THE COURT OF APPEAL

UNAPPROVED
REDACTED

Neutral Citation Number [2021] IECA 204
Court of Appeal Record Number 2020/161

Whelan J.
Costello J.
Murray J.

BETWEEN

J.S.

APPLICANT/
APPELLANT

- AND -

M.S. AND A JUDGE OF THE CIRCUIT COURT, NORTHERN CIRCUIT

RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 19th day of July 2021

Introduction

1. This is a most unusual appeal. On 6 July 2020, the High Court (Meenan J.) granted the applicant an order of *certiorari* quashing a decision of a judge of the Circuit Court, made on 22 March 2019, in proceedings between the applicant and the first named respondent, and remitted the matter for further consideration by a different judge of the Circuit Court. Notwithstanding this favourable outcome, the applicant appealed to this court and sought leave to appeal directly to the Supreme Court pursuant to Article 34.5.4° of the Constitution. On 14 December 2020, the Supreme Court refused leave to appeal

directly to it ([2020] IESCDET 136). Thereafter, the applicant pursued his appeal before this court.

The history of the litigation

2. The applicant and the first named respondent are Polish nationals living in Ireland, and were married to each other in Poland in 2009. There are two children to the marriage, born in August 2009 and March 2012. Prior to the breakdown in the marriage, the applicant, who is the father of the children, was their primary carer and the first named respondent ("his wife"), their mother, worked outside the home. In or about August 2016, the marriage relationship deteriorated, and his wife left the family home with their two children. According to the applicant, she is living with another partner. The parties instituted divorce proceedings in Poland. Those proceedings are ongoing.

3. On 18 November 2016, his wife issued a summons seeking maintenance from the applicant and custody of their two children. On the 22 June 2017, an interim order was granted pursuant to s. 7 of the Family Law (Maintenance of Spouses and Children) Act 1976 ordering the applicant to pay maintenance in respect of the children to his wife in the weekly sum of €100 on and from 23 June 2017.

4. On 28 September 2017, the District Court made an order under s. 11 of the Guardianship of Children Acts 1964-1997 directing that custody of the two children be granted to his wife and that the applicant was to have access to the children after school on every second Friday to Sunday at 8 p.m., every Wednesday after school until Thursday morning, and every Thursday after school to 5.45 p.m. On 2 October 2017, the applicant appealed that decision. He contends that there should be joint custody of the children.

5. On 28 October 2017, the District Court made an order pursuant to s. 5(1)(a) of the Act of 1976 directing the applicant to pay his wife weekly maintenance in respect of the children in the sum of €120. This order also was appealed by the applicant, who contends

that he should not be ordered to pay maintenance, but rather he should receive maintenance from his wife.

6. The two appeals to the Circuit Court had not been resolved a year later so the applicant applied on 27 September 2018 to vary the maintenance order pursuant to s. 6(1)(b) of the Act of 1976, and on 24 September 2018 to vary the order regarding access and custody pursuant to s. 12 of the Act of 1964.

7. On 10 October 2018, the District Court varied the provisions as to access by providing that in "Week 1", the applicant was to have access from Friday after school to Monday at school and each Wednesday after school to Thursday 8 p.m. On "Week 2", the children were to spend the weekend with his wife. Directions were also given in relation to summer and Christmas holidays. There was no alteration to the maintenance payable by the applicant.

8. In December 2018, in the District Court appeal, the Circuit Court directed the applicant to disclose details of his bank accounts to his wife. The matter was adjourned until 22 March 2019 to permit this to occur. On 22 March 2019, the appeal was listed before a different judge of the Circuit Court. The court dismissed the appeal and affirmed the order of the District Court of 28 September 2017, and ordered the applicant to pay his wife the costs of both the District Court and the Circuit Court. The order does not recite what occurred in relation to the orders of 28 October 2017 or 10 October 2018.

