THE HIGH COURT

[2021] IEHC 221

[2020 No. 95 M]

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 AND IN THE MATTER OF THE CHILDREN AND FAMILY RELATIONSHIPS ACT 2015 AND IN THE MATTER OF THE RELOCATION OF [CHILD A], [CHILD B], AND [CHILD C]

BETWEEN

R

APPLICANT

– AND –

R

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 18th March, 2021.

I

Introduction

1. This is an application to remit the within proceedings, due for hearing by this Court later this month, to a lower court. The application arises in the context of various proceedings involving a family who came to Ireland from a non-EU/EEA country in the relatively recent past, it seems from the papers sometime around June 2019. Following on that move, regrettably, relations between the parents deteriorated to such an extent that, *inter alia,* a barring order (the subject of a pending appeal) was obtained by the wife against the husband last November. It is not necessary to go into the various proceedings now extant between the parties in great detail. However, it is useful to set out in summary form what has unfolded thus far proceedings-wise in order that the background to the within application might better be understood. For ease of reference, the non-EU/EEA third country is hereafter referred to as 'Ruritania'.

II

Summary Chronology

2. By way of summary chronology, the following key events have occurred thus far:

03.11.2020	Ms R makes *ex parte* application for, *inter alia,* an interim barring order, which is granted. District Judge issues summons for safety order and barring order returnable for 10.11.2020.
10.11.2020.	Barring order proceedings proceeded with at election of Ms R; one-year barring order granted.
18.11.2020.	Appeal against barring order lodged by Mr R with the Circuit Court. The hearing date for that appeal has since been set as 28 and 29 April 2021.
01.12.2020.	Separation proceedings commenced before Ruritanian courts.
02.12.2020.	The within relocation proceedings were issued by way of special summons.

09.12.2020.	Separate separation proceedings commenced by Mr R before the High Court pursuant to the Judicial Separation and Family Law Reform Act 1989. Thereafter an appearance was entered on behalf of Ms R, on a without prejudice basis, solely to contest the jurisdiction of the High Court.
10.12.2020.	Mr R made *ex parte* application in the context of the separation proceedings for access to his dependent children. (In fact, it has since turned out that the District Court Judge did not prohibit access but this has only lately become known; that it was not previously realised is not attributable to anyone acting improperly).
15.12.2020	Affidavit of Verification grounding the relocation proceedings delivered to Mr R.
17.12.2020.	Access application heard by this Court.
18.12.2020.	Ms R issued motion seeking appointment of independent assessor.
22.12.2020.	Written judgment issued pursuant to access application declining jurisdiction to vary the barring order and granting supervised access to Mr R. On the same day the District Court varied its barring order in light of the High Court judgment.
06.01.2021.	Appearance entered on behalf of Mr R in the within proceedings. This was done without prejudice and solely to contest the jurisdiction of the High Court.
12.01.2021.	Court ordered appointment of assessor on consent basis.
19.01.2021.	Issue of recordings of family interactions raised in court.
09.02.2021.	Following the hearing of a discovery motion, the Court indicated in a written judgment that it would direct the Garda Commissioner, who had since come into the possession of the said recordings to provide them to the court for it to assess whether investigative privilege attached to same.
13.02.2021.	Papers in Ruritanian proceedings served on Mr R. A Ruritanian lawyer acting for Mr R is currently applying to the courts of Ruritania to have the separation proceedings there set aside on the basis of want of jurisdiction (alleged non-eligibility because of Ruritanian residency requirements).

18.02.2021.	Interim access arrangements agreed between the parties and made the subject of a consent order.
23.02.2021.	Court indicated in a written judgment that it will direct that the recordings aforesaid be produced by the Garda Commissioner. No perfected order has issued in this regard, pending a hearing later this month of an application for a stay on the issuance of such order.
04.03.2021.	Court granted leave to Mr R to bring the within remittal proceedings, returnable to 11.03.2021.
11.03.2021.	Remittal application heard.
24-26.03.21	These dates have previously been set aside for the hearing of the relocation proceedings and the stay application

III

Notice of Motion

3. The notice of motion of 8th March states that what is being sought by Mr R is an order remitting the within proceedings to the Circuit Court. It does not indicate what statute or rule of court is being relied upon by Mr R.

IV

Grounding Affidavit

4. There is a single affidavit before the court in this application, being the affidavit grounding the within application, as sworn by a solicitor for Mr R. In it, that solicitor avers, *inter alia,* as follows:

> ***"Jurisdiction***
>
> *13. I say and believe that there must be a secure and clear legal and jurisdictional basis for the Orders and Declarations being sought by the Applicant concerning the paramount welfare of the dependent children, in particular where a court is being asked to decide the proposed relocation of the children to another jurisdiction, namely [Ruritania]…which clearly is a non-EU Member State, and where the Respondent is staunchly opposed to the proposed relocation and also the claim for sole custody of the dependent children by the Applicant.*
>
> *14. Although strictly a matter for legal submissions, [1] I say, believe and am so advised that the statutory jurisdiction governed by the Guardianship of Infants Act 1964 (as amended), specifically as amended by [the] Children and Family Relationships Act 2015 is the secure and legal basis governing the custody, access, primary care, relocation and the paramount welfare of the dependent children of the marriage and that the 1964 Act (as amended) vests the concurrent jurisdiction in the District Court and the Circuit Court as the first instance court to hear and determine these matters. [2] I am advised, say and so believe that the 1964 Act (as amended) vests the jurisdiction in this Honourable Court as a first instance*

court to hear and determine the above matters only when such reliefs are being sought under the 1964 Act in the context of judicial separation or divorce proceedings – but not otherwise.

