



**THE COURT OF APPEAL
Civil**

APPROVED
Neutral Citation No. [2023] IECA 62

Appeal Numbers: 2022/35 & 2022/37

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

**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 -

**IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964
AND IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996,
AS AMENDED**

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 March 2023

Background

1. This judgment is directed towards the issue of costs in respect of appeals brought by the appellant from a judgment and orders made in the High Court in family law proceedings being appeals nos. 2022/35 and 2022/37 which resulted in three judgments being delivered by this court on the 20th December, 2022 - *A v J* [2022] IECA 297, *KA v AMQ* [2022] IECA 295 and *Q v J* [2022] IECA 297.
2. The appellant failed on all his grounds of appeal arising from the judgment and orders made by Mr. Justice Jordan in the High Court on the 17th December, 2021 wherein he sought the recognition and enforcement of certain orders pursuant to the provisions of the *Hague Convention of 19 October, 1996, on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (the 1996 Hague Convention). The appellant sought the summary return of the two younger children of the parties, who are now adolescents, to the jurisdiction of the courts of Pakistan. He contested the jurisdiction of the Circuit Court to determine the wife's divorce proceedings and of the Irish Courts to make ancillary orders concerning the children of the marriage. The appeals failed on all grounds.
3. In the aforementioned judgments which had been delivered on the 20th December, 2022 electronically the court indicated its provisional view as to costs and in particular its proposal that costs would be made against the appellant in respect of the said appeals, he having failed to succeed in any of the grounds raised in his notices of appeal. The wife seeks an order for her costs.

Submissions on behalf of the respondent wife

4. It is contended on behalf of the wife that an order as to costs ought to be made in her favour in respect of each of the appeals. Reliance is placed on O.99, r.1(3) of the Rules of the Superior Courts to the effect that costs ought to follow the event unless the court for special reasons directs otherwise. Citing *Veolia Water UK Plc v Fingal County Council* (No. 2) [2007] 2 IR 81, it is contended that no such special or unusual circumstances have been identified in the instant case that would warrant deviating from the normal rule. It is contended that the appellant has failed to identify arguments as to “*why a costs order should not be made against him*”. It is contended that he has engaged in prolific litigation to date in relation to the children and that in substance he has repeatedly re-litigated the same issue concerning where the children should reside. This, it is said, has caused hardship to the respondent wife who has been reliant on civil legal aid for legal representation.

5. It is contended on behalf of the wife that she has been subjected to hardship by reason of the litigation conduct of the appellant *inter alia* insofar as he has:

- (a) brought proceedings/appeals “*without foundation in law*” or that had no reasonable prospect of success;
- (b) that he invariably appeals all court orders;
- (c) apart from a single judicial review which took place many years ago the appellant is said to have been unsuccessful in every cause of action and appeal that he has pursued before the courts in this jurisdiction;
- (d) the institution of each set of proceedings has necessitated the wife making fresh applications for legal aid pursuant to statute and has required her to make financial contributions to secure same. Such contributions, it is said, she has difficulty in affording by reason *inter alia* that she is responsible for the three

children of the marriage and does not receive any financial support from the appellant who is a person of considerable means.

- (e) The husband is in control of and in receipt of the rents and profits from certain properties which the couple own in Ireland. He does not maintain his wife and children although he is a very highly qualified professional person with significant earning capacity.

Submissions of the appellant

6. In large measure the submissions filed by the appellant seek to re-argue the substantive grounds of appeal he unsuccessfully advanced at the appeal hearing. He contends for a reversal of the judgments delivered herein on the 20th December, 2022. It is contended that this court in its judgment erred in ignoring the role of the respondent mother and a lawyer in relation to “...*deteriorated welfare of the children, and not informing the father*” in previous proceedings which he unsuccessfully brought. The appellant persists in agitating issues pertaining to the oldest child of the parties notwithstanding that he has attained the age of majority and can no longer be the subject of orders for his summary return to Pakistan, as sought. Further, the second child of the parties has also attained the age of majority albeit subsequent to delivery of the judgments of this court last December.

7. The appellant contends that this court erred in ignoring the evidence which he contends had been advanced by the respondent, his wife, in the Circuit Court “... *that Ireland only has jurisdiction for access*”. This latter contention has been comprehensively dealt with in the judgment delivered by the court which had upheld the determinations of the High Court and is devoid of substance. The appellant ventilates complaints and grievances directed against the former President of the Circuit Court, the judge of the High Court against whose judgment the within appeals were brought and a judgment of this

court where an application for a stay brought by the appellant had been refused and an order for costs had been made against him. A wide variety of extraneous matters not directed towards the issue of costs are canvassed.

