

THE HIGH COURT

[2022] IEHC 196

RECORD NO: 2019/515JR

BETWEEN

MM

APPLICANT

AND

LOC

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 14 March 2022

Summary

1. This is an application for judicial review of a decision of a Circuit Court Judge of 10 July 2019, whereby he dismissed an appeal from an Order of District Court Judge Ní Chondúin of 8 February 2018 to increase the amount of maintenance payable by the applicant in respect of his son from €60 per week to €125 per week. The District Court Order was made in the absence of the applicant, in circumstances where he says he was never served with the summons and knew nothing of the hearing. He equally argues he was not served with the District Court Order, that he knew nothing about it until 25 April 2018 and did not see it until 20 June 2018 when he was arrested in the context of its enforcement.
2. The applicant argues that the Circuit Judge acted in breach of fair procedures and constitutional justice in dismissing his appeal against the District Court Order by (a) failing to hear or adequately hear his submissions on the issue of the service of the summons in respect of the District Court hearing and (b) refusing to adjourn the matter to allow the applicant to obtain legal representation from the Legal Aid Board and to prepare an affidavit of means, and determining the matter without a substantive hearing.
3. Having read the transcript, it is unfortunately apparent that the Circuit Judge did not permit the applicant to make substantive submissions in relation to the alleged defect in service despite his request to do so. Further, having refused an adjournment to allow the applicant to file an updated affidavit of means, the Judge dismissed the appeal without substantively adjudicating upon it, on the basis that he considered it would be preferable, due to the elapse of time, for the applicant to seek to vary the Order of 8 February 2018 in the District Court rather than continue with the appeal. It is clear from the transcript that he did so from the best of motives i.e. in the belief that it was more advantageous for the applicant to obtain a fresh decision on maintenance in the District Court, rather than appeal an Order that was 18 months old at the date of the appeal.
4. Nonetheless, the applicant was entitled to have his appeal heard and substantively determined, both in relation to his service point and on the substantive question of maintenance. In circumstances where he was neither heard nor had his appeal substantively determined, I conclude the Order of 10 July 2019 should be quashed and the matter remitted to the Circuit Court.

Facts

5. The applicant and respondent are the father and mother of a young man who I will refer to as Brian. Brian was born on 2 July 2003 and is now 18. The applicant does not appear

to have ever lived with Brian and his mother but has consistently paid maintenance in respect of Brian. A maintenance Order in being since 2011 was varied on 18 October 2016 and affirmed by an Order of the Circuit Court on 20 June 2017 in the amount of €60 per week. The subsequent events that give rise to these proceedings are best set out in a chronology.

Chronology of relevant events

- 28 November 2017: Summons issued by respondent to vary maintenance Order of 18 October 2016.
 - 8 February 2018: Order of the District Court varying maintenance Order to increase weekly payment to €125 made in absence of applicant.
 - 25 April 2018: Garda McSweeney served applicant with a warrant of arrest alleging arrears of maintenance (warrant referred to the 2011 maintenance Order rather than the 2018 Order).
 - 20 June 2018: Applicant arrested for failure to comply with the Order and brought to Cork District Court. Received copy of the Order of 8 February 2018.
 - 11 September 2018: Hearing on enforcement of the Order of 8 February 2018 before the District Court, including the question of service of the summons and the Order on the applicant. Adjourned to 28 November 2018.
 - 28 November 2018: Adjourned hearing resumed before Judge Lucey, who granted an extension of time to the applicant to appeal the Order of 8 February 2018 to the Circuit Court.
 - 28 November 2018: Notice of appeal lodged.
 - 10 July 2019: Appeal heard and dismissed before the Circuit Court.
6. No stay was placed on the Order of 8 February 2018 at any stage. The applicant continued to pay the sum of €60 per week consistently as he had done since 2016 but did not increase the amount after he learned of the terms of the Order of 8 February 2018. Arrears therefore accrued from 8 February 2018 to 2 July 2021, being the date upon which Brian turned 18.

Proceedings

7. On 29 July 2019 Mr. Justice Jordan granted leave for judicial review grounded upon the affidavit of the applicant sworn on 22 July 2019. Leave was granted in respect of two of the reliefs sought by the applicant, namely an Order of *certiorari* quashing the decision of the Circuit Judge made on 10 July 2019 and an Order for costs, expenses and damages. The applicant was at this stage unrepresented. The applicant filed a supplemental affidavit sworn 31 July 2019. On 9 September 2019 the applicant filed a further notice of motion seeking an Order to join LOC as a notice party, grounded on a further affidavit he swore on the same date.

