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No further redactions required*



**THE COURT OF APPEAL**

**CIVIL**

**Neutral Citation Number: [2022] IECA 102**

**Court of Appeal Record Nos 2020/241**

**Haughton J**

**Collins J**

**Binchy J**

**BETWEEN**

**M. D**

*Applicant/Appellant*

**AND**

**E.H.D**

*Intended Respondent*

**JUDGMENT of Mr Justice Maurice Collins delivered on 3 May 2022**

## PRELIMINARY

1. The Applicant, Mr D, seeks leave to seek judicial review of an Order made by Judge Brian O' Callaghan in the Circuit Court in Ennis on 21 July 2020. The effect of that Order was to bring to an end proceedings brought by the Applicant (Record number 2842F/2020) in which he sought a declaration pursuant to section 29 of the Family Law Act 1995 ("*the 1995 Act*") that his marriage to the intended Respondent (to whom I shall refer as Ms H) subsisted on the 30 December 2019, as well as a declaration that a decree of divorce dated 28 February 2006 ("*the Divorce Decree*") in respect of that marriage was not entitled to recognition in the State. I shall refer to those proceedings as "*the Section 29 Proceedings*".
2. The Applicant's essential complaint is that all that was before Judge O' Callaghan on 21 July 2020 was his motion for judgment in default of appearance and that the Judge wrongly struck out both that motion and the substantive proceedings without giving him an opportunity to open his case to the Court (Statement of Grounds, para (e)1) and without giving any reasons for its decision sufficient for him to properly consider his position (Statement of Grounds, para (e)2). The Applicant seeks *certiorari* of the Circuit Court's Order and an order of *mandamus* "*instructing*" the Circuit Court to make the declarations sought by the Applicant. Alternatively, the Applicant invites the High Court to make those declarations of its own motion.
3. By Order of 2 November 2020, the High Court (Meenan J) refused leave to apply for judicial review. In his view, the Applicant had failed to set out "*the most basic facts*" in his grounding affidavit. In particular, the Judge noted that the Applicant had appealed

the Divorce Decree but that there was “*complete silence*” as to what had happened to that appeal. He was also critical of the lack of information as to what precisely had occurred in the Circuit Court on 21 July 2020, who was in court and whether the other side (Ms H) had been represented. The Judge made it clear that the Applicant could renew his application on the basis of fuller evidence addressing the issues identified by him.

4. Instead of renewing his application to the High Court, the Applicant has appealed to this Court. When that appeal first came on for hearing before this Court, the Court directed the Applicant to provide further material and the Court has since been provided with an further Affidavit of the Applicant sworn on 15 June 2021 which exhibits a number of additional and material documents, including pleadings in family law proceedings involving the parties, as well as the pleadings in earlier judicial review proceedings to which it will be necessary to make further reference. The Court was also provided with copies of various orders made in those proceedings as well as a transcript of the hearing before Judge O’ Callaghan in Ennis on 21 July 2020.
5. Before addressing that material further, it is appropriate to address the relevant threshold test applicable to applications for leave to apply for judicial review under Order 84 RSC.

## APPLICATION FOR LEAVE - THE THRESHOLD TEST

6. What is before the Court is an application for leave to seek judicial review. The threshold test is that set out by the Supreme Court in *G v Director of Public Prosecutions* [1994] 1 IR 374.
7. The test in *G v Director of Public Prosecutions* is set out in the judgment of Finlay CJ (Blayney and Denham JJ concurring) at pages 377-378, as follows:

*“It is, I am satisfied, desirable before considering the specific issues in this case to set out in short form what appears to be the necessary ingredients which an applicant must satisfy in order to obtain liberty of the court to issue judicial review proceedings. An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:*

*(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).*

*(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.*

*(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.*

*(d) That the application has been made promptly and in any event within the three months or six months time limits provided for in O. 84, r. 21 (1), or that the Court is satisfied that there is a good reason for extending the time limit.*

*(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure.”*

Finlay CJ emphasised that, in addition to these “*conditions or proofs*”, the court had a general discretion, observing that “*judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an ex parte application*” (at page 378).

8. While the *G* threshold is a relatively low one, it is nonetheless real and the filtering function of the High Court (and of this Court on appeal) is an important one.

## THE FACTS

9. The High Court Judge was understandably critical of the paucity of the evidence put before him and in particular the absence of any adequate explanation as to what happened to the Applicant's appeal against the Circuit Court Order for Divorce made on 28 February 2006. The picture is a good deal clearer now as a result of the further material furnished to the Court.
  