15. *Further and again, although strictly a matter for legal submissions, [3] I say, believe and am so advised that had the Oireachtas wanted to give the High Court a concurrent jurisdiction along with the District Court and Circuit Court to act as a court of first instance concerning the standalone matters under the 1964 Act it would expressly have given this Honourable Court power to do so.*

16. *I say that these proceedings have been commenced as standalone proceedings in this Honourable Court by or on behalf of the Applicant pursuant to the statutory jurisdiction governed by the 1964 Acy (as amended). I say, believe and am so advised that [4] these standalone proceedings are required to have been commenced and/or should have been commenced in the District Court or the Circuit Court as a court of first instance. I say, believe, and am so advised that [5] the Applicant ought not to have commenced these proceedings, namely, outside of the context of separation or divorce proceedings.*

17. *I say that [6] by proceeding to ask this Honourable Court to hear and determine these standalone family law proceedings under the 1964 Act (as amended) the Applicant is attempting to deprive tbe Respondent of his statutory entitlement of a de novo appeal against any interim or final determination or direction that this Honourable Court may make and the Respondent ought not to be deprived of this right and/or suffer prejudice as a result of being so deprived.*

18. *Although strictly a matter for legal submissions, I say believe and am so advised that [7] not merely as a matter of procedural law but in the interests of fairness and constitutional justice, the Applicant is obliged to commence these proceedings in the lowest court available. Strictly without prejudice to the foregoing, whilst the District Court is the lowest court available, I say and believe that the Respondent is amenable to these proceedings being remitted to the Circuit Court to be heard and determined rather than to a court of summary jurisdiction only.*

Strictly without prejudice to the foregoing:

19. *I say and believe that [8] it is necessary and/or appropriate that the judicial separation of the parties is heard and determined together with all matters concerning the paramount welfare of the children in the context of the same proceedings.*

20. *As appears from the reliefs being sought in the Special Summons of the Separation Proceedings, the Respondent is seeking for this Honourable Court to regulate custody, access and the paramount interests concerning the dependent children of the marriage. I say, believe, and am so advised that [9] a remittal of these proceedings to the lower court would leave open the availability for the Applicant to pursue these proceedings in the court below. Alternatively, the Applicant may bring*

a new application in the context of the separation proceedings. It is open to the Applicant to bring an application to have the separation proceedings remitted to the court below.

21. *I say and am advised and so believe that [10] there would be a serious risk of injustice if any court were to embark on a hearing and make any determinations concerning the paramount interests of the dependent children, in particular, relocation, custody, access, and to do so separately and in isolation to the judicial separation of the parties.*

22. *I say am advised and so believe that [11] the judicial separation proceedings, which also encompass the paramount interest of the dependent children, do and ought to take priority over these proceedings notwithstanding [that] the separation proceedings were issued approximately 8 days after the commencement of these proceedings.*

23. *I say and believe that [12] the duplication of costs for hearing and determining these standalone proceedings separately and in isolation to the judicial separation of the parties would be unfair and oppressive to the Respondent."*

[Emphases added].

5. There is a lot to the foregoing, which is why the court has numbered the various substantive points made by Mr R's solicitor. In essence, it seems to the court that twelve points are raised. The court states these grounds below; a number of them can be addressed in short space; a number of them require lengthier consideration.

6. [1] The statutory jurisdiction governed by the Guardianship of Infants Act 1964 (as amended), specifically as amended by the Children and Family Relationships Act 2015 is the secure and legal basis governing the custody, access, primary care, relocation and the paramount welfare of the dependent children of the marriage and that the 1964 Act (as amended) vests the concurrent jurisdiction in the District Court and the Circuit Court as the first instance courts to hear and determine these matters.

7. [2] The 1964 Act (as amended) vests the jurisdiction in this Honourable Court as a first instance court to hear and determine the above matters only when such reliefs are being sought under the 1964 Act in the context of judicial separation or divorce proceedings – but not otherwise.

8. [3] Had the Oireachtas wanted to give the High Court a concurrent jurisdiction along with the District Court and Circuit Court to act as a court of first instance concerning the standalone matters under the 1964 Act it would expressly have given this Honourable Court power to do so.

9. [4] These proceedings are required to have been commenced and/or should have been commenced in the District Court or the Circuit Court as a court of first instance.

10. The issue of non-jurisdiction on the part of the High Court to hear the within proceedings is *not* now being contended. However, for the sake of completeness the court treats with this issue later below.

11. The High Court enjoys a concurrent jurisdiction as a court of first instance (with both the Circuit and District Courts) to hear the within proceedings. A consequence of this is that it is possible for a litigant to commence such proceedings before the High Court. The solution where one finds oneself as the respondent to High Court proceedings which one considers ought to have been commenced and/or ought to continue in a lower court is, as here, to bring an application for remittal. Such an application may or may not succeed; here, for the reasons stated herein, it has not succeeded.

12. [5] The Applicant ought not to have commenced these proceedings, namely, outside of the context of separation or divorce proceedings.

13. It is perfectly legitimate and lawful to bring relocation proceedings outside the context of separation or divorce proceedings, though it may be that a judge in any one case will decide to hear all the related matters together (that will depend on the case). In the within proceedings the court can see why Ms R believes and believed herself to have had good reason for proceeding as she has. She is a mother of three children. One is a mid-age adolescent ('Child 1'), one is a younger adolescent ('Child 2'), and one is a little child ('Child 3'). Child 1 is very unhappy in Ireland and in conversation with me and in all the evidence that I have seen to date has indicated the clearest desire to get back to life and friends in Ruritania. Doubtless all parents of adolescent children can understand the apprehensions and fears that present when an adolescent child confesses to extreme unhappiness. A particular fear of any parent in that circumstance is likely that the child might do something impulsive. Child 2 is also unhappy in Ireland but seemed (in my one meeting with Child 2) to be less unhappy than Child 1. Even so, doubtless many parents have themselves experienced the worry that settles in on the mind of a parent when a child says that s/he is to a greater or lesser extent unhappy in some or all regards: typically parents would sooner be unhappy themselves than see their children out of sorts. Child 3 is too young to have an opinion. I am not saying in any of this that I agree that the proposed relocation is a good idea. Nor, I should note, do I believe that the proposed relocation is a bad idea. The relocation proceedings have yet to be heard and I have no views at all in this regard. What I *am* saying is that in terms of commencing the standalone relocation proceedings I can see why Ms R has proceeded as she has. She is the mother of three children. Like any good mother she wants them to be happy. She is told by the two eldest children (who are of an age when they are perhaps more of a worry but also when they can seek to prescribe the best ailment/s for their woes) that they would be happier if they could but go back to Ruritania. So Ms R has come to court trying to make matters as her children want them to be. She may win in her relocation application, she may lose in her relocation application, but her motives in bringing that application are perfectly understandable and proper. She has also the additional incentive that she is, the court understands from all the evidence that it has seen to date, a partner in a firm back in Ruritania and wishes to get back to her work there and start making

money so that she can provide from same for her children and herself, money being less flush than it was before the marriage breakdown. It seems to the court that in all of the foregoing lies good and proper reason for bringing the standalone relocation proceedings, however those proceedings may ultimately fare.