8. Rather than focusing on and engaging with the issue of costs the appellant has availed of the costs application to reprise his arguments pertaining to the substantive issues raised in the appeal, all of which have been dealt with and none of which succeeded.

9. It is clear that the appellant strongly disagrees with the findings and determinations of the courts in respect of matters where his applications or arguments have not succeeded. That cannot in and of itself be a basis for determining the issue of costs.

10. He asserts *“I am bound to represent myself in the court due to financial reasons, I had representation for about 17 days (out of 25 days) of court hearings in High Court, full representation in Court of Appeal and full representation in High Court for judicial review.”* However, the appellant is a professional person of high standing who lives and works abroad in employment and clearly has substantial earning capacity.

Order for Costs – Costello J. March 2022

11. The appellant states:

“I am requesting the court not to award the cost and cancel the cost awarded by J. Cotello (sic) for the motion March 2022. In the same time the judgements (sic) needs to be rectified.”

12. In the first instance this court does not have any appellate function in respect of an order for costs awarded against the appellant by Costello J. on 25th March 2022. It would appear that a stay on execution of the said costs order was granted pending the determination of the divorce proceedings which are now in being before the Circuit Court in the circuit where the respondent wife and the children reside. Accordingly, the issue not being before this court no order is to be made in respect of same.

Analysis

13. These being family proceedings and the issues engaging considerations of the welfare of the children the proper allocation of costs requires consideration be had to that factor.

14. It would not be unusual for the courts to direct that each party bear their own costs in family law proceedings where the facts so warrant. The approach was considered by McCracken J. in *MK v JPK (No. 3) (Divorce; Currency)* [2006] 1 IR 283 where at p. 291 he noted:

“These are family law proceedings in which the court must have regard to the interests of both parties. This is not a case in which damages have been awarded to the wife for some wrongdoing or injury caused to her by the husband. In family law cases there is a pool of assets, comprising those of both the husband and the wife, which assets are to be used both to make proper provision for both spouses and any dependant members of the family and to pay the costs of both parties. ... In the circumstances of family law cases the court must look at the effect of the award of costs on both parties.”

15. However, by contrast, the applications and appeals of the appellant are primarily directed towards attempting to delimit the issues that can be decided by the Circuit Court judge and impeding an expeditious determination of the Divorce proceedings, including claims for ancillary reliefs, instituted by the wife in 2019 before the local Circuit Court where she resides with the children of the marriage

16. The Supreme Court in *WYYP v PC* [2013] IESC 12 approved of the approach of McCracken J. Both cases concern substantive divorce proceedings and the distribution of

assets on the dissolution of a marriage, an issue not the subject matter of the within appeal, the observations of Denham C.J. are noteworthy insofar as she stated:

“The award of costs is an exercise of discretion of the trial judge, who has considered all of the circumstances of the proceedings before her or him, and decided the issues. This Court is very reluctant to interfere with the exercise of such discretion.”

17. There is force in the contention advanced on behalf of the respondent wife that in circumstances where “the event” is the outcome of the appeal, and the appellant was unsuccessful on all grounds, unless the court considers it appropriate to make a different order the default position and starting point in a case such as the present and in light of the prolix and wide-ranging nature of the Notices of Appeal, is that costs follow the said event.

18. In my view, the evidence discloses substantial factors that warrant an order for Costs being made against the unsuccessful appellant in the instant case for the following reasons.

- (1) Firstly, there has been a history of protracted litigation being brought and pursued by the appellant concerning the children of the marriage of which the within appeals represent but a further iteration.
- (2) The appellant in the proceedings under appeal sought the recognition and enforcement of orders which he had procured before the courts in Pakistan. There was no evidence put before the High Court that the said application was brought on notice to the respondent wife who at all relevant times was resident in Ireland.
- (3) There is no evidence that the appellant took any step to either serve the proceedings on the wife or serve notice of the proceedings on the wife. In the absence of the respondent wife the appellant secured orders in Pakistan effectively varying orders previously obtained by the respondent mother on

the 4th May, 2015 from the relevant Guardian Court in that country pertaining to the children.

