Neutral Citation [2016] IEHC 721

THE HIGH COURT

RECORD NO: 2015/704JR

JUDICIAL REVIEW

BETWEEN

A.Q.

Applicant

AND

K.J. (OTHERWISE K.A.), IRELAND

AND THE ATTORNEY GENERAL

Respondent

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 17th day of November 2016

1. This is a case which concerns the validity of a District Court order which dispensed with the consent of a father (the applicant) to the issuing of passport facilities in respect of his three children. The order was made on the 25th September 2015 an *ex parte* basis on the application of the first respondent (the mother of the children and wife of the father). The order was made pursuant to s. 11(2) of the Guardianship of Infants Act, 1964. The order also dispensed with recognisance so that the order would have immediate effect notwithstanding the possibility of appeal. It was clear, therefore, that the order was final and not provisional in nature despite the fact that it had been made on an *ex parte* basis.

2. A range of reliefs have been sought in the present proceedings, including *certiorari* of the District Court order, a number of declarations (the details of which are set out later in this judgment), and damages for breach of constitutional and Convention rights of the father.

3. The challenge to the validity of the District Court order is based upon two grounds; (1) the 'geographical ground', namely that the District Court had no jurisdiction to make the order because the mother who had made the application to the District Court did not reside within the geographical jurisdiction of the Dublin Metropolitan District Court and, indeed, did not reside within Ireland at the time of the application; and (2) the 'notice ground', namely that the District Court made a final order affecting the rights of the father on the basis of an *ex parte* application by the mother without any notice ever having been given to the father or his ever having been heard in relation to the matter. A constitutional issue is said to arise insofar as s.11 of the Guardianship of Infants Act, 1964 required or permitted such an order to be made on an ex parte basis and without notice to the father.

4. All of the respondents have raised the issue of mootness and this is a central issue to be decided in the case. There are two separate aspects to the mootness issue. The first is the issue of mootness as regards the impugned order, namely the District Court order dated the 25th September 2015, which issue was addressed by counsel on behalf of the first named respondent. The second aspect of mootness relates to s. 11 of the Guardianship of Infants Act, 1964, in circumstances where an explicit legislative requirement was later introduced, namely s.53 of the Children and Family Relationships Act, 2015, that notice be given in such applications. The mootness of the constitutionality of the legislation was addressed by counsel on behalf of the second and third respondents.

Relevant legal provisions

5. Section 16 of the Courts Act 1981 provides as follows:-

> "16. – (1) The jurisdiction under the Illegitimate Children (Affiliation Orders) Act, 1930, the Guardianship of Infants Act, 1964, the Family Law (Maintenance of Spouses and Children) Act 1976, and section 5 of this Act conferred on the Circuit Court shall be exercised by the judge of the circuit where any party to the proceedings ordinarily resides or carries on any profession, business or occupation.
>
> (2) Notwithstanding anything contained in section 79 of the Courts of Justice Act, 1924, and, as respects proceedings under the Illegitimate Children (Affiliation Orders) Act, 1930, section 2 of the latter Act, proceedings under the latter Act, the Guardianship of Infants Act, 1964, and the Family Law (Maintenance of Spouses and Children) Act, 1976, may be brought, heard and determined before any by a justice of the District Court for the time being assigned to the District Court district where any party to the proceedings ordinarily resides or carries on any profession, business or occupation."

6. Order 58 of the District Court Rules (SI 125/1999) provides as follows in rule 2(1);

> "Proceedings under the Act may be brought, heard or determined at any sitting of the Court for the court area where any party to the proceedings resides or carries on any profession, business or occupation."

7. Form 58.17, Schedule C is entitled "Guardianship of Infants Act 1964 -Notice of Application under section 11 for the court's direction."

8. Section 11 of the Guardianship of Infants Act, 1964 provides as follows:-

> "11.—(1) 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.

(2) The court may by an order under this section—

(a) give such directions as it thinks proper regarding the custody of the infant and the right of access to the infant of his father or mother;

(b) order the father or mother to pay towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the father or mother, the court considers reasonable.

(3) An order under this section may be made on the application of either parent notwithstanding that the parents are then residing together but an order made under subsection (2) shall not be enforceable and no liability thereunder shall accrue while they reside together, and the order shall cease to have effect if for a period of three months after it is made they continue to reside together.

(4) In the case of an illegitimate infant the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the natural father of the infant and for this purpose references in this section to the father or parent of an infant shall be construed as including him; but no order shall, on such application, be made under paragraph (b) of subsection (2).”