14. [6] The Applicant is attempting to deprive the Respondent of his statutory entitlement of a *de novo* appeal against any interim or final determination or direction that this Honourable Court may make.

15. This issue is addressed later below. The court should note in passing that there is a difference between something being (i) an incidental consequence to a particular lawful course of action and (ii) an object which it is attempted deliberately to secure by proceeding with a particular lawful course of action. Mr R has not proven that Scenario (ii) rather than Scenario (i) is at play in the within proceedings.

16. [7] Not merely as a matter of procedural law but in the interests of fairness and constitutional justice, the Applicant is obliged to commence these proceedings in the lowest court available.

17. See the answer following points [1]-[4].

18. [8] It is necessary and/or appropriate that the judicial separation of the parties is heard and determined together with all matters concerning the paramount welfare of the children in the context of the same proceedings.

19. See the court's answer under point [5].

20. [9] A remittal of these proceedings to the lower court would leave open the availability for the Applicant to pursue these proceedings in the court below. Alternatively, the Applicant may bring a new application in the context of the separation proceedings. It is open to the Applicant to bring an application to have the separation proceedings remitted to the court below.

21. It is for Ms R to decide for herself how best to conduct and order her affairs/proceedings both in her own right and in her capacity as a mother.

22. [10] There would be a serious risk of injustice if any court were to embark on a hearing and make any determinations concerning the paramount interests of the dependent children, in particular, relocation, custody, access, and to do so separately and in isolation to the judicial separation of the parties.

23. As to the risk of injustice, the court addresses this issue later below. As to bringing the within proceedings as standalone proceedings, see the court's analysis under point [5].

24. [11] The judicial separation proceedings, which also encompass the paramount interest of the dependent children, do and ought to take priority over these proceedings

notwithstanding that the separation proceedings were issued approximately 8 days after the commencement of these proceedings.

25. All else being equal, a court might say that because Proceedings A were commenced first in time they should take precedence over Proceedings B which were commenced second in time. For the reasons stated at various points in the within judgment, the court considers that the standalone relocation proceedings should proceed to hearing before this Court at end-March, but its decision in this regard has nothing to do with the timing of the commencement of the proceedings.

26. [12] The duplication of costs for hearing and determining these standalone proceedings separately and in isolation to the judicial separation of the parties would be unfair and oppressive to the Respondent.

27. The issue of cost is considered later below.

V

Article 34

28. Article 34.3.4□ of the Bunreacht provides that "*The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law."* Among the arguments raised by Mr R at the hearing of the within application were that (i) if the court does not accede to the within application to remit, the end-result would be to deprive Mr R of his right of appeal from a court of limited and local jurisdiction, and (ii) on a related note, that the right to a *de novo* appeal from a court of local and limited jurisdiction is an important safeguard which has been provided to Mr R by the Oireachtas to mitigate against injustice. *However*, the court respectfully notes in this regard that the law, as considered herein, also clearly contemplates that there will be instances in which the High Court, acting in accordance with law, will *not* remit proceedings to a lower court; implicit in that is a recognition that there will be instances in which a 'High Court hearing + right of appeal to the Court of Appeal' scenario may lawfully be allowed to continue, rather than the High Court invariably remitting matters so that, e.g., a 'Circuit Court hearing + right of appeal to the High Court' scenario presents.

VI

The Courts of Justice Acts 1924 and 1936

29. Section 25 of the Act of 1924, as enacted, provides as follows:

> *"When any action shall be pending in the High Court which might have been commenced in the Circuit Court, any party to such action may, at any time before service of notice of trial therein, apply to the High Court that the action be remitted or transferred to the Circuit Court, and thereupon, in case the court shall consider that the action is fit to be prosecuted in the High Court, it may retain such action therein, or if it shall not consider the action fit to be prosecuted in the High Court it may remit or transfer such action to the Circuit Court or (where the action might have been commenced in the District Court) the District Court, to be prosecuted before the Judge assigned to such District, as may appear to the High Court*

suitable and convenient, upon such terms, in either case and subject to such conditions, as to costs or otherwise as may appear to be just:

Provided that the High Court shall have jurisdiction to remit or transfer any action, whatever may be the amount of the claim formally made therein, if the court shall be of opinion that the action should not have been commenced in the High Court but in the Circuit Court or in the District Court if at all."

30. Section 11 of the Act of 1936 makes supplementary provision to the foregoing, providing as follows:

"(1) An application under section 25 of the Principal Act for the remittal or transfer of an action pending in the High Court may be made at any time after an appearance is entered therein and before service of notice of trial therein and, where the summons in such action is required by rules of court to be set down for hearing before the Master of the High Court, notwithstanding that such summons has not been so set down.

(2) Notwithstanding anything contained in section 25 of the Principal Act the following provisions shall have effect in relation to the remittal or transfer of actions under that section, that is to say:-

(a) an action shall not be remitted or transferred under the said section if the High Court is satisfied that, having regard to all the circumstances, and notwithstanding that such action could have been commenced in the Circuit Court, it was reasonable that such action should have been commenced in the High Court;

(b) an action for the recovery of a liquidated sum shall not be remitted or transferred under the said section unless the plaintiff consents thereto or the defendant either satisfies the High Court that he has a good defence to such action or some part thereof or discloses facts which, in the opinion of the High Court, are sufficient to enable him to defend such action."

