[2020] IEHC 691

THE HIGH COURT

[2020 No. 102 M]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995 AS AMENDED BY THE FAMILY LAW DIVORCE ACT 1996

BETWEEN

C

APPLICANT

– AND –

C

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 22nd December 2020.

I

Introduction

1. This is an unhappy case in which a family has relocated from a non-EU/EEA state to Ireland, where things have not gone well thus far. At least two of the children seem unhappy here, their parents' marriage appears to have broken down, there is considerable rancour between the parents, the husband has been the subject of a barring order against which he has brought a currently pending appeal, and the Child and Family Agency and An Garda Síochána have become involved following on alleged violence by the father towards one of his children, though whether the Gardaí continue actively to be investigating matters is unclear.

2. The court refers to the parents hereafter as Mr C and Ms C.

3. As mentioned, a barring order has issued against the husband. This issued from the District Court on 10 November last and directs the father to leave the family home, prohibits him from entering the home until a stated date, and contains prohibitions on using or threatening to use violence, etc.

4. Separately, Ms C has commenced proceedings under the Guardianship of Infants Act 1964 in which, *inter alia*, she seeks an order regulating interim access arrangements with the children. One might perhaps instinctively have expected that Mr C would seek whatever access he wishes for at this time within the context of those proceedings. However, he has commenced separate judicial separation proceedings, as he is entitled to do. In the context of those proceedings he issued a notice of motion of 10 December 2020 in which he seeks, *inter alia*, the following reliefs:

> *"1. An interim order pursuant to section 6 of the Family Law Act 1995 and under section 11 of the Guardianship of Infants Act 1964 regulating the contact that each party is to have to the dependent children of the marriage pending the determination of the within proceedings.*
>
> *2. To the extent as may be required, an order pursuant to section 6 and/or 10 of the Family Law Act 1995 varying the barring order that was made by the District Judge…on the 10th November 2020."*

5. It is relief 2 that is the focus of the within judgment, for a question arises as to whether the High Court, if minded, on the evidence before it, to grant access of the type sought here by the husband, has the power in proceedings such as the within to vary a barring order that has separately been granted by the District Court. The court ruled at the hearing of the within motion that it did not have that power and that it would provide a written judgment outlining its reasons for that ruling. This is that judgment.

6. When it came to this question, counsel for Mr C read from certain correspondence with the lawyers for Ms C in which the following line of argument was advanced (for reasons of clarity the text of the correspondence appears in Bold font):

> *"The legal basis for the assertion that the High Court must and does have a jurisdiction to make the order sought at paragraph 2 of the Notice of Motion is found, first and foremost, in the fact that the High Court has full original jurisdiction under the Constitution [per Art.34.3.1☐] and it has a duty to ensure that the constitutional rights of citizens are vindicated. This jurisdiction cannot be fettered by statute.*
>
> [Court Note: Article 34.3.1☐ of the Bunreacht provides that:
>
> > *"The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal".*
>
> As Hogan et alia helpfully observe of Article 34.3.1☐ in Kelly: The Irish Constitution, 5th ed. (Dublin: Bloomsbury Professional, 2018), at pp. 883-84:
>
> > *"The High Court established in 1961, like its predecessor, has an unlimited civil jurisdiction…and also, under the title of the Central Criminal Court, an unlimited criminal jurisdiction….That is to say, no cause of action known to the law is constitutionally excluded from the jurisdiction of the High Court, nor any criminal matter; though…a statutory 'distribution of jurisdiction may have the effect of confining certain matters with exclusive effect to some other courts",*
>
> and, at p. 887,
>
> > *"[T]he object and purpose of Article 34.3.1☐ was described by Gannon J. in R v. R* [[1984] IR 296*] as ensuring that there was in existence a court to which recourse 'may be had in any event or upon any occasion and in any circumstances where there may exist a wrong for which in justice a remedy may be required….*
> > *Recent case law has stressed that Article 34.3.1☐ is a part of a system of interlocking constitutional guarantees along with provisions such as Article 40.3 which individually and collectively ensure that 'litigants are guaranteed*

