APPROVED JUDGMENT NO REDACTION NEEDED

THE COURT OF APPEAL

JUDICIAL REVIEW

Court of Appeal Record No. 2023/121

Woulfe J. **Neutral Citation Number [2024] IECA 169**

Ní Raifeartaigh J.

Power J.

Between

G.M.

Applicant/Appellant

-and-

I.M.

Respondent

JUDGMENT (No. 2) of Mr. Justice Woulfe delivered electronically on the 28th day of June, 2024

1. This second judgment relates to two issues which have arisen consequential upon the principal judgment of the Court (Woulfe J.; Ní Raifeartaigh J. and Power J. concurring)

delivered on the 28th February, 2024, which dismissed the appeal by the applicant/appellant (described in this ruling as "the applicant") against an order of the High Court that a previous order of that Court granting the applicant leave to apply for judicial review be set aside, and also that the proceedings be dismissed and that the respondent recover against the applicant the costs of the proceedings.

(A) Isaac Wunder Order

Background

2. The background to this issue is as follows. These judicial review proceedings arose out of very protracted family law proceedings between the same parties, in circumstances where the parties had formerly been in an intimate relationship and have a child together. The parties have been estranged for a number of years now, and the long running and highly contentious litigation has related primarily to matters such as access by the applicant to their child and payment of maintenance by the applicant.

3. The proceedings which gave rise to the judicial review were appeal proceedings in the Circuit Court from an order or orders made by the District Court as far back as the 8th December, 2015. The trial judge stated in the Court below that these proceedings had previously been listed before the Circuit Court for hearing on more than forty occasions. During her ruling on costs the Circuit Court judge stated that she had no doubt that the costs in the matter had been significantly increased by the applicant's unmeritorious conduct, including his constant breaches of the access order and constant applications to the Court.

4. During the submissions on costs before the Circuit Court, then counsel for the applicant stated that the matter of bringing repeated litigation could be dealt with by way of an Isaac Wunder order instead of by way of a costs order. At the conclusion of the hearing,

the Circuit Court judge stated that she was making an Isaac Wunder order restricting the applicant from taking any further proceedings in the District Court, the Circuit Court or in any other Court, and she then purported to make such an order restricting any such proceedings without the leave of the Court.

5. In the judicial review proceedings the applicant sought, *inter alia*, an order of *certiorari* quashing that Circuit Court order. The High Court granted leave to apply for judicial review, but subsequently set aside the grant of leave on the basis of misstatements and non-disclosure by the applicant. The applicant appealed, and in our judgment we upheld that decision subject to the one minor qualification that the misstatements and non-disclosure were not material to the applicant's challenge to the Isaac Wunder order, which on balance we found the grant of leave did encompass. In the circumstances, we varied the order of the Court below to the limited extent of not setting aside the grant of leave on that one aspect of his challenge to the Circuit Court order.

6. The issue which then arose was whether that small outstanding balance of these proceedings (regarding the validity of the Isaac Wunder order made by the Circuit Court) should be remitted to the High Court for determination, in circumstances where the trial judge had cast doubt upon the validity of that order as made, and where remittal would, inevitably, give rise to further costs. The Court indicated to the parties that, in the alternative, this Court could make an order quashing the Isaac Wunder order and proceed to entertain an application by the applicant for a fresh Isaac Wunder order. The parties agreed to this course of action, and subsequently written submissions were filed and a supplemental hearing was held on this issue.

Submissions of the Parties

7. In her submissions the respondent refers to being subject to more than one hundred and three court attendances since November 2012, in either the District Court or the Circuit Court, and she also refers to two unsuccessful judicial review proceedings brought by the applicant in the High Court. She submits that continued failure to comply with various court orders and failure to deal honestly and openly with the s. 47 report compilers caused the multiple court appearances and resulting interim orders. She refers to three affidavits filed by her in the Circuit Court which are said to set out the applicant's continued failure to comply with various orders, and she notes that the applicant did not file any replying affidavits in response, and this Court was furnished with copies of these affidavits.

8. The respondent states that in addition the applicant unsuccessfully appealed various safety orders made by the District Court, was involved in applications for grandparent access made by his parents and appeals of District Court orders for such access which were then not proceeded with, and also made an unsuccessful half-sibling access application on behalf of his minor daughter. She states that as a result of the unending litigation she has suffered and continues to suffer significant financial strain, and that the continual litigation has had a significant personal impact on her, and more particularly has caused significant stress and anxiety on the part of the minor child.