8. On 4 January 2021 a notice of appointment of solicitor was filed identifying that Blanchardstown Law Centre had been appointed as solicitor for the applicant. On 9 June 2021 the applicant filed a notice of motion seeking orders reconstituting the proceedings, naming LOC as a respondent and striking out the proceedings as against the Circuit Judge.
9. On 14 June 2021, Mr. Justice Barrett reconstituted the proceedings, naming LOC as the *legitimus contradictor* and respondent. On 17 June 2021 the respondent filed her statement of opposition, relying upon her affidavit of 12 May 2021. On 23 July 2021 the applicant swore an affidavit replying to the respondent's affidavit of 12 May 2021.

Circuit Court hearing

10. It is important to describe various exchanges between the applicant and the Circuit Judge and to identify the substantive findings of the Circuit Judge that emerge from the transcript of the hearing.
11. First, the applicant had brought a motion seeking to prevent the respondent from bringing any further applications to vary maintenance. The Circuit Judge refused that application on the basis that he could not constrain a person's access to the Court.
12. Next, when the applicant raised the failure to serve him with the summons to appear at the hearing in the District Court on 8 February 2018 and his consequent absence, the Circuit Judge concluded that the service would have been checked by the Court and refused to hear the ground of appeal in relation to service:

"JUDGE: Now, what is the position with regard to your appeal against that order?"

MR M: Okay. Okay, okay. What happened, your honour, is I was never served.

JUDGE: With what, sorry?"

MR M: I was never served notification of the hearing.

JUDGE: Sorry, what hearing are we talking about?"

MR M: The hearing in February 2018 to vary --

JUDGE: You weren't present?"

MR M: -- to vary the order. I was never --

JUDGE: You say you weren't present and you, the reason?"

MR M: I wasn't present and I wasn't served, your honour.

JUDGE: Now, is it accepted that he wasn't there?"

COUNSEL: No, Judge, it's absolutely not accepted.

JUDGE: That he wasn't there?

COUNSEL: Oh, he was 100% not in court, but we are absolutely adamant that he was properly served.

JUDGE: Served, okay.

MR M: Okay.

JUDGE: Now, so you weren't there.

MR M: No, your honour.

JUDGE: You may take it that the service would have been checked by the Court before embarking in your absence.

MR M: Your honour, if I may --

JUDGE: Sorry, excuse me, Mr M.

MR M: Sorry, okay.

JUDGE: You may take it that the District Court would not have embarked on the matter in your absence without checking to ensure that, on paper, there was proper service.

MR M: Your honour, on September, [LOC] was put on the stand because she was instructed to put the service into my post box and under my door and she gave testimony to that effect.

JUDGE: I couldn't care less --

MR M: Oh, I know that your honour, but the --

JUDGE: -- about doors or post boxes, Mr M.

MR M: - but your honour, the evidence supports that she committed perjury.

JUDGE: No, it does not.

MR M: Your honour.

JUDGE: Excuse me, Mr M, I'm dealing now with an appeal on maintenance.

MR M: That's correct, your honour, and it's my appeal, your honour.

JUDGE: And the appeal is in.

MR M: That's correct. Yes, your honour.

JUDGE: Okay. So, there's a sum of €125 that you have to pay for maintenance.

MR M: But your honour, I was never served that --

JUDGE: Sorry, excuse me, Mr M, you were served with the order.

MR M: I was not served, your honour. I have evidence that supports I wasn't served.

JUDGE: Sorry, would you listen to me? You were served with the order.

MR M: Oh, sorry, I got that in June 2018.

JUDGE: Would you please listen to what the Court is saying.

MR M: Oh, sorry, your honour. Excuse me. Sorry.

JUDGE: And stop jumping to conclusions.

MR M: Sorry, your honour, sorry.

JUDGE: I'm proceeding on the basis that the order was made.

MR M: Oh yes, sorry, your honour.

JUDGE: You got a copy of the order.

MR M: In June 2018.

JUDGE: You say in June of '18

MR M: That's correct, your honour."