9. On 21 May 2019, the applicant completed an *ex parte* motion docket in respect of an application for leave to seek judicial review of the decision of the Circuit Court of 22 March 2019, pursuant to O. 84, r. 21 of the Rules of the Superior Courts. He named his wife as the sole respondent to the proceedings. On 27 May 2019, the High Court (Noonan J.) directed the applicant to issue and serve a notice of motion seeking leave to apply for judicial review returnable for 25 June 2019 on notice to the first named respondent.

On 9 July 2019, the High Court (Ní Raifeartaigh J.) granted the applicant leave to seek judicial review and directed that *"a judge of the Circuit Court"* be added as a respondent to the proceedings. She made no order directing that a judge of the District Court be joined as a respondent. The order records that the applicant was given leave to apply by way of application for judicial review for the reliefs set forth at para. D of the statement on the grounds set forth at para. E therein.

The applicant's pleadings

10. By his *ex parte* motion docket, the applicant applied for:

"1. An order granting the applicant leave to seek judicial review of the decision [of 22 March 2019] where [the judge] dismissed appeal from court order from District Court [of 10 October 2018 and 28 September 2017] where [the District Court judge made orders pursuant to the Act of 1976 and Acts of 1964-1997]. Apply for cancelling them and replacing share custody 50/50.

2. I apply a cancellation charge me the cost of the courts in the District, Circuit and High Court.

3. I apply for refund of not correctly receive maintenance with interest from wife.

4. I apply to receive the same Social Welfare support that my wife receives from August 2016 along with compensation for previous years.

5. I apply to receive the same legal assistance as the wife receives with compensation for previous years.

6. I apply to get a social house or social surcharge to the rent for the house, as the wife.

7. I apply to receive a free medical care, like a wife.

8. Compensation for the harm caused to the children and me.

9. Such further or order (sic) as to this Honourable Court shall deem necessary."

11. In his statement required to ground the application for judicial review, the applicant sought *certiorari* of the orders of the Circuit Court of 22 March 2019 and of the District Court of 28 September 2017 and 10 October 2018. In addition, he applied for relief as follows:-

> *"I apply for share custody 50/50. I apply for not charging me with any costs. Also requests reimbursement of the amounts of maintenance which gave her with interest and making satisfy for harm done, which have been done to me and children. I also apply for the same social assistance, what a wife receives without division into better or worse parents with compensation for previous periods, when I did not receive them.*
>
> *…*
>
> *I request [an order] … granting me the main or equal care for children without any division into better or worse parents and granting me financial support for the maintenance of children, the way a wife has support."*

12. It is important to note the exact terms of the applicant's pleadings because he was granted leave to seek judicial review in respect of the reliefs sought in para. D of his statement grounding his application for judicial review. His proceedings are limited to those grounds in respect of which leave was granted. This means that he may not pursue issues in respect of which leave to seek judicial review was not granted and specifically, he may not seek relief in respect of matters other than those I have set out above. While the applicant has complained at different points in these proceedings of *"formalism"*, the limitation of any application for judicial review to the reliefs and grounds in respect of which leave has been granted is a fundamental and clearly established feature of the remedy and procedure governing its grant; see *Lavole v. O'Donnell* [2007] IESC 35, where Murray C.J. said, *"[i]n principle judicial review proceedings should be confined to the*

grounds upon which leave was granted. This is what the rules require and is necessary for the efficient and fair conduct of litigation."

13. The applicant himself records that Ní Raifeartaigh J. informed him that his complaints that his wife is wrongfully in receipt of certain welfare benefits and of legal aid, and of the fact that he is not in receipt of social welfare benefits or legal aid, or complaints that he was discriminated against by An Garda Síochána, did not form part of the proceedings and would not be taken into account in the judicial review proceedings.