10. On 9 February 2006 judicial separation proceedings (Record No 619F) came on for hearing before Judge James O' Donoghue in the Circuit Court in Ennis. While the Civil Bill is not amongst the papers before the Court, Mr D was the applicant in those proceedings and the applicant for judicial separation. Mr D was represented by solicitor and counsel. Ms H was also legally represented. Various orders were made by the Judge on 9 February pursuant to the Judicial Separation and Family Law Reform Act 1989 and the 1995 Act. Mr D was present in court on 9 February and according to him (per para 5 of his affidavit of 9 July 2021), the Judge raised an issue as to whether the appropriate decree was one for judicial separation or divorce and "*both sides indicated that at that stage a decree of divorce was appropriate*". In the circumstances, the Judge indicated that he would adjourn the proceedings to 28 February to allow for "*the required divorce documentation to be put in place.*" Clearly, what was intended and agreed was that, subject to appropriate proceedings being issued, an order for divorce would be made on 28 February. Mr D accepts that he understood that to be the case.
  
11. A further Civil Bill then issued, with Ms H as applicant and Mr D as respondent, seeking

a decree of divorce and ancillary relief (Record No 1013F). That Civil Bill issued on 27 February 2006 and was served on the solicitors then acting for Mr D. On 28 February 2006 Judge O' Donoghue granted the Divorce Decree pursuant to section 5(1) of the Family Law (Divorce) Act 1996. He also made an order pursuant to section 18(1) of that Act excluding claims by one party against the estate of the other. No record of that hearing is before the Court but in the course of the hearing before Judge O' Callaghan on 21 July 2020, Mr L, the solicitor who had acted for Ms H in those proceedings, informed the Court that he had appeared for Ms H on the granting of the decree of divorce and that Mr D was represented by solicitor and counsel (Transcript, page 14). The divorce was uncontested (*ibid*). That is not disputed by Mr D, though he now suggests that his legal advisors ought to have raised objections to the making of the order.

12. While the immediate focus of these intended judicial review proceedings may be the Order made by Judge O' Callaghan on 21 July 2020, the Applicant's real objective is to overturn the Divorce Decree made more than 16 years ago.
  
13. Prior to the hearing of the divorce proceedings on 28 February 2006 (Record No 1013F), Mr D instructed his solicitors to lodge an appeal from the Circuit Court's judgment and order of 9 February 2006. Curiously, the Notice of Appeal (which is dated 16 February 2006) purports also to appeal the judgment of the Circuit Court of 28 February 2006. According to Mr D, the Circuit Court's Order of 9 February 2006 provided for a stay in the event of an appeal and that the Order was thus stayed on this appeal.

14. Mr D says that, if Judge O' Donoghue was informed on 28 February 2006 that the Order made by him on 9 February had been appealed, he would not have the Divorce Decree. I will come back to that point later.
15. On 1 March 2006 Mr D's solicitors lodged a further appeal from the judgment and order of 28 February 2006.
16. These appeals appear to have come on for hearing before the High Court on Circuit (O' Higgins J) in Ennis on 8 March 2007. Mr D was legally represented at that hearing and it appears that he gave evidence at it. O' Higgins J made a detailed Order (which references both 619F and 1013F in its title) dealing with financial, property and custody issues. The order does not include any order for divorce. The reason for that appears to be that Mr D did not pursue his appeal against the Divorce Decree and the hearing before the High Court on Circuit was therefore concerned with, and only with, the ancillary/consequential orders to be made. Mr D accepted that he had not challenged the divorce order on appeal. He clearly regrets that approach now but that does not alter the position. The Order made by O' Higgins J effectively disposed of both of Mr D's appeals.
17. Issues subsequently arose with respect to compliance by Mr D with his financial obligations under the order made by O' Higgins J on appeal and in December 2011 Ms H commenced enforcement proceedings in the High Court. According to Mr D (per para 17 of his affidavit of 9 July 2021), in the course of those proceedings he "*became aware of the issues regarding the manner in which the divorce proceedings were initiated.*" At that stage (so the affidavit goes on) he sought leave to apply for judicial



review including the necessary extension of time but that application was refused.