> *an effective remedy in respect of all justiciable controversies [S (a minor) v. MJELR* [2011] IEHC 31]"

and, at p. 892 (under the heading *"High Court has inherent power to decline jurisdiction"),*

> *"This power was first asserted by Gannon J. in* R v. R [[1984] IR 296] *where he ruled that notwithstanding the jurisdiction vested in the High Court by Article 34.3.1□, that court retained an inherent power to decline jurisdiction in appropriate cases. Thus, where courts of local and limited jurisdiction enjoyed a concurrent jurisdiction in relation to certain justiciable matters, the High Court was not obliged:*
>
> > *'to provide any person, as a matter of constitutional right, with access to [it] so as to enable him to have recourse to [it] at his choice in lieu of recourse to the court of first instance established by law and having the jurisdiction sought to be invoked'*

and, at pp. 893-94, (under the heading "*Does Article 34.3.1□ prevent the fettering of the powers of the High Court?"),*

> "*It may be noted that* [in] Re McAllister [[1973] IR 238] *Kenny J. used Article 34.3.1□ in rejecting the notion that the Oireachtas could, in a certain class of case, exclude the granting of bail….The correctness of this proposition seems dubious….[I]t does not seem obvious that the exclusion of bail in certain cases trenches on either the area of judicial independence or the particular jurisdiction of the High Court….If Kenny J's view is correct, it would seem that a wide variety of statutory provisions might be rendered unconstitutional on this account. In fact, the difficulty in McAllister is that it tends to collapse the distinction between the investiture of jurisdiction in the High Court on the one hand and statutory restrictions on the availability of certain remedies on the other. It is certainly true that, if the Oireachtas were unfairly to restrict or even exclude the availability of certain remedies, this might be unconstitutional*".

A few points might perhaps usefully be made at this juncture. First, the Oireachtas, having enacted, *inter alia*, the Family Law Act 1995, it cannot be stated that Mr C is without effective remedy, even if a remedy falls to be provided in the first instance by another court than the High Court. Second, the family law area being an area in which there is a great deal of concurrent jurisdiction, one court with concurrent jurisdiction will not lightly intrude on the jurisdiction of another court with concurrent jurisdiction; for the courts to proceed otherwise would be a recipe for chaos. Third, to view, if one were to view, *e.g*., the Family Law Act of 1995 as improperly curtailing the role of the High Court as contemplated by Article 34.3.1□, would be, it seems to the court, to conflate the investiture of original jurisdiction and the statutory regulation of the availability of certain remedies. Fourth, the court

does not see that there has been any failure to vindicate Mr C's constitutional rights.]

In the context of these judicial separation proceedings, section 7(12)(c)(ii) and/or (13) of the Domestic Violence Act 2018, as extended by section 6(a) of the Family Law Act 1995 (as substituted by section 45(b) of the Domestic Violence Act 2018) states:

> *Where an application is made to the court for the grant of a decree of judicial separation, the court, before deciding whether to grant or refuse to grant the decree, may, in the same proceedings and without the institution of proceedings under the Act concerned, if it appears to the court to be proper to do so, make one or more of the following orders– (a) an order under section 6, 7, 8 or 10 of the Act of 2018.*
>
> [Court Note: There appears, with respect, to be some confusion in the quoted text as to where the quoted provision derives from; it is but a recitation of s.6 of the Family Law Act 1995, as amended *("Preliminary orders in proceedings for judicial separation")].*

Accordingly, this enabling provision confers statutory jurisdiction on the High Court to make an Order pursuant to section 7 of the Domestic Violence Act 2018 ["Barring order"] and any Order within that section, It follows that it can vary the terms of an existing barring order. By simple analogy, and also in the context of these judicial separation proceedings, section 6(b) of the 1995 Act extends section 11 of the 1964 Act and in like manner, this enabling provision confers statutory jurisdiction on the High Court to make orders concerning access to children.

