APPROVED **[2023] IEHC 95**

THE HIGH COURT
JUDICIAL REVIEW

2022 No. 722 JR

BETWEEN

G.M.

APPLICANT

AND

I.M.

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 6 March 2023

INTRODUCTION

1. This judgment is delivered in respect of an application to set aside the grant of leave in judicial review proceedings. The application to set aside the grant of leave is advanced on the basis that the applicant for judicial review failed to disclose all material facts to the court at the time of the *ex parte* application for leave. It is also alleged that the applicant is in breach of an order restraining him from taking further proceedings without the prior permission of the Circuit Court, i.e. a so-called *Isaac Wunder* order.

PROCEDURAL HISTORY

2. These judicial review proceedings seek to challenge certain orders made by the Circuit Court in family law proceedings. The family law proceedings are taken between the same parties as in these judicial review proceedings. The applicant and the respondent had formerly been in an intimate relationship and have a child together. The parties are now estranged and there has been long running litigation in respect of matters such as child access and maintenance payments. For ease of exposition, the parties are described in this judgment by reference to their role in the judicial review proceedings (as opposed to in the family law proceedings).

3. The Circuit Court orders were made in the context of an appeal from the District Court. It is an indication of the protracted nature of the litigation that the impugned District Court order dates from 8 December 2015, yet the appeal was not finally determined until 23 May 2022. The family law proceedings had been listed before the Circuit Court for hearing on more than forty occasions.

4. The Circuit Court order of 23 May 2022 addresses the following matters. First, certain access arrangements in respect of the parties' child were adjusted. Secondly, the applicant was directed to pay outstanding maintenance to the respondent. It appears from the oral evidence given to the Circuit Court that the applicant had previously been directed to pay maintenance on a weekly basis but had failed to make a number of payments. The Circuit Court ordered that a sum of €3,265 be paid in respect of these arrears. The Circuit Court also determined that the applicant should not be required to make any *future* periodical payments, but he was directed instead to make *ad hoc* contributions towards the child rearing expenses incurred by the respondent. Thirdly, the applicant was directed

to pay a portion of the legal costs incurred by the respondent in the family law proceedings, which costs were measured in an overall sum of €140,720. The applicant was directed to pay half of these costs, i.e. a sum of €70,360 ("*the costs order*"). Finally, the Circuit Court purported to make an order restraining the applicant from taking any further proceedings in the District Court, Circuit Court or any other Court without the leave of the Circuit Court. A restraining order of this type is often referred to as an "*Isaac Wunder* order", so named for the judgment in *Wunder v. Hospital Trust (1940) Ltd*, unreported, Supreme Court, 15 January 1968.

5. These judicial review proceedings are addressed solely to the order directing the payment of outstanding maintenance in the sum of €3,265. For completeness, however, this judgment will also consider the possibility that the applicant had intended to challenge the costs order. It should be emphasised that a challenge to the costs order does not form part of his pleaded case and is considered in this judgment *de bene esse*.

6. This court has had the benefit of a transcript of the hearing before the Circuit Court on 23 May 2022. This transcript only became available in February 2023, that is many months after the *ex parte* application for leave to apply for judicial review.

7. These judicial review proceedings were instituted on Friday, 19 August 2022. On that date, a statement of grounds was filed in the Central Office of the High Court, together with a verifying affidavit sworn by the applicant. An *ex parte* application for leave to apply for judicial review was then made to me as the vacation judge sitting on that date. The application was said to be urgent on the basis that the three-month time-limit prescribed for the taking of judicial review

proceedings under Order 84, rule 21 of the Rules of the Superior Courts was set to expire.

8. The gravamen of the complaint made in the judicial review proceedings is that the Circuit Court conducted the hearing on 23 May 2022 in contravention of the applicant's constitutional right to fair procedures. The three principal complaints made are as follows. First, it is alleged that the Circuit Court admitted into evidence, and relied upon, material which was neither provided on affidavit nor adduced in the course of oral testimony. Secondly, it is alleged that the Circuit Court did not permit cross-examination when requested by counsel for the applicant. Thirdly, it is alleged that the Circuit Court denied the applicant the right to submit evidence supporting his claim and denying the claims against him. There is no direct challenge to the making of the *Isaac Wunder* order.

