Neutral Citation: [2015] IEHC 617

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 276 J.R.]

BETWEEN

K.L.

APPLICANT

AND

JUDGE AINGEAL NÍ CHONDÚIN

RESPONDENT

AND

G.L.

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 9th day of October, 2015

1. The applicant and the notice party are married but live apart and for convenience I will refer to the parties as the husband and the wife respectively. This application arises out of a maintenance application brought by the wife against the husband in respect of herself and the two children of the marriage.

2. The husband seeks to quash an order for maintenance made by the District Judge on the 13th May, 2015 by which she directed, by way of interim order, that the husband would pay to the wife maintenance in respect of herself and the two children of the marriage, two boys then aged 20 and 22 years of age, both of whom are stated by the wife to be in full-time education, and thus dependant within the Family Law (Maintenance of Spouses and Children) Act 1976 (the "Act of 1976").

3. The husband does not deny that his wife is entitled to maintenance, nor does he complain that the amount awarded was beyond his ability to pay. His seeks to quash the District Judge's order on the basis that it was made in the absence of fair procedure, and because he alleges the District Judge failed to employ natural and constitutional justice in the way in which she conducted the hearing and came to her decision.

4. Noonan J. made an order on 8th June, 2015 directing by consent that there be a telescoped hearing of the applicant's application for leave and of the substantive judicial review.

Grounds of application

5. The husband claims that he was denied natural and constitutional justice in the conduct of the hearing, that the District Judge displayed bias towards him, that she truncated the hearing and refused to permit him to cross-examine his wife, refused to permit his solicitor to complete her submission, that she made various interjections in the course of the hearing, and that she failed to state reasons for her decision. By way of a separate application it is contended that the District Judge erred in law in coming to a determination that the two children of the marriage were dependant within the meaning of the code. Finally, it is claimed the District Judge erred in determining the matter when there were in being, at the date of the hearing, Circuit Court proceedings for judicial separation and ancillary relief pursuant to the Family Law Act 1995 and commenced by the husband.

6. The wife denies that there was any absence of fair procedure, says that there was adequate evidence before the trial judge on which she could make a determination that the children were dependent within the meaning of the legislation, and that the judicial separation proceedings did not commence until after the District Court application was filed and served, and do not preclude the exercise by the District Judge of her jurisdiction under the Act.

7. I will deal with each of the heads of claim individually.

The first ground: failure to afford fair procedure

8. An unfortunate element of the application is that the DAR recording for the hearing in question was not available despite attempts to obtain this through the relevant District Court Office. Five affidavits have been filed, an affidavit and a supplemental affidavit of Susan Martin, solicitor for the applicant, and a replying affidavit and supplemental affidavit of Amy Murphy, solicitor for the wife. The husband did not swear an affidavit but there is a lengthy affidavit of the wife. However, counsel do not disagree significantly as to the course of the hearing.

9. From the affidavit evidence, the following appears: A maintenance summons was issued by the wife without the benefit of legal representation on the 22nd April, 2015 returnable for the 13th May, 2015 at Cork District Court, by which she sought maintenance for herself and the two children identified by their respective dates of birth. The children were born in 1992 and 1995 respectively, and both continue to reside with their mother at the former family home. The husband denies that the children are dependant, and says neither is in full-time education.

10. Prior to the issue of the summons, correspondence had been sent to the wife by the husband's solicitor, which indicated that he intended to seek an order for judicial separation. The wife asked to be given time to obtain legal aid, and hoped in those circumstances that her husband would stay his hand as she was unable to afford private legal representation. The judicial separation proceedings did issue on the 29th April, 2015 in the Cork Circuit Court and bear record no. 253/2015. The maintenance summons thus was issued one week before the judicial separation proceedings.

11. There is some difference between the parties as to precisely what occurred in the District Court but certain matters are not in contention. The District Judge heard limited oral evidence, and the only evidence on oath was given by each of the parties to confirm the contents of their respective statement of means filed for the purposes of the application for maintenance. No cross-examination was had of either deponent, and the husband says that through his solicitor he sought an opportunity to cross-examine his wife but that none was permitted.