VII

NP v. MP

i. Case-Law

31. A difficulty that Mr R faces in relying upon the Act of 1924, as supplemented by s.11(2)(a) of the Act of 1936, is offered by the decision in *NP v. MP* (High Court, Lynch J., 17th June 1994). That case has been reported, *inter alia,* in the following terms at [1996] 3 *Fam. L.J*. 101-102:

"FACTS: The respondent to these proceedings had issued virtually identical though converse proceedings in the Circuit Court as applicant against the applicant in these proceedings, as respondent. The Circuit Court proceedings had been instituted first and had progressed further having had a date fixed for the hearing. The respondent applied by notice of motion for an order pursuant to Order 70A…of the Rules of the

Superior Courts that the High Court proceedings be remitted to the Circuit Court and be heard on the same date as the Circuit Court proceedings….

Lynch J. 17 June 1994.

What is before me at the present time for determination is an application brought by the respondent in these proceedings to remit these High Court proceedings to the Dublin Circuit Court to be tried there concurrently with virtually identical though converse proceedings in that court brought by the respondent, the husband in these proceedings as applicant against the applicant, the wife in these proceedings, as respondent.

The application is brought by notice of motion dated the 26 May 1994 which asks for the order in the following terms: 'An order pursuant to the provisions of Order 70A…of the Rules of the Superior Courts that the within proceedings be remitted to the Dublin Circuit Court…'. …I was referred to section 25 of the Courts of Justice Act 1924 which provides as follows [s.25 quoted]….That section was amended in a minor respect by section 11, subsection 2, paragraph (a) of the Courts of Justice Act 1936 and that subsection provides [s.11(2)(a) quoted]….These sections have been amended in minor respects, or more correctly stated, applied to various other forms of proceedings by sections in the Courts Supplemental Provisions Acts and in other subsequent Courts of Justice Acts.

Applications under those sections are brought under Order 49 rule 7 of the original rules of the Superior Courts but it seems to me that none of these sections has any application whatever to proceedings in family law matters. The jurisdiction in family law proceedings is regulated by section 31 of the Judicial Separation and Family Law Reform Act 1989".

[Emphasis added].

ii. Shatter

32. By way of learned commentary, the court has been referred to *Shatter's* Family Law (4th ed., Butterworths, 1997), in which its distinguished author states, *inter alia,* as follows, at 105-106:

"*[2.19] The issue of court selection in court proceedings is more complex where a variety of orders are sought in which both the High Court and Circuit Court possess a concurrent jurisdiction….If proceedings are commenced and pending: (a) in the High Court, which might have been commenced in the Circuit or District Court; (b) in the Circuit Court which might have been commenced in the District Court, any party to the proceedings may apply to have the proceedings transferred or remitted to a lower court.45 The Rules of the Superior Courts applicable to family proceedings provide that where such application is made to the High Court, of the Court considers it to "in the interests of justice" it shall remit or transfer such action or proceeding to the Circuit Court or District Court as* "may appear to the court suitable and convenient upon such terms and subject to such conditions as to costs or otherwise as may appear just."

[2.20] The central issue for the Court to determine in such application is whether 'it is in the interests of justice' to transfer proceedings to a lower court which appears 'suitable and convenient' for the hearing of the particular proceedings to which an application to remit or transfer relates. The onus of proof rests on the party applying for such transfer.

45 See also the Courts of Justice Act 1924, s.25 which expressly provides for the transfer/remittal of proceedings from the High Court….However it should be noted that in NP v. MP High Court, unrep, June 1994 Lynch J. held the 1924 Act had no application whatsoever 'to proceedings in family law matters' where the Circuit Court and High Court exercised a concurrent jurisdiction".

iii. Analysis

33. The critical portion of Lynch J.'s judgment in NP for the purposes of the within proceedings is his observation that:

> *"Applications under those sections are brought under Order 49 rule 7 of the original rules of the Superior Courts but it seems to me that none of these sections has any application whatever to proceedings in family law matters. The jurisdiction in family law proceedings is regulated by section 31 of the Judicial Separation and Family Law Reform Act 1989 [and by later like provision]".*

34. It is perhaps to be regretted that Lynch J. did not offer a more comprehensive analysis for reaching the just-quoted conclusion. However, as he immediately moves on to consider the concurrent jurisdiction of the High Court and Circuit Court in the family law arena (he refers, *inter alia,* in this regard, at p.102, to how "The legislature has endeavoured to minimize the burden of costs of legal proceedings in family matters by giving jurisdiction to the Circuit Court to deal with virtually all such matters and to the District Court to deal with a fairly wide variety thereof"), what Lynch J. seems to have had in mind is that:

(i). the then relatively novel idea of expansive concurrent family law jurisdiction on the part of the High Court and Circuit Court (and, to a lesser extent, the District Court) supplanted, in the family law arena, the general jurisdictional arrangements contemplated by the Act of 1924 in the earliest days of the State, and

(ii) as a result, the approach in Lynch J.'s time (and ours), when it comes to jurisdiction in the family law arena, is for a litigant to approach the issue of concurrent jurisdiction via the relevant family law statute/s and, if then minded to seek remittal, to proceed by way of application pursuant to Order 70A.

35. This Court considers itself to be bound by the longstanding decision in *NP*. Additionally, however, it may be useful for the court to note that if it is correct in its assessment of what Lynch J.'s likely reasoning was, it finds itself in respectful agreement with his reasoning. Needless to say, if the court is not correct in its assessment of what Lynch J.'s likely reasoning was, it nonetheless considers such reasoning as it has offered in this regard to be correct.