13. The Circuit Judge then moved onto the substantive question of maintenance and at that point the applicant sought an adjournment. It is important to understand that at the call over on the same day, the applicant had already sought an adjournment to obtain legal aid in circumstances where, some 8 days earlier, he had made an application to the Legal Aid Board. This application was refused by the Circuit Judge. At the substantive hearing, that application was renewed, with the applicant explaining that he thought the appeal was just in relation to service and indicated he had not submitted an up to date affidavit of means for that reason. The trial judge observed that the applicant was not ready for the appeal;

"JUDGE: And it's [Brian] we are talking about and his maintenance. Now, you now wish to appeal that amount. You're saying that you're not able to pay that amount?

MR M: That's correct, your honour.

JUDGE: And have you submitted an up-to-date affidavit of means statement?

COUNSEL: No, Judge.

MR M: Your honour, my affidavit of means is the same as it was last time, your honour.

JUDGE: Ah, Mr M, I've just asked you a question, please.

MR M: Yes, yes.

JUDGE: And I'll be asking the same question of the other side.

MR M: Yes. No problem, your honour.

JUDGE: Have you submitted an up to date affidavit of means?

MR M: No, I didn't, your honour.

JUDGE: And why not?

MR M: The reason why I didn't, your honour, is because I thought this appeal was just in relation to the service, because I wasn't served. That's what it was.

JUDGE: It's an appeal against the order made by the District Court.

MR M: That's correct, yes. That's correct, yes, your honour.

JUDGE: Okay, So, you're not ready for it.

MR M: Pardon me?

JUDGE: You're not ready for your appeal."

Correctly, counsel for the applicant observes that at this point in the hearing, the Circuit Judge appears minded to grant an adjournment so that the substantive issue could be adjudicated upon.

14. Some minutes later, the Circuit Judge having explored the amount that was currently being paid by the applicant, being €60 per week, and the amount that had been ordered on 8 February 2018, being €125, the following exchange took place:

"JUDGE: Now, thank you. I don't think we can address matters today.

COUNSEL: No, Judge. My difficulty is my client is a legal aid lady, this is her 24th time, I think, in court, the Legal Aid are breaking into a rash at this point every time they see her turning up.

JUDGE: Oh, for heaven's sake.

COUNSEL: So, she's finding it exceptionally difficult.

JUDGE: Why is she in court 24 times?

COUNSEL: Between trying to get service, substituted service, adjournments, then I think since January, I think we might have had four or five trips here to the Circuit Court. And, Judge, taking up Circuit Court time as well, and it's very, very busy.

MR M: Your honour, if I may --

JUDGE: No need to.

MR M: No, okay.

JUDGE: That's ridiculous.

COUNSEL: It is, it is ridiculous, Judge.

JUDGE: Okay.

COUNSEL: I just wonder, Judge, is it something, given that a year has passed, should he not be making an application for variation in the District Court?

15. That information clearly alters the approach of the trial judge as demonstrated by the following exchange:

"JUDGE: The Court will do it's best to make things fair for you.

MR M: Yes.

JUDGE: But you cannot get an advantage by virtue of the fact that you're not represented.

MR M: I agree, your honour. That's -- I've asked for the matter to be adjourned this morning.

JUDGE: Now, it is, sorry, it is --

MR M: Because I approached for legal aid.

JUDGE: -- I know you're looking for an adjournment. What I'm doing is, the suggestion that you go back to the District Court and apply -- excuse me, apply to have the order of €125 varied makes absolute good sense."

16. At that point, the applicant indicated that that was not fair because he hadn't been served with the summons for the hearing on 8 February 2018 and there was some further discussion about the service of a registered letter. The judge then indicated that he was striking out the appeal and explained why.

"JUDGE: Mr M, please. What I propose to do is to strike out your appeal and you go back and apply to the District Court to vary that order.

MR M: I don't think that's fair, your honour, but I will respect obviously what you're saying.

JUDGE: Great.

MR M: But I don't think it's fair, personally.

JUDGE: I'm allowing you. You're free to go back to the Court and that's where you should deal with it to have that order. It's so – it's over a year. Now, that mightn't be -- quite possibly, not your fault. But we must take a pull here, 24 times in the Court is ridiculous.

COUNSEL: Twenty-two, Judge, I exaggerated.

JUDGE: Twenty-two, but sorry, I blame that on both parties, Mr M, not just you, okay.