By virtue of these respective enabling provisions, it is not necessary for our client to institute fresh proceedings (which our client would otherwise be required to commence in the District Court or the Circuit Court, as the case may be) for the respective reliefs being sought in the Notice of Motion under the 1964 Act, 1995 Act and/or the 2018 Act. The fact that the District Court order is under appeal is, we believe, neither here nor there as the jurisdiction to vary is premised on there being a valid and subsisting Barring Order in existence, which for the time being there is."

II

The Acts of 1996 and 2018

(i) Overview.

7. Notably, the Act of 2018 is not, in what it provides, an entirely novel piece of legislation. It was preceded by the Domestic Violence Act 1996, a great many provisions of which were transposed into the new enactment, though the new enactment involves significant amendments/innovations also. This legislative history means that it can be useful (and here is useful) to consider both the present position under the Act of 2018 and the evolutionary process whereby the Oireachtas arrived at the current legislative position. Why is that useful? Because the degree of similarity between the two measures, insofar

as is considered hereafter, is such that it would be remarkable if the jurisdiction that Mr C contends for had never previously been identified – and as will be seen there is very recent case-law which suggests that its non-identification is not because what was there went unseen but because in truth the proper operation of the Act of 2018 (as with the previous operation of the Act of 1996) differs from what has been contended for by Mr C.

(ii) Variation.

8. Turning to the Act of 1996, s.3 of that Act ("*Barring order*") – its counterpart in the Act of 2018 is s.7 ("*Barring order*") – provided in subsection (6) that *"Where a barring order has been made, any of the following may apply to have it varied…".* So, variation was a subsection of s.3 and not provided as a separate form of relief. The same arrangement now exists under s.7 of the Act of 2018, which provides in subsection (12) that "*Where a barring order has been made, any of the following may apply to have the order varied*…". So again, variation is a subsection of s.7 and nor provided as a separate form of relief.

(iii) Exceptionality/Conditionality.

9. Another aspect of the Act of 1996 worth mentioning is s.3(3) of same – its counterpart in the Act of 2018 is s.7(3) and (4). Section 3(3) provided that -

> *"A barring order may, if the court thinks fit, prohibit the respondent from doing one or more of the following, that is to say: (a) using or threatening to use violence against the applicant or any dependent person; (b) molesting or putting in fear the applicant or any dependent person; (c) attending at or in the vicinity of, or watching or besetting a place where, the applicant or any dependent person resides; and shall be subject to such exceptions and conditions as the court may specify."*

10. The effect of this provision was that where, for example, no application was being brought under s.11 of the Act of 1964, it was nonetheless possible to apply for some form of exception/conditionality to a prohibition under s.3.

11. Section 7(3) and (4) of the Act of 2018 now likewise provide as follows:

> *"(3) A barring order may, if the court thinks fit, prohibit the respondent from doing one or more of the following: (a) using or threatening to use violence against, molesting or putting in fear, the applicant or a dependent person; (b) attending at or in the vicinity of, or watching or besetting, a place where the applicant or a dependent person resides; (c) following or communicating (including by electronic means) with the applicant or a dependent person.*
>
> *(4) A barring order may be subject to such exceptions and conditions as the court may specify."*

(iv) Making of Orders on Appeal.

12. Section 3(7) of the Act of 1996 provided that "*For the purposes of subsection (6), a barring order made by a court on appeal from another court shall be treated as if it had been made by that other court"*. This had the effect that a variation application had to be to the District/Circuit Court where the appeal had been to the Circuit/High Court. Somewhat similar provision now appears in s.21 ("*Discharge of orders*") of the Act of 2018, subsection (4) of which provides that "*For the purposes of this section, an order made by a court on appeal from another court shall be treated as if it had been made by that other court", i.e.* the lower court when it goes on to determine the relevant, e.g., matrimonial proceedings, can itself discharge the barring order.

