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Judgment: approved by the Court for handing down | *Delivered:* **03/04/09**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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C's Application [2009] NICA 23

AN APPLICATION FOR JUDICIAL REVIEW BY C
AND
IN THE MATTER OF A DECISION BY DISTRICT JUDGE (MAGISTRATES' COURT) MAGILL MADE ON 2 JUNE 2008

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BETWEEN:

SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST

Applicant;

-and-

C

Respondent.

_____

Before: Kerr LCJ, Higgins LJ and Girvan LJ

_____

GIRVAN LJ

Introduction

[1] This matter comes before the court by way of an appeal from Coghlin L J who by an order dated 15 September 2008 in judicial review proceedings brought by C quashed a decision made by District Judge (Magistrates Court) Magill ("the District Judge") on 2 June 2008 sitting in the Newtownards

Family Proceedings Court. The District Judge determined that he did not have jurisdiction to hear and determine an application brought by C, the father of four children, for a contact order made under Article 8 of the Children (Northern Ireland) Order 1995 ("the Order"). The case raises an important question, apparently not yet decided by higher authority, namely whether a Family Proceedings Court has jurisdiction to make a contact order in relation to children who are accommodated by an authority under voluntary care arrangements where they are not the subject of a care order or an interim care order.

Background

[2] Following an unannounced visit to the children's home by employees of the South Eastern Health and Social Care Trust, C and the children's mother SB agreed to their four children JC (aged 8), DC (7), DC (5) and AC (3) being placed in voluntary care accommodation with foster parents under the supervision of the Trust. As would be normal in such cases an agreement was entered into between the parents and the Trust in relation to the fostering of the children. This agreement made provision for (inter alia) contact between the parents and the children. We were not provided with a copy of the agreement but counsel informed the court that the contact was agreed at twice a week, with the Trust to make the necessary arrangements to facilitate that contact.

[3] By early 2008 the parents were no longer content with the arrangements in relation to contact and in January 2008 the mother applied for a residence order in accordance with the provisions of Article 8 of the 1995 Order. The Trust's response to that application was to institute proceedings for a care order on 4 February 2008. At a timetabling meeting held on 13 March 2008 the District Judge fixed the full hearing of the application for 9 October 2008. In the meantime no interim care order was sought. According to C's affidavit sworn in the judicial review proceedings this was because the parents agreed that they were not withdrawing their consent to the voluntary care arrangements and the Trust saw no need to pursue an interim care order in respect of the children who were not perceived to be at risk of harm.

[4] It further appears from C's affidavit that the issue of parental contact was a constant "thorn in the side" as between the parents and the Trust. There were parental complaints about the frequency and the organisation of contact from the outset. They decided to bring those issues before the court and attempted to do so by making an application under Article 53 of the 1995 Order. This form of application was misconceived because Article 53 only comes into play when an interim or full care order is actually in place. The District Judge dismissed the Article 53 application, as he was bound to do, on 12 May 2008.

[5] It appears from C's affidavit that the District Judge decided to list the interim care order application which, if it resulted in such an order being granted, would enable the court to rule on parental contact in the meantime pending determination of the full care application. Counsel for the parents submitted to the court that it had power to grant an Article 8 contact order as there was no express provision in the Order that precluded the making of such an order in relation to children voluntarily accommodated by the Trust by agreement with the parents. The District Judge decided to list for argument the question whether he had jurisdiction to make an Article 8 contact order during the pendency of care proceedings which were ongoing but without an interim care order being in place in the meantime.

[6] On 2 June 2008 following submissions the District Judge ruled that he did not have jurisdiction to make an Article 8 contact order. A formal order to that effect was made on 16 June 2008.

[7] On 13 June 2008 SB appealed the District Judge's decision to the Family Care Centre sitting at Belfast. On 4 July 2008 Her Honour Judge Philpott QC ruled that the matter should proceed by way of judicial review rather than appeal. She did however indicate that, if the court confirmed that the Family Care Centre was the appropriate court, she would hear the appeal.

[8] Judicial review proceedings were instituted on 9 July 2008. The applicant sought an order quashing the District Judge's decision that he did not have jurisdiction. In those proceedings Coghlin LJ granted judicial review and quashed the decision of the District Judge on 15 September 2008. He stated at paragraph 15 of his judgment:

> "In my opinion, bearing in mind the importance of welfare of the children and the interest in maintaining contact with parents, this is a situation in which the court has jurisdiction to make an Article 8 contact order enforceable against the Trust by virtue of the initiation of the family proceedings by the Trust."

[9] Although the effect of the quashing order was that the District Judge did have jurisdiction to make an order under Article 8 of the 1995 Order it does not appear that he was asked to make such an order. On 20 October 2008 the District Judge dismissed the application for an interim order but subsequently on 15 December 2008 the care proceedings concluded with the making of a full care order.