9. Section 53 of the Children and Family Relationships Act, 2015 provides as follows:-

“53. Section 11 of the Act of 1964 is amended by—

(a) the substitution of the following subsection for subsection (2):

‘(2) The court may by an order under this section—

(a) give such directions as it thinks proper regarding the custody of the child and the right of access to the child of each of his or her parents, and

(b) order a parent of the child to pay towards the maintenance of the child such weekly or other periodical sum as, having regard to the means of the parent, the court considers reasonable.’,

(b) the substitution of the following subsection for subsection (4):

‘(4) In the case of a child whose parents have not married each other—

(a) a reference in subsection (2)(b) to a parent of that child shall be construed as including a parent who is not a guardian of the child, and

(b) the right to make an application under this section regarding the custody of the child and the right of access thereto of each 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 a child shall be construed as including such a parent.',

and

(c) the insertion of the following subsection after subsection (9):

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

10. Section 14 of the Passports Act, 2008 provides as follows:

“14.— (1) Subject to this section, the Minister shall, before issuing a passport to a child, be satisfied on reasonable grounds that—

(a) where the child has 2 guardians, each guardian of the child, and

(b) where the child has more than 2 guardians, not fewer than 2 of those guardians,

consents to the issue of a passport to the child.

(2) If a parent of a child is not a guardian of the child, the Minister shall, in determining whether to issue a passport to the child without the consent to such issue of that parent of the child, have regard to the circumstances of the case in so far as they are known to the Minister.

(3) Subject to this Act, the Minister may issue a passport to a child without the consent to such issue of a guardian of the child if a court in the State makes an order directing that a passport may be issued to the child without the consent to such issue of that guardian of the child.

(4) If a court in the State makes an order under any enactment which authorises a person other than a guardian of the child (including the Health Service Executive) to give consent to the issue of a passport to the child, the Minister may, subject to this Act and for so long as the order is in force, issue a passport to the child in accordance with the order.

(5) Subject to this Act, the Minister may, on application in that behalf to him or her in accordance with *section 6* by a guardian of a child, issue a passport to the child without the consent to such issue of the other guardian or, if appropriate, the other guardians of the child if it is not practicable or appropriate, by reason of the fact that the first-mentioned guardian and the child are ordinarily resident outside the State, for that guardian of the child to obtain an order of a court in the State directing that a passport may be issued to the child without the consent to such issue of the other guardian or, if appropriate, the other guardians of the child and the Minister is satisfied that—

(a) having regard to all the circumstances of the case, including whether or not any other guardian or, if appropriate, the other guardians of the child has notified the Minister in writing that he or she objects to the issue of a passport to the child, and

(b) for the purpose of securing the welfare of the child,

a passport should be issued to the child.

(5A) (a) Subject to this Act, and on application in that behalf to him or her in accordance with section 6 by a guardian of the child, the Minister may, without the consent to such issue of the other guardian or, if appropriate, the other guardians of the child, issue a passport to a child who is ordinarily resident outside the State, where—

(i) a court or competent judicial or administrative authority of the state of ordinary residence of the child takes a measure directing that a passport may be issued to the child without the consent to such issue of the other guardian or, if appropriate, the other guardians of the child, or

(ii) by operation of the law of the state of ordinary residence of the child, the requirements relating to the consent of the other guardian or, if appropriate, the other guardians of the child have been fulfilled.

(b) Paragraph (a) is without prejudice to paragraph 2 of Article 23 of the Convention.

(c) In this subsection—

'Act of 2000' means the Protection of Children (Hague Convention) Act 2000;

'Convention' has the meaning it has in section 1 of the Act of 2000;

'guardian', in relation to a child, includes a person exercising parental responsibility in respect of the child, within the meaning of paragraph 2 of Article 1 of the Convention;

'measure' has the meaning it has in section 1 of the Act of 2000;

'state' means a state that is another contracting state, within the meaning of section 1 of the Act of 2000.

(6) Subject to this Act, the Minister may, on application in that behalf to him or her in accordance with section 6 by a guardian of the child or any other person who has an interest in the welfare of the child, issue a passport to the child without the consent to such issue of the other guardian or, if appropriate, any of the guardians of the child if the Minister is satisfied that—

(a) there exist in relation to the child exceptional circumstances involving an immediate and serious risk of harm to his or her life, health or safety requiring him or her to undertake travel for which a passport is required, and

(b) for the purpose of securing the welfare of the child,

a passport should be issued to the child.

(7) A passport issued under *subsection* (6) shall be valid for such period as the Minister considers appropriate in the circumstances.

(8) The Minister may, for the purposes of *subsection* (1), regard a consent given in writing by a guardian of a child to the issue of a passport to the child as being the consent of that guardian of the child to the issue of a passport to the child at any time or times after the consent is given until the child attains full age, unless that guardian of the child revokes the consent by notification in writing to the Minister.

(9) Notwithstanding subsection (8), the Minister shall require one guardian of a child who applies to the Minister for the issue of a passport to the child to give consent in writing to such issue."