9. The case is elaborated upon as follows in the applicant's verifying affidavit (at paragraphs 4 to 7):

> "The aforementioned appeal was heard and finalised by the Circuit Court on the 23rd of May 2022. There was no supportive affidavit sworn by the Respondent in respect of the appeal. Furthermore, the Respondent was permitted by the Court to adduce a hand written note averring to monetary sums which, she claimed, was owed by the Applicant. There was no formal report from an accountant, financial advisor or any other qualified expert vouching to the figures adduce in Court.
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> There was no affidavit or oral testimony averring to the information relied upon by the Court. Further to this, counsel for the Applicant sought to cross examine the Respondent in relation to the financial information that was submitted to, and accepted by, the Court. This request was not considered nor permitted by the Court. The Court also refused the submission of any evidence by the Applicant, whether in the form of oral testimony, affidavit or otherwise. The Applicant was prevented from submitting evidence before the Court.

> Following this hearing, the Court granted an Order which relied upon the financial information that was improperly before it. Furthermore, after the substantive hearing the Court informed the Applicant that any future application to take up the DAR would be refused. […]
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> I say that the manner in which the Circuit Court hearing on the 23rd of May 2022 was conducted denied the Applicant his rights to due process in accordance with the Rules of Court and the Constitution. The Applicant was prevented from submitting any evidence to Court while the Respondent was permitted to submit evidence that was not properly before the Court. In consequence of this, the Court granted an Order which has significant financial consequences for the Applicant. Furthermore, the Court acted with prejudice against the Applicant by stating that it would refuse any application for the DAR before any such application came before the Court."

10. As appears, the essence of the case being made by the applicant is that the Circuit Court acted on inadmissible evidence and did so in circumstances where the applicant was denied a request to cross-examine the respondent and denied an opportunity to adduce his own evidence.

APPLICATION TO SET ASIDE GRANT OF LEAVE

11. The respondent issued a motion on 20 October 2022 seeking to set aside the grant of leave in these judicial review proceedings. In parallel, the applicant had made a request to take up a transcript of the digital audio recording (DAR) of the hearing before the Circuit Court on 23 May 2022. The application to take up the transcript was refused by the Circuit Court and the applicant subsequently brought an appeal against that refusal to the High Court: 2022 No. 240 CA. I made an order, on the appeal, allowing the transcript to be taken up. This judgment has been prepared with the benefit of that transcript.

ORDER RESTRAINING FURTHER PROCEEDINGS BY THE APPLICANT

12. Before turning to address the merits of the application to set aside the grant of leave, it is necessary first to address the restraining order purportedly imposed by the Circuit Court. The order recites that the Circuit Court made an *Isaac Wunder* order against the applicant which precludes him from taking any further proceedings in the District Court, Circuit Court or any other Court without leave of the Circuit Court. It appears from the transcript of the hearing that this supposed restriction was imposed by the Circuit Court judge of her own motion and not at the request of the respondent.

13. The application to set aside the grant of leave is predicated, in part, on the fact that the applicant did not obtain permission from the Circuit Court to pursue these judicial review proceedings. See paragraphs 16 and 17 of the respondent's affidavit grounding the set aside motion. For the reasons which follow, this procedural objection is not well founded.

14. The jurisdiction to make an *Isaac Wunder* order has been described as follows by the Court of Appeal in *Kearney v. Bank of Scotland plc* [2020] IECA 92 (at paragraph 131):

> "*Isaac Wunder* type orders can be made by the High Court pursuant to its inherent jurisdiction to restrain the further prosecution by a party to proceedings without leave of the court. The power of a superior court to attach such restraint to the institution or continued prosecution of civil litigation extends to existing proceedings and to new proceedings and also to proceedings before any of the lower courts. In the case of new proceedings, such restraint may, in an appropriate case, include an order restraining the institution of proceedings against present, former or anticipated legal representatives of parties to the litigation."

15. The Court of Appeal has emphasised elsewhere that the circumstances in which it may be necessary or appropriate for a court to consider making any form of

Isaac Wunder order of its own motion are likely to be rare indeed; and that where such circumstances appear to arise, that context makes it particularly important that the party who would be affected by any such order is given an adequate opportunity to be heard before any decision is made (*Houston v. Doyle* [2020] IECA 289).