(v) Hearing of applications under various Acts.

13. Section 9 of the Act of 1996 ("*Hearing of applications under various Acts together*") – its counterpart is s.15 of the Act of 2018 ("*Hearing of applications under Acts together*") – provided, *inter alia*, as follows:

> *"(1) Where an application is made to the court for an order under this Act, the court may, on application to it in the same proceedings and without the institution of proceedings under the Act concerned, if it appears to the court to be proper to do so, make one or more of the orders referred to in subsection (2).*
>
> *(2) The provisions to which subsection (1) relates are as follows, that is to say…(a) an order under section 11…of the Guardianship of Infants Act 1964…".*

14. Section 15 of the Act of 2018 likewise provides, inter alia, as follows:

> *"(1) Where an application is made to the court for an order under this Act, the court may, on application to it in the same proceedings and without the institution of proceedings under one or more of the Acts referred to in subsection (2), if it appears to the court to be proper to do so, make one or more of the orders specified in that subsection.*
>
> *(2) The orders specified for the purposes of subsection (1) are orders made under…(a) section 11 of the Act of 1964…"*

III

The Decision in N.K. v. S.K.

15. The court in exercising its jurisdiction under the provisions of the Act of 2018 is exercising a statutory jurisdiction. Mr C contends, e.g., by reference to section 6(b) of the 1995 Act, that it extends section 11 of the Act of 1964 so as to confer statutory jurisdiction on the High Court to make, in effect, any orders it considers prudent concerning access to children. As it happens a like argument failed before the Court of Appeal in *N.K. v. S.K*. [2017] IECA 1.

16. The appeal before the Court of Appeal in that case was taken by the respondent husband against a decision of the High Court whereby the High Court had made an order pursuant to s. 11(1) of the Act of 1964, on an interim basis, requiring the husband to leave the

family home pending the determination of pending judicial separation proceedings. The appeal raised a number of issues of importance. These included whether the High Court has a jurisdiction under s.11 of the Act of 1964, separate from and outside of the ambit of the Act of 1996, to exclude a spouse from a dwelling which they own. The judgment of Hogan J. for the Court of Appeal is customarily enlightening and, given its direct relevance to the within proceedings, the pertinent portion of that judgment is worth quoting in extenso. Thus, under the heading "*Whether the High Court had jurisdiction to exclude a spouse from the family home under the 1964 Act*", Hogan J. observes, *inter alia*, as follows:

"*53. I next turn to the question of whether the High Court had jurisdiction under s. 11(1) of the 1964 Act to make an order excluding the husband from the family home….*

55 *[More particularly, t*]he question…is whether a spouse may be excluded from a family home under the general provisions of s. 11(1) of the 1964 Act regarding the welfare of H. for reasons other than domestic violence (or the threat of such) or a property transfer or adjustment order following a decree of judicial separation or divorce….

67 *[A]*ny order made excluding a spouse from a family home outside of the special jurisdiction conferred by the 1996 Act must have a secure and clear legal basis. This in its own way is illustrated by *The People (Director of Public Prosecutions) v. O'Brien* [2012] IECCA 68, a case where the Court of Criminal Appeal was required to address the issue of whether members of An Garda Síochána could lawfully effect an arrest of a person in a dwelling under s. 30 of the Offences against the State Act 1939 where it was found that the Gardaí were not lawfully present. Hardiman J. observed*:*

> "…Article 40.5 by guaranteeing the 'inviolability' of the dwelling reflects long standing constitutional traditions in both common law and civil law jurisdictions…. This constitutional guarantee presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and reinforces other constitutional guarantees and values….In these circumstances, clear, direct and express language would be necessary before this Court would be prepared to impute to the Oireachtas an intention to override such carefully protected constitutional rights…".