[10] In the meantime by a notice of appeal dated 24 October 2008 the Trust appealed against Coghlin J's order.

Preliminary question: is the appeal academic?

[11] As the children are the subject of a full care order the issue of contact now falls to be determined under Article 53 of the Order. The appeal is thus technically of academic interest to the respondent and SB. The general rule is that if an appeal is academic between the parties it should not be heard but exceptions can be made to this rule where there is good reason in the public interest of doing so, for example where a number of similar cases have arisen or are likely to arise and the issue will therefore need to be resolved by the courts at some time in the future.

[12] The principle stated by the House of Lords in R v Secretary of State for the Home Department ex parte Salem (1999) 1 AC 450 applies with particular force to hearings in the Court of Appeal. Lord Slynn stated at 457:

> "The discretion to hear disputes even in the area of public law must be exercised with caution and appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statute construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the very near future."

[13] The principle was adopted by this court in Re McConnell's Application [2000] NIJB 116 in which Carswell LCJ stated:

> "It is not the function of the courts to give advisory opinions to public bodies, but if it appears that the same situation was likely to recur frequently and the body concerned had acted incorrectly, they might be prepared to make a declaration, to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future."

(see also the comments of Kerr J in Re Richard Nicholson's Application for Judicial Review [2003] NIQB 30 at paragraph 7 and 11).

[14] When the matter was mentioned on 20 March 2009 counsel for the Trust indicated that the case was not fact specific, the judgment at first instance had opened up an entire front of litigation in cases where children are voluntarily accommodated and on a practical level difficulties had arisen.

He indicated that there were many cases in the lower courts which were adjourned awaiting the decision of this court. In the circumstances we consider that this appeal does satisfy the Salem test as it raises an important jurisdictional point which will arise in other cases.

The procedure followed

[15] The route followed to determine the preliminary jurisdictional question which arose in this case was unnecessarily complex, long and expensive. When the District Judge concluded that he did not have jurisdiction, C wished to appeal as he was entitled to do. The appeal could have taken the form of a case stated to the Court of Appeal and in retrospect that it would have been by far the most convenient and cost effective mode of appeal. If this court had concluded that the District Judge had jurisdiction the matter would have been remitted to him to determine. This would have avoided the need to appeal to the County Court or to take a judicial review.

[16] C, however, appealed to the County Court judge as he was entitled to. The County Court judge had both the jurisdiction and the duty to decide the case. Since the question of jurisdiction inevitably arose again before her, there is no reason why the point should not have been determined by her. Either party, if aggrieved by her decision on that point, could have requisitioned a case stated. The judge, however, directed that the point should be resolved by an application for judicial review and since she had so directed it was inevitable that the matter would proceed in that way. Before deciding that it was appropriate to stay the appeal so that the jurisdictional point could be tested by judicial review, the judge should have considered the question whether there was an adequate alternative remedy to judicial review. Although this question normally arises when the judicial review court considers whether there is an alternative, more suitable remedy available, it was a question which applied in reverse in the present instance and should have been considered by the lower court. There was such a remedy in the form of the appeal itself which fell for determination before the judge, the parties having the right thereafter to requisition a case stated.

[17] The judicial review proceedings involved a plethora of representation with each parent being separately represented by senior and junior counsel and the District Judge and the Trust being represented by junior counsel. Had the matter proceeded by way of case stated no question of representation of the District Judge would have arisen. It is open to question whether it was either necessary or appropriate in the judicial review proceedings for the District Judge to be an active participant in the argument. The issue was a net legal point in which the District Judge had no interest to be protected

although he was interested in the outcome. No allegation or complaint was made about the District Judge's conduct of the proceedings. If the jurisdictional point was determined in favour of C, the proper course would have been to remit the matter to the District Judge to hear the case on the merits. While the mother and father may have had separate interests in the event of the court having jurisdiction, they had an identity of interest on the issue of jurisdiction and separate representation at public expense appears to have been unnecessary.

[18] Having directed the parties to pursue a judicial review the judge indicated that if jurisdiction was established she would proceed to determine the appeal. However, if the District Judge was wrong in his decision and did in fact have jurisdiction then the matter would have had to be remitted to the District Judge for determination on the merits.