Relevant Facts and Chronology

11. The applicant (the father) and the first named respondent (the mother) married on 27th April 2001. The father is from Pakistan and the mother has family links to Pakistan, but spent most of her childhood in Kuwait. They are the parents of three children aged 14, 11 and 8 years old respectively. I will refer to them as 'the father' and 'the mother' in this judgment. All three children were born in Ireland and have dual citizenship of Ireland and Pakistan. The children lived in Ireland from the time of their births until August 2014, when they were brought by both parents to Pakistan. They returned to Ireland in November, 2014 with their mother, in the circumstances described below, and have resided in Ireland since that date.

12. Marital difficulties led to the wife leaving her husband some time after the family's arrival in Pakistan. Arising out of this, on 2nd May 2015, proceedings issued in the Guardian Court of Lahore, Pakistan, for directions regarding the welfare of the three children. On that date an order was made restraining the children's mother from removing the children from Pakistan. On 4th May 2015, an order was made by the Guardianship Court in Lahore granting the mother custody of the three children pending the full hearing.

13. The mother travelled to Ireland and made an *ex parte* application to the Dublin Metropolitan District Court for an order dispensing with the consent of the husband to the issue of passports for the three children, which order was granted on the 25th September 2015. On 17th October 2015, the father applied to the Guardian Court in Lahore, Pakistan to restrain the mother from applying for the passports and an order was made to that effect by that Court on 19th October 2015.

14. The children's passports were issued by the Department of Foreign Affairs and were sent by courier to Pakistan, but were intercepted by the father at the residence of the mother's uncle, where she and the children were residing. Subsequently, the Department of Foreign Affairs issued the children with emergency travel documents, which were collected by the wife from the Irish Diplomatic Mission. On 3rd November 2015, the first named respondent travelled with her children from Lahore to Ireland. On 7th November 2015, the father became aware that the mother and the children had travelled to Ireland and on 9th November 2015, the father arrived in Ireland.

15. On 11th November 2015 the father instituted proceedings in the High Court under the Protection of Children (Hague Convention)

Act, 2000 and under the Guardianship of Infants Act, 1964 for the summary return of the children.

16. On 14th December 2015, an order was granted for leave to apply for judicial review in respect of the District Court order dated 25th September 2015.

Submissions of counsel

17. As referred to above, the first mootness issue relates to the impugned order, namely the District Court order dated the 25th September 2015. Counsel on behalf of the father contended that the District Court order is not moot merely because the passports have already issued on foot of it and that the children have travelled to Ireland and been here for almost a year; it was argued that the order does continue to have force and effect in a number of different ways. It was argued in the first instance that in and of itself, the continued existence of the order has a 'reputational' dimension insofar as it is a formal and public order which proclaims a negative message to the world about the father, namely that he was a person in respect of whom it was appropriate to grant an order dispensing with his consent for passports in respect of his children, and that this negative communication will continue to resound against him in future legal proceedings, unless it is quashed, in circumstances where there is a context of matrimonial breakdown and disputes about matters relating to the children likely to persist into the future. Secondly, it was argued that the District Court order of 25th September 2015 could be relied upon in the future to generate further passports for the children without the father's consent, and that it was not of a 'once-off' nature; it was argued that the order had already been used twice in this regard, once to generate the passports that were intercepted by the father, and a second time, to ground the grant of emergency travel documents to the respondent. This two-fold use of the order, it was argued, demonstrated that such an order is not limited to a 'once-off' grant of a passport. It was pointed out that the order on its face does not limit the period of its validity, and argued that while a passport may be limited in duration, the District Court order itself was not. Counsel on behalf of the father also drew attention to the difference in wording between subsections (3) and (4) of s. 14 of the Passport Act, 2008 to support her argument that a passport issued pursuant to subsection (3) was not temporally limited.

18. It was argued on behalf of the mother that the quashing of the impugned order would be futile and was moot because the District Court order was now spent and had no continuing force or effect, and that the order could not be relied upon to ground any future application for passports. It was argued that the use of the order to generate emergency travel documents in this case had arisen because of the unusual circumstances of the case, namely that the father had intercepted the actual passports which had been sent to the mother by post, but that this did not demonstrate that the order could be used at some indeterminate point in time in the future. Counsel referred to the practice relating to the making of orders in surrogacy cases; counsel told the Court that, in order for the Irish parents to bring the child back into the jurisdiction, an application is made to the Circuit Court, inter alia, for an order dispensing with the consent of the surrogate mother for a passport for the duration of the child's minority. It was argued that this practice demonstrated that, unless explicitly expressed in a court order, it would not be normally understood that the dispensation with a parent's consent to a passport was for the duration of the child's minority.