14. Ní Raifeartaigh J. joined a judge of the Circuit Court as a respondent to the proceedings, but not a judge of the District Court. It follows that the relevant judge of the District Court was not a party to these proceedings and, accordingly, it was not open to the High Court to quash the decisions of the District Court in circumstances where the relevant party was not a party to the judicial review proceedings. It is clear to me, therefore, that Ní Raifeartaigh J. did not intend to grant the applicant leave to seek judicial review of the decisions of the District Court. This is consistent with the fact that the applicant chose to appeal the decisions of the District Court in question and that the High Court granted leave to seek *certiorari* of the decision of the Circuit Court in respect of the appeals. Furthermore, O. 84, r. 21(1) RSC provides that an application for leave to apply for judicial review shall be made within three months from the date when the grounds for the application first arose. The time to seek judicial review of the District Court orders had long since expired. While it is possible for the court to extend the time, pursuant to sub-rule (3), no application to extend the time to seek judicial review of these orders was sought or granted. Therefore, it is not possible to obtain, in these proceedings, any relief by way of judicial review in respect of the orders of the District Court.

The decision of the High Court

15. Neither the first nor the second named respondents opposed the application for judicial review, so no replying affidavits or opposition papers were filed. Meenan J. adjourned the application for three weeks to give himself sufficient time to consider the extensive papers filed by the applicant. On 6 July 2019, Meenan J. gave an *ex tempore* judgment. He held that the hearing on 22 March 2019 in the Circuit Court *"was not in accordance with law"*. He held:-

> *"I have had an opportunity to read these papers and it seems to me that the appropriate order for this Court to make, having considered the transcript of the hearing that took place in the Circuit Court on 22 March 2019 and also having regard to the order made by Ms. Justice Ní Raifeartaigh on 9 July [2019], it seems to follow and this is obviously, given the position which effectively the respondent, the second named respondent is taking that I ought to grant the order sought of certiorari and remit the matter to the Circuit Court for the appeal to be heard by a judge other than the one named in the proceedings.*
>
> *…*
>
> *I appreciate that [Mr. S. has] numerous other issues, but none of them are before this court,… I am going to make an order in terms of the reliefs which are being sought and that's as is set out in the order of Ms. Justice Ní Raifeartaigh on 9 July 2019, so that effectively sets aside the order of the Circuit Court, then then I am going to remit your appeal back to the Circuit Court for the purposes of a re-hearing. … that re-hearing is to take place before a judge other than the one named in the proceedings."*

16. The trial judge awarded the applicant his expenses and outlay associated with and arising from the hearing of the judicial review proceedings. He explained that he could not

deal with the other issues which the applicant sought to agitate and confirmed that the judicial review proceedings were finished.

The appeal

17. Despite the fact that the applicant had succeeded before the High Court, he appealed to this court and sought leave to bring a leapfrog appeal to the Supreme Court. He filed a detailed notice of appeal running to thirty pages which canvassed a myriad of arguments, some of which did not form part of the proceedings before the High Court. His essential ground of appeal is to be found in his written submissions, which reveals why he has appealed. He submits:-

> *"I request that the entire case be considered comprehensibly … the judgment of the High Court didn't settle any case definitively, despite that fact that, by submitting the appeals, I hoped that the final case would solve all the problems described."*

18. While not purporting to summarise all of the detail in the notice of appeal, the following gives a flavour of the grounds upon which the applicant has appealed the decision of the High Court. He alleges that the trial judge should have rectified *"the situation in the proceedings in the District and Circuit"* courts, he is afraid to have the cases reheard in the District or Circuit Court, and he said the procedure fails to vindicate his rights under the European Convention on Human Rights (ECHR), the EU Charter of Fundamental Rights ("EU Charter") and the Constitution; *"the system is the problem and not just the judges in his cases"* (though in his oral submissions he stated that his complaints were not systemic but were confined to the judges who had heard his cases in the District Court and the Circuit Court). He alleges that the High Court should have initiated disciplinary proceedings against the judges under s. 7 of the Judicial Council Act 2019 (which had not yet been commenced) and should have referred the judges for *"consideration under Article 35"* of the Constitution (for impeachment). He says the High

Court should have considered allegations of misfeasance in public office against the relevant judges and that the High Court ought to have made a reference to the Court of Justice of the European Union (CJEU) pursuant to Article 267 of the TFEU. He complains that national procedural law effectively denies him a remedy as required under Articles 7 and 13 of the ECHR and he says that he should have been awarded *Köbler* type damages.