18. A copy of the Statement of Grounds and verifying affidavit of Mr D (sworn on 12 April 2012) has been furnished to the Court. The Statement of Grounds names Judge O' Donoghue and O' Higgins J as Respondents, with Ms H and the then Attorney General named as Notice Parties. The primary relief sought in the proceedings was an order setting aside the Circuit Court orders of 9 and 28 February 2006 and the order made by the High Court on appeal on 8 March 2007. It also sought a declaration that the provisions of section 22 of the Family Law (Divorce) Act 1996 and section 18 of the Family Law Act 1995 (which provide for variation of certain orders previously made by a court under those Acts) were "*incomplete and therefore unconstitutional.*" The Statement of Grounds stated that the Divorce Decree "*may be invalid*" for the reasons set out in paragraph 3 of Mr D's affidavit. There Mr D stated that he was "*concerned regarding the status of the Decree of Divorce*" before going to make various points about the sequencing of the proceedings, the detailed form of the Circuit Court orders and the fact that the Civil Bill in Proceedings 1013F were not served personally on him (though allowing that "*it may be argued*" that it was served on his solicitors, as appears clearly to have been the case).
  
19. In that affidavit, Mr D says that he had "*no issue with being divorced from the Respondent*" but wondered "*about the legitimacy of the decree*" and wished to have that clarified (para 4). His real concern appears to have been the nature of the "*proper provision*" that had been made and, in particular, the fact that the High Court had directed payment of a lump sum of €75,000 which Mr D was attempting – unsuccessfully – to have reviewed/varied (and which was the subject of a separate

application brought by Mr D in January 2012 which was dismissed by the High Court (White J) on 20 April 2012 for the reasons set out in his written judgment of that date ([2012] IEHC 580).

20. The High Court (White J) initially directed that the application for leave be served on Ms H and also directed that Mr D was to issue a motion seeking an extension of time (Order of 20 April 2012) to be served on all of the proposed parties. That motion was heard on 11 May 2012 and on 8 June 2012 White J gave judgment refusing the extension sought. The Court has not been provided with any record of the Judge's ruling but has been provided with the Order of 8 June 2012.
21. The Order refusing an extension of time appears not to have been appealed by Mr D.
22. Between 2012 and 2020 there were many further hearings before the District, Circuit and High Courts involving the parties relating to ongoing disputes relating to maintenance and financial/property provision.
23. We then come to the Section 29 proceedings (2842F/2020). Section 29 of the Family Law Act 1995 makes provision for declarations as to marital status. Its enactment followed from a recommendation made by the Law Reform Commission in its Report on *Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters* (LRC 6-1983). Subsection (1) provides that:

*“(1) The court may, on application to it in that behalf by either of the spouses concerned or by any other person who, in the opinion of the court, has a*

*sufficient interest in the matter, by order make one or more of the following declarations in relation to a marriage, that is to say:*

*(a) a declaration that the marriage was at its inception a valid marriage,*

*(b) a declaration that the marriage subsisted on a date specified in the application,*

*(c) a declaration that the marriage did not subsist on a date so specified, not being the date of the inception of the marriage,*

*(d) a declaration that the validity of a divorce, annulment or legal separation obtained under the civil law of any other country or jurisdiction in respect of the marriage is entitled to recognition in the State,*

*(e) a declaration that the validity of a divorce, annulment or legal separation so obtained in respect of the marriage is not entitled to recognition in the State.”*

24. The relevant sub-paragraphs here are (b) and (e), Mr D having sought a declaration that his marriage to Ms H subsisted on 30 December 2019 (the date of the Civil Bill) as well as a declaration that the Divorce Decree of 28 February 2006 “*is not entitled to recognition in the State.*”
25. No appearance having been entered by Ms H, Mr D brought a motion for judgment in default which, as already narrated, came before Judge O’ Callaghan in the Circuit Court in Ennis on 21 July 2020. A number of other family law matters involving Mr D were before the Circuit Court that day. A solicitor, Mr W, appeared for Mr D in relation to one of those matters, a District Court appeal relating to maintenance.

26. A solicitor, Mr L, was also in attendance on behalf of Ms H. When the section 29 proceedings were called, Mr W excused himself but Mr L remained in court (Transcript, page 11). Mr L told the Judge that substantially the same issues as were raised in the proceedings had been canvassed by Mr D in the unsuccessful judicial review proceedings brought in 2012. The Judge then raised with Mr D the question of how he could pursue the section 29 proceedings in circumstances where, subsequent to the granting of the Divorce Decree, he had brought various applications which recognised the Decree (the Judge gave details of those applications but it is not necessary to set out the detail here). There was then discussion of the circumstances in which the Decree was made, in the context of which Mr L intervened to confirm that Mr D had been represented by solicitor and counsel before the Circuit Court on 28 February 2006. After some further exchanges the Judge indicated that he was refusing Mr D's application and striking out the motion for judgment in default of appearance (Transcript, page 17).

