| Neutral Citation No: [2021] NICA 41 | *Ref:* McC11559 |
|---|---|
| *Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered: 18/06/2021* |

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

---

**ON APPEAL FROM**
**THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION**

---

**Between:**

**JK**

**Appellant;**

**and**

**LM**

**Respondent;**

---

**Before: McCloskey LJ and Humphreys J**

---

**Representation**
**Appellant: Self-representing**
**Respondents: Lisa Moran BL (instructed by Rosemary Connolly Solicitor)**

---

**McCloskey LJ (delivering the judgment of the court)**

*Introduction*

[1] This case comes before the Court of Appeal by a somewhat circuitous route. It purports to be an appeal against the order and decision of McFarland J, neutral citation [2021] NIQB 4. Following the parties' compliance with certain case management directions, the central question to be determined is whether there is a valid appeal in existence.

[2] The cornerstone fact giving rise to what has become protracted litigation in both Northern Ireland and the jurisdiction of the Republic of Ireland "(ROI") is that the parties are former partners and there is a child of their relationship. The father is the appellant in this matter and the mother is the respondent.

*The ROI Costs Orders*

[3] Following the termination of their relationship the appellant initiated guardianship proceedings in the Republic of Ireland, unsuccessfully so. The sequence of events culminating in the purported appeal to this court is the following:

(a) On 17 January 2013 the appellant was ordered to pay costs of €22,079.01 to the respondent.

(b) On 18 December 2013 the appellant was ordered to pay costs of €23,371.23 to the respondent.

(c) On 13 February 2014 the appellant was ordered to pay costs of €2,447.84 to the respondent.

Each of these orders was made in separate cases. None of them has been satisfied.

*The NI Registration Order*

[4] By order dated 02 April 2015 the Queen's Bench Master, acceding to the respondent's *ex parte* application, registered the aforementioned three judgements in the Queen's Bench Division of the High Court. We shall describe this as the "registration order." This triggered the following sequence of events:

(a) On 20 April 2015 the registration order was served on the appellant.

(b) By letter dated 21 April 2015 addressed to the Central Office the appellant alleged fraud on the part of the respondent, questioned why he had not been served with the application generating the registration order and intimated his intention to appeal.

(c) On 20 May 2015 the one month period for appealing expired.

(d) By letter dated 16 July 2015 addressed to the respondent's solicitors the appellant repeated his allegation of fraud and conveyed his intention to defend the "costs action" in both jurisdictions.

(e) Enforcement proceedings in this jurisdiction against the respondent followed. The milestones during this discrete phase included a conditional order for the issue of a warrant to arrest the respondent and a means hearing on 19 January 2017 attended by him at which he refused to answer any questions.

*The Set Aside Application*

[5] The next landmark event occurred on 10 February 2020. On this date the appellant issued a summons in the Queen's Bench Division seeking the relief

described as "... an order to set aside the Order of 02 April 2015 … pursuant to Order 13, rule 8 of the Rules of the Court of Judicature". The central complaint raised by the appellant in the grounding affidavit was that he had not been served with the application giving rise to the registration order. He further avers:

> "… I would have objected on grounds of fraud, errors in taxation, patent unlawfulness of the Orders which supported the Costs Orders, the fact that a legal challenge was still before the Irish Courts and the absence of an EU 1215.2012 Certificate of Enforceability."

He further complained that the registration order included a provision requiring him to pay the costs of those proceedings. His fundamental complaint is encapsulated in pithy terms:

> "The approach followed denied me my right to participate in legal proceedings."

The appellant made the following further averment:

> "I say that the Head of the Irish Family High Court, Reynolds J, made orders on 15 June and 31 July 2017 and ruled that the orders of White J were unconstitutional and unlawful. An approved ex tempore [judgement?] was issued to both parties in early October 2017."