19. His fundamental claim is that he was not treated equally and that there was discrimination against him as compared with his wife, not only in relation to the proceedings, but also in relation to matters of social welfare and legal aid. He says that the courts have failed to uphold the best interests of the children by not awarding equal custody and access to both parents. He claims damages of €1m. against his wife and €3m. against the judge of the Circuit Court.

20. The notice of appeal is diffuse. As the applicant has represented himself throughout these proceedings, no issue is taken regarding the form of the notice of appeal. Nevertheless, and while affording him considerable latitude, it is apparent that, insofar as he seeks redress for these complaints, they are largely outside the scope of his judicial review proceedings, or exceed the jurisdiction of the High Court and this court. The most constructive approach is to consider Part IV of his notice of appeal where the applicant sets out the precise orders he seeks in the event of his appeal being successful. Reliefs 1, 2, 3 and 7 relate to the substantive issues concerning custody, access and maintenance of the children.

21. At Relief 4, he asks the *Supreme Court* to refer fourteen, rather tendentious, questions to the CJEU *"in order to repair the judicial system, to protect the children and me against a defective judicial system, to restore the rule of law, protection against discrimination and synchronisation of laws as interpreted by EU law and the European Convention on Human Rights will be followed by final decisions on custody and child*

maintenance." At Relief 6, he seeks the immediate application of the decision of the CJEU on the reference not just to his case but to *"all fathers"*, and at Relief 9 that all judgments of CJEU and ECtHR be applied without delay.

22. In Reliefs 5 and 8, he seeks an award of damages from his wife in the sum of €1m. and against the second named respondent in the sum of €3m.

23. At Relief 10, he seeks access to all DAR files of all proceedings in the District Court, Circuit Court and the High Court judicial review. In Relief 11, he seeks to have the proceedings heard in public. In Relief 12, he seeks disclosure of his wife's applications for, and granting of, social welfare benefit, legal aid, housing support from the local county council and a medical card. In Relief 13, he seeks *"the form of equality of arms in a lawsuit"* to the level that his wife receives; and at Relief 15 he seeks *"an accessible approach"* when submitting documents to court. There is no Relief 14.

Discussion

24. The applicant submitted extraordinarily voluminous papers in support of his appeal, running to more than 3,600 pages. He has clearly conducted immense legal research. He submitted two, detailed written submissions of approximately 10,000 words each in support of his very extensive notice of appeal, and two affidavits grounding his judicial review proceedings. These have all been carefully considered by the court.

25. The fundamental difficulty in this appeal, it appears to me, is that the applicant misunderstands the nature of judicial review proceedings and, in particular, the distinction between proceedings which determine substantive matters, and those which do not. The District Court and the Circuit Court on appeal are designated by the Acts of 1976 and 1964-1997 as the courts to determine questions concerning maintenance of children, custody and access. The merits of the arguments, and most importantly, the evidence relevant to the arguments, are considered in the first instance by a judge of the District

Court and on appeal by a judge of the Circuit Court. It is also important to emphasise that the appeal to the Circuit Court is an appeal by way of rehearing. This means that each party is in a position to present their case fully afresh. They are entitled to adduce evidence and advance arguments which were not raised in the District Court. The Circuit Court considers all of the issues raised *de novo*. There is no further appeal from the decision of the Circuit Court.

26. Judicial review is an entirely different procedure. It is not an appeal from the decision of the inferior court to the High Court. It is not concerned with the merits of the decision of the inferior court or tribunal. It does not engage in resolving the substance of the issue(s) before the inferior court or tribunal. This distinction between courts which rule on substantive issues on the one hand, and those which review the legality of those decisions on the other hand, is both clear and fundamental. In putting in place a process whereby the *merits* of proceedings concerning maintenance of children and issues of custody and access are determined by one court, appealable *on the merits* to another, and amenable to review by another on grounds of legality alone, the State is not in breach of any provision of either the ECHR or of European law. Therefore, the limitations on the scope of the instant proceedings is not in breach of any such principles. The fact that a trial by a reviewing court is limited in its scope in comparison to a trial on the merits, is in no way incompatible with the requirements of Articles 47 and 52(3) of the EU Charter or Articles 7 and 13 of the ECHR. This satisfies the rights of the applicant to access to an independent and impartial tribunal where his case may be determined in accordance with law.