## DISCUSSION

### **The Applicant's Case on Appeal**

27. In his Notice of Appeal, Mr D says that Meenan J wrongly considered the grounds before the Circuit Court and applied too high a threshold for granting leave. The issue, Mr D says, is that the Circuit Court failed to make “*a very simple declaration regarding the status of my marriage*”. Mr D says that he has a legal right to have the status of his marriage determined by the Court and the Circuit Court should have stated that his marriage was either valid or otherwise. He says that the leave procedure is intended to filter out vexatious applications and those doomed to fail and he says that his application does not fall into either of those categories.
28. In his oral submissions, presented succinctly and courteously, Mr D accepted that his immediate concern was with the orders that had been made by O’ Higgins J on appeal relating to financial provision for Ms H and in particular the lump sum order that had been made and the effects of it on his financial position and his capacity to look after a minor child born subsequent to the Divorce Decree. However, his contention was that he was not properly divorced because the Divorce Decree was invalid because it was not compliant with the Constitution. If he succeeded in establishing that, the financial provision orders made by O’ Higgins J would “*fall away*”. Proper procedures had not been followed. The divorce proceedings had not been served on him. The Circuit Court Judge should have been told that he had appealed the earlier order of 9 February 2006 and, if he had, he would not have proceeded to make the Divorce Decree.

## **Analysis**

29. While the immediate target of these proceedings is the Order made by the Circuit Court on 21 July 2020, it is clear that Mr D's ultimate objective is to challenge the Divorce Decree. He did so directly, without success, in 2012 and the Section 29 proceedings brought by him in late 2019/early 2020 are an attempt to achieve the same outcome indirectly. Mr D fairly accepts that that is so and accepts that, if permitted to proceed with the Section 29 Proceedings, he would be relying on the same alleged frailties in the Divorce Decree and the procedures leading to it as had been advanced in the judicial review proceedings in 2012 and inviting the Circuit Court to conclude that the Decree was invalid on that basis.
30. In my view, Mr D is clearly not entitled to pursue either of the reliefs sought in the section 29 proceedings and those proceedings were at all times doomed to fail. In the circumstances, the Circuit Court Judge was quite correct to refuse to enter judgment and was also correct to strike out the proceedings.
31. Mr D's marital status was determined by the Order made by Judge O' Donoghue in the Circuit Court on 28 February 2006 granting a decree of divorce. That order was uncontested. It had the effect of dissolving Mr D's marriage to Ms H: section 10(1) of the Family Law (Divorce) Act 1996.
32. The Circuit Court Order was a final order, not an interim or interlocutory order. Once it was made, the Circuit Court was *functus officio* as regards the marital status of Mr D

and Ms H (the financial provision orders are, of course, in a rather different category). The Order could, of course, be appealed to the High Court. While Mr D brought such an appeal, he did not prosecute it to hearing or adjudication. The order made by the High Court (O' Higgins J) on 8 March 2007 did not set aside or vary the Divorce Decree of 28 February 2006 or otherwise affect its binding effect.

33. The Circuit Court's Order of 28 February 2006 was also, in principle, amenable to judicial review. Mr D did, in fact, seek to judicially review the Order (as well as the Circuit Court's Order of 9 February 2006 and the High Court's Order of 8 March 2007) some 6 years later but his application was rejected because it was manifestly out of time.
34. The net result of this is that the Circuit Court Order of 28 February 2006 remains in place and remains of binding effect. No further appeal lies from it and it is no longer amenable to judicial review. The marital status of Mr D and Ms H has been finally determined and the dissolution of their marriage is *res judicata*.
35. Section 29 of the Family Law Act 1995 does not entitle the Circuit Court to set aside, vary or disregard that Order, as it would necessarily have to do were it to entertain Mr D's application for a declaration that his marriage with Ms H subsisted as of December 2019. Any such declaration would be in absolute conflict with the Divorce Decree, by reason of which Mr D's marriage to Ms H was dissolved in February 2006, and, while the Divorce Decree continues to be a binding and effective Order, not having been reversed on appeal or set aside in judicial review proceedings or otherwise, it simply is not open to the Circuit Court – or indeed to any court - to grant such a declaration.