[19] While we are considering the issue in this appeal so as to determine a point of general application and the factual and procedural peculiarities of this case are not therefore relevant to the issue of principle, nevertheless from the procedural history of this case some points of general application emerge. Courts and practitioners must focus carefully on the question of the most expeditious, most cost effective and most efficient way of resolving the questions arising in the proceedings. The overriding objective of rules of procedure requires a focus on the saving of expense, dealing with issues proportionately and ensuring that the case is dealt with expeditiously and fairly. This is expressly provided for in Order 1 rule 1A of the Rules of the Supreme Court (Northern Ireland) 1980 and in the equivalent provisions of the County Court Rules. Those objectives are implied in any event. Where parties have an identity of interest on an issue (as the parents did on the jurisdictional question) it is necessary to focus on the question whether separate representation on that point should be regarded as appropriate. This is a point of relevance to be considered by the parties, the court and the Legal Services Commission. Where the decision of a lower court or tribunal is under challenge in judicial review proceedings, thought must be given to the question whether it is appropriate or necessary that the court or tribunal is separately represented when there is in fact no challenge to the conduct of the lower court and where what is an issue is a point of law in which the lower court has no interest other than ensuring that it receives proper guidance from the High Court. When the parties are fully represented they are the legitimate contradictors.

The jurisdictional issue

[20] The issue for determination being whether the court has jurisdiction under Article 8 of the 1995 Order when children are accommodated by a Trust with the consent of parents under a voluntary arrangement, it is

necessary to analyse with some care the provisions of the 1995 Order. It is important to note the provisions of Article 3 of the Order, which makes the child's welfare the paramount consideration. Article 3(2) also makes clear that in any proceedings in which any question arises with respect to the upbringing of the child, the court should have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child. Jurisdictional issues which have the potential to hold up the determination of questions affecting a child's welfare must be determined expeditiously. This case demonstrates the potential for such questions to create a protracted legal debate which may appear arid and time consuming to families seeking an early resolution of a dispute impinging on the interests of the key person concerned, namely the child.

[21] The 1995 Order draws a clear distinction between, on the one hand, family proceedings in the private field and, on the other, care proceedings on the public side. Under Part V of the 1995 Order provision is made for the making of care orders placing a child in the care or under the authority of his designated authority. The pre-requisite for such an order is that the child is suffering or likely to suffer significant harm. Article 51 requires the court to draw up a timetable with a view to disposing of the application without delay. The effect of the care order is to confer parental responsibility for the child on the designated authority. Under Article 53 where a child is in the care of an authority it shall allow reasonable contact to take place with the child's parents. Under Article 53(2)(c) application can be made by (inter alios) the parents of the child for such order as the court considers appropriate with respect to the contact which is to be allowed. It is clear that where a child is in care under a care order under Part V the court has a clear jurisdiction to deal with contact arrangements relating to the child. Where, on the other hand, a child is not the subject of a care order the relevant provisions of the Order which must be considered are to be found in Part III. Article 8(1) defines a contact order thus:

> ""Contact order" means an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person or the child otherwise to have contact with each other."

[22] Article 9(1) precludes the court from making a contact order other than a residence order with respect to a child who is in the care of an authority. Article 9(2) provides that no application can be made by an authority for a residence order or a contact order. Article 9(3) restricts the rights of foster parents to apply for an Article 8 order.

[23] The court's power to make an Article 8 order is dealt with in Article 10. Article 10(1) provides:

> (1) In any family proceedings in which a question arises with respect to the welfare of any child, the court may make an Article 8 order with respect to the child if –
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> (a) an application for the order has been made by a person who
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> (i) is entitled to apply for an Article 8 order with respect to the child; or
>
> (ii) has obtained the leave of the court to make the application."

Article 10(4) makes clear that any parent or guardian of the child is entitled to apply for a contact order under Article 8.

Article 10(9) provides that:

> "(9) Where the person applying for leave to make an application for an Article 8 is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to
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> (a) the nature of the proposed application for the Article 8 order;
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> (b) the applicant's connection with the child;
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> (c) any risks that there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and
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> (d) where the child is being looked after by an authority;
>
> (i) the authority's plans for the child's future; and
>
> (ii) the wishes and feelings of the child's parents."

[24] Article 11 imposes a duty on the court to draw up a timetable to enable determination of the question of making an Article 8 order without delay. By Article 11(7) an Article 8 order may contain directions about how it is to be

carried into effect, impose conditions, be made to have effect for a specified period or make such incidental, supplemental or consequential provision as the court thinks just.

[25] Applications for contact orders, as indeed for residence orders, most usually arise in the context of disputes between parents or other relatives. The question raised in this appeal however arises out of a situation in which the children were not subject to a care order but are children looked after by the authority which is providing accommodation. Under Article 21(4) every authority shall provide accommodation for any child within the authority's area, even though a person who has parental responsibility for him is able to provide him with accommodation, if the authority considers that to do so would safeguard and promote the child's welfare. It may not do so if a person with parental responsibility objects and is willing and able to provide accommodation for him or arrange for accommodation to be provided for him. Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the authority under Article 21. The authority under Article 26 must safeguard and promote the welfare of the child but, before making any decision in respect of a child, it must ascertain the wishes and feelings of the child and parents. Under Article 29 every authority looking after a child shall, unless it is not reasonably practicable or consistent with his welfare, endeavour to promote the contact between the child and his parents and shall take reasonably practicable steps to ensure that the parents are kept informed of where he is being accommodated.