12. It was evident that the sole income of the family was the income of the husband, and that the wife had been during the currency of the marriage entirely dependent on him for her financial needs and that she had ceased working after the marriage due to suffering a serious illness. Both parties accept that the District Judge asked each of their legal representatives to state their positions with regard to an appropriate figure for maintenance, although they disagree as to whether the figures now identified were those identified to her. Both parties are agreed that the District Judge took as her baseline or guide the amount that a single person would obtain from the Department of Social Welfare in respect of unemployment assistance, the sum of €188.00 per week, and that this was the figure she awarded to the wife. Both parties agree that the matter was adjourned to the 2nd November, 2015 and that the order was an interim order until that date. Both parties also agree, although with some differences of emphasis, that the wife had sought, but had not yet received, the benefit of legal aid in respect of her application, and that it was anticipated that legal aid would be available to her by the adjourned date. The wife issued the summons for maintenance as a litigant in person but was allocated a solicitor under the private practitioner scheme on an emergency basis to deal with the hearing on 13th May, 2015.

13. What is in dispute between the parties, however, is that the husband's solicitor says on affidavit that the District Judge described the process of calculating an appropriate figure in respect of maintenance as containing an element of "Russian roulette", and that she said to some extent calculating a figure was akin to "putt[ing] her finger in the air and pluck[ing] a number from it". The solicitor for the wife denied that comment was made specifically, and says that whilst the District Judge did make some comment of that nature that her comment was by reference to the task in a general sense and not the task of assessing the correct figure for maintenance in the case before her.

14. What is also in contention between the parties is whether the District Judge had any evidence before her with regard to the claim that the two children of the marriage were dependent. The older son will be 23 in October 2015, and irrespective of whether he is then in full-time education he will cease to be dependent within the meaning of the legislation once he reaches that age. It also seems that submissions were made to the District Judge by the solicitor for the wife to the effect that the older son of the marriage had taken a break from his college education due to suffering a degree of anxiety but he intended to resume his education in September of 2015. The younger son is described as suffering from a "psychiatric difficulty" and from depression. This is apparent from the affidavit of welfare filed by the husband in his judicial separation proceedings as is required by the Rules of the Circuit Court. The solicitor for the wife says that the District Judge was made aware of some degree of "mental illness" or "mental health issues" of the younger son.

15. It is clear that the District Judge had a long list and was under significant time pressure, and that she had in that context attempted to deal with the matter in as efficient a manner as she could.

The first question: is judicial review an appropriate remedy
16. Counsel for the wife asserts by way of a plenary objection that judicial review is not an appropriate remedy in the circumstances and that the husband had available to him as a matter of law a right to a full re-hearing by way of appeal to the Circuit Court. The husband's counsel initially submitted that it was not possible for him to appeal as he had tried and failed to obtain a copy of the District Court order but the order did become available in the course of the hearing. That difficulty, it seems to me, if there was one, would not have prevented the lodging of a notice of appeal although it might have prevented the husband from processing the appeal in the Circuit Court had he launched an appeal.

17. Counsel for the wife relies on the judgment of the Supreme Court in *The State (Abenglen Properties Ltd.) v. Dublin Corporation* [1984] 1 I.R. 381 where the Supreme Court confirmed the general proposition that the existence of a right or remedy of appeal does not of itself prevent the court from granting judicial review, but that where an alternative remedy is available, and is adequate, this fact might influence the exercise of the courts discretion to grant judicial review.

18. Counsel for the husband however points to the *dicta* of O'Higgins J. in that case to the effect if the impugned decision is made without jurisdiction or in breach of natural justice then *"normally, the existence of a right of appeal or a failure to avail of such, should be immaterial."*

19. Counsel for the husband also argues that the correct approach is found in the judgment of the Supreme Court in *Stefan v. Minister for Justice* [2001] 4 I.R. 203 where Denham J. at p. 218 of the judgment made the simple comment *"a fair appeal does not cure an unfair hearing"*, and that if a hearing at first instance is unfair, or indeed made in absence of jurisdiction, that a litigant is denied his or her statutory and constitutional right to two hearings, a hearing at first instance and on appeal.

Conclusion on appropriateness of remedy
20. I consider that in the case of a decision made at first instance where a court lacked jurisdiction, that judicial review is the appropriate remedy in the absence of other factors relevant to the exercise of the court's discretion. Thus I consider that the correct approach is that I would deal first with the jurisdiction arguments raised by the applicant.

