



**THE COURT OF APPEAL
Civil**

**Birmingham P.
Whelan J.
Binchy J.**

**UNAPPROVED
NO REDACTION NEEDED
Neutral Citation Number [2022] IECA 297**

Appeal Number: 2022/35

**IN THE MATTER OF THE PROTECTION OF CHILDREN (HAGUE
CONVENTION) ACT 2000**

AND IN THE MATTER OF THE MINORS X. and Y.

BETWEEN/

A Q

APPELLANT

- AND -

K J

RESPONDENT

AND

Appeal Number: 2022/37

**IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964 AND IN
THE MATTER OF THE FAMILY LAW DIVORCE ACT, 1996**

BETWEEN/

K J (OTHERWISE K A)

RESPONDENT

- AND -

A M Q (OTHERWISE A M Q)

APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 20th day of December 2022

1. This brief judgment is confined to the issue of jurisdiction and to the lack of entitlement of the appellant to further pursue grounds of appeal against the judgment and order of Jordan J. made in the High Court Appeal Record No. 2021/31CAF on 17th December, 2021. The said appeal was brought from Orders made by Groarke J. in the Circuit Court in Family Law proceedings Record Number F284/2019 on 15 June 2021.

Background

2. The parties are husband and wife and there are three children of the marriage. The oldest is now of full age. Issues concerning the children have been the subject of litigation over the past several years culminating in court orders both in Pakistan and in this jurisdiction. The respondent (the wife) instituted proceedings F284/2019 in the circuit where she resides with the children in October 2019 seeking, *inter alia*, a decree of divorce together with ancillary orders. It appears that same were served on the husband in September 2020.

15th June 2021

3. The appellant (the husband) is a litigant in person. He contested the jurisdiction of the relevant Circuit Court to hear and make orders in the said divorce proceedings. Those jurisdictional objections were raised, *inter alia*, in an affidavit sworn by him on the 30th October, 2020. The husband brought a notice of motion returnable before the relevant Circuit Court on the 22nd March, 2021. Due to the Covid-19 pandemic the matter was heard remotely and was the subject of orders made by Groarke J. on the 15th June, 2021.

4. An essential element in the husband's argument contesting the jurisdiction of the Circuit Court centred on his contention that the institution of the proceedings by the wife in the Circuit Court amounted to a breach of a prior High Court order made by O'Hanlon J. on

the 26th May, 2017 in the context of child abduction proceedings Record No. 2015/61M which were instituted by the husband in November 2015 and ultimately concluded by determination of the Supreme Court in May 2018.

5. Having considered affidavits dated 30th October, 2020, 23rd February, 2021 and 28th May, 2021 and heard the procedural and jurisdictional arguments advanced by the husband and the further arguments and submissions advanced by the husband and also by counsel on behalf of the wife, Groarke J. refused the husband's application and held that the Circuit Court did have jurisdiction to hear the matter on foot of the wife's Family Law Civil Bill in proceedings Record No. F284/2019. A conditional stay was placed on the said order for a period of four weeks to allow the husband lodge an appeal with the High Court sitting on circuit.

Appeal to High Court

6. From that Circuit Court Order the husband appealed, which said appeal was listed for hearing along with two further separate sets of High Court proceedings:

(i) Proceedings 2021/19 HLC brought by the husband seeking recognition and enforcement of Orders ("the Recognition proceedings") pertaining to the children he had obtained in [city], Pakistan on 8th July 2019 and

(ii) proceedings 2021/127M brought by the wife seeking orders pertaining to habitual residence, custody access and guardianship ("the Welfare Proceedings").

Both the Recognition and Welfare proceedings as well as the Circuit Appeal were heard and considered by the High Court and a comprehensive *ex tempore* judgment was delivered by Mr. Justice Jordan on the 17th December, 2021.