- (4) Further, he exhibited orders said to have been obtained by him on the 8th July, 2019 from the courts in Pakistan granting him sole custody of the three teenage children of the parties. There was no evidence put before the High Court by him to establish either service of proceedings on the respondent wife or indeed to demonstrate that she had been afforded any opportunity to be heard before the said courts or that any opportunity was afforded to the children of the parties who were at the said date adolescents, to be heard or have their views taken into account prior to the making of such far-reaching orders.
- (5) Further, it is evident that the appellant took no step after procuring the said orders to serve the orders on the wife in a timely fashion.
- (6) It was only after the wife instituted proceedings in Ireland in the circuit where she resides, seeking a decree of divorce that the appellant took steps by the institution of proceedings pursuant to the 1996 Hague Convention seeking the recognition and enforcement of the orders he had procured in her absence almost two years prior before the courts in Pakistan.
- (7) The evidence suggests that the appellant is primarily focused on impeding and delaying the proper and full determination of divorce proceedings instituted by the wife in 2019, including the making of all appropriate ancillary orders, and which stand adjourned before the Circuit Court.
- (8) The conduct of the appellant has caused hardship and distress to the children of the marriage who have unequivocally indicated their wish not to be removed from the care of the respondent mother and in particular not to be

returned to the jurisdiction of the courts of Pakistan. Two of the children have now attained the age of majority. The appellant has sought orders for their summary return to Pakistan notwithstanding their unequivocal communication to the court that they were opposed to such a course of action. All children of the marriage were born in this jurisdiction. Apart from a relatively brief interlude from mid-2014 for a period of about 15 months they have throughout their entire lives resided in this jurisdiction and been educated in this jurisdiction.

- (9) The appellant does not deny that he does not pay maintenance for the upkeep and support of his children and his spouse the respondent. His litigation conduct has caused hardship to the household and the respondent has been dependant on legal aid to enable her to defend the various appeals being brought by the appellant.
- (10) In large measure, the appeals amount to reiterations and repetitions of the previous proceedings pursued from 2015 onward whereby the summary return of the children had been repeatedly sought by the appellant, to the jurisdiction of the courts of Pakistan. The said applications had not been successful at any level and leave to appeal to the Supreme Court was refused.
- (11) Although incorporated into the two Notices of Appeal and not the subject of a standalone Notice of Appeal (or any Order for Costs), it is nonetheless a fact that the appellant did in substance appeal against the Order of the High Court dismissing his appeal against an order of the President of the Circuit Court notwithstanding that he acknowledged that he was aware that he was not entitled in law to pursue such an appeal by virtue of s.39 of the Courts of Justice Act 1936. In such circumstances the grounds of appeal against the

order in question amounted to a collateral attack against that Order of the High Court which was not in law appealable.

Conclusion

19. In my view, the appeals brought in the instant case serve no function other than to delay and impede the hearing and determination of the Family Law Divorce proceedings pending before the relevant Circuit Court in this jurisdiction. There was no legitimate basis made out for the appellant's contentions that the Circuit Court lacked jurisdiction to hear and determine all aspects concerning the welfare of the children, including access and custody. The conduct of the appellant has been advantageous to himself insofar as he has managed to defer determinations with regard to maintenance, property adjustment orders and ancillary orders including maintenance in respect of the wife and the children, all of whom are in full time education and dependants.

20. In my view the event of relevance in this appeal was the determination as to the correctness of the orders made in the High Court adverse to all of the claims and contentions advanced by the appellant. In its determination of the appeals before this court all grounds advanced by way of appeal by the appellant were rejected.

21. I am satisfied that the appellant has identified no principled basis for deviating from the general rule that costs follow the event in this instance. To order otherwise would impose hardship on the respondent wife. I am satisfied accordingly that in respect of Appeals 2022/35 and 2022/37 the respondent is entitled to her costs in the Court of Appeal when ascertained.

22. Though two notices of appeal were served, the appellant in substance within both notices pursued or purported to pursue a further appeal against the orders of Jordan J.

which had upheld orders previously made in the Circuit Court by Groarke J. on the 15th June, 2021. Such an appeal was not maintainable in law. The reasons are set forth in the judgment delivered by this court on 20th December, 2022, [2022] IECA 297. However, as stated therein, since, overall, in the course of the appeal hearing the appellant did not expend a substantial period of time pursuing the said grounds, the court is satisfied that the balance of justice warrants that no order as to costs be made in regard to those specific aspects that gave rise to the third judgment directed towards an asserted right to appeal further certain orders made in the Circuit Court on the grounds in the notices of appeal referred to and determined in that judgment. Accordingly, the respondent is entitled to an order for costs of this appeal in respect of appeal 2022/35 and appeal 2022/37. The appellant has identified further no basis to interfere with the orders as to costs previously made in the High Court in respect of each of the said proceedings.

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