36. Reference was made by counsel for Mr R, e.g., in his written submissions to how "*A clear example of the intention that the Oireachtas that the 1924 Act applies to Family Law proceedings is seen in Section 2 of the Legitimacy Act 1932 (as amended by section 20 of the Courts Act 1971)"*. While counsel may be correct as to the long-ago historical stance of the Oireachtas in this regard, the point that the court understands to have been made in effect by Lynch J. (and the point that it would itself make in any event) is that the changed legislative environment by 1994 (and which continues today) has seen expanded and expansive concurrent jurisdiction shared by the High Court and Circuit Court (and to a lesser extent the District Court). It was in this changed legislative environment which diverged from what had historically been the case that Lynch J. could and did conclude (again, rightly in this Court's respectful opinion) that *"[N]one of these sections [s.25 of the 1924 Act and related provision] has any application whatever to proceedings in family law matters. The jurisdiction in family law proceedings is regulated by* [the relevant modern statutes pertaining to family law and in which expansive concurrent jurisdiction is the norm that the Oireachtas has elected to establish]".

37. The judgment of Lynch J. in *NP v. MP,* a judgment binding on this Court, marks an end insofar as Mr R seeks to rely on the Act of 1924 in the within application. If Mr R's application is to succeed before the High Court in the within application, he must succeed under O.70A.

VIII

Order 70(A), Rule 15 RSC

i. Introduction

38. Order 70A, rule 15 of the Rules of the Superior Courts provides as follows:

> *"15. (1) Where any action or proceeding is pending in the High Court which might have been commenced in the Circuit Court or the District Court any party to such action or proceeding may apply to the High Court that the action be remitted or transferred to the Circuit Court or the District Court (as the case may be) and if the High Court should, in exercise of its discretion, consider such an order to be in the interests of justice it shall remit or transfer such action or proceeding to the Circuit Court or the District Court (as the case may be) to be prosecuted before the Judge assigned to such Circuit or (as the case may require) the Judge assigned to such District as may appear to the Court suitable and convenient, upon such terms and subject to such conditions as to costs or otherwise as may appear just.*
>
> *(2) An application under this rule to remit or transfer an action or proceeding may be made at any time after an appearance has been entered."*
>
> *[Emphasis added.]*

39. In the within proceedings, Mr R has taken the view that a remittal to the Circuit Court would be the most preferable course of action, rather than remitting matters to the District Court.

ii. Jurisdiction of High Court/*R v. R*

40. It is not now contended that the High Court wants in jurisdiction to proceed to hear and adjudge upon the within proceedings. Even so, it is useful and instructive to consider in passing the decision of Gannon J. in *R v. R* [1984] IR 296.

41. In *R v. R*, the plaintiff (the defendant's wife), issued a High Court summons seeking certain reliefs under (*inter alia*) the Guardianship of Infants Act 1964 and the Family Law (Maintenance of Spouses and Children) Act 1976, and the Family Law (Protection of Spouses and Children) Act 1981. Section 5 of the Act of 1964, as enacted, stated that the jurisdiction conferred on a court by Part II of that Act might be exercised by the High Court; but the new s.5 substituted by the Courts Act, 1981, contained no reference to the High Court in declaring that the said jurisdiction might be exercised by the Circuit Court or District Court. In a similar vein, s. 23 of the Act of 1976, as enacted, stated that the High Court, the Circuit Court (on appeal from the District Court) and the District Court might exercise concurrent jurisdiction to determine proceedings under certain sections of the Act of 1976; however, the s. 23 substituted therefor by the Courts Act, 1961, contained no reference to the High Court in declaring that the Circuit Court and the District Court shall have jurisdiction to determine those proceedings. Also, s.2(1) of the Act of 1981 stated that "*the Court*" may make a barring order and elsewhere defined "*the Court"* as the Circuit Court or the District Court. The plaintiff contended that, if the said sections of those Acts purported to restrict or remove the jurisdiction of the High Court to hear the claims made in her summons, those sections were unconstitutional. It was held by Gannon J., *inter alia,* that the jurisdiction of the High Court to hear the plaintiff's claims had not been removed or restricted.

42. Copper-fastening the just-mentioned conclusion of Gannon J in *R v. R* is the fact that, for example, (i) there is specific statutory recognition of High Court jurisdiction in the Rules of the Superior Courts (No. 3), 1997 (S.I. 343 of 1997); (ii) the High Court has continued to exercise its jurisdiction, its decision in some of those cases having been the subject of appeal to the appellate courts (by way of but one example, see *O'C v. Sacred Heart Adoption Society and Ors*. [1996] 1 I.L.R.M. 297); (iii) it is clear from, e.*g., F v. G* [2014] 1 I.R. 417 that the High Court can exercise its guardianship jurisdiction (albeit with circumspection) in respect of any Irish child, even though neither child nor parents are resident in Ireland; neither the Circuit Court nor the District Court can do so under their respective rules (Orders 59 and 58 respectively). So for this Court to conclude that it has no jurisdiction to act in the within proceedings, notwithstanding the judgment of Gannon J. in R v. R, a longstanding decision by which this Court considers itself bound, would, *inter alia,* yield the fanciful conclusion that no Irish court could exercise its guardianship jurisdiction, albeit with circumspection, to protect the welfare of an Irish child in circumstances where neither child nor parents are resident in Ireland.

iii. *Tormey v. Ireland*

[1985] I.R. 289

43. It was contended for Mr R that the decision of the Supreme Court in *Tormey* casts a doubt over the correctness of the decision in *R v. R*. In *Tormey*, the plaintiff was arrested and charged with a serious offence under the Larceny Act, 1916. Having been sent forward for

trial on indictment to the Dublin Circuit Court, he sought a transfer of his trial to the Central Criminal Court or, alternatively, to a circuit outside Dublin. Section 31(1) of the Courts Act 1981 permitted the transfer of a criminal trial from a Court judge sitting outside Dublin to the Dublin Circuit but not *vice versa*. Section 32(1) of the Courts Act, 1981, repealed an earlier statutory provision which allowed for the transfer of trials in criminal cases by judges of the Circuit Court to the Central Criminal Court. The plaintiff brought an action in the High Court challenging the constitutionality of s.31(1) on the ground that it infringed Article 40(1) of the Bunreacht and also challenging s.32(1) on the ground that it infringed Article 34.3.1□ of the Constitution. He failed in the High Court and an appeal on s.32(1) to the Supreme Court also failed. In the Supreme Court, Henchy J. observed, *inter alia,* as follows, at p.296:

> *"The Court accepts that Article 34, s. 3, sub-s. 1, read literally and in isolation from the rest of the Constitution, supports the plaintiffs claim to be entitled to a trial in the High Court. But the Court considers that such an approach would not be a correct mode of interpretation. The "full" original jurisdiction of the High Court, referred to in Article 34, s. 3, sub-s. 1, must be deemed to be full in the sense that all justiciable matters and questions (save those removed by the Constitution itself from the original jurisdiction of the High Court) shall be within the original jurisdiction of the High Court in one form or another. If, in exercise of its powers under Article 34, s. 3, sub-s. 4, Parliament commits certain matters or questions to the jurisdiction of the District Court or of the Circuit Court, the functions of hearing and determining those matters and questions may, expressly or by necessary implication, be given exclusively to those courts."*

44. Shatter, at p.87, contends that the approach of the Supreme Court in *Tormey "cannot be reconciled with the approach of the High Court in…R v. R*". The court respectfully disagrees with this analysis which likely depicts the legal landscape as it was perceived to be in the period immediately after *Tormey* (the 4th edition of Shatter being published in 1997). As the learned authors of Kelly: The Irish Constitution, (5th ed., Bloomsbury Professional, 2018), observe, at p.887, "*While the Supreme Court* [in Tormey*]…appeared to take a different view on the question of whether Article 34.3.1□ allowed exclusive jurisdiction to be vested in the lower courts, it did not take issue with Gannon J.'s analysis of the object and purpose of Article 34.3.1□*". It seems to the court to be important too to note that a key finding of Gannon J. in *R v. R,* at least for the purpose of the within proceedings, *viz*. that the statutory jurisdiction of the High Court to hear the plaintiff's claims in those proceedings had not been removed or restricted, was not up-ended by *Tormey*, and is a finding which later practice and case-law, as noted above, suggests to have been entirely correct.

iv. *W v. W*

(Supreme Court, Unreported, 25th November 1999)

45. The authoritative case on remittal continues to be the decision of the Supreme Court in *W v. W*, a set of judicial separation proceedings in which the applicant wife had commenced her proceedings before the High Court and the respondent husband sought, pursuant to

O.70A, r.15 RSC, a remittal of same to the Circuit Court. The remittal was refused and that refusal was upheld on appeal to the Supreme Court. In her judgment for the Supreme Court, Denham J., as she then was, observed, *inter alia*, as follows, at pp.5 *et seq.* of her judgment:

> *"The onus is on the person seeking to have the case remitted. Thus, the onus rests on the respondent in this case.*
>
> *The court has a discretion. The judge has to balance the relevant matters raised. The test to be applied is that an order to remit should be in the interests of justice.*
>
> *The High Court and Circuit Court have a concurrent jurisdiction. No issue on this aspect of the case arose.*
>
> *Delay is not a bar to seeking to remit an action in view of the [portion of?] Rule 15(2) which states that an application to remit may be made at any time after an appearance has been entered. However, if an application is not made at an early date and the proceedings are joined and advanced a delay in seeking to remit in all the circumstances of the particular case be a factor for consideration by the High Court judge in the exercise of his discretion in considering the interests of justice. In this case the delay in seeking the order to remit was not such as to weigh against the respondent. However, the issue of delay in general in the case was an important factor in considering the interests of justice.*
>
> *…*
>
> *This is a dysfunctional family…pending the court decision on the action. In light of the circumstances time is an important aspect of this case. Also important is access to court on interim and interlocutory applications to process the case. The probability is that hearings in Cork would take longer and whilst the financial affairs on the surface appear not too complex the intricacy arises in the applicant's suspicion as to other assets and intention to try and prove their existence. The court has a discretion. The discretion should be exercised to remit if that be in the interests of justice. In the circumstances of the case the refusal to exercise the discretion to remit was just. Further delay should be avoided. The case should be decided as soon as is reasonably possible. Such procedure would be for the benefit of all the family. I would uphold the decision of the High Court and refuse to remit the case.*
>
> *However, a cautionary note should be raised. These proceedings in the High Court may be costly. The only source of family funds is the respondent. If monies are spent on lengthy litigation it will be to the detriment of both parties and the children. Further, the fact of the expense involved may be a factor in any determination of a judge in the action on the division of the property between the parties or on the issue of costs."*

IX

"[T]*he Interests of Justice*"

i. How and Why the Proceedings Were Commenced

46. The court notes the mention in Mr R's submissions of Ms R's reasons for commencing her proceedings before the High Court. In this regard, the court would respectfully note that the test applicable under O.70A, r.15 is not exclusively or even predominantly one that is backward-looking. What the court must do is ask where "*the interests of justice*" now lie. Yes, in deciding where "*the interests of justice*" now lie the court must have regard to how and why the proceedings have come before it. But it is eminently possible, to take an extreme example – and this is not the case that presents here – that a person could with no good reason commence proceedings before the High Court rather than a lower court, yet by the time an O.70A application came to be heard, and despite the circumstances whereby the proceedings commenced, it would be held not to be in the interests of justice that the case be remitted.

ii. "*The interests of justice*": A Non-Exhaustive List of Relevant Factors

47. The phrase "the *interests of justice*", as identified in O.70A, r.15 RSC, is general in nature, doubtless because the authors of the Rules did not desire unduly to constrain the court's freedom of action, which desire itself doubtless springs from an awareness that the rule-drafters cannot predict the precise nature of each and every case that will come before the courts and so must yield considerable freedom of action to courts which are confronted every day with proceedings that seek similar reliefs but in which the facts can be widely different.