Determination in Circuit Appeal 2021/31 CAF

7. Having considered the arguments the conclusions of the judge were succinctly set out at para. 2 of his judgment: -

“... (the husband) has brought an appeal in respect of the order of Judge Groarke made on 15th June, 2021. Judge Groarke refused to accept the argument put forward by (the husband) that the Circuit Court did not have jurisdiction to deal with the divorce proceedings. I have heard the submissions of the parties and I have had regard to the evidence before the court, voluminous evidence in terms of affidavits and exhibits, and I am satisfied that the Circuit Court did have jurisdiction to deal with the matter. The Circuit Court did have jurisdiction to deal with the matter because under s. 39 of the Family Law Divorce Act 1996 it is sufficient to prove that the applicant was resident in the jurisdiction of ... Circuit Family Court for at least one year preceding the date the proceedings were issued. I am satisfied from the evidence before the court and submissions made that the jurisdictional requirements were met and that Judge Groarke was correct to make the order he did make on the 15th June, 2021. The divorce proceedings are properly before the Circuit Court Family Court ... so it does have jurisdiction and in those circumstances I am dismissing the appeal against the order of Judge Groarke and affirming Judge Groarke’s finding in refusing the respondent’s application and affirming the declaration at para. 2 of the order that the Circuit Court has jurisdiction to hear the matter before the court on foot of the applicant’s Family Law Civil Bill, record number F284/2019.”

The two Notices of Appeal

8. Two prolix Notices of Appeal were lodged by the husband. One is expressed to relate to High Court proceedings 2021/19 HCL the recognition proceedings the other to the welfare proceedings 2021/127M. Both are identical. I note that within his submissions at para. 7(c) the husband states:

“The third case was an appeal against Circuit Court decision allowing Jurisdiction for a divorce with ref. no. 2021/31CAF by father. It is not being appealed as no liberty to appeal was granted.”

However, notwithstanding that statement, within the terms and grounds of both Notices of Appeal, the husband explicitly and repeatedly seeks to challenge the said Order refusing his appeal from the Orders of the Circuit Court.

9. Whilst ostensibly no formal appeal has been brought in respect of proceedings 2021/31CAF (the within Circuit Appeal), same being statutorily impermissible, the appellant set out several grounds of appeal common to both Notices, particularly at grounds 6 and 26-29 (inclusive) which are clearly directed towards impugning the High Court decision upholding the decision and Order of Groarke J. of 15th June 2021 and having this court review and/or reverse the determination of Jordan J. in respect of Circuit Appeal 2021/31CAF. As such, both Notices of Appeal at the very least purport in substance, without leave and impermissibly, to indirectly appeal from the determination of the High Court judge in the appeal from the Circuit Court order of Groarke J. *“regarding Irish court jurisdiction for divorce with ref. no. 2021/31CAF”*.

10. For instance, Ground of Appeal 6 in each Notice of Appeal states:

“The Court was unfair in related case to refuse the liberty to appeal jurisdiction of divorce in Court of appeal or to stay the proceedings until determination of appeal of related case ie custody of children. It was an appeal form (sic) Circuit Court about jurisdiction of divorce. If my this (sic) appeal get successful then dimension of the divorce case will change and if my appeal is unsuccessful it will be economically viable for me to hire lawyers for a straight forward case of divorce dealing with custody on same time rather than dealing with two cases starting at different times. It is not an urgent issue as it does not involve children. I am asking

for urgency for the case children welfare. It was delayed by court or the lawyer for 2 years and six months delay as my documents were returned. The family law civil bill was obtained by providing the incorrect information. Affidavit of welfare part 8 there has been no mention about Pakistani court proceedings or orders and it was against the Court order as well.”

11. Grounds of Appeal 26 – 29 in both Notices are entitled; “*Contesting the Jurisdiction of the ... circuit Court*”. The said grounds contend, *inter alia*, that the High Court had on 26th May, 2017 retained jurisdiction solely in relation to access to the children and that the Irish courts only had “*temporary jurisdiction*” which, the husband contended, had come to an end. Further, the contention is advanced that the wife had brought the Divorce Proceedings in the Circuit Court “*... in violation of High Court Order*”. It is further asserted “*[r]ather than any contempt proceedings the Judge granted the permission for the divorce case.*” Ground of Appeal 29 states: “*The Judge erred*”.