Section 29 does not confer on courts hearing proceedings under it a form of quasi-judicial review jurisdiction. While there may be no express provision to that effect in Part IV of the 1995 Act – in contrast to the position of foreign judgments which are addressed in section 30(3) of the Act – it follows as a matter of fundamental principle inherent in our system of justice.<sup>1</sup>

36. It may be said that these are issues that ought properly to be determined by the Circuit Court only after a full hearing. However, there is an obvious and pressing importance to certainty and finality in this area. The marital status of Mr D and Ms H was settled as long ago as 2006 (or, at the latest, 2007) and, in the same way as the High Court obviously concluded that Mr D should not be allowed to re-open that issue in 2012, I am firmly of the view that it would be wholly inappropriate to allow him to do so now, some 10 years later.

37. As regards the second declaration sought by Mr D. that is wholly misconceived. The Divorce Decree here was made by the Circuit Court pursuant to the provisions of the Family Law (Divorce) Act 1996. It was not “*obtained under the civil law of any other country or jurisdiction*” and, accordingly, no question of its “*recognition in the State*” arises.

38. In these circumstances, I am not persuaded that there is any arguable case that the Circuit Court Judge erred in dismissing the Section 29 proceedings in the manner that

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<sup>1</sup> Section 30(3) provides that a declaration conflicting with a previous final judgment or decree of a court of competent jurisdiction of a country or jurisdiction other than the State shall not be made unless the judgment or decree was obtained by fraud or collusion. It is inconceivable that the Oireachtas intended final judgments of foreign courts to have a higher status than a final judgment of a court in this jurisdiction.



he did. As the Judge observed, it was not open to Mr D to pursue a declaration that his marriage with Ms H subsisted in the face of the Circuit Court Order of 28 February 2006. The Section 29 proceedings were an impermissible collateral attack on the Divorce Decree and could not properly have been pursued. The fact that Mr D had subsequently brought various applications which recognised and relied on the divorce simply highlights the untenable nature of the Section 29 proceedings. The Circuit Court had no jurisdiction to grant the declarations sought by Mr D and, in the event that it had proceeded to do so, its decision would have been invalid and ineffective. Mr D has no arguable basis for seeking *certiorari* of the Circuit Court's order, less still any basis for an order of *mandamus*.

39. I would add that I am not persuaded that there is any substance in any of the arguments made by Mr D as to the alleged invalidity of the Divorce Decree. There is no doubt that the divorce proceedings did not follow the normal procedural pathway envisaged by Order 59 of the Circuit Court Rules. But that was by agreement of the parties and of the Circuit Court Judge. As for the issue of service on Mr D, it is clear that the Civil Bill was served on his solicitors and there is no suggestion that they were not authorised to accept service on his behalf. As regards Mr D's contention that the Judge ought to have been told of the fact that the Order of 9 February had been appealed and that, if he had been, he would not have granted the Divorce Decree, that is doubly speculative. There is no evidence either way as to whether the Judge was informed of the appeal and how he would have reacted to such information is a matter of conjecture. What is *not* a matter of conjecture is that the Divorce Decree was not contested. If Mr D wished to contest the making of the Divorce Decree on the basis that the Court's earlier order was subject to appeal, he could have instructed his legal representatives accordingly. He clearly did

not do so. Finally, in terms of the substantive jurisdiction of the Circuit Court Judge to grant the Divorce Decree, section 5(1) of the Family Law (Divorce) Act 1996 (as amended) sets out the matters of which the Judge had to be satisfied before granting such a decree. It is in the following terms:

*“5 (1) Subject to the provisions of this Act, where, on application to it in that behalf by either of the spouses concerned, the court is satisfied that— (a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least two years during the previous three years, (b) there is no reasonable prospect of a reconciliation between the spouses, and (c) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family, the court may, in exercise of the jurisdiction conferred by Article 41.3.2° of the Constitution, grant a decree of divorce in respect of the marriage concerned.”*

40. No issue is raised as to (a) and (b) above. As to (c), Mr D says that proper provision was not made because the Judge considered that issue, and made the orders that he did, in the context of judicial separation proceedings, not in the context of the subsequent divorce proceedings. In my view, there is nothing in that point. The Judge had made orders relating to the division of property and financial provision including maintenance on 9 February. When asked to make a decree of divorce less than 3 weeks later, he was entitled to take the view that *“such provision as the court considers proper having regard to the circumstances exists”*. No argument to the contrary was made on Mr D’s behalf. The fact that Mr D had appealed the order made on 9 February did not

alter the position or oust the jurisdiction of the Circuit Court Judge to grant a decree of divorce in those circumstances.

41. I would therefore dismiss the appeal and refuse leave to apply for judicial review. No issue of costs arises.

*Haughton and Binchy JJ agree with this Judgment and with the Order proposed*