept of hierarchy of constitutional rights comes into play in this particular case so as to render that Constitutional protection inoperative. In particular, Article 41.3.2 providing for the circumstances in which marriage may be dissolved in Ireland is not in my view in any way in conflict with regulations governing the recognition for foreign divorce, and providing for grounds to establish jurisdiction to hear such application.

The decision in *Crotty v. An Taoiseach* [1987] I.R. 713 was relied on in support of the contention that Brussels II/IIA Regulations did not apply – because they effected a change to the Constitution without the vote of the people. However the *Crotty* decision did not deal at all with the validity or status of a community regulation and Article 29.4.10 which affords constitutional protection to such regulations had no application in that case.

(2) The applicant contends that it is impermissible for the respondent to commence or at least pursue proceedings for divorce in France. Despite the fact that:-

(a) The parties were married in France.

(b) The parties are French citizens

(c) The Brussels II Regulations specifically includes nationality of the parties as the basis of determining jurisdiction. It is nonetheless submitted that the exercise of that choice by the applicant is rendered impermissible because the parties have lived in Ireland and have property in Ireland and Ireland was the seat of the marriage. It is argued that despite the provisions of the Brussels II regulation the course of action is impermissible.

The argument is as follows:-

The State puts a very high constitutional value on marriage. The provisions of the Article 41.3.2 provides to limit the circumstances in which marriages may be dissolved in Ireland. The concept of proper provision is also part of the regime for judicial separation. The consequence of adopting Brussels IIA Regulation was that the grounds for recognition of foreign divorce had an effect of diluting or negating the proper provisions section and that that is impermissible. It is argued that because the property regime under French divorce laws are different and impinge on the proper provision under the Judicial Separation Act, it was somehow impermissible to have recourse to French law.

It is true that, as contended for by the respondents, Irish law attaches a high value to the status of marriage in Ireland (see *Murphy v AG* [1982] I.R. 241, *Hamilton v. Hamilton* [1982] I.R. 466, *W v. Somers* [1983] I.R. 122, *Bank of Ireland v. Smyth* [1995] 2 I.R. 459. It is also true that the power to grant a dissolution of marriage emanates directly from the Constitution. The statutory provisions emanate directly from the terms of Article 41.3.2 of the Constitution. As Barron J. observed in *R.C. v. C.C.* [1997] 1 I.R. 337 (where he granted a divorce under the Constitutional provisions of Article 41.3.2 before the coming into effect of the Family Law (Divorce) Act, 1996). However these facts do not impinge on the applicability of the Brussels II Regulation in this case. The Brussels II regulation is part of Irish law. It specifically allows for a choice of jurisdiction in some circumstances, including those which are applicable in the case of the respondent.

Under the Regulations he was entitled to bring proceedings in the jurisdiction of the French Courts. By so doing there were indeed consequences for the applicant which may well be different than those following a judicial separation under Irish Law. However in my view there is nothing in law to support the contention that because the seat of the marriage was in Ireland, the respondent was precluded for exercising the options specifically given to him under the Brussels II Regulation. A choice of jurisdiction was available to him and he was legally entitled to exercise that choice to seek divorce in France.

(3) That the decision of the French Courts as to when the proceedings commenced was incorrect and should be the subject matter of a reference to the European Court of Justice.

The French Court held that the institution of proceedings was by the document issued on the 22nd November, 2002, and rejected an argument that it only became seized of the position for divorce after the reconciliation meeting of February 2003 (after this Court had commenced the judicial separation proceedings of the 23rd December, 2002). It therefore held. It was argued that this Court should refer this decision to the Court of Justice as being a question of Community law. I cannot agree with that proposition. This was a decision of a French Court deciding when proceedings had commenced under French law. This finding was unappealed. No issue of Community law arises to be determined by this or any other court. It would be entirely inappropriate to make a reference to the European Court of Justice pursuant to Article 234 of the EC Treaty for a preliminary ruling as contemplated in the affidavit of the applicant's solicitor.

(4) A second point arises out of an affidavit of the applicant's solicitor dated the 18th day of November, 2003, in which she avers that the applicant's "most serious concern" is that "the respondent's representatives and possibly the French Court are under the misapprehension that if the French Court has jurisdiction to determine the question of status in relation to divorce proceedings that the French Court has also the jurisdiction to determine property rights of the parties". On these grounds too this Court is asked to intervene. The precise nature of the intervention sought is unclear. This point may be dealt with shortly. In my view it would be unwarranted and irresponsible of this Court to act on the assumption that the French Courts will act other than in any way permitted by the relevant legislation, and it is clear that the Irish Courts have no role in the supervision of the French Courts in doing their legitimate business. It is noteworthy in this context that the financial expert appointed was appointed with the consent of the applicant.

For the reasons that I have already stated I have to reject the arguments made by the applicant.

In my view it is clear that the French Courts have jurisdiction in this case and that it is appropriate for this Court to declare pursuant to the provisions of Article 9 of Council Regulation (EC) 1347/2000 (Brussels II) and Regulation 220/2003 (Brussels IIA) that it has no jurisdiction in this matter.