12. In lengthy written submissions the husband disputes and takes issue with the determination of the High Court in 2021/31CAF delivered on 17th December, 2021 upholding the orders of Groarke J. made on the 15th June, 2021. For instance, at para. 6 of the written submissions dated 1st April, 2022 he states:

“The question here was that how the case was brought in Circuit Court in violation of High Court order.”

He thereby advances arguments which amount in substance to an impermissible attempt to bring an appeal against the Order of the High Court in 2021/31CAF. Same is a clear attack on the final and conclusive order of the High Court made on 17th December 2021, refusing the appeal against the Circuit Court Order of 15th June, 2021.

Section 39 of the Courts of Justice Act, 1936

13. Section 39 of the Courts of Justice Act, 1936 provides:

“The decision of the High Court or of the High Court on Circuit on an appeal under this Part of this Act shall be final and conclusive and not appealable.”

14. The practical operation of s. 39 was succinctly explained by Barrett J. in *Permanent TSB Plc Formerly Irish Life and Permanent Plc v O’Connor & Anor* [2018] IEHC 339 at para. 3 where he adopted arguments advanced by the defendants before him and characterised the import of s. 39 thus:

“...Within our court system, in proceedings commenced before the Circuit Court, parties typically get two chances to make their respective cases. They get an initial trial before the Circuit Court on such evidence as is properly before that court. A party to such proceedings who considers that s/he or it has one or more grounds of appeal, has a right of appeal to the High Court where a de novo hearing is undertaken. Following such de novo hearing, matters typically end. There is no further appeal as of right, though there can be onward reference of a question of law.”

15. The said principle applies equally in family law proceedings. As Shatter observed in the authoritative family law text *Shatter’s Family Law* (4th ed., Butterworths, 1997) at para. 2.25:

“...The High Court may also conduct a full hearing of a case initiated in the Circuit Court upon an appeal being made to it. ... A further appeal on a point of law from the decision of the High Court to the Supreme Court may be taken, but only with leave of the High Court judge. A case may also be stated on a point of law to the Supreme Court by leave of the High Court in appellate proceedings from the Circuit Court before a final appellate decision is made in the proceedings by the High Court.”

Since the coming into operation of the Court of Appeal Act, 2014 and the establishment of the Court of Appeal it is this court rather than the Supreme Court which has appellate jurisdiction from all decisions of the High Court “... *with such exceptions and subject to such regulations as may be prescribed by law*” as provided by Article 34.4.1 of the Constitution.

Public Policy

16. In considering the effect of s. 39 of the 1936 Act in the context of family law proceedings the Supreme Court in *L.P. v M.P.* [2002] 1 IR 219, Murray J. (as he then was) observed:

“[Section 39 of the Courts of Justice Act, 1936] was re-enacted by Section 48(1) and (3) of the Courts (Supplemental Provisions) Act 1961. The effect of its re-enactment means that ‘decisions of the High Court (or of the High Court on Circuit) on appeal from the Circuit Court are now validly excluded from the appellate jurisdiction of this Court’, per Henchy J. in Andrews Productions v. Gaiety Theatre [1973] I.R. 295 at 304). In that case it was held that the section creates a valid and effective exception to the appellate jurisdiction of this Court from decisions of the High Court as envisaged in Article 34.4.3 of the Constitution.”

17. Murray J. observed:

“It is manifestly clear from the terms of Section 39 of the 1936 Act as re-enacted by the [Courts (Supplemental Provisions) Act, 1961] that the Oireachtas intended the High Court to be the Court of final instance in the hearing of appeals from the Circuit Court. That provision is a recognition of the desire of public policy to determine the point in which proceedings inter partes should be considered final.”

He further observed –

“As Hamilton C.J. observed In Re Greendale Developments Ltd. (in liquidation) (No. 3) [2000] 2 I.R. 514 ‘...the finality of proceedings both at the level of trial and possibly more particularly at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law, and should not lightly be breached.’