The effect of the judicial separation proceedings on jurisdiction
21. The first point is that the District Judge had no jurisdiction to hear and determine an application for maintenance as there was in existence at the date of the hearing an application for judicial separation under the Judicial Separation and Family Law Reform Act 1989, and ancillary financial relief is sought in those proceedings under the Family Law Act 1995 (the "Act of 1995").

22. The District Court has jurisdiction to grant maintenance under the Act of 1976 and this jurisdiction exists concurrent with the equivalent jurisdiction in the Circuit Court. The Circuit Court has, together with the High Court, jurisdiction to grant an order for judicial separation and/or divorce and in the context of such an application may grant an order for maintenance by way of ancillary relief either by way of order pending suit or following the making of a decree of divorce or judicial separation.

23. Counsel for the husband argues that the District Judge had no jurisdiction to make an order for maintenance when judicial separation proceedings had already been instituted in which maintenance was sought by way of an interim as well as a final ancillary order. He claims in the alternative that the District Judge ought to have declined jurisdiction in those circumstances.

Does jurisdiction lie when judicial proceedings are in being?
24. The summons for maintenance was instituted by the wife acting as a litigant in person in the District Court. Her evidence, and this

had been flagged in correspondence prior to the institution by either party of their respective proceedings, is that she required legal aid for the purpose of defending the threatened application for judicial separation, and correspondence in January 2015 from her asked that her husband would refrain from instituting those proceedings until she obtained legal aid. Her evidence is that there is a significant waiting list for legal aid, that she and her husband had ceased to live under the same roof, and as she was dependent on him for all of her maintenance needs as well as those of the children, she had an urgent need for maintenance. At the time the maintenance summons issued the husband's judicial separation had not been issued or served on the wife. What is more critical is that the husband has sought maintenance and secured periodic payments from the wife in the civil bill, as well as interim relief under ss. 6 and 7 of the Act of 1995. While it may be the case that the civil bill was drafted either by a solicitor or a counsel with the benefit of a template, the husband's application for maintenance was one at the time of the civil bill which had no bearing in reality, as the parties agree that the wife had never worked outside the home, and that as a result of her ill health she was unable to do so. At the time the wife issued the summons for maintenance, and at the time the District Judge heard the application of the wife for maintenance there were no proceedings in being before the Circuit Court in which she had sought maintenance, and at the date of the hearing in July 2015 the wife had yet to obtain legal aid to defend the judicial separation proceedings and she had not served a defence or counterclaim to those proceedings. The evidence was it would take some time before legal aid was available to her, and that the full trial of the judicial separation proceedings would not likely be reached in the Circuit Court list for at least a year after pleadings closed.

25. In context of the argument that the District Judge ought to have declined jurisdiction, it seems to me unarguable and not to accord with either reason or fairness that a spouse could, by instituting proceedings in which he or she sought maintenance in the Circuit Court thereby prevent his or her spouse from seeking maintenance in the District Court and thereby availing of the cost effective and speedy procedures available in that court. This is particularly so, and this fact must influence a court in exercising its discretion whether to decline jurisdiction, when the claim of the spouse seeking maintenance in the Circuit Court is one which has no connection with the real circumstances of the couple. Thus I consider that the District Judge did not err in exercising her discretion to refuse to hear the maintenance application of the wife where the only existing maintenance application was a maintenance application by the husband, which bore no real connection to the financial circumstances of the couple.

26. However, that consideration does not answer the more fundamental question raised by counsel for the applicant namely, that the mere existence of judicial separation proceedings in which maintenance relief is sought precludes the District Court from granting maintenance order in favour of either spouse.

27. In *AM v. District Judge Hartnett and other* (Unreported, High Court, 6th July, 1996) Lynch J. was hearing a judicial review in which the applicant father had challenged the jurisdiction of the District Court to make an order for custody of the children of this marriage to the notice party. The applicant argued that the Circuit Court had sole jurisdiction to determine the matter as the mother of the children had previously sought orders concerning the welfare of the children in that Court which had yet to be determined. Lynch J. refused to order judicial review and in doing so made the following observation which I consider to be correct:

> *"It is quite clear that the District Court has jurisdiction to hear applications of the nature heard by the respondent on the 27th November, 1992. That jurisdiction is not ousted by the application to the Circuit Court but if the Applicant in the Circuit Court wished to proceed with that application then normally the District Court would give way. Here the Applicant in the Circuit Court and the District Court were the same person, namely, the mother, and it was quite open to her to proceed in the District Court as she did and have the application to the Circuit Court struck out, as she did."*

28. I consider the correct legal proposition to be as follows: both the District Court and the Circuit Court have jurisdiction under the relevant legislation to make an order for maintenance, including an order for interim maintenance or maintenance pending suit. The interests of justice and the principle of legal certainty require that two applications for identical relief ought not to be heard and determined by different courts at first instance. Thus a person who for example seeks maintenance in the Circuit Court may not seek similar or identical relief in the District Court unless he or she agrees, or undertakes if such be required by the court, not to proceed to seek similar relief in the other court. Further, as the Circuit Court has jurisdiction under s. 44 of the Family Law Act 1995 to discharge an order of the District Court by way of ancillary relief order following the making of the decree of judicial separation the Oireachtas has envisaged circumstances where a spouse may seek and obtain a maintenance order in the District Court and seek that such order not become incorporated within the ancillary relief orders granted following divorce or judicial separation. By implication I consider that the court may under s. 44 refuse to discharge an order made under the Act of 1976. The Circuit Court in adopting or incorporating a District Court order is determining an application in respect of that relief, but is in exercise of its statutory power adopting or refusing to adopt a determination by another court. Thus it seems to me that the legislation envisages circumstances such as have arisen in the instant case, such that a spouse who had the benefit of a maintenance order may seek that this would or would not become part of the ancillary relief orders granted in another court.

29. However, the circumstances in this case are different. In the first place, the wife did not seek maintenance in any other court, and her response to the judicial separation proceedings and to the application for her husband for ancillary relief including a maintenance order in his favour against her, had not yet been the subject matter of any pleadings. No application in respect of maintenance for the wife exists nor existed at the time the District Court determined her application. Had the husband sought maintenance in the District Court the position would have been different, and while the District Judge clearly did as a matter of law have jurisdiction to determine the maintenance application, the Circuit Court would as a result no longer have jurisdiction to determine the application in respect of maintenance for the husband

30. Accordingly, I am of the view that the District Judge did not err in assuming jurisdiction in respect of the wife's application for maintenance and that the application for judicial review on that basis has failed.

The decision to award maintenance in respect of the children?

31. The second jurisdictional argument made by the applicant is that the District Judge did not have jurisdiction to make the maintenance order in respect of the two dependent children, both of whom are over eighteen years of age. A child is dependent within the meaning of the Act of 1976 if he or she is under the age of 18, or between the age of 18 and 23 if he or she is receiving full-time education or instruction in any university, school or other educational establishment. The evidence is that one of the children, the older boy, had taken time out from university and is due to resume his studies in September or October 2015, some weeks before he will achieve the maximum age at which maintenance is payable, 23 years of age.

32. With regards to the other son who is under 23 and who is not in full-time education it is alleged by the wife that he was a dependent child within the meaning of s.3 of the Act of 1976 as he was:

> *"suffering from mental or physical disability to such extent that it is not reasonably possible for him to maintain himself fully".*

The evidence is that the affidavit of welfare served by the husband in conjunction with his application for judicial separation describes the younger son of the marriage as suffering from some "psychiatric difficulty". He does not plead however in his civil bill that his son's difficulties were such that it was not reasonably possible for him to maintain himself fully.

33. Both parties are agreed that the District Judge did not hear evidence as to the current educational status or mental or physical condition of either of the sons of the marriage, and at best she heard submissions from the solicitors for each party. The husband asserts that the District Judge expressed a view that as the two young men were living at home with their mother they were "costing money". There is no evidence from either party that she heard evidence as to their dependence within the meaning of the Act. At its height the solicitor for the wife asserts that she submitted to the District Judge that the younger son was dependent "on the basis that he was suffering from a mental illness, namely depression and anxiety". In regard to the older boy she said that he was "returning to full time education in September" and that he thus remained a student.