[7] By order dated 04 August 2020 the Queen's Bench Master dismissed the appellant's set aside application and ordered the appellant to pay the respondent's costs. The terms of the order indicate that the Master was satisfied about the following matters: the respondent was entitled to apply ex parte under Order 71 for the registration order; her application was governed by EC Regulation 1215/2001; and the appellant had raised no valid ground for setting aside the registration order. The appellant appealed to the High Court.

***The First and Second Instance Proceedings***

[8] The underlying proceedings were conducted and determined on the basis that the applicable legal framework had the following three components. The first is Council Regulation (EC) Number 44/2001 ("Brussels 1"). This regulates, per its title:

> "Jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (in EU Member States)"

It established the concept of "free movement of judgements" as appears from recital (6):

> "In order to attain the objective of free movement of judgements in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgements be governed by a Community Legal Instrument which is binding and directly applicable."

The thrust and scope of the enforcement regime can be gleaned from recitals (16) – (18):

> "(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.
>
> (17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.
>
> (18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected."

[9] Article 32 defines "judgement" in the following terms:

> "For the purposes of this Regulation, 'judgement' means any judgement given by a court or tribunal of a Member State, whatever the judgement may be called, including a decree, order, decision or writ of execution, **as well as the determination of costs or expenses by an officer of the court.**"
> [Emphasis added.]

The mutual recognition regime is enshrined in Article 33 in these terms:

> "(1) A judgement given in a Member State shall be recognised in the other Member States without any special procedure being required.
>
> (2) Any interested party who raises the recognition of a judgement as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgement be recognised.
>
> (3) If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question."

Article 34 makes provision for the circumstances in which a judgement shall not be recognised.

[10] Order 71 of the Rules is the second component of the legal framework. In the present context its key provision is rule 15:

> "An application for the registration in the High Court of a Community judgement or Euratom inspection order may be made ex parte."

Rule 16 prescribes the supporting evidence which must be provided. Rule 18 provides:

> "(1) Upon registering a community judgment of Euratom inspection order, the proper officer of the Court shall forthwith send notice of the registration to every person against whom the judgment was given or the order was made.
>
> (2) The notice of registration shall have annexed to it a copy of the registered Community judgment and the order for its enforcement or, as the case may be, a copy of the Euratom inspection order, and shall state the name and address of the person on whose application the judgment or order was registered or of his solicitor or agent on whom process may be served.
>
> (3) Where the notice relates to a Community judgment under which a sum of money is payable, it shall also state that the judgment debtor may apply within 28 days of the date of the notice, or thereafter with the leave of the court,

> for the variation or cancellation of the registration on the grounds that the judgment has been partly or wholly satisfied at the date of registration."

[11] The third component of the legal framework is the Human Rights Act 1998. By virtue of section 6 the court must not act in a manner incompatible with any party's Convention rights. The Convention rights invoked by the appellant is Article 6(1), which provides in material part:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society."

***The First Appeal***

[12] The appellant challenged the order of the Queen's Bench Master by a purported appeal to the High Court. This gave rise to the judgment of McFarland J promulgated on 15 January 2021 and under appeal to this court. The judge dismissed the appeal. His principal conclusions were the following:

(i) The registration order did not determine any civil right of the appellant within the scope of Article 6(1) ECHR.

(ii) In any event, the appellant had a right of appeal which he exercised.

(iii) Order 71 faithfully reflects Brussels 1.

(iv) The registration regime in Order 71 is an "administrative process".

[13] McFarland J also gave consideration to the post-2015 proceedings in the ROI. He noted that the appeal to Ms Justice Reynolds concerned only <u>one</u> of the three orders under consideration, namely that dated 18 December 2013. Her ruling was that this order was not as a matter of law final or conclusive in relation to the issue of guardianship. She ordered remittal to the Circuit Court for the purpose of determining this issue having regard to the child's welfare and best interests. McFarland J observed:

> "She did not make any mention of any of the costs orders contained in the ROI judgements and she did not revoke any of them …

> The reference to the 18 December 2013 order not being a final order related to the issue of the guardianship of the child. It did not relate to the order to pay costs in that, or any other, order."