MR M: Yes, your honour. She's consistently came in and lied to the Court saying I was in default of maintenance and everything, your honour.

JUDGE: I blame that on both parties.

COUNSEL: Judge, that's very unfair.

MR M: And that is not the case.

JUDGE: Yes. What I'm doing is, as far as this Court's concerned, two parties before the Court 22 times to deal with maintenance is ridiculous. Now, I'll strike out your appeal on the basis, Mr M, quite simply, and I'm giving you the reason for it, because we'll have to start all over again were we to hear your appeal, it is so long since the previous order was made. It just wouldn't make sense. It is always the position that the Court should adopt that where parties have a right of access to the courts, they exercise that access where there is less involved from the point of view of costs and expense, and that is to go to the District Court. Now, if either one of you are dissatisfied with what order is made by the District Court, by way of variation or otherwise, you can then appeal to this Court."

17. Having considered the above, it seems to me that the Circuit Judge did not give the applicant an opportunity to make his arguments on service (although, given the respondent's arguments on this point addressed below, it is important to note he did not treat same as either an impermissible matter to raise on an appeal or as not pleaded by the applicant in his notice of appeal). Rather, he simply rejected the substantive argument that service of the summons and of notice of the making of the Order of 8 February 2018 had not been effected on the applicant, without actually hearing the applicant. Instead he held that the District Court would have checked service before proceeding.

18. Second, he refused the applicant's request for an adjournment to lodge an up to date affidavit of means and obtain legal aid.
19. Third, he struck out the appeal on the basis that it was a long time since the previous Order was made and were he to hear the appeal, it would have to be started all over again. In those circumstances he advised the applicant to put in an application to the District Court to vary the maintenance order.

Analysis

20. I should observe first that although both parties have cited a significant volume of case law about when it is permissible to refuse an adjournment, it seems to me that the outcome of this case does not hinge on the refusal to grant an adjournment. That is because, unlike the cases cited, the Circuit Court did not proceed to hear the case following the refusal of an adjournment. Rather, the Court struck out the case without hearing it at all, because of the gap of time between the District Court Order and the date of the appeal hearing, and the nature of the exercise the Circuit Court would have to carry out. No substantive decision was made in the absence of legal advice or an updated affidavit of means, because no substantive decision on the application was made at all. In truth, the applicant's legal rights were affected not because of the refusal to grant an adjournment but because of the refusal to hear the case.
21. Turning to the alleged failure to hear the applicant on his service point, as a matter of fundamental fair procedures, it seems to me that an appellant in a Circuit Court appeal, whether in family law or any other context, ought to have an opportunity to make his or her arguments to the court. The principle of *audi alteram partem* is one of the most basic principles of constitutional justice. Every party to a hearing has a right to be heard. Where they are prevented from making their submissions, it is difficult to conclude that they have been heard. That uncontroversial proposition is supported by the case law identified by the applicant.
22. In *JN v MJE* [2009] 1 IR 146, Birmingham J. (as he then was) quashed a decision of the Refugee Appeals Tribunal in circumstances where a tribunal member refused to permit submissions, holding in essence that adjudication requires the weighing and analysis of arguments and no such exercise can be carried out where no arguments are permitted to be made. Similarly, Denham J. (as she then was) in *Coughlan v Judge Patwell* [1993] 1 IR 31 quashed a decision of a District Court Judge where he refused to hear an argument in relation to a potential breach of the applicant's constitutional rights. With reference to the seminal decision *In Re Haughey* [1971] IR 217 the Court held that the District Judge had exceeded his jurisdiction in refusing to allow the applicant to make any submission on the point and in proceeding to trial without having considered their argument.
23. I am satisfied that the applicant was not given an opportunity to make his argument on defects in service to the Circuit Court Judge. As noted above, the Judge did not reject his entitlement to make an argument as to service per se, and substantively engaged with the topic in that he took a view as to the adequacy of service, but he did not permit the applicant to make any submissions on service. There is no doubt but there were potential

issues that the respondent could have raised in respect of the applicant's argument on service. For example, a judge might well have taken the view that in circumstances where the applicant received the Order of the District Judge on 20 June 2018 in the context of the enforcement of that Order, where he was substantively heard by the District Court on 11 September 2018 in relation to the issues concerning service, again in the context of the enforcement of the Order, and where he decided to appeal against the Order of 8 February 2018, any defects in service had been cured and that he was not entitled to overturn the Order on that basis. Alternatively, the Circuit Court Judge might have accepted the argument made in these proceedings by the respondent to the effect that an appeal on the basis of service was not open to him in circumstances where there is a process under Order 39, Rule 2 of the District Court Rules ("the DCR") permitting him to seek to set aside the Order of 8 February 2018 on the grounds of an irregularity in service.