19. Counsel on behalf of the mother also drew to the Court's attention to the other set of proceedings currently at hearing before the High Court in which issues relating to the future custody of the children are in issue (i.e. the 'Hague Convention' or 'child abduction' proceedings). It was pointed out that the Court in those proceedings has made orders in relation to, and has taken possession of, all the passports relating to the children. It was argued that in those circumstances it was inconceivable that the mother would be able to seek further passports in the future on the basis of the impugned District Court order. It was argued that there is no longer any live issue between the father and the mother concerning the children's travel from Pakistan to Ireland; it was now something that had happened in the past and could not be undone and the impugned order had ceased to have any relevance. The outstanding live issue between the parties was whether the children had been wrongfully brought to Ireland, and their future custody, and a quashing of the impugned order would have no impact on that live issue.

20. My understanding of the Hague Convention proceedings is that there are preliminary technical issues to be decided, including an issue as to whether the Hague Convention applies to this case at all, and that it is not yet clear whether the Irish courts or the Pakistani courts will ultimately decide issues relating to the custody of the children.

Authorities and relevant principles on mootness

21. I was referred to a number of authorities on the issue of mootness, including: In the matter of Section 1(ix) of the *Ministers and Secretaries Act 1924, and in the Matter of a passport issued in the name of Carol Igoe and Thomas Anthony Igoe (a minor); Patrick Igoe v. Ireland, The Minister for Foreign Affairs, the Attorney General and Carol Igoe* [1989] 1 I.R. 386; *Goold v. Collins* [2004] IESC 38; *P.V. (a minor suing by his mother and next friend A.S.) v. the Courts Service, the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General,* [2009] 4 I.R. 264; *Lofinmakin v. the Minister for Justice, Equality and Law Reform* [2013] 4 I.R. 274; *Copymoore Ltd. v. Commissioner for Public Works in Ireland* [2015] IECA 119; *O.O. (an infant acting by his mother and next friend C.O.) and others v. Minister for Justice and Equality*, (Unreported Supreme Court, 19 March 2015); and *I.R.M v. Minister for Justice and Equality, Ireland and the Attorney General* [2016] IEHC 478. I do not propose to summarise the facts and principles in each of these here as there is a relatively recent and comprehensive analysis of these matters by the Supreme Court in the *Lofinmakin case*, but I will seek to apply the principles as identified in those cases to the present case below. Nonetheless, it is worth noting at the outset that it appears clear from the authorities that the Court should consider in the first instance whether an issue is moot, and secondly, whether, even if the answer to the mootness question is in the affirmative, the case should be considered to fall within one of the exceptional categories which would render it appropriate to consider the matter notwithstanding that it is technically moot. Examples of the latter type of situation include cases where the factual situation may repeat itself but evade judicial review because of its short duration; or situations involving points of significant public interest. The exercise of this exceptional jurisdiction is described in detail by Denham CJ. in *Lofinmakin* at paragraphs 17-22 inclusive; and by McKechnie J. in the same case at paragraphs 66-67.

Application of the mootness principles to the impugned District Court order in the present case

22. The reliefs sought in respect of the impugned District Court order in this case are *certiorari* of the order and a declaration that '*the determination and order of District Judge Deirdre Gearty made on the 25th September 2015 is null and void for the reasons set out hereunder*' and a declaration that the order of the respondent made on the 25th September 2015, was made '*in breach of the constitutional and Convention protected rights of fair procedures of the father and was fundamentally unfair'*.

23. In approaching the issue of whether the matters relating to the District Court are now moot in the case, I must of course have regard to the various general definitions of mootness as set out in the previous authorities, in particular the *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 I.R. 274,where Denham CJ said:-

> "[13] The current proceedings, insofar as they relate to the deportation order against the third appellant, are moot, as that deportation order has been revoked.

[14] As the deportation order has been revoked, there is no basis upon which to proceed. Furthermore, any decision by this court would be based on a hypothesis, and would be an advisory opinion. It has long been the jurisprudence of this court that it will not give advisory opinions, except in exceptional circumstances, such as under Article 26 of the Constitution, or as identified in the case law of the court.

[15] Thus, while the parties had a real dispute when the proceedings were commenced, this is no longer the case.

[16] As has been cited by this court previously, including by Hardiman J. in *Goold v. Collins* [2004] IESC 38 (Unreported, Supreme Court, 12th July, 2004), the *dictum* of the Supreme Court in *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342 reflects the law of this jurisdiction where it is stated:-

> 'An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercised its discretion to depart from it.'"

In the same case, Denham CJ also said: -

> "The foundations of a case that is moot have fallen away and so they are usually not appropriate cases upon which to decide important points of law, unless there are other factors such as arose in *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2006] IESC 62 , [2007] 1 I.R. 328 and *Okunade v. Minister for Justice* [2012] IESC 49 , [2012] 3 I.R. 152 ."