The judge added:

> "Until such times as [the appellant] produces to this court an unequivocal judgement of the Republic of Ireland courts revoking all or any of the ROI judgements, then as far as this court is concerned the judgements stand as good and proper and can be enforced both in the Republic of Ireland and Northern Ireland after registration."

***The Purported Appeal to this Court***

[14] The appellant challenges the judgement and order of McFarland J by a Notice of Appeal (undated) which contains a series of grounds.

[15] On the occasion of the first listing the court raised the question of whether it was seized of a valid appeal, having regard to the following:

(i) Article 38(1) of Brussels 1 provides:

> "A judgement given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there …
>
> However, in the United Kingdom, such a judgement shall be enforced in England and Wales, in Scotland or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom."

(ii) By Article 40(1):

> "The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought."

(iii) Article 41 provides:

"The judgement shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. **The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.**"
[Emphasis added.]

(iv) By Article 42:

"(1) The decision on the application for a declaration of enforceability shall forthwith be brought to the Notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

(2) The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgement, if not already served on that party."

(v) Article 43 provides, in material part:

"(1) The decision on the application for a declaration of enforceability may be appealed against by either party …

(5) An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service either on him in person or at his residence. No extension of time may be granted on account of distance."

The combined effect of Article 43 and Annex III is that in Northern Ireland any appeal against a registration order must be made to the High Court. This is the <u>first</u> appeal which Brussels 1 permits.

(vi) Article 44 continues:

> "The judgement given on the appeal may be contested only by the appeal referred to in Annex IV."

Annex IV provides in material part:

> "The appeals which may be lodged pursuant to Article 44 are the following …
>
> In the United Kingdom, **a single further appeal on a point of law.**"
> [Our emphasis.]

This is the second appeal made possible under Brussels 1.

(vii) Article 45 provides:

> "(1) The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or evoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.
>
> (2) Under no circumstances may the foreign judgement be reviewed as to its substance."

(viii) Section 6(1) of the Civil Jurisdiction and Judgments Act 1982 (the "1982 Act") provides, insofar as material:

> "The single further appeal on a point of law referred to in the 1968 Convention in Article 37, second paragraph and Article 41 in relation to the recognition or enforcement of a judgement other than a maintenance order lies –
>
> (a) In England and Wales or Northern Ireland, to the Court of Appeal or to the Supreme Court in accordance with Part II of the Administration of Justice Act 1969 (appeals direct from the High Court to the Supreme Court)."

(ix) Section 35(1) of the Judicature (NI) Act 1978 provides:

> "Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with Rules of Court appeals from any judgement or order of the High Court or a judge thereof."

The "any other statutory provision" clause applies here, by virtue of s 6(1) of the 1982 Act,

[16] The legal framework which both the court and the parties believed to be applicable at the stage of the underlying proceedings in the High Court had the three components noted in [8] - [11] above. However, as appears from [15], it is considerably more expansive, having a series of further ingredients which were not appreciated. The net effect of the combination of the provisions of EU law and domestic statutory law noted above is the following:

(i) An application for a registration order may lawfully be made ex parte.

(ii) The court must give formal notice of the making of a registration order to the respondent.

(iii) The respondent may, within 28 days of the notification or thereafter with the leave of the court, apply to have the registration order varied or cancelled – but only on the ground that the judgement has been partly or wholly satisfied at the date of registration.

(iv) The respondent has a right of appeal against the registration order.

(v) The appeal lies to the High Court.

(vi) Following the aforementioned appeal, a single further appeal to the Court of Appeal, on a point of law, may be pursued.

[17] The route whereby this "appeal" has reached the Court of Appeal is the following:

(i) On 02 April 2015 the Queen's Bench Master made the registration order concerned.

(ii) On 10 February 2020 the appellant lodged an application for "an order to set aside the Order of 02 April 2015" pursuant to Order 13, rule 8 of the Rules.