68. While it is true that the facts of *O'Brien* are remote from the present case, the underlying principles are not. That decision rather prompts us to inquire whether there is a clear statutory authority contained in the 1964 Act such as would permit the conclusion that the Oireachtas intended *'to override these carefully protected constitutional rights.'*

69. *In this context, it is first worth observing that if the High Court is correct, then the courts must have had this jurisdiction to exclude spouses from family homes from the very commencement of the 1964 Act. If that is so, then it seems curious that the Oireachtas does not seem to have ever integrated the s. 11(1) of the 1964 Act jurisdiction into the corpus of legislation dealing with barring orders….Nor was this jurisdiction aligned with the power of the Court under s. 10(1)(a) of the 1995 Act to exclude one spouse from the family home following the granting of a decree of judicial separation.*

70. *In particular, the barring order jurisdiction under s. 3 of the 1996 Act is predicated on the existence of a threat to the safety or welfare of the other spouse (or, in some instances, the other partner) and any dependent children. Yet if the courts enjoyed a jurisdiction to make an exclusion order under s. 11 of the 1964 Act in cases involving children, there would be no necessity at all to show that there was such a risk to the safety of the children: it would be sufficient to show that the exclusion order was justified by general considerations of child welfare which were independent of issues of safety, fear or molestation. Such orders could, moreover, be made in circumstances where the particular safeguards introduced to the 1996 Act regime in the wake of the Supreme Court's decision in DK by the Domestic Violence (Amendment) Act 2002 might not have to be respected, given that the order itself was not made under the 1996 Act (as amended).*

71. *One might similarly observe that s. 10(2) of the 1995 Act imposes a duty on any court making an order excluding the other spouse following the making of an order for judicial separation to have regard 'to the welfare of the spouses and any dependent member of the family' and, in particular, to take into consideration the accommodation needs of any dependent spouse and any other dependent family member. If there were such a jurisdiction to exclude spouses from a family home by reason of the making of an order under s. 3 of the 1964 Act, one might again have expected that the Oireachtas would have sought to ensure that this jurisdiction would have been attended by safeguards similar or analogous to those contained in s. 10(2) of the 1995 Act.*

72. *Second, to make a related point, if there were such a s. 11(1) jurisdiction, it is surprising that it has not generated its own corpus of case-law. There is, in fact, a dearth of direct authority on the point. Counsel for the wife…nonetheless placed reliance on three decisions in particular in support of this contention….*

73. *But while all of these cases stress in their own way the wide breadth of the s. 11(1) jurisdiction, they nonetheless all directly concern the welfare of children in the sense of doing something to or directly in respect of the child….*

74. *As it happens, the case which in some ways provides the truest analogy to the present one happens to be a decision of my own which I delivered as a judge of the High Court in JG v. Staunton [2013] IEHC 533….In that case the question was whether in proceedings under the Child Care Act 1991 ('the 1991 Act') the District*

Court could direct parents to undertake specific courses, including a course in psychotherapy. It was argued that s. 47 of the 1991 Act gave the Court such a jurisdiction:-

> '….where a child is in the care of a health board, the District Court may, of its own motion, or on the application of any person, give such directions and make such orders on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order.'

75. In my judgment I *[observed that]*…the s. 47 order must relate directly to the welfare of the child. The Oireachtas did not envisage that this jurisdiction could be used to impose obligations on third parties (even such as parents) to do certain things…."

76. In my view, the same reasoning applies by analogy to the present case. If the Oireachtas had intended that the s. 11(1) jurisdiction could be invoked so as to affect the constitutional and other legal rights of third parties in such an immediate and potentially far-reaching fashion – such as, in this instance, by excluding the father from the family home in the absence of any judicial finding that he posed a threat to the safety of the children – then…clear words to this effect would have been required for this purpose. These words are simply not present in s. 11(1) of the 1964 Act."