Once the High Court has embarked on the hearing of an appeal from the Circuit Court it is acting exclusively within its appellate jurisdiction pursuant to Section 38 of the 1936 Act and all decisions in and in the course of that hearing are governed by Section 39.

It seems to me that to allow a party to a Circuit appeal before the High Court to appeal to this Court a ruling of the presiding Judge made in the course of hearing the appeal would be inconsistent with and thwart the clear intention of the legislature as expressed in the statute.”

18. The appellant has not identified any exception that would take this matter outside the ambit of s. 39 such as the exceptionality identified by Finlay Geoghegan J. in *Kelly v National University of Ireland Dublin AKA UCD v The Director of the Equality Tribunal* [2017] IECA 161, [2017] 3 I.R. 237.

19. The far-reaching impact of s. 39 of the 1936 Act was made clear in the judgment of this court delivered by Murray J. in *Bank of Ireland v Gormley* [2020] IECA 102 where, having considered the text of s. 39 he observed:

“6. The preclusion on appeal to this Court entailed by this provision is not limited to the final decision of the High Court in allowing or refusing the appeal in question. It extends to any interlocutory application made to, and any decision made by, the High Court exercising its appellate jurisdiction under the 1936 Act in the course of appeals from the Circuit Court. This was explained in Kinahan v.

Baila (Unreported Supreme Court, 18 July 1985). There, the Court was concerned with an attempt to appeal a decision of the High Court refusing an order for security for costs of proceedings by way of appeal from the Circuit Court.”

20. As was observed by Baker J. in *ACC Loan Management Limited and Pepper Finance Corporation (Ireland) v Fagan* [2021] IESC 20 at para. 82:

“That the purpose of s. 39 was to bring an end to litigation is reflected in the legislative provision for a complete rehearing by the High Court judge hearing the appeal, subject only to those restrictions concerning the admission of new evidence in cases wholly heard on affidavit. The policy of s. 39 is that the statutory appeal to the High Court be an end to Circuit Court litigation.”

Determination

21. The High Court conducted a full hearing of the appellant’s appeal 2021/31CAF and unequivocally concluded that the Circuit Court had jurisdiction to hear the matter on foot of the Family Law Civil Bill Record No. F284/2019, thereby upholding the order of Groarke J. made on the 15th June, 2021. That is the end of the matter.

22. Despite assertions to the contrary, the appellant has advanced various grounds in both Notices of Appeal, in written submissions and arguments to assert in this court review further and find that the High Court judge erred in upholding the orders of Judge Groarke made in the Circuit Court on the 15th June, 2021, including that the said court has jurisdiction to hear the divorce proceedings of the wife’s Family Law Civil Bill Record No. F284/2019. I am satisfied that same constitute an impermissible indirect attempt to have this court review the High Court order and judgment of 17th December, 2021 in appeal 2021/31CAF. This court does not have jurisdiction to entertain such an appeal. All grounds of appeal in both appeals

which directly or indirectly in whole or in part seek to further agitate the decision of the High court in appeal 2021/31CAF fall to be struck out as impermissible.

23. The appellant did not withdraw the said grounds of appeal at any time. This judgment is provided to put the matter beyond doubt in light of the long-running, protracted and extensive nature of the litigation that has subsisted between the parties both in Pakistan and Ireland. Such grounds of appeal seeking in substance to revisit, review or vary the findings of the High Court in Circuit Appeal 2021/31CAF were never maintainable.

Costs

24. The appellant did not expend very much time pursuing these grounds at the hearing and in the circumstances the court's provisional view is that the balance of justice warrants that no order as to costs be made in relation to these specific grounds of appeal referred to and determined in this judgment. If the wife contends for a different order in relation to costs, a written submission no longer than 1,500 words should be provided identifying cogent reasons why the said proposed approach to costs ought to be varied. Any such submission be filed by or on behalf of the wife within 21 days of the date hereof, the husband having a further 21 days to file any replying submission.

25. Birmingham P. and Binchy J. having considered the within judgment agree with same.