(iii) By order of the Queen's Bench Master dated 04 August 2020 this application was refused.

(iv) The appellant appealed to the High Court, which dismissed his appeal.

(v) The appellant has brought a further purported appeal to this court.

[18] In Valentine, All Laws of Northern Ireland (General Materials) it is stated at p223:

> "The substantive jurisdiction of the Court of Appeal is statutory and it has no inherent jurisdiction to hear an appeal where no statute confers it …
>
> It has no original jurisdiction except on certain ancillary and procedural matters such as amendment, enforcement, contempt of its proceedings …"

This principle is stated emphatically in Halsbury's Laws of England (4th Edition Reissue), Volume 37, para 1501:

> "An appeal is an application to a superior court or tribunal to reverse, vary or set aside the judgment, order, determination, decision or award of an inferior court or tribunal in the hierarchy of courts or tribunals on the ground that it was wrongly made or that as a matter of justice or law it requires to be corrected. **A right of appeal is conferred by statute or equivalent legislative authority; it is not a mere matter of practice or procedure, and neither the superior court nor the inferior court or tribunal nor both combined can create or take away such a right. "**
> [Our emphasis]

It is also articulated in the judgment of Donaldson MR in *WEA Records v Visions Channel 4* [1983] 1 WLR 721 at 737.

[19] The effect of the full legal framework, considered in tandem with the events outlined above, is in our view the following:

(i) The registration order was lawfully made.

(ii) Notice to the appellant of the respondent's application for the registration order was not required.

(iii) The appellant did not pursue the "variation or cancellation" route of challenge specified in Order 71, rule 18(3) and Article 43 of Brussels 1.

(iv) Nor did the appellant pursue the appeal specified in Article 44 and Annex III to Brussels 1.

(v) The Queen's Bench Master had no jurisdiction to entertain the "set aside" application made by the appellant some five years after the making of the registration order. The reason for this is that the only recourse available to the appellant was an appeal against the order to the High Court. In passing, this order also failed to deal with the significant issue of time.

(vi) Giving effect to the long-established principle that an appeal lies only where conferred by statute, the appellant had no right of appeal to the High Court (or any other court for that matter) against the invalid order of the Master. Thus the High Court appeal proceedings were also without jurisdiction.

(vii) The two pre-requisites to the exercise of appellate jurisdiction by this court were an appeal to the High Court against the registration order and an ensuing appeal against the order of the High Court. Neither of these pre-requisites is satisfied.

[20] The combined effect of the relevant provisions of Brussels 1, section 35(1) of the Judicature Act and section 6(1) of the 1982 Act is that in a context such as the present this court's jurisdiction as a second appellate court is exercisable only where the pre-requisites noted above have been observed. There is nothing in the framework of the applicable EU law provisions or those of domestic statutory law empowering this court to waive either of these pre-requisites. Thus the proceedings before the Queen's Bench Master cannot be treated as if they were an appeal to the High Court against the registration order. Nor can the ensuing "appeal" to the High Court be treated as an appeal of the genre permitted by Brussels 1, Article 43.

[21] We consider that our construction of the relevant provisions of EU law and domestic statutory law is consonant with the following aims of Brussels 1 namely the promotion of simplicity and expedition and the avoidance of delay. The inordinate delay and procedural complexity which characterise the present proceedings are manifestly antithetical to these aims.

***Conclusion***

[22] For the reasons given the "appeal" specified in the appellant's Notice dated 1 March 2021 is misconceived. If the contrary conclusion had been reached the court would have had no hesitation in dismissing the appeal on its merits as we concur without hesitation with the determination of the relevant substantive issues of law of McFarland J.

[23] In the exercise of this court's powers under section 38(1)(a) and (i) of the Judicature (NI) Act 1978, we order:

(i) The appeal is dismissed.

(ii) The decision and order of McFarland J are reversed and set aside, save in respect of costs.

(iii) Ditto the decision and order of the Queen's Bench Master.

(iv) We declare that the registration order is lawful in all respects.