24. However, what I am considering here are not the merits of the applicant's service arguments and whether he would ultimately have been successful but whether the applicant had an opportunity to advance this ground of appeal, so that a ruling could be made on that ground. I am quite satisfied that no such opportunity was provided here, where the Circuit Judge did not permit him to make his arguments and instead arrived at the conclusion that the District Court had ensured service was adequate, without hearing any submissions or identifying the material upon which he based that conclusion. Because of the failure to adequately hear the applicant, the hearing was deficient and did not satisfy fair procedures.
25. The second difficulty was the decision of the Circuit Judge to reject the appeal, again without having heard the substantive issues arising in that appeal i.e. whether the District Court Judge was correct to vary the maintenance amount from €60 per week to €125 per week and what amount should be paid by the applicant. The applicant had no updated affidavit of means before the Court. However, rather than adjourning the matter to allow for that to be lodged or refusing an adjournment and substantively adjudicating on the amount payable, the Judge declined to adjudicate upon the substantive application at all.
26. That is made clear by the reasons he gave for his decision to strike out the appeal, i.e. that the exercise was not one he thought it appropriate to engage in at that time, given the alternative route open to the applicant of seeking a variation in the District Court. He considered that was the most desirable route having regard to the amount of time that had elapsed, and the substantive nature of the exercise required of the appeal court.
27. The second reason provided was somewhat surprising: a court cannot refuse to entertain an appeal simply because the hearing of the appeal will involve that court adjudicating on the substantive question of whether to vary or affirm the District Court Order. That exercise is the very purpose of an appeal.
28. In fairness to the Circuit Court Judge, in making this decision he was seeking to give effect to the following laudable policy aim identified by him i.e. that parties should exercise their right of access to the Court where there is less involved from the point of

view of time and expense i.e. at District Court level. I can fully understand his view that it might have been more straightforward for a fresh variation application to be brought in the District Court, particularly where the applicant was arguing that he had not been heard on the first occasion because of the failure to serve the summons.

29. However, statutory provision is made for a right of appeal from the District Court to the Circuit Court by way of s.84 of the Courts of Justice Act 1924 as amended by s.57 of the Courts of Justice Act 1936 which provides:

"An appeal shall lie in all cases other than criminal cases from any decision of a Justice of the District Court to the Judge of the Circuit Court within whose Circuit the courthouse in which such decision was given is situate, and the decision of the Judge of the Circuit Court on any such appeal shall be final and conclusive and not appealable."

30. A judge charged with an appeal from the District Court under this provision is obliged to hear and determine that appeal. A judge is not absolved from that obligation by reason of the fact that he or she believes that an alternative approach would be more beneficial to one or both parties. Of course, if the parties agree that this is a better approach and withdraw the appeal consensually, then there is no difficulty. But where one party wishes to have his appeal heard, the obligation of the Court is to substantively determine the appeal even where it considers there is a better alternative. In the circumstances, by striking out the appeal to avoid substantively determining it, albeit in an attempt to assist the applicant, the Judge failed to vindicate the applicant's right of access to an appeal before the Circuit Court and did not afford him a fair trial.
31. In the circumstances, I do not need to determine whether the refusal of the adjournment application was in breach of fair procedures since, as identified above, it was the refusal to substantively hear the case, and not the refusal of an adjournment, that fundamentally impacted upon the applicant's right to a fair hearing.

Arguments of the respondent

32. I turn now to explain in more detail why I have not accepted the arguments of the respondent, who sought to argue that no Order of *certiorari* was warranted and that the trial had been conducted appropriately.
33. First, the respondent says that in relation to the arguments of the applicant on service, he ought not to have brought them by way of appeal. The essence of the argument appears to be that because the applicant was not in any case entitled to appeal against service, the way in which the Judge dealt with the service argument could not prejudice him. It must be remembered in this context that the applicant was a lay litigant and that the suggestion of an appeal in fact came from Judge Lucey when the matter came before the District Court in the context of the enforcement proceedings in November 2018. That is accepted by LOC at paragraph 19 of her affidavit of 12 May 2021 where she acknowledges that it is correct that the District Judge informed the applicant that if he

was dissatisfied with the ruling on 8 February 2018 he could appeal the matter to the Circuit Court.