48. Notwithstanding the foregoing, is there a non-exhaustive list of factors to which the High Court might reasonably have regard when seeking to identify where "*the interests of justice*" now lie? As it happens, Shatter, at p.105, identifies a number of factors to which a litigant may have regard when deciding in which court to commence her/his proceedings, which factors it seems to the court also offer a readily transferable, non-exhaustive list of factors to which the High Court can usefully have regard when seeking to determine an O.70A application. The factors to which Shatter refers are the following:

> "*(a) the nature of the issues in dispute and the type of court orders sought;*
>
> *(b) the jurisdictional competence of the court to grant the order or orders ought;*
>
> *(c) the legal complexity of the matter;*
>
> *(d) the accessibility of the court;*
>
> *(e) the estimated amount of time that will elapse between the date of the issuing of proceedings and the court hearing;*
>
> *(f) the income and asset position of the parties insofar as it is relevant to the matters in issue;*
>
> *(g) the value of the property, if any, in dispute*

(h) the overall family circumstances, where relevant;

(i) the suitability of the particular court to deal effectively and expeditiously with the issues that require determination in the proceedings;

(j) the estimated legal costs".

To these this Court would respectfully add:

(k) the explanation offered by the party who commenced the proceedings as to how/why the proceedings have been commenced before the High Court;

(l) the extent to which proceedings have already proceeded in the High Court;

(m) the fact that the Oireachtas in giving concurrent jurisdiction was seeking to minimise the burden of costs of legal proceedings;

(n) the implications of a non-remittal on the right of a party later to bring a *de novo* appeal before the High Court;

(o) given that this motion is brought within the context of proceedings where, to borrow from s.3(1) of the Guardianship of Infants Act 1964, the *"guardianship, custody, or upbringing of, or access to, a child…is in question*" and hence are proceedings governed, *inter alia,* by s.3(1), and that the question arising (which court should hear the relocation proceedings) is a predicate question and/or a question that falls within the wider issue of the question of the "*guardianship, custody, or upbringing of, or access to, a child*" (however, one describes it, it is simply not a standalone question from the 'guardianship, custody, upbringing or access question'), the court considers that it must in this motion have regard to the *"best interests of the child[ren] as the paramount consideration*";

(p) any and all other factors which seem of relevance in the context of any one case to reaching a determination as to where "*the interests of justice*" lie for the purposes of O.70A.

iii. Where "*the interests of justice*" lie

49. The court turns now to consider where "*the interests of justice lie"* in the within application, using the various factors mentioned above as a crutch by which to reach its conclusions in this regard. Each of the above-mentioned factors appears in Bold text below, with the court's related observations appearing immediately underneath each segment of Bold text, recalling before proceeding that it is remittal to the Circuit Court that has been sought by Mr R.

50. (A) THE NATURE OF THE ISSUES IN DISPUTE AND THE TYPE OF COURT ORDERS SOUGHT.

51. Court Observation: Both the High Court and Circuit Court are capable of dealing with the issues in dispute and making appropriate order.

52. (B) THE JURISDICTIONAL COMPETENCE OF THE COURT TO GRANT THE ORDER OR ORDERS OUGHT.

53. Court Observation: The High Court and the Circuit Court have concurrent jurisdiction.

54. (C) THE LEGAL COMPLEXITY OF THE MATTER.

55. Court Observation: The court does not consider that the legal complexity of the matters in issue yields a necessity for matters to be heard before it.

56. (D) THE ACCESSIBILITY OF THE COURT.

57. Court Observation: The parties can have no complaint as to the accessibility of this Court which has held all hearings as and when requested and delivered judgment promptly. Hearing-days have already been allocated towards the end of this month (24th-26th March). If these proceedings are not remitted to the Circuit Court they will be heard and a reserved judgment will issue within a total timespan of about 4 weeks from today. The court respectfully does not believe that such a prompt timeframe could possibly be achieved at Circuit Court level if these proceedings were now to be remitted to that Court.

58. (E) THE ESTIMATED AMOUNT OF TIME THAT WILL ELAPSE BETWEEN THE DATE OF THE ISSUING OF PROCEEDINGS AND THE COURT HEARING.

59. Court Observation: If these proceedings are not remitted to the Circuit Court they will be heard and a reserved judgment will issue within a total timespan of about 4 weeks from today. The court respectfully does not believe that such a prompt timeframe could possibly be achieved at Circuit Court level if these proceedings were now to be remitted to that court.

60. (F) THE INCOME AND ASSET POSITION OF THE PARTIES INSOFAR AS IT IS RELEVANT TO THE MATTERS IN ISSUE.

61. Court Observation: The court has no substantive evidence before it in this regard (to the extent relevant).

62. (G) THE VALUE OF THE PROPERTY, IF ANY, IN DISPUTE.

63. Court Observation: The court has no substantive evidence before it in this regard (to the extent relevant).

64. (H) THE OVERALL FAMILY CIRCUMSTANCES, WHERE RELEVANT.

65. Court Observation: The court is aware from its ongoing dealings with this matter that Ms R is desirous of returning to Ruritania and continuing with her career there so that she has her own income from which to provide for her children and herself. The court has spoken with the two older children (the youngest child is not of an age when any meaningful engagement is possible): both children, as of last Christmas, were keenly desirous to return to Ruritania; the eldest child seemed especially miserable here and there is no evidence before the court to suggest that this has changed. Mr R has raised the possibility of his working/living in Ireland and his children being far away in Ruritania as an issue of concern; however, the court understands that to this time, even throughout the Covid pandemic (the court mentions this to show his level of commitment to his business, not in any way to deprecate his actions), he has been travelling to and from Ruritania for several days each month to keep his business there going, the central locus of his business being in Ruritania.

66. (I) THE SUITABILITY OF THE PARTICULAR COURT TO DEAL EFFECTIVELY AND EXPEDITIOUSLY WITH THE ISSUES THAT REQUIRE DETERMINATION IN THE PROCEEDINGS.

67. See the observations following (A)-(E) (inclusive).

68. (J) THE ESTIMATED LEGAL COSTS.