17. In short, the Court of Appeal held that if the Oireachtas had wanted to give the High Court a freewheeling jurisdiction to exclude in the manner that was done by the High Court in *N.K*. it would have given the court a power to make such orders. The power of the court to make an order under s.11 of the Act of 1964 on a preliminary issue did not extend to excluding someone from the family home because on determining the proceedings the court can so exclude; however, the Oireachtas did not say that the court had power to do this on an interim basis. By analogy, the same position presents here: if the legislature wished the court to exercise a power to vary barring orders made in other courts in the manner as occurred here it would expressly have given the court the power so to do, and it did not. Indeed, as in *N.K*., there is a "*a dearth of direct authority*" to indicate that the courts have ever so proceeded. This is not because the Act of 2018 is a new Act and this is the first case where this issue has come to the boil: the Act of 1996 was on the statute-books for two decades before the Act of 2018 came along, making like provision in many respects (as considered above), yet the type of case-law that one would expect to find if Mr C is correct in his contentions as to the operation of the Act of 2018 has never arisen, for the reason that, with respect, the statutory schemes established under those enactments did not (under the Act of 1996) and do not (under the Act of 2018) operate as he contends.

18. One further point might usefully be made. The court notes that *Shatter's Family Law*, 4th ed. (Dublin: Butterworth, 1997), a seminal work now much in need of updating but still often a most useful resource, comprehensively identifies, at p. 887 *et seq*., a variety of preliminary court orders that can be sought when judicial separation or divorce

proceedings are instituted. Notably, Shatter does not indicate that the High Court has a power to make an order varying another court's barring order in the manner sought here by Mr C, and if that was the position and anybody considered that the then legislation (and the degree of overlap between the then legislation and the Act of 2018 has been considered above) could be given such an interpretation, such a view would doubtless have been touched upon in a text as authoritative as Shatter. Second, if this court was to vary the barring order it would have to engage in a full hearing as to why the barring order was granted in the first place. The court would be concerned that were it so to proceed, even if it could properly so proceed, would be to open the floodgates to fresh hearings of barring proceedings in a manner that was never contemplated by the Oireachtas.

IV

Conclusion

19. For the reasons stated, the court does not consider that it can vary the barring order ordered by the District Court in the manner contemplated by Mr C. The court can, and has, made an order varying access, though it has stayed that order pending a further approach to the District Court by Mr C for the District Court to vary its barring order so as to allow for such access. The stay will end upon such variation being made.

20. The within judgment is concerned with the court's ruling as to whether it could vary the District Court's barring order. The court does not therefore address in this judgment any other matters that arose at the hearing.

TO THE APPLICANT/RESPONDENT:

WHAT DOES THIS JUDGMENT MEAN FOR YOU?

Dear Applicant/Respondent,

I have dealt in the preceding pages with various issues presenting in this appeal. Much of what I have written might seem like jargon. In this section, I identify briefly some key elements of my judgment and what it means for each of you. This summary is not a substitute for what is stated in the preceding pages. It is meant merely to help you understand some key elements of what I have stated.

To preserve your confidentiality I refer to you as 'Mr C' and 'Ms C'.

Mr C sought in his application that I make an order concerning his access to your children. He also asked that I vary the barring order that issued from the District Court on 10 November last so as to allow for whatever order I was minded to make as to access. Otherwise he was concerned that there might be a mismatch between what I was minded to order access-wise and what the District Court prohibited in its barring order.

I indicated at the hearing that I was satisfied to make certain changes as to the physical access arrangements. However, I also indicated that I do not consider that I have the legal power to vary the barring order of 10 November in the manner contemplated by Mr

C. I consider that Mr C needs to return to the District Court to obtain such a variation. So I made my order as to access and 'stayed' it, i.e. paused its coming into effect until the District Judge varies the barring order to allow for the physical access that I consider appropriate having regard to what is known of the Child and Family Agency's views in this regard.

My judgment is concerned only with the ruling that I made as to whether I could vary the District Court's barring order. I have not addressed in this judgment any other matters that arose at the hearing.

Yours faithfully

Max Barrett (Judge)