24. I also have regard to the underlying policy of the mootness doctrine as discussed by Hardiman J. in *Goold v. Collins* [2004] IESC 38 and by McKechnie J in the *Lofinmakin* case. In this regard, the three-pronged rationale for the mootness doctrine put forward by the Supreme Court of Canada in the *Borowski v. Attorney General of Canada* [1989] 1 S.C.R 342 is particularly lucid and has been approved by the Supreme Court in both *Goold v. Collins* and *Lofinmakin*.

25. At a factual level, the present case can be distinguished from a number of the previous cases insofar as the impugned District Court order has not been formally cancelled or discharged in any way. Thus, it is not on all fours with cases such as *Goold v. Collins*, where the protection order in issue had been discharged by the agreement of the parties and the criminal charges against the father withdrawn; or *Lofinmakin*, where the impugned deportation order had been quashed by the Minister; or *Copymoore*, where the disputed circular had been withdrawn.

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

27. In the present case, one of the questions which arises is whether the District Court order, which is not time-limited on its face, should be taken at face value as being of indefinite duration throughout the minority of the children or whether it should be implicitly 'read down' as grounding only one application for a passport. There appears to be no authority on point, and section 14 of the Passport Act, 2008 does not directly deal with the matter. As noted above, the father argued that the difference in wording between subsections (3) and (4) of section 14 of the Passport Act, 2008 suggested that an order made pursuant to subsection (3), such as the order in the present case, is not temporally limited and could be relied upon in the future to apply for further passports for the children. It will be recalled that it was argued on behalf of the mother that the practice in surrogacy cases, where the orders explicitly refer to the order being of effect for the duration of the child's minority, demonstrated that the order would not be of indefinite effect unless this were so stated. This is not an easy issue to determine but on balance I would incline to the view that, in the absence of a temporal limitation on the face of the order, it could possibly (absent events which are extraneous to the order itself) continue to have legal effect and be relied upon to ground future applications for passports.

28. This leads to the next point, which is whether in this case, subsequent events have deprived the order of its normal effect, those events being the commencement of the Hague Convention proceedings in the High Court in which the issue of the children's future custody will be determined. As noted earlier, it was argued on behalf of the mother that the existence of these proceedings rendered issues relating to the potential 'enduring effect' of the impugned District Court order moot. The case most similar to the present situation is the *P.V. case*. In *P.V. (a minor suing by his mother and next friend A.S.) v. the Courts Service, the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General,* [2009] 4 I.R. 264, the child's mother sought to bring *an ex parte* application in the District Court seeking the surrender of the child's passport, which at the time was held by his father, on the basis of a fear that the father intended to imminently remove the child from the jurisdiction without the mother's consent. The District Court Registrar advised the child's mother that the application would not be heard as it was not a proper application pursuant to the Guardianship of Infants Act, 1964 of the District Court Rules 1997, there being no provision for such an application to be made *ex parte*. I note in passing the irony of the District Court's attitude in that case when contrasted with the procedure in the present case. Proceedings were brought in the High Court and an interim, and subsequently permanent, injunction was granted by the High Court against the child's father and the child's passport was returned to his mother on an undertaking by her that she would not leave the jurisdiction with the child other than with the consent of his father. Judicial review proceedings on behalf of the child in respect of the refusal of the Registrar to accept the application in the District court was held to be moot because the substantive issue was no longer alive. In *P.V.*, therefore, it was clear that precisely the same issue had been dealt with by the High Court as the issue which had previously been sought to be brought before the District Court. The same cannot quite be said in the present case; rather, it is argued on behalf of the mother that the Hague Convention proceedings, by dealing with issues of custody, will inevitably subsume issues of custody of the children and the issue of passports in due course. However, it seems to me that there is a degree of uncertainty around this in the sense that it is not yet clear whether the Irish or the Pakistani courts will decide the question of custody, and therefore how or whether the issue of how the children came to be living in Ireland for the last year will impact on future decisions concerning the children's custody.

29. Another dimension to the matter is the argument on behalf of the father that the existence of the order creates ongoing reputational damage for the father, an issue that was discussed by Hardiman J. in the *Goold* case but rejected, *inter alia*, because of the provisional nature of the *ex parte* protection order in that case. Counsel on behalf of the father sought to distinguish the *Goold* case on this point, on the basis that the *ex parte* order in the present was not provisional in nature, and I am of the view that this distinction is valid. In *Goold*, Hardiman J. also said that it was important to consider the distinction between the effect of the order and the fact that the order had been made simpliciter. He pointed out that in *DK v. Crowley* [2002] 2 I.R. 744, the court was concerned with a situation where the impugned order could tilt the balance in future litigation between the parties on matters such as the custody of the children because it concerned a barring order which could remove a spouse from the home and this might have consequence later, even if the barring were subsequently found to be wrongful, whereas in the *Goold* case, there was no possibility that the order would tilt the balance of any future litigation between the parties because it concerned a protection order, which did no more than prohibit the spouse from doing that which she ought not do in any event, and could have no possible consequence on future disputes. This raises the question in the present case; could the existence of the District Court order, even if legally spent in the sense of grounding passport applications in the future, tilt the balance of future litigation between the parties on the issue of custody, simply by virtue of having been made? In the present case, this issue is not easy to determine; it is not yet clear whether Irish or Pakistani courts will determine the custody of the children, as there are jurisdictional issues yet to be decided; and therefore whether or not it will be relevant to future decisions about the custody of the children how precisely they came to be living in Ireland for the last year and whether they were wrongfully brought to Ireland. Certainly, if the matter is ultimately determined pursuant to Hague Convention principles, any period consequent upon a wrongful abduction of a child must be excluded from the Court's determination on custody matters; but it is not yet clear that the matter will be dealt with under the Hague Convention.