69. Court Observation: No substantive evidence has been placed before the court in this regard. With respect, it does not suffice, when it comes to any (if any) perceived issue as to legal costs for an applicant seeking remittal merely to say, in effect, that 'I am worried about the legal costs presenting'. Courts are not omniscient, they proceed upon evidence, and – save to a very general extent – do not know what costs will present if matters proceed as an applicant for remittal would prefer, and what kind of costs will present if matters proceed as they are. Just because the solicitor acting for an applicant for remittal predicts by way of averment that there will be a duplication of costs in a particular scenario does not make it gospel that there will in fact be a duplication of costs in that scenario. In an application where the burden of proof falls on Mr R to establish that the interests of justice lie in ordering remittal, it is for him to provide such detail as he wishes to provide as to his concerns regarding cost. Apart from the brief reference to costs in the affidavit evidence of his solicitor (as quoted previously above), Mr R has provided no substantive evidence in this regard, not even an estimate of the likely costs presenting, depending on whichever route pertains ('Circuit Court + possible appeal to High Court' or 'High Court + possible appeal to Court of Appeal').

70. (K) THE EXPLANATION OFFERED BY THE PARTY WHO COMMENCED THE PROCEEDINGS AS TO HOW/WHY THE PROCEEDINGS HAVE BEEN COMMENCED BEFORE THE HIGH COURT.

71. The reasons offered are (i) the seriousness of the matters at issue and (ii) the impact of Covid 19 on access to the courts. The court is unconvinced by point (i): the concurrent jurisdiction exists and the Circuit Court does consider cases of the type in issue. More convincing is point (ii): despite the very best efforts at every level of the courts system by judges and courts staff and the Courts Service, and more generally by barristers and solicitors, all of the foregoing meriting commendation for their continuing efforts in this regard, there has been a discernible slowdown in the operation of the courts throughout the lockdowns and the court understands why a party might (and here Ms R clearly did) take the view that 'I just have to get this aspect of matters decided and so will commence proceedings before the High Court where I think it will be decided more quickly'. That seems an understandable and proper manner of proceeding in the circumstances presenting.

72. (L) THE EXTENT TO WHICH PROCEEDINGS HAVE ALREADY PROCEEDED IN THE HIGH COURT.

73. The relocation proceedings are not especially advanced. An imminent hearing-date has been set, but that aside they are not so advanced that another judge (here a Circuit Court judge) would struggle to pick up the 'relocation ball' and run with same.

74. (M) THE FACT THAT THE OIREACHTAS IN GIVING CONCURRENT JURISDICTION TO THE CIRCUIT/DISTRICT COURTS WAS SEEKING TO MINIMISE THE BURDEN OF COSTS OF LEGAL PROCEEDINGS.

75. See the observation at (J).

76. (N) THE IMPLICATIONS OF A NON-REMITTAL ON THE RIGHT OF A PARTY LATER TO BRING A *DE NOVO* APPEAL BEFORE THE HIGH COURT.

77. The law contemplates that there will be instances in which the "*interests of justice*" do not lie in favour of remittal. It is for Mr R to prove that "*the interests of justice*" lie in favour of remittal. Here, even when the court takes the *de novo* appeal point (a good point in its own right) and sets it in the context of all the other factors presenting, it respectfully does not see that Mr R has so proven.

78. (O) THE BEST INTERESTS IF THE CHILDREN

79. For the reasons given at paras. 13 and 83, the court considers that the best interests of the children point to this being a case in where "*the interests of justice*" do not point in favour of remittal.

80. (P) ANY AND ALL OTHER FACTORS WHICH SEEM OF RELEVANCE IN THE CONTEXT OF ANY ONE CASE TO REACHING A DETERMINATION AS TO WHERE "*THE INTERESTS OF JUSTICE"* LIE FOR THE PURPOSES OF O.70A.

81. The other factors that spring to mind are delay and speed.

82. As to delay, the court respectfully does not see that there has been much if any delay in bringing the within application. The entirety of the litigation between the parties reaches back only to 3rd November last, Ms R's affidavit of verification in the within proceedings was only delivered to Mr R on 15th December last, a conditional appearance was entered for Mr R on 6th January, the court gave liberty to bring the within application on 4th March, it was heard on 11th March, the court indicated its decision on 16th March and is handing down its written reasons today. Moreover, any (if any) delay must be viewed in the context of (a) the fact that it was clear from the conditional appearance on 6th January last that an application such as the within was almost inevitable, and (b) any (if any) delay presenting looks worse given that the court is bringing on the relocation proceedings very quickly indeed; had they come on slower any (if any) delay would not look the same. To the extent that there has been any (if any) delay in bringing the within application it is so short as to be of no practical or legal consequence.

83. Conversely, as to speed, it seems to the court that there is a need for swift progress of the relocation proceedings for a reason identified by Denham J. in the penultimate paragraph of her judgment in *W v. W*: at the moment this is a dysfunctional family; it is in nobody's interests that such a situation should pertain for any longer than is necessary. To borrow from Denham J., "*Further delay should be avoided. The case should be decided as soon as is reasonably possible. Such procedure would be for the benefit of all the family."*

X

Conclusion

84. Pursuant to O.70A RSC, the onus rests on Mr R to prove that "*the interests of justice*" lie in favour of remitting the within proceedings to the Circuit Court. The court respectfully concludes that he has not succeeded in so doing and therefore declines to order the remittal sought.

TO THE APPLICANT/RESPONDENT:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?

Dear Applicant/Respondent

I have dealt in the preceding pages with the various issues presenting in this application. Much of what I have written might seem like jargon. In this section I identify briefly some key elements of my judgment and what it means for you. ***This summary is not a substitute for what is stated in the preceding pages. It is meant merely to help you understand some key elements of what I have stated.*** *To preserve your confidentiality I have referred to you in the judgment as Ms R and Mr R respectively.*

Mr R has applied to me to send the relocation proceedings to the Circuit Court for hearing, rather than proceeding myself to hear them at the end of this month. In order for Mr R to succeed in his application he has to prove that it is in 'the interests of justice' *that I send the proceedings to the Circuit Court. I have considered all manner of factors in this last regard and I have arrived at the conclusion that Mr R has not so proved.*

It follows that I will proceed to hear the relocation proceedings at the end of this month as previously planned.

Yours faithfully

Max Barrett (Judge)