34. Nonetheless, the respondent says that where the applicant wished to dispute service, he had at least three alternative avenues open to him other than an appeal. First, he could exercise the procedure under the Order 39, Rule 2 of the DCR whereby he could seek to set aside the Order of 8 February 2018 on the grounds of an irregularity in service. Second, the applicant could bring a fresh application to vary the amount of maintenance set on 8 February 2018. Third, the applicant could in the context of the enforcement proceedings that were brought against him, seek to vary the amount of arrears payable and alter the amount payable going forward. In fact, in the context of the matter being returned to the District Court following the applicant's arrest on 20 June 2018, the District Court was considering whether to vary the Order of 8 February and that process was only halted by the applicant's decision to appeal following the hearing before Judge Lucey on 28 November 2018.
35. In short, there were undoubtedly various options open to the applicant that may well have provided him with a better solution than an appeal to the Circuit Court (although it is true that any variation Order would not address the outstanding arrears that had accrued post 8 February 2018. In this respect, it is worth observing that the Circuit Court Judge failed to recognise that his dismissal of the appeal and suggestion that that the applicant would seek a variation in the District Court had the significant disadvantage from the applicant's point of view that the arrears would remain owing).
36. But all of this is beside the point. The respondent has failed to identify a legal basis for an argument that the applicant had no entitlement to raise an argument on service such that any error of the Circuit Judge in dealing with same must be ignored. The provision of the 1936 Act set out above identifies the entitlement to appeal and does not limit the subject matter of that appeal. Nor were there any District or Circuit Court rules that could be said to prevent the applicant raising the service point. The fact that the applicant elected not to seek to vary the District Court Order, or to seek to set aside the Order under Order 39, Rule 2, cannot bar him from exercising his statutory right of appeal. Indeed, the proposition that the existence of alternative options could not preclude the applicant as a matter of law from exercising his right of appeal to the Circuit Court was ultimately accepted by counsel for the respondent during hearing.
37. A subsidiary but related argument was made to the effect that the appeal identified only that the Order was being appealed against and not the service of the order. The notice of appeal, as prescribed by Form 101.1 under Order 101 of the DCR, is summary in nature. There is no requirement or indeed opportunity for an appellant to identify the grounds of appeal. Where the applicant was asked to identify the Orders being appealed against, he inserted "*Order Varying Maintenance Order*" of "*8 February 2018*". That description cannot be taken as excluding grounds in relation to service of the Order. The question of service of an Order is bound up with the legality of the Order and cannot be treated as being *ipso facto* excluded in a Circuit Court appeal.

38. It was also argued that the applicant's true motivation for seeking to appeal was because he wanted to attack the *bona fides* of the respondent in relation to the evidence she had given on service in the District Court in support of an argument that because the appeal was ill founded, the trial judge was entirely at large in how he dealt with it. The motivation of the applicant in bringing an appeal in this case appears to me largely irrelevant. Applicant have all sorts of motives for challenging decisions, some *bona fide*, others less so but those motives do not normally affect their entitlement to appeal except in very exceptional circumstances. This is certainly not one of those circumstances.
39. Finally, even if the respondent was correct that the service ground was not a matter that could permissibly form part of the applicant's appeal – and I find she is not - the respondent cannot attempt to use that argument to absolve the Judge of error in dealing with the service ground, in circumstances where the Circuit Judge himself engaged with the question of service and did not indicate that it was an impermissible ground of appeal. As I have identified above, he failed to hear the applicant on the point, but he certainly did not exclude it as a ground. In those circumstances it does not seem to me open to the respondent to rely on the inappropriateness of the service point to excuse the failure to hear the applicant on the point.
40. Next, the respondent argues that, on reading the transcript as a whole, it is evident that the applicant was afforded ample opportunity to put all matters to the Court, that the applicant made submissions on the service point to the Court, and that the hearing did not suffer from brevity. I fully accept that one cannot always get the full import of a hearing from reading the transcript. However, I have read the transcript a number of times and have set out the relevant parts of same in this judgment and having done so, I am quite satisfied that the applicant was not afforded an opportunity to make submissions on service. The applicant was continually interrupted by the trial judge when seeking to make the submissions and never managed to reach the point where he could put forward his substantive arguments on service.
41. In relation to the striking out of the appeal to allow an application to vary to be brought, it is argued that the trial judge was entitled to guide the appeal to the District Court and afforded the applicant an adequate remedy. It was further said that it was open to the Circuit Judge as a matter of discretion to decline to deal with the matter given the alternatives available and to strike out the appeal.
42. I cannot agree with these arguments. The obligation of a trial judge in an appeal is clear: they must hear the appeal. The fact that the trial judge identified an alternative path for the applicant was not an adequate vindication of his right to an appeal hearing. The respondent contends that he was entitled to do this *inter alia* because there was no updated affidavit of means before him. But the absence of an affidavit of means did not absolve him of the duty to hear the appeal in the face of opposition from the applicant to that course.