30. In deciding the issue of mootness regarding the impugned order, it may also be useful to consider the three-pronged description of the rationale of the mootness doctrine identified by the Supreme Court of Canada in the *Borowski* case, and which was approved in *Goold v. Collins* as well as *Lofinmakin*.

> "The first rationale for the policy with respect to mootness is that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootnesss doctrine is the need for the courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa."

31. Thus, the first prong of the rationale relates to the adversarial nature of our system and the need for the courts to avoid making decisions where any real adversarial element is lacking or where there is no *legitimus contradictor*. The second prong of the rationale concerns judicial economy, while the third relates to what might broadly be described as a separation of powers argument, such that the Court should confine itself to its proper sphere of activity and not engage in the issuing of advisory opinions. An interesting feature in the present case is that there was, and could be, no real argument but that the District Court had acted without jurisdiction on the 'geographical' point referred to above, that is to say, that it had no jurisdiction to deal with the issue in circumstances where the entire family lived in Pakistan at the time of the application to the District Court. This was in effect conceded in oral argument. Further, the 'notice' point was argued but took up very little time at the hearing. That being so, it seems to me that points relating to the preserving of judicial resources and absence of *legitimus contradictor*, for example, do not lean against the father in the present case.

32. In all of the circumstances, it seems to me that the matter is not so obviously moot that the Court should not proceed to consider issues relating to the validity of the District Court order.

33. For the avoidance of doubt, I should say that I am not dealing with this matter on the basis of the 'exceptional' jurisdiction to entertain a moot case identified in some of the authorities, but rather on the more straightforward basis that it is not moot in the first place. It seems to me that none of the exceptional features identified in certain cases would have applied in any event.

The validity of the District Court order: the geographical issue

34. Order 58, rule 2(1) of the District Court Rules makes it clear what the geographical preconditions are, before a particular District Court can assume jurisdiction over a matter. Given the factual circumstances of this case, namely that all the parties were living in Pakistan at the time of the District Court application, it is plain that that neither of the preconditions were satisfied. Therefore, if I am correct in reaching the conclusion that the issue of the validity of the District Court order is not moot, it seems to me to follow that there is no question but that the District Court order was invalid because the court had no jurisdiction to make the order as the case did not fall within its territorial jurisdiction.

The validity of the District Court order: the notice issue

35. It is clear from the relevant form required by the District Court Rules that the application should have been made on notice. In granting the order on an *ex parte* basis, the District Court made the order in breach of its own Rules.

36. I am also of the view that, as a matter of constitutional fair procedures, notice ought to have been be given before the order was made, given the importance of the interests of a parent with regard to his or her own children. The principle of *audi alterem partem* is so fundamental that this hardly requires further reference to authority, although in the present context, the decision in *D.K. v. Crowley* [2002] 2 I.R. 744, is of particular relevance, in which certain interim barring order provisions of the Domestic Violence Act, 1996 were held unconstitutional by reason of the fact that they failed to prescribe a fixed period of relatively short duration during which an interim barring order made *ex parte* was to continue in force, depriving the respondent of the protection of the principle of *audi alteram partem* in a manner, and to an extent, which was disproportionate, unreasonable and unnecessary

37. Counsel on behalf of the mother suggested that it might be in accordance with constitutional fair procedures for notice to be dispensed with in an extreme case, but conceded that the present case did not fall within that category. Counsel on behalf of the father argued that no court order of this kind could ever be made on an *ex parte* basis, and that urgent cases could instead be dealt with by the Minister under the powers conferred on the Minister under section 14 of the Passport Act 2008. It is not necessary for me to determine whether there might be exceptional cases in which notice might be dispensed with for a court application without breaching constitutional norms, in view of the concession on behalf of the mother that this was not such an exceptional case warranting such unusual treatment.

38. It therefore seems to me that the District Court order was invalid by reason of the failure of the Court to require that the father

be put on notice of the application and given an opportunity to be heard before the order was made.