Discussion: the older son
34. A court has jurisdiction to award maintenance in respect of a dependent child between the ages of 18 and 23 when that child is in full time education. The evidence before the District Judge did not point to the older son of this marriage being then in education, and at best he had been in full-time third level education and had taken a break and intended to resume his studies. The normal academic year of course includes an amount of holidays and study leave but a student in full-time education is in my view a student who is continuing a course on a year-to-year basis. A student who takes a year off from studies is not, during that year, in full time education. A certain degree of latitude or common sense would of course be required in the case for example of a pupil who finished secondary education and was contemplating a number of third level options. That child would probably be in most cases a dependent child at least until the academic term commenced and he or she had taken up or not taken a third level course as the case may be. A student on a "gap year" or who has taken time out is not a full-time student.

35. In the case of the older son of the marriage it seems to me that the submissions heard by the District Judge, and the contents of the affidavit of welfare, did not point to the older boy being dependent within the meaning of the Act of 1976. It is difficult to discern precisely the reason for the grant of maintenance save that the children were "costing money", but I am of the view that the District Judge did err in awarding maintenance in respect of the older son of the marriage when the evidence is that she heard at best that he had taken a gap year from his third level studies. Had she awarded maintenance to commence in September of 2015 when and if he resumed his studies the matter might have been different but that was not the basis for her decision.

Discussion: the younger son
36. With regard to the younger son of the marriage, and even taking the case at its height, while there was evidence that he was suffering from some degree of psychiatric difficulty or depression, there was no evidence before the Court, nor even submissions in that context, that could have led the District Judge to take the view that he was as a result of his difficulty not reasonably able to maintain himself fully. The test is cumulative and requires evidence not merely of an incapacity, but evidence that the incapacity was such as to render the child incapable of financial independence

37. Thus it seems to me that the District Judge had no evidence before her on which she could have made a decision that the younger son of the marriage was dependent within the meaning of the legislation.

38. A determination that a child is dependent is a matter of fact, but the question of whether a judge had sufficient evidence to come to a decision in fact is a matter of law and one amendable to judicial review. The District Court lacked jurisdiction to award maintenance as the Court did not have any evidence before it on which it could make a decision to award maintenance in respect of the children, or to come to a decision that they were dependent within the meaning of the Act of 1976. I consider then that the order in respect of maintenance for the dependent children should be quashed by way of an order for *certiorari*.

The maintenance order in respect of the wife: absence of fair procedure
39. The second limb on the application for review is that the decision was made in the absence of fair procedure and that the husband was denied natural and constitutional justice in that he was not permitted to adduce evidence under oath, or to test the evidence of his wife.

40. It cannot be doubted that the applicant is correct that the means by which evidence is to be tested is by cross-examination, and that fair procedure would require in the context of any matter where a court hears oral evidence that the other party should be given the opportunity to test that evidence. The solicitor for the husband on affidavit avers to having applied on two separate occasions to the District Judge to be permitted to cross-examine the wife and sought to lead evidence to counter her claim.

Discussion on fairness
41. O'Malley J. considered similar arguments in an application for judicial review in *LC v. Judge O'Donnell* [2013] IEHC 268. The applicant father sought to review maintenance orders made in District Court family law proceedings between himself and the mother of his children. The argument was *inter alia* that the order made by the District Judge was made without hearing sworn testimony and in the circumstances it was argued that there was no proper examination of the facts. The application for judicial review was refused *inter alia* because O'Malley J. noted that there had been over twenty separate applications in the proceedings and she took the view that the judge was entitled to rely on his or her memory of the case and reminders in respect of earlier evidence offered by solicitor or counsel. That point cannot be made in this case. However, I consider it relevant that O'Malley J. did point to the requirement that when new information was offered relevant to the order proposed to be made and when that is not accepted by the other party it should *"in the normal course of events be given by way of sworn evidence"*. She also pointed to the fact that the applicant's affidavit did not disclose what his proposed evidence would have been or what he was seeking to achieve by way of variation.

42. The evidence in this case was that maintenance in the sum of €80 per week was been paid on an informal basis by the husband to the wife at the time of the application. Certain matters were not in issue, namely that the sole earner in the household was the husband, and that his income was not insignificant. It is not suggested that evidence was to be adduced that the wife was working outside the home or that she had an income or independent means. Thus the dispute was one as to the quantum of maintenance.