16. As appears, the power to make such a restraining order forms part of the High Court's inherent jurisdiction, and this power extends to the making of orders by the High Court which restrain the taking of proceedings in the lower courts, such as the Circuit Court. It is unnecessary, for the purpose of resolving the procedural objection raised in the present case, to determine whether the Circuit Court possesses its own independent jurisdiction to make a restraining order in respect of proceedings before it. Whatever the precise position may be in this regard, the Circuit Court most certainly does not have jurisdiction to impose a restriction on the right of access to the High Court. The High Court exercises a supervisory jurisdiction over the Circuit Court, by way of judicial review, and the Circuit Court cannot frustrate the exercise of that supervisory jurisdiction by purporting to oblige a party to obtain prior permission from the Circuit Court before having recourse to the High Court. If and insofar as the order of 23 May 2022 purports to impose such an obligation—and it is not apparent from the transcript that this is what the Circuit Court judge actually intended—this represents an error on the face of the record. This aspect of the order cannot oust the High Court's full original jurisdiction to entertain these judicial review proceedings.

DISCUSSION AND DECISION

17. The Supreme Court has held that the High Court has an inherent jurisdiction to set aside an order granting leave to apply for judicial review which has been made on the basis of an *ex parte* application (*Adam v. Minister for Justice* [2001] IESC 38, [2001] 3 I.R. 53). It has been emphasised, however, that this inherent jurisdiction should be exercised sparingly and only in exceptional cases.

18. One circumstance in which it may be appropriate to set aside the grant of leave is where there has been material non-disclosure on the part of an applicant. The position has been stated as follows by the High Court (Kelly J.) in *Adams v. Director of Public Prosecutions* [2001] 2 I.L.R.M. 401 (at page 416):

> "On any application made *ex parte* the utmost good faith must be observed, and the Applicant is under a duty to make a full and fair disclosure of all of the relevant facts of which he knows, and where the supporting evidence contains material misstatements of fact or the Applicant has failed to make sufficient or candid disclosure, the *ex parte* order may be set aside on that very ground. […]
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> The obligation extends to counsel. There is an obligation on the part of counsel to draw the judge's attention to the relevant Rules, Acts or case law which might be germane to his consideration. That is particularly so where such material would suggest that an order of the type sought ought not to be made."

19. This passage has since been expressly approved of by the Supreme Court in *Ryan v. Governor of Mountjoy Prison* [2020] IESC 8, [2021] 1 I.R. 590.

20. The nature of the obligation upon an applicant for judicial review has been summarised as follows by the High Court (Barrett J.) in *Director of Public Prosecutions v. Judges of the [Stated Place] Circuit Court* [2021] IEHC 505 (at paragraph 16):

> "Having regard to applicable case law and to the considerations iterated above, it seems to this Court that a moving party, and the lawyer who moves an application for

> the moving party in a leave application, are more properly described as subject to a duty of disclosure, i.e. a duty to do their best (a) to ensure that the judge to whom a leave application is made gets a full and proper grasp of the facts, issues, and law in play in the proceedings in respect of which leave-to-bring is sought and (b) not to conceal anything that they consider ought, even if just in abundance of prudence, to be disclosed to the judge to whom application is made, (c) all of the foregoing obtaining within a human system of justice that must bring some degree of tolerance to instances of innocent human error that occur as regards the detail provided to a judge of whom leave is sought. All that said, the parties here are agreed that a full-blooded duty of *uberrimae fidei* applies to the moving party in a leave application and that, therefore, is the test that the court has brought to bear in determining the within application."

21. I turn next to apply these principles to the circumstances of the present case. For the reasons which follow, I have concluded that the grant of leave should be set aside.

22. It is apparent from the transcript of the hearing before the Circuit Court on 23 May 2022, and from the affidavits filed in the family law proceedings, that the applicant's characterisation of that hearing is grossly misleading. First, it is simply untrue to say that there was no evidence before the Circuit Court in relation to the outstanding maintenance payments. The respondent had given sworn oral evidence to the court on 23 May 2022. This evidence is set out in the transcript, and the respondent specifically confirmed that there was a sum of €3,265 outstanding. Secondly, the averment that counsel for the applicant had sought to cross-examine the respondent is also untrue. Thirdly, the applicant's averment that no supportive affidavit had been sworn by the respondent is incorrect. The respondent had, in fact, filed three affidavits in support of her appeal from the District Court. The affidavit of 14 January 2022 expressly addresses the arrears in maintenance payments and exhibits a copy of a legal costs accountant's report.