9. The respondent submits that the Courts have a jurisdiction to restrain a person who has habitually or persistently instituted vexatious or frivolous civil proceedings from bringing any further proceedings without first seeking the leave of the Court to do so, which restraining order is commonly referred to as an Isaac Wunder order. She refers to certain authorities which state that, in assessing the question of whether the proceedings are vexatious, the Court is entitled to look at the whole history of the matter.

10. The respondent submits that the continued and ongoing litigation has caused and continues to cause her enormous personal stress and anxiety, together with financial stress. The continued litigation is said to have led to a diminution in family finances, with a current expenditure in excess of €300,000, which has had an impact on the family's ability to holiday and to spend the money expended on litigation on the family and the minor child more generally. It submitted that an Isaac Wunder order, while restricting unfettered access to the Courts, would act as a filter and/or a supervisory role of the Court in preventing the continued personal and financial harassment and oppression of the respondent, and by extension of the minor child.

11. In his submissions the applicant states that the Circuit Court proceedings were initiated by the respondent by way of appeal of the District Court order dated the 8th December, 2015, and, as such, all subsequent appearance dates relating to these proceedings before the Circuit Court are as a consequence of the applicant's appeal. As regards the number of court attendances, he refers to certain correspondence (which was not furnished to the Court) which he says indicates that there were in fact eight applications brought by the parties before the District Court and out of these eight, six were brought by the respondent and two were brought by the applicant.

12. The applicant submits that to characterise these proceedings as the applicant having brought an inordinate amount of litigation against the respondent and/or having caused significant costs to be incurred is plainly wrong and baseless. Both parties have availed of their right of access to the courts on a number of occasions, and both parties have a particularly strong interest in the proceedings as they relate to their son. It is said that it is not unreasonable for either party to initiate proceedings and/or appeal orders and/or bring judicial review proceedings as has occurred in this matter. It is also submitted

that family law proceedings often result in a large number of appearances and hearing dates.

13. As regards the law, the applicant accepts that the approach to the making of an Isaac Wunder order was set out in cases such as *Riordan v. Ireland (No. 4)* [2001] 3 I.R. 365 *("Riordan (No. 4)")*, and he goes on to cite two family law cases. In *M.M. v. G.M.* [2015] IECA 29, the Court of Appeal set aside part of a High Court order which directed that "no further application is to be made in respect of the children either by way of enforcement or review" before a certain date, in circumstances where that order went beyond an Isaac Wunder order requiring leave and, if read literally, constituted a denial of access to the courts on a most important question, namely, infant welfare. In *S.P. v. U.G.* [2016] IEHC 693, Abbott J. appeared to be willing to vacate an Isaac Wunder order in part so as to exclude certain family law litigation from the scope of the order, but the Court did not make a final decision on the matter.

14. The applicant submits that the current case does not fall into the category of proceedings for which an Isaac Wunder order should be granted based on the authorities. For a party to have his constitutional right of access to the courts restricted when responding to an appeal brought by another party is said to be clearly not aligned with the principles outlined in the authorities. The applicant submits that at no point could these proceedings be defined as vexatious, and that he has only brought applications, and opposed a number of applications and appeals brought by the respondent, to assert his rights as a father and to maintain his son's right of access.

The Legal Principles

15. In *Riordan (No.4)*, Keane C.J. summarised the jurisdiction to grant an Isaac Wunder order as follows (at 370):

> "It is, however, the case that there is vested in the Court as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the Court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly groundless and vexatious. The Court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public office as well as by private citizens. This Court would be failing in its duties, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation."

16. In *Burke v. Judge Fulham* [2010] IEHC 448 ("*Burke*"), Irvine J. (as she then was) followed certain Canadian authorities when she stated as follows:

> "Amongst the factors a Court may consider justifying the making of such an order are first, the bringing of one or more actions to determine an issue already determined by another court of competent jurisdiction; second, where it is obvious that an action cannot succeed or would lead to no possible good; third, actions brought for an improper purpose including harassment and oppression of other parties; fourth, the rolling forward of issues into subsequent actions; fifth, the whole history of the matter; sixth, a failure on the part of a party instituting proceedings to pay the costs of previous proceedings wherein they were unsuccessful; and finally, the conduct of a party who persistently pursues unsuccessful appeals."