Mootness

43. It is argued by the respondent that the proceedings are moot because Brian turned 18 on 2 July 2021 and the Order is therefore discharged. It is said that, should I quash the Order and remit, when the appeal proceeds the applicant will be asking the Court to vary an Order for maintenance in respect of a young person who is no longer dependent. Accordingly, the Court will have no jurisdiction to entertain the appeal. However, despite making this argument, the respondent points out that the discharge of the Order does not mean the applicant is forgiven the arrears of €11,500 (calculated from 8 February 2018 to the date Brian turned 18 on 2 July 2021) and that those arrears stand. In fact, I am told that there is an enforcement application in respect of those arrears before the District Court on 29 March 2022.
44. The applicant counters that the matter is not moot because of the arrears. He points out that if he is successful, the Circuit Court will deal with the appeal on the basis of the amount that ought to have been paid up to Brian's 18th birthday.
45. In those circumstances, it appears that there is a live controversy in being between the parties that will potentially be resolved by these proceedings since, if the Order of the Circuit Court is quashed, there is likely to be a determination of the applicant's appeal against the Order of 8 February 2018. The determination of that appeal will in turn determine whether the arrears are due and owing or not. It is true that there may be difficulties in determining the appeal in circumstances where Brian will at the time of the hearing of any appeal be over 18. However, there are various possibilities in relation to the determination of any such appeal in the circumstances. The Circuit Court might for example decide to hear the appeal solely to address the arrears. In those circumstances, I cannot assume at this point that there could be no benefit to the applicant in having the Order of 10 July 2019 quashed and that a live controversy will not be resolved by these proceedings. Accordingly, these proceedings are not moot.

Exercise of discretion

46. Separately, it is argued that even if I consider there are grounds for quashing the Order, I should exercise my discretion not to do so where quashing it would provide no benefit to the applicant, given that the Order is now discharged by reason of Brian reaching the age of 18. It is said that the quashing and remittal in those circumstances would be a futile exercise.
47. There is a dispute between the parties as to the question of discharge of the extant District Court Order upon the young person turning 18, with the applicant arguing that pursuant to s.6 of the Family Law (Maintenance of Spouses and Children) Act 1976, a maintenance Order does not automatically become discharged and that an application must be made to the Court for discharge. The respondent on the other hand argues that discharge takes place automatically and no application is required.
48. I think it undesirable to reach a view on whether it is necessary for an application to be made to a court to discharge a maintenance Order once a young person reaches 18 and the legal status of any such Order. Those are complex questions best reserved to the trial judge assigned to deal with the matter when remitted back, who will have the benefit of

full arguments on the point. It would be wrong for me to assume that all aspects of those arguments will be resolved in the respondent's favour, such that I should conclude that the applicant will obtain no benefit from any such remittal. In those circumstances I cannot be satisfied that granting an Order quashing the decision of 10 July 2019 would be wholly ineffective or afford no benefit to the applicant. Accordingly, I refuse to exercise my discretion not to quash the decision.

Conclusion

49. For the reasons set out above, I am granting an Order of *certiorari* in respect of the Order of 10 July 2019 and remitting the matter back to the Cork Circuit Court. I will list the matter for hearing in relation to costs and any other matter that may arise on *22 March at 10.30*. The parties have liberty to apply to the registrar in relation to that date if it is unsuitable.