27. Hogan & Morgan in *Administrative Law in Ireland* (5th ed., Round Hall, 2019) state with admirable clarity and concision in para. 10-03:-

"The High Court, when exercising its powers of judicial review, is not concerned with the merits, but rather with the lawfulness of the decision under review." (see for example, *Carrons Wind Farm v. Valuation Tribunal* [2018] IEHC 64).

28. This distinction in principle is clear, though on occasion its application may not also be straightforward. It is to be contrasted with an appellate jurisdiction. An application for leave to seek judicial review in the High Court of a decision of the District Court or the Circuit Court is not an appeal to the High Court. The High Court does not rehear the case. The High Court is not concerned with the merits of the case. The High Court does not hear evidence relating to the substantive issues with a view to determining those issues. It receives affidavit evidence (though the possibility of providing oral testimony exists) relevant to its review of the legality of the decision under review. The High Court is solely concerned with the legality of the decision of the inferior court, in this instance, or tribunal.

29. Bearing this fundamental principle in mind, it is apparent that there was no jurisdiction in the High Court and, therefore, no jurisdiction in this court on appeal from the High Court, to grant Reliefs 1, 2, 3 and 7 as they concern the substantive issues of custody, access and maintenance. As was submitted by counsel for the second named respondent, there is no jurisdiction in this court to entertain these claims. I agree. For this reason, these reliefs must be refused.

30. Reliefs 4, 6 and, to some extent, 9 concern the applicant's request that the court refer a series of questions for a preliminary ruling to the CJEU in accordance with Article 267 TFEU. The Article provides:-

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) ...

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

31. The notice of appeal appears to be a composite notice of appeal in the sense that it was also the notice for leave to seek a leapfrog appeal to the Supreme Court. At p. 25 of his notice of appeal the applicant applies to the Supreme Court for a preliminary ruling of fourteen questions.

32. Also on p. 25 of the notice of appeal, the applicant requests the High Court to send thirteen preliminary questions to the CJEU. This likewise cannot arise in the context of an appeal from the decision of the High Court to the Court of Appeal.

33. In order to give the applicant the benefit of the doubt, I shall construe his notice of appeal as including a request that this court refers the fourteen questions set out for a preliminary ruling to the CJEU in accordance with Article 267.

34. If the court is to refer questions to the CJEU, the court must be satisfied that an issue as to the interpretation of the treaties or EU legislation arises in the proceedings, and that a decision on the question is necessary to enable the court to give judgment in the proceedings before it. In Case 283/81 *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, the court held that:-

"9. … the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or

tribunal concerned is compelled to consider that a question has been raised within the meaning of [Article 267]. …

10. … [a national court is] not obliged to refer to [the CJEU] a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case."

35. These principles have been elaborated and applied in numerous decisions since 1982, but still govern all invitations by parties to a domestic court to refer questions to the CJEU.

36. The first issue is to consider whether any question of EU law arises for determination in the proceedings. The judicial review proceedings concern the legality of a decision of the Circuit Court of 22 March 2019 when the applicant's appeal against the orders of the District Court in relation to maintenance, custody and access was dismissed. The High Court has held that the decision of the Circuit Court was reached otherwise than in accordance with law and quashed the decision. The underlying proceedings must now be heard. The first and second named respondents do not argue that the decision was lawful. It necessarily follows that questions tending to address alleged breaches of EU law, the ECHR or the EU Charter do not arise for consideration in these proceedings: the applicant has obtained his remedy of *certiorari* on other grounds. It is thus not necessary for this court to refer any question to the CJEU directed towards establishing the unlawful nature of the decision of 22 March 2019 in the Circuit Court.