Application of the Principles

17. I fully agree with the approach set out by Irvine J. in *Burke*, and would simply add that the above factors should be looked at in a broad untechnical way, as a list of potential factors capable of adaptation and extension, rather than in any literal or mechanical way, having regard to the broad nature of the jurisdiction described by this Court in *Riordan (No. 4)*.

18. It is helpful to consider the factors in *Burke*, as set out above, in deciding whether an Isaac Wunder order is justified in the present case. The first factor is the bringing of one or more actions to determine an issue already determined by another Court of competent jurisdiction, and the following actions or applications arise under this heading:

(i) The bringing by the applicant of the unsuccessful judicial review proceedings in 2018 to challenge the interim access order made by the Circuit Court dated the 27th June, 2018;

(ii) The bringing of the present unsuccessful judicial review proceedings;

(iii) The bringing of an application to the District Court in 2021 on behalf of his minor daughter for half-sibling access. At para. 9 of her uncontroverted affidavit sworn on the 14th January, 2022, the respondent averred that the District Court was concerned lest the half-sibling access be used as a means of the applicant obtaining access via "the back door"; and

(iv) The bringing or intended bringing of an application to the District Court in October, 2021 to vary access, notwithstanding that there was an extant order of the Circuit Court concerning access, as averred to at para. 8(b) of the said affidavit.

19. The first factor also requires consideration of the huge number of applications and attendances before the Circuit Court since the District Court order in December, 2015. While the applicant acknowledges that huge number, he submits that all subsequent appearance dates relating to these proceedings are as a consequence of the appeal brought by the respondent, rather than any action "brought" by him.

20. With respect, I do not think the matter is that simple. In *Scanlan v. Gilligan* [2021] IEHC 825 ("*Scanlan*"), Butler J. considered an argument by the plaintiff in 2019 proceedings opposing the grant of an Isaac Wunder order on the grounds, *inter alia*, that she had been a defendant to the earlier 2015 proceedings. At para. 115 of her judgment, Butler J. stated as follows:

> "In my view such application for an Isaac Wunder order has to be considered on the basis of its particular facts and the circumstances of the previous litigation between the parties. Whilst in general it would not be appropriate to make such an order against a litigant who has not previously instituted proceedings, this is not an invariable rule as the conduct of the litigant in the earlier proceedings may be such that they have *de facto* become the moving party in the unreasonable or unnecessary extension or prolongation of that litigation."

21. I agree with the approach adopted by Butler J., and it is apposite in the present case. In this case the Circuit Court made an interim access order on the 27th June, 2018, which was subject to future review. In her uncontroverted affidavit sworn on the 27th March, 2019, the respondent set out "an absolute wilful and abject failure" on the applicant's part "to comply with any single aspect" of that interim order, and she explained how this behaviour caused her to apply to the Court to withdraw the respondent's access as previously granted.

22. Furthermore, the Circuit Court judge, in her judgment dated the 23rd May, 2022, which gave rise to the judicial review, referred to the applicant's constant breaches of the access order and constant applications, and stated that she had no doubt in saying that the costs in the matter had been significantly increased by his unmeritorious conduct. In my opinion, as per *Scanlan*, the conduct of the applicant has been such that he is responsible for the unreasonable or unnecessary extension or prolongation of this litigation.

23. The second *Burke* factor is "where it is obvious that an action cannot succeed and would lead to no possible good". The present judicial review proceedings clearly fall into that category, for all of the reasons set out in the principal judgment of the Court.

24. The third factor mentioned in *Burke* concerns actions brought for an improper purpose, including harassment and oppression of other parties. While applications brought by the applicant may have been brought in part for a proper purpose of achieving access or greater access to his son, it appears that his purpose has also included harassment and oppression of the respondent, as set out in three uncontroverted affidavits of the respondent sworn on the 8th March, 2016, the 27th March, 2019 and the 14th January, 2022.

25. The conduct of the applicant amounting to harassment and oppression of the respondent included numerous and multiple unfounded complaints against the respondent regarding the care of the child, and aggressive behaviour and treatment of the respondent, which caused her to obtain a safety order in the District Court against the applicant. I note that in her judgment the Circuit Court judge queried whether the applicant's conduct of the litigation was really just to make life difficult for the respondent, and stated that this conduct had created an enormous amount of stress for her.

26. The fourth *Burke* factor is the rolling forward of issues into subsequent actions, and this can be seen in the applicant's pattern of seeking to use High Court judicial review proceedings to frustrate the outcome of proceedings decided against him in the Circuit Court.