39. Counsel on behalf of the mother placed reliance on the *Igoe* decision in arguing that the Court should exercise its discretion against the granting of *certiorari* or any declaration in respect of the impugned District Court order. It was argued on behalf of the mother that the father should have taken immediate steps to appeal or set aside the impugned District Court order as soon as he learned of its existence, and that his failure to have done so should prevent his obtaining the relief sought in the present proceedings. In the *Igoe* case, the High Court refused to grant *mandamus* against the Minister directing him to withdraw a passport in circumstances where a wife had forged her husband's signature on the relevant form and subsequently took the child of the marriage to Canada. Both the High Court, and on appeal, the Supreme Court, in refusing to grant the relief sought, took the view that the husband should have taken steps to alert the Circuit Court to her actions and seek to have the passport impounded. By analogy, it is argued, the father in the present case, who had become aware of matters sufficiently quickly to enable him to intercept the passports which were posted to Pakistan, should have taken steps immediately by seeking to set aside the District Court order or by way of appeal to the Circuit Court. I do not find this argument persuasive. In the *Igoe* case, the husband was living in Ireland and was already involved in Circuit Court proceedings arising out of the marital difficulties at the time that he engaged in correspondence with the Minister; and he had been told that the Minister had no power to do what was being asked of him. It would have been an easy matter for him to raise with the Circuit Court in the circumstances, but he did not do so. In the present case, the father was living in Pakistan and the District Court order had been made, with recognisance dispensed with so that the order would have immediate effect. I do not accept that his failure to take the suggested steps in those circumstances should lead the Court, in its discretion, to refuse the relief of *certiorari* in respect of an order which was plainly invalid. I also have regard to the difference in kind between the remedies of *certiorari* and *mandamus*; the latter being a direction to take positive remedial steps, which in the case of *Igoe* would have involved the courts directing the Executive to take certain particular steps, whereas certiorari in the present case would involve the simple quashing of a District Court order.

40. Accordingly, I will grant the reliefs of *certiorari* of the District Court order of 25th September 2015 together with a declaration that the said order was granted in breach of the father's constitutional right to fair procedures, specifically the right to be notified of, and heard on, an application of the kind in issue in the present case.

Application of the mootness principles to section 11 of the Guardianship of Infants Act 1964

41. One of the reliefs sought on behalf of the father was a declaration in relation to s. 11 of the Guardianship of Infants Act, 1964. This particular relief was sought in the following terms: *'A declaration that insofar as the Guardianship of Infants Act, 1964 (as amended) allows for a final order to be made without notice to the father dispensing with his consent to the issue of passports for his children, that same is unconstitutional, and in particular Article 41 and 40.3, therefore.'*

42. Counsel on behalf of the second and third respondents contended that the issue of whether the statute was unconstitutional was moot because of the enactment and commencement of section 53 of the Children and Family Relationships Act, 2015, which has made the requirement of notice explicit. It was contended that statutory repeal or amendment was one of the classic instances of mootness, referred to, for example, by McKechnie J. in *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274. The Court was also referred to authorities on the grant of declaratory relief, including *In the matter of Mount Carmel Medical Group (South Dublin) Ltd. (in Liquidation)* [2015] IEHC 450 and *Omega Leisure Limited v. Barry & ors* [2012] IEHC 23. It was argued that a grant of a declaration of unconstitutionality could not possibly benefit the father over and above a grant of *certiorari* in relation to the District Court order itself, and that the principle of judicial restraint regarding adjudicating on matters relating to the constitutionality of a statute should apply.

43. Counsel on behalf of the father contended that the issue of the constitutionality of the statute was not moot by reason of the father's claim for damages; she sought to rely upon the judgment of McMahon J. in *Kemmy v. Ireland* [2009] 4 I.R. 74 to construct an argument that the father would be entitled to damages if it could be shown that his rights had been breached by a court order made pursuant to an unconstitutional statute. In this regard, she relied on a passage of the *Kemmy* judgment, which appears to be *obiter*, in which McMahon J. discussed when the State might be directly, as distinct from vicariously, liable for breaches of rights by the courts. This is perhaps most memorably encapsulated in a passage where he used a 'scaffolding' metaphor:

> "In a constitutional sense, the State merely provides the scaffolding for judicial activity. The State is no longer involved once the judge begins his work. The State may be liable for failing to erect the appropriate scaffolding, but once this is up, and the judge goes about his business, the only liability that arises is that of the judge. To speak of the State's liability for judicial acts in that context is somehow to re-introduce in disguise the concept of vicarious liability, something that I have already rejected."