37. I have earlier stressed that the issues for determination on an appeal in relation to judicial review proceedings cannot extend to issues in respect of which leave to seek judicial review was not granted. The applicant was given leave to seek judicial review of the decision of the Circuit Court of 22 March 2019 on the grounds set out in his statement of grounds which I have quoted above. Those questions which the applicant requests the

court to refer to the CJEU for a preliminary ruling which relate to the judicial system generally in Ireland, or to previous decisions by either the District Court or the Circuit Court in the custody, access and maintenance proceedings between the applicant and his wife, do not fall for decision on the appeal and, accordingly, cannot form the basis for a reference to the CJEU. Likewise, considerations of the merits of the issues concerning custody, access and maintenance do not arise for consideration by this court or the CJEU. Resolution of the questions posed by the applicant is not relevant to the determination of this appeal. For these reasons, I am of the opinion that this court does not require to refer any of the suggested questions to the CJEU pursuant to Article 267 to enable it to reach its decision on the appeal in these proceedings.

38. In relation to Reliefs 5 and 8 (damages in the sum of €1m. from the first named respondent and €3m. from a judge of the Circuit Court) no damages were sought from the Circuit Court judge in the High Court and no leave to seek such damages was granted by the order of Ní Raifeartaigh J. There was no evidence adduced by the applicant which would enable a court to assess the appropriate award (if any) of damages due to the applicant. More importantly, neither respondent had the opportunity to oppose this relief and to place such evidence as they deemed appropriate before the High Court. There was no determination of the matters of fact essential to the assessment of an award of damages. If this court were to permit this ground of appeal to be argued it will inevitably require the court to remit the case back to the High Court to make the required findings of fact and to determine whether the applicant is entitled to damages and, if so, from whom, and to assess the appropriate level of damages.

39. The Supreme Court recently considered the principles concerning the admission of new evidence and the introduction of new issues on appeal in the case of *Ennis v. Allied Irish Banks plc.* [2021] IESC 12. MacMenamin J. noted that appeal courts are not

automatically precluded from considering new argument or evidence simply because they were not raised in a court of first instance. He referred to the decision in *Lough Swilly Shellfish Grower Co-operative Society Limited & Anor. v. Bradley & Anor.* [2013] IESC 16, [2013] 1 I.R. 227 where O'Donnell J. indicated that appeal courts might apply a certain *"sensible flexibility"* regarding the raising of new grounds on appeals in plenary proceedings, having regard to the *"interests of justice"*. In *Ambrose v. Shevlin* [2015] IESC 10, Clarke J. (as he then was) emphasised that a case which would necessarily involve new evidence, and not simply a new legal argument, would place much greater weight on the side of the equation which lay against permitting a new point to be raised for the first time on appeal, on the basis that the risk of real prejudice will be significant.

40. In my judgment, it is simply not possible for this court to award damages in the sums claimed, or any sum, against either his wife or the judge of the Circuit Court in the circumstances of this case. There was no evidence before the High Court in support of the claimed damages and no leave was given to seek damages against either his wife or the judge of the Circuit Court. Even allowing for the flexibility referred to in the judgments of the Supreme Court, this is not a case where it would be possible for this court to make any award of damages in favour of the applicant. Insofar as this relief might be construed as an application to:

(a) amend his statement of grounds to include this claim for damages;

(b) amend his notice of appeal to include this claim; and

(c) for leave to adduce new evidence relevant to this ground;

I would refuse it for the reasons set out.

41. Relief 9 requests an order that the courts apply *"all judgments"* of the CJEU and the ECtHR *"without delay in accordance with applicable law"*. This court is not called upon to apply any such judgment in determining these proceedings. Insofar as the applicant

seeks a direction that courts in the future would apply the judgments to which he refers in the subsequent hearings of the cases concerning custody, access and maintenance of the children, (a) no such issue arises in these proceedings, and (b) this court will not presume that a court in the future will not act in accordance with law. The relevance or otherwise of the *jurisprudence* referred to would be a matter for the judge hearing the appeal, to determine in light of the issues and evidence before him or her.