43. The solicitor for the husband in her affidavit does not state that the informal payments were made in an excessive amount nor does she identify a figure that he was prepared to pay. There is no suggestion that an argument was made to the District Judge that a maintenance order was not appropriate, or that the wife was financially self-sufficient and not in need of maintenance. The evidence from the solicitor for the applicant is that she wished to cross-examine the evidence of the notice party on her statement of means, but she does not for example say that her instructions were to put certain facts with regard to the financial needs of the wife to her.

44. Thus it seems to me while the District Judge had very little evidence before her on which she could make a determination of the

appropriate figure for maintenance, that there was in truth no dispute between the husband and wife as to the entitlement of the wife to receive spousal maintenance. The District Judge did have sworn evidence with regard to the respective means of each of the parties, and had a submission that the husband was meeting certain outgoings on the family home, and that the wife was in receipt of a small amount in respect of disability benefit.

45. It seems to me in those circumstances that the evidence available to the District Judge was limited, and that she erred in not permitting the applicant to cross-examine the notice party on her affidavit of means or in respect of her needs. However, I consider notwithstanding this that there is no error in the order made by the District Judge. This is for a number of reasons. In the first place the District Judge assessed maintenance at what she regarded as the lowest possible level, namely the amount payable to an individual under the social welfare code by way of social welfare assistance. The applicant argues that this approach was incorrect and amounts to a degree of bias or prejudgment by the District Judge. I will deal more fully with the argument of bias below, but I consider that the administration of justice, and the assessment by a court of the appropriate amount to be granted in respect of spousal maintenance was never intended to be calculated by reference to a formula. A judge is assumed to have experience, legal knowledge and knowledge of the cost of living and of the basic financial needs of an individual living in Ireland from his or her own personal experiences. Were it to be otherwise and taking two ends of the spectrum, a maintenance order could be characterised as an administrative act, one that could be done by way of a calculation from the formula, or it would be a judicial exercise in which the judge would be assumed to operate in a vacuum and with no experience of day-to-day life. As O'Malley J. said in the LC v. Judge O'Donnell, family law proceedings are *"rarely directly analagous to other forms of litigation"*. This does not mean, nor taking the judgment of Judge O'Malley in its entirety could it be said that she meant, that a decision of a court in a family law case could be arrived at with a degree of informality that denied the parties basic natural and constitutional justice and fair procedure, or that it ignored the rules of evidence. However, it seems to me that the amount that the State considers to be an appropriate amount of basic financial provision to an individual in the State is a good starting point for a District Judge in calculating maintenance, and that this is particularly so, as in the instant case, where what was in question was a maintenance order that was intended to operate for a period of six months only. The District Judge had no argument before her that the husband could not afford the amount that she ordered, nor that the wife could be expected to maintain herself and meet her day-to-day means on a lesser amount.

46. Furthermore, I consider that as the husband has sought a decree of judicial separation, and various financial and other orders in that context, including lump sum payments and a property adjustment order, any failure or wrong approach in the calculation of the District Court interim maintenance order can be redressed at the determination of the judicial separation proceedings when the court will make orders intended to deal with the long term financial needs of each of the parties to the marriage and will be in a position to more fully understand their respective needs and means, and to redress any difference in the past or anticipated in the future, including the balancing of the interim payments already made.

47. Thus I consider that, while the failure to permit cross-examination was an error, and that such error did amount to a degree of absence of fair procedure, the District Judge did have sufficient evidence and argument on which she could have made a decision, and the decision she made was not one made wholly without jurisdiction. The husband did not deny his wife was entitled to maintenance, and was in fact paying her some maintenance. It was the quantum that was an issue and I consider that the applicant is not entitled to an order quashing the decision for that reason. In this I am persuaded also by the decision of Lynch J. in *O'Broin v. District Justice Ruane* [1989] IR 214, where the learned judge refused an order for *certiorari*, although he accepted that the District Judge was incorrect to prohibit cross-examination of a Garda on a procedure used in processing and taking of specimens from the applicant as he held that the error was *"not of so gross a nature as to oust jurisdiction"*, and that in those circumstances the error did not justify the making of an order for *certiorari*.