27. The fifth *Burke* factor is the whole history of the matter. That history involves a consistent pattern of unmeritorious conduct on the part of the applicant, including his constant breaches of the access order and constant applications to the Court, as referred to at para. 8 of the principal judgment, and his behaviour towards the s. 47 report compilers. It also involves his unmeritorious conduct of the current judicial review proceedings, in terms of the material misstatements and non-disclosure present in this case.

28. The sixth *Burke* factor is a failure on the part of a party instituting proceedings to pay the costs of previous proceedings wherein they were unsuccessful. This Court was furnished with copies of three District Court orders which ordered the applicant to pay costs to the respondent, and we were informed that no payment of costs has been made by the applicant on foot of same. As regards the first unsuccessful judicial review, the High Court ordered the applicant to pay the respondent the cost of the proceedings "when taxed and ascertained", and it was stated by the respondent's counsel at the hearing that these costs have not been dealt with, which I took to mean have not been adjudicated to date.

29. The final factor referred to in *Burke* was the conduct of a party who persistently pursues unsuccessful appeals. While the applicant was not the party who brought the appeal of the District Court order to the Circuit Court, this is subject to the qualification set out by Butler J. in *Scanlan* as referred to above. It appears from the uncontroverted affidavit of the respondent sworn on the 27th March, 2019 (at para. 19) that the dismissal

of the first judicial review by the High Court was "the subject of a Court of Appeal application", but the nature of that application is unclear. The present judicial review proceedings obviously involve the pursuit of an almost entirely unsuccessful appeal by the applicant.

30. Having considered all of the above factors, I am satisfied that a situation has been reached where to permit the applicant an unrestricted right to continue to litigate against the respondent would be unfair and oppressive to the respondent, and a waste of scarce court time and resources to the detriment of other litigants. While there was some debate at the hearing as to whether only some specified type of family law litigation should be restricted, I think that any attempt at such classification could prove problematic, and it is appropriate that the scope of the order should encompass any litigation against the respondent.

31. Therefore, I would make an order that the applicant be restrained from instituting any proceedings against the respondent, including any appeal proceedings, whether in the District Court, the Circuit Court, the High Court or the Court of Appeal, except with the prior leave of the President of that Court or some judge nominated by the President. It is important to note that the Isaac Wunder order is not an absolute bar to litigation, but rather a controlling device whereby any possible genuine and stateable litigation against the respondent may be permitted, upon the applicant showing there is merit in such a course, but at the same time restricting unmeritorious or vexatious litigation against her.

(B) Costs

32. The respondent sought an order for her costs above and below, on the basis that she was successful in the High Court and largely successful in this Court. The applicant

sought the costs of his appeal to this Court, on the basis that he had to bring the appeal to vindicate his right of access to the Court. In reply, counsel for the respondent submitted that the words "Isaac Wunder order" did not appear anywhere in the applicant's statement of grounds and verifying affidavit, and he referred to para. 61 of the Court's principal judgment which stated that the applicant's misstatements and non-disclosure must be deprecated by this Court.

33. With regard to costs, my view is that the respondent should recover against the applicant 95% of the costs of this appeal, as the applicant has been almost entirely unsuccessful in this appeal. While the applicant was partially successful to a very limited extent as regards setting aside the previous Isaac Wunder order made by the Circuit Court, and partial success might in some circumstances lead to a different costs outcome by taking into account the successful element of an appeal, I do not think that anything more than a 5% discount in the costs order is justified in this appeal for two reasons.

34. Firstly, I have had regard to the matters referred to at para. 62 of the Court's judgment. I stated therein that I had reached the conclusion to vary the High Court order with considerable reluctance, having regard to the history of this matter, including the applicant's previous unmeritorious conduct during the family law proceedings as referred to at para. 8 of the judgment, and his conduct during these proceedings, and in particular the serious level of material misstatements of fact and non-disclosure by him, and the absence of any affidavit by him explaining and apologising for same.

35. Secondly, the fact that the applicant's challenge to the Isaac Wunder order was not properly pleaded in his statement of grounds, nor the facts relied on verified in his verifying affidavit, and thus the necessity for this appeal can be seen as largely attributable to his own default.

36. I would therefore order that the applicant do pay to the respondent 95% of the costs of the appeal, to be adjudicated upon in default of agreement. The order for costs made by the High Court will not be disturbed.

37. As this judgment is being delivered electronically, I note that each of Ní Raifeartaigh J. and Power J. have indicated their agreement with it and with the orders I propose.