42. In relation to Relief 10, the applicant was granted access to the DAR in respect of the relevant hearings prior to this appeal. The DAR of the hearing before the Circuit Court on 21 December 2018 is no longer relevant as the decision of the Circuit Court on 22 March 2019, which followed on from it, has been quashed. The DAR of the hearing in the High Court on 6 July 2020 has been made available to the applicant. The DAR of the application for leave to seek judicial review before Ní Raifeartaigh J., or indeed in the initial application before Noonan J., can have no bearing on the proceedings. Further, the application for the DAR was the subject of a notice of motion issued on 25 February 2021 and returnable in the Directions List of the Court of Appeal on 26 March 2021. On that day, I refused the application for the DAR and thus, this application has already been determined.

43. By Relief 11, it appears that the applicant objects to the conduct of the proceedings *in camera*. Whether this is a challenge to the legislation requiring that such proceedings be conducted *in camera*, or whether it is an application to lift the *in camera* rule in the circumstances of his proceedings, is not immediately clear. In any event, this was not part of the leave to seek judicial review, was not an issue before the High Court and, accordingly, cannot arise on appeal before this court.

44. Relief 12 of the notice of appeal seeks disclosure of his wife's applications and all help she receives in relation to social welfare, legal aid and housing support. These are

matters which fall outside the scope of the judicial review proceedings. Ní Raifeartaigh J. informed the applicant that this was so when she granted him leave to seek judicial review. He is not entitled to relief of this nature in these proceedings.

45. In Relief 13, he seeks *"equality of arms"* which appears to be an application to seek legal aid. He was informed by the High Court that the question of legal aid (whether for himself or his wife) was not part of these proceedings. This too was relief which had been sought in the notice of motion on 26 March 2021 and which was refused. It is not open to this court to grant legal aid to any litigant. That is a matter solely within the competence of the Legal Aid Board under the Civil Legal Aid Act 1995 (as amended).

46. Finally, in Relief 15, the applicant seeks *"an accessible approach"* to the submitting of documents. It is not at all clear what relief is intended by this plea. He has succeeded in filing very considerable papers both in this court and in the High Court. The question of the filing of papers and adducing of evidence in the Circuit Court will be a matter for the Circuit Court to determine in accordance with the Circuit Court Rules and the facilities available in the relevant Circuit Court offices. It is not an issue in respect of which leave to seek judicial review was granted and so is not part of the proceedings, and therefore of the appeal. I would refuse this relief.

Conclusion

47. In summary, as was observed by the Supreme Court in giving its determination on the application for a leapfrog appeal in this case, the applicant succeeded before Meenan J. and obtained an order of *certiorari* quashing the decision of the Circuit Court judge and directing a rehearing before a different judge. In those circumstances, it is difficult, indeed, to understand how the issues addressed by the applicant can be said to arise by way of appeal from the said order. In my judgment, they simply do not and for the reasons set out, I would dismiss this appeal.

48. In view of the deeply felt concerns expressed by the applicant and the unsatisfactory hearing which occurred on 22 March 2019, I would request the President of the Circuit Court to assign a judge who has no previous involvement in this litigation to hear and determine all the outstanding issues, including any interlocutory applications, between the applicant and his wife in relation to custody, access and maintenance of the children. The court recommends that this should occur as soon as the resources of the court permit, given the passage of time and the ages of the children.

49. The applicant has not been successful on any ground raised in his appeal. My provisional view, having regard to the provisions of s. 169 of the Legal Services Regulation Act 2015 and O. 99 RSC, is that costs follow the event and the costs of the appeal should be awarded against the applicant. If the applicant wishes to argue that a different order as to costs should be made, he should notify the office of the Court of Appeal within 14 days of the delivery of this judgment and file in the office, and serve on the respondents, a submission of no more than 1,500 words setting out the order he contends the court ought to be make in respect of costs and the basis for his submission within 21 days of the delivery of this judgment. The respondents must file and serve any replying submissions they wish to make within 14 days of receipt of the submission from the applicant. The court will consider the submissions and deliver its ruling on costs to the parties thereafter.

50. Whelan and Murray JJ. have read this judgment in advance and have indicated their approval with it.