48. Further I consider that it would be unrealistic for me to ignore the fact that the application before the District Court was for an interim order, that the District Judge was under significant pressure of time, and that the order was intended to last only for a number of months. The nature of an interim order, and of the more summary procedures in District Court applications such as these, is that a judge must use a degree of common sense, and a degree of judicial discretion, in determining the extent to which certain evidence is required, and is also entitled to take into account the extent of the dispute between the parties. This was not a case where the entitlement to maintenance was in dispute, nor was there any suggestion that the wife had an undisclosed income or other financial means. The exercise of fairness by the District Court in making interim maintenance orders can properly be reconciled with the need for expediency by affording the District Judge a degree of latitude to deal with the matter as he or she chooses, bearing in mind the limited time available to hear each case.

49. Thus it seems to me for these reasons that whilst there was a denial of fairness that I ought to exercise my discretion to refuse an order quashing the decision of the District Judge with regard to maintenance for the spouse, insofar as the application is grounded on an assertion that she failed to afford natural justice by allowing the applicant to adduce more complete evidence on an affidavit and/or to cross-examine his wife's evidence.

50. Even if I am wrong in this, it seems to me that the specific decision made by the District Judge was one within jurisdiction, and one in respect of which an appeal lay, and accordingly judicial review is not an appropriate remedy to deal with that complaint.

Bias

51. The applicant also claims that the District Judge displayed a degree of bias or prejudgement in her approach. This argument is made in the context of the evidence of the applicant's solicitor that the District Judge made perhaps a somewhat unfortunate comment with regard to the application being a form of "game of Russian roulette" or that she might "put her finger in the air and pluck a number". The personal tensions and unhappiness of the parties must be apparent to a judge during the hearing of matrimonial proceedings and many judges in that context will seek to achieve a degree of informality, or at least a degree of pleasantness, in his or her approach. In that context, it is easy to envisage circumstances where the judge might use colloquial language to put the parties more at their ease. The approach taken by the District Judge was not, in my view, an approach in any way akin to a game of Russian roulette, nor did she come to a conclusion that was so irrational as to amount to such. She required the parties to confirm the contents of each of their affidavits of means, and she heard submissions from each of the parties through their solicitors. I accept that, if the District Judge used the language said to have been used by her, that it may not have had the effect that she intended, namely to put the parties at their ease, or to explain to them the difficulty that any judge would have in coming to a decision as to how limited resources were to be distributed. The District Judge, it seems to me, was endeavouring to show her humanity, and also to identify to the parties the real difficulty that any judge has in calculating a fair means to distribute limited resources in the context of a marriage breakdown.

52. Furthermore, it seems to me that the expressions used by the judge were used more as an illustration of how the process might *appear*, rather than how it actually was. She was not explaining the process as *she* engaged it, but perhaps rather, the process as it might *appear*, either to litigants, or to an outsider. She was, in that context, recognising her own degree of experience in dealing with matrimonial cases, and her own knowledge of the basic financial needs of an individual living in modern Ireland. I do not consider that

the comments made by the District Judge amount to a degree of bias or prejudging of the matter.

53. I also do not consider that the judge displayed that she had any "fixed policy" with regard to the conclusion that she was to come to in saying that, in her experience, persons who come before her whose sole income was social welfare often resisted an application for maintenance on the grounds that they needed the entire of the welfare payment in order to live. That was not, in my view, a bias or prejudging of the matter, but rather an observation by her that her experience as a judge led her to believe that the sum of €188, the current social welfare payment for an unemployed individual, was a basic minimum for day-to-day living.

54. Counsel for the applicant relies on the decision of Kearns P. in *Farrelly v. District Judge Watkin* [2015] IEHC 117, where the applicants sought to challenge a decision of the District Judge on the basis that she had predetermined the matter. The President did not accept the argument that there was evidence of prejudging the matter, but he did take the view that a *"reasonable onlooker"* would not have understood the hearing in the District Court as *"manifesting the qualities of constitutional justice appropriate to a criminal trial where the liberty of an individual was at stake".* That decision was made in the light of certain observations made by the District Judge that any consideration of leniency could not arise in the absence of some sort of confession of post-conviction guilt by the applicant.

55. The judgment of the President must, it seems to me, be seen in the context in which it was decided, namely where the matter was a prosecution and where the liberty of the applicant was in issue, and offers me little assistance in this case.