23. More generally, the applicant failed to disclose the convoluted history of these family law proceedings. The case had been listed for hearing before the Circuit Court on more than forty occasions, with multiple interim orders having been made. The false impression created by the applicant's verifying affidavit is that the appeal had been determined in a peremptory manner by the Circuit Court.

24. For completeness, I have considered, separately, whether the complaint sought to be made by the applicant might relate to the costs order (rather than that part of the order which directed him to discharge the outstanding arrears in maintenance payments). It will be recalled that the Circuit Court made two related orders in this regard: first, an order directing that the applicant discharge a portion of the respondent's legal costs of the family law proceedings, and, secondly, an order measuring those costs in gross. The measurement of the costs was based on a report from a legal costs accountant which had been submitted to the court and had been circulated to the applicant a number of months earlier. The Circuit Court judge, in effect, applied a discount of 50% to the costs as estimated by the legal costs accountant. This produced the figure of €70,360 referred to earlier. This discount was in ease of the applicant.

25. On my understanding of the statement of grounds, no complaint is actually made in relation to the costs order. However, even if the statement of grounds were to be given an expansive interpretation so as to capture such a complaint, the information provided to the High Court at the time of the *ex parte* application had been misleading. It is incorrect to say that there was no expert report before the Circuit Court vouching the figures for costs. In truth, the legal costs accountant's report had been circulated to the applicant in January 2022 and had been before the Circuit Court at the hearing on 23 May 2022. Counsel on behalf

of the applicant made no meaningful attempt to challenge the accuracy of the legal costs accountant's report.

26. The approach adopted by the Circuit Court to the measurement of costs is entirely consistent with that outlined by the Court of Appeal in *Landers v. Dixon* [2015] IECA 155, [2015] 1 I.R. 707.

CONCLUSION AND PROPOSED FORM OF ORDER

27. It is imperative that a person, who seeks to invoke the High Court's supervisory jurisdiction by way of judicial review, make material disclosure at the time of the *ex parte* application for leave. The supervisory jurisdiction is intended to vindicate the rule of law by allowing for the correction, by the High Court, of significant errors made by lower courts and public authorities. It is an abuse of process for an individual to seek to invoke this supervisory jurisdiction, in circumstances where the lower court or public authority has acted lawfully, by exaggerating events to create the false impression of there having been significant errors.

28. Here, the misstatements in, and omissions from, the statement of grounds and verifying affidavit cannot be overlooked as merely technical or peripheral. Rather, they go to the very heart of the applicant's case. The applicant sought and obtained leave to apply for judicial review from the High Court by misrepresenting the nature of the hearing before the Circuit Court. The description of that hearing as *per* the statement of grounds and verifying affidavit is grossly misleading and conveys the false impression that the Circuit Court had acted in breach of fair procedures and in breach of the basic rules of evidence. I would not have made my order granting leave to apply for judicial review had

an accurate description of the Circuit Court hearing been provided to me at the time of the *ex parte* application. Now that the true circumstances of the case have been put before me, I propose to set aside the grant of leave. It should be emphasised that this is not being done to "*punish*" the applicant for his material non-disclosure, nor to serve as a "*warning*" to other litigants. Rather, it reflects the reality that the applicant's case, now that it has been laid bare, does not meet the threshold prescribed for the grant of leave. The pleaded case, namely that the Circuit Court hearing had been conducted in breach of fair procedures, is simply untenable.

29. Regrettably, the applicant has chosen not to file any affidavit in response to the application to set aside the grant of leave. The applicant has not apologised for, still less sought to explain, the subterfuge in his verifying affidavit.

30. In summary, I have concluded that these judicial review proceedings represent an abuse of process. Accordingly, I propose to set aside the grant of leave and to dismiss the proceedings.

31. As to legal costs, my *provisional* view is that the respondent is entitled to recover the costs of these proceedings as against the applicant having regard, first, to the fact that she has been entirely successful in having the proceedings dismissed, and, secondly, to the conduct of the applicant in failing to make material disclosure. If the applicant wishes to contend for a different form of costs order, written legal submissions must be filed within 14 days of today's date. The respondent will have 14 days thereafter to reply.

Approved Garrett Simons