44. Counsel on behalf of the second and third respondents replied that the relief as pleaded did not link the claim for damages to the allegation that the Guardianship of Infants Act, 1964 was unconstitutional. In that regard, I note that the relief was articulated in the statement of grounds as follows: *'Damages for breach of the Constitutional and Convention protected rights of the father arising from the making of the order.'* The unconstitutionality of the legislation was dealt with under a separate heading, namely:

> *"A Declaration that insofar as the Guardianship of Infants Act 1964 (as amended) allows for a final order to be made without notice to the Father dispensing with his consent to the issue of passports for his children, that same is unconstitutional, and I particular Article 41 and 40.3 thereof."*

45. It seems to me to be correct to say that the statement of grounds did not seek to link the claim for damages to the alleged potential unconstitutionality of the 1964 Act and instead anchored the claim for damages on the order made by the District Judge. Accordingly, I will deal with the matter on the basis that (a) the claim for damages in the present case as pleaded was limited to the alleged invalidity of the order of the District Judge; and (b) the issue of damages therefore does not preclude the ordinary application of the principles of mootness to the legislation in question.

46. As regards mootness, I am of the view that the question of the constitutionality of the legislation is moot in the present case. Any benefit that can be conferred on the father by granting *certiorari* and a declaration in respect of the District Court order cannot in my view be added to by any finding in relation to s. 11 of the Act of 1964, and there can be no general public interest in the court ruling upon a point which will no longer arise because of the 2016 legislation. The result is the same whether one approaches the matter through the lens of the mootness authorities, or the authorities cited to the court on declaratory relief, or those concerning the principle of judicial restraint concerning the examination of statutes for constitutional compatibility.

The claim for damages

47. As set out above, the claim for damages as pleaded in this case was based upon the District Court order. That being so, and notwithstanding that the District Court order was made without jurisdiction, the principle of judicial immunity applies and the State is not vicariously liable for the error of the District Court in granting an invalid order, whether one considers the matter from the point of view of (a) the geographical point, or (b) the notice point. It is clear from *Kemmy v. Ireland* [2009] 4 I.R. 74, as well as previous decisions such as *Deighan v. Ireland* [1995] 2 I.R. 56, and *Desmond v. Riordan* [2000] 1 I.R. 505 that there is no vicarious liability on the part of the State for errors made by judges, even those affecting the constitutional rights of persons before the court, and that the principle of judicial immunity operates to bar liability both in respect of the judge and the State, whether the error is within or outside jurisdiction. In *Kemmy*, McMahon J, having engaged in a significant review of the rationale and scope of the principle of judicial immunity in a number of common law jurisdictions, concluded:

> "For the above reasons it is wholly inappropriate to attempt to describe the relationship between the State and a member of the judiciary in the master/servant terminology developed for the purposes of imposing vicarious liability for tortious acts or omissions. Accordingly, in my view, the State cannot be vicariously liable for the errors which a judge may commit in the administration of justice. This conclusion holds in respect of errors which may be described as errors within jurisdiction, and *afortiori* in respect of errors which are outside the judge's jurisdiction, including those committed, *mala fides*, for which of course, in extreme cases, the judge may lose his personal immunity."

48. Finally, I should perhaps say that I would have in any event reached the conclusion that the 'double construction' rule should be employed to read s. 11 of the Act of 1964 as requiring notice to be given, on the basis of the constitutional principle of *audi alterem partem*. Section 11 of the Guardianship of Infants Act, 1964 is silent as to notice; it does not explicitly require that an order be made *ex parte*, nor does it permit, as did the impugned legislation in *DK v. Crowley*, that an *ex parte* order be continued for a particular period which could be of considerable length. In view of the silence of s. 11 of the Guardianship of Infants Act, 1964 on the notice point, there is ample room to construe it in a manner which gives due respect to constitutional principles of fair procedures. This being so, I would not have found the statute to be unconstitutional. Further, as regards the argument made on behalf of the father that the State had failed to erect an adequate 'scaffold', to use the metaphor of McMahon J. in the *Kemmy* case, by enacting legislation which was silent as to the important issue of notice, I do not see why the method of statutory instrument cannot legitimately constitute a part of the 'scaffolding' by which the State creates a system of fair procedures. The situation would be different if the statute conflicted with the District Court Rules and positively prevented notice from being given, but such is not the case here. Therefore, I am of the view that, for the purpose of applying the reasoning in the *Kemmy* case, the 'scaffolding' erected by the State by way of statutory instrument was adequate and there would not in any event have been an appropriate basis for an award of damages based on the fact that the State dealt with the issue of notice by way of statutory instrument rather than by statute.

49. Accordingly, I will grant the following reliefs only:

(i) An order of *certiorari* quashing the District Court order dated 25th September, 2015;

(ii) A declaration that the District Court order dated 25th September, 2015 was granted in breach of the father's constitutional right to fair procedures, specifically the right to be notified of, and heard on, an application to dispense with his consent to the issue of passports in respect of his children.