56. Furthermore, I consider that the conduct of the District Judge in the case is more akin to that identified by the Supreme Court in *L.M v. O'Donnabháin* [2011] IESC 22. In that case the Circuit judge was hearing an application for nullity, and after the case was called the judge, who had obtained prior to the hearing a copy of the report of the court-appointed medical inspector, and before the parties went into evidence, said that he had read the report and that "on the face of it you don't have a case".

57. The Supreme Court refused an order of certiorari and the following description by Fennelly J. of the approach of the Circuit Judge in that case seems to me to be particularly apposite to the circumstances of the present case:

> *"Secondly, and on the other hand, I do not think that this is a true case of bias at all. To the extent that the learned Circuit Court Judge had disposed of the application for an adjournment in an abrupt or peremptory fashion, the appellant may well advance a complaint grounded on departure from fair procedures. That in truth is the burden of his complaint. It is unnecessary to raise any issue of bias. The behaviour of the learned Circuit judge does not evince any disposition to favour one party over another, merely to dispose of the case. I do not believe that the facts outlined by the appellant disclose any basis for objective bias."*

58. The view of Fennelly J. in essence is that a judge must be afforded quite a wide margin of appreciation in the conduct of a case. More significantly however, and this is particularly important in the instant case, the Supreme Court held that the behaviour of the learned Circuit Judge did not evince any deposition of favouring one party over another, but that his approach had merely shown a desire to dispose of the case with expedition.

59. No argument is made in this case that the District Judge showed any bias in favour of either party, and indeed no argument could be made that such was the case. Neither party was permitted to cross-examine the evidence of the other party, neither was permitted to elaborate on the evidence contained in their respective statement of means, and each of them was permitted to make submissions through their solicitor. The trial judge showed an interest that the matter be dealt with expediently, and she pointed to the fact that she had a long list and limited time. Her approach did not amount to a bias in favour of either party or against the applicant.

60. Thus the applicant has not persuaded me that the District Judge has by her behaviour shown a degree of bias against him such that he was denied natural justice in the conduct of the case.

Failure to give reasons

61. Finally, the applicant claims that the respondent failed to give reasons for her decision. The applicant relies on the decision of the Supreme Court in Mallack v. Minister for Justice, Equality and Law Reform [2012] 3 I.R. 297, and in particular the *dicta* of Fennelly J. at para. 68, that the *"most obvious means of achieving fairness is for reasons to accompanied the decision."* The rationale behind that approach is of course that a person is in a stronger position to assess whether a decision ought to be appealed if reasons for the decision are clear. A similar approach is taken by McMenamin J. in Clare County Council v. Judge Kenny [2009] 1 I.R. 22, also relied on by the applicant, where the learned judge held that reasoning or the giving of reasons was not maybe desirable but was *"required … so that all the parties would be aware precisely of their positions".*

62. Reliance is also placed on the judgment of Clarke J. in *Rawson v. Minister for Defence* [2012] IESC 26 at para. 6.5 where he said:

> *"It has consistently been held that parties who have a right of appeal within a process are entitled to sufficient information to enable them to consider, and it appropriate to mount, such an appeal."*

63. The applicant claims that he has a statutory right to appeal to the Circuit Court and that he was in the circumstances entitled to know the reasons for the District Judge's decision. There is evident to me certain circularity in this argument, however, in that the applicant has not said on affidavit, either personally or through his solicitor, that it is his intention to appeal. Were the contest between the parties to have been one as to an entitlement for maintenance then it is arguable that the applicant would have required to know the reasons for which the District Judge came to a decision to grant maintenance. However, the issue was one of quantum only, and the applicant knows the figures that were before the District Judge, and the basis on which she calculated that the figure available to an individual in receipt of social welfare assistance was the relevant and appropriate figure to guide her determination. Not only did the applicant know the information that was available to the District Judge, but he knew the approach she took. Thus while I accept the argument of his counsel that he was entitled to reasons, it seems to me that he did have sufficient reasons on which to make a decision whether to appeal. Thus it seems to me that the failure of the District Judge to more fully articulate her reasoning did not led to any injustice that would lead me in my discretion to grant an order for certiorari and quash the decision of the District Judge.

64. Therefore, I refuse the relief sought in certain regard to the maintenance order made in respect of the wife.

Summary

65. I make an order quashing the order for maintenance in respect of the two sons of the marriage, but refuse the relief sought in respect of spousal maintenance.