The submissions

[26] Mr Toner QC, who appeared on behalf of the Trust with Mr Montgomery, argued that the voluntary accommodation of children by local authority involves agreement on issues such as where the children live, contact and other practical issues. If a dispute arises between the parties as to any of these matters the appropriate course of action is for the local authority to apply for an interim care order, should it determine that the children ought not to be returned to the care of their parents. Such a course of action would provide a mechanism for a court to rule on whatever issue was in dispute. The parents can withdraw their consent to the accommodation and, in view of their parental responsibility and rights, they could take the children back into their own care, leaving it to the Trust to take such steps as it considers appropriate, including applying for a care or interim care order. Article 8 proceedings relate only to private law proceedings. An order ought not to be made against an authority which cannot itself apply for such an order under the statute. If a party cannot be an applicant it ought not to be a respondent.

[27] Mr Long QC, who appeared with Mr Kerrin on behalf of C, argued that there was nothing in the wording of the 1995 Order which precluded C

from making an application under Article 8. Article 9 contains a prohibition against the making of an Article 8 order other than a residence order in respect of a child who is in care. There is no such restriction in respect of a child who is not in care of the authority but who is being looked after by the authority. Article 10 enables the court to make such an order on the application of any parent and there is no restriction on a parent applying for an Article 8 order in respect of a child who is being provided with accommodation by an authority. The definition of a contact order refers to persons with whom the child lives. A person under the Interpretation Act 1978 (this should be a reference to the Interpretation Act (Northern Ireland) 1958) includes a body such as the authority. Placement is governed by the Arrangement for Placements of Children (General) Regulations (NI) 1996 and the Foster Placements (Children) Regulations (NI) 1996. Schedule 3 to the latter Regulations sets out matters which are to be contained in the foster placement agreement, which is a pre-requisite to placements with a foster parent. Paragraph 6 makes specific reference to the possibility of an Article 8 application. It is thus apparent that the Regulations contemplated that an Article 8 contact order can be made in respect of such a child who is not subject to a care order. Appendix 3 of the Family Proceedings Rules (Northern Ireland) 1996 requires that notice of any Article 8 application should be given to any authority providing accommodation for the child. This recognises that Article 8 applications can arise in such cases. Mr Long called in aid the obiter view expressed by Gillen J in Re X's Application [2007] NIQB 113 that an application for a contact order could be made under Article 10 when a child is in voluntary accommodation. Mr Long also stressed that the provisions of the 1995 Order must be read compatibly with the provisions of the Convention particularly Article 6.

Conclusions

[28] The answer to the question whether the court has a power to make an Article 8 order in a case such as the present must be found within the 1995 Order itself. The question involves the construction of the statutory provisions. The construction of the statute must be approached in the light of the statutory imperative to ensure that the child's welfare is paramount. A construction which advances the welfare of children is to be preferred to one which limits the power of the court to exercise its powers in the interests of the child. In addition the proper construction of the legislation is to be arrived at by reference to the wording of the Order which cannot be restricted or expanded by subordinate legislation.

[29] The arguments presented by counsel for both sides focused to some extent on the first part of the definition of a contact order *("an order requiring the person with whom the child lives or is to live, to allow the child to visit or stay with the person named in the order"*). Mr Long argued that the Trust should properly be regarded as the person with whom the child lives. While the

word 'person', by virtue of section 37 of the Interpretation Act (Northern Ireland) 1954, includes incorporated and unincorporated bodies if the context so permits, it is a strained interpretation of Article 8 to regard the Trust as a person with whom the child actually lives. During the fostering the child lives with the foster parents. A contact order could effectively make provision for contact in relation to the children while they are living with the foster parents. There is a second part to the definition which is wider (*"for that person (ie the person named in the order) and the child otherwise to have contact with each other"*). There is nothing in the definition of a contact order to limit it to situations where the parties seeking contact are seeking that contact in relation to a child who is living with a person who does not have parental responsibility. The definition is wide enough to encompass an order defining contact arrangements in favour of the person seeking contact in any circumstances where the child is living elsewhere than with the parents. As in all cases involving a child under the 1995 Order the child is the proper centre of attention.

[30] The focus must be on the question of contact between the applicant and the child, not on the relationship between the parties seeking contact and the third party who de facto or de jure has in their control the child in respect of whom the contact is sought. For this reason the Trust argues that if the authority cannot be an applicant for an Article 8 order, an order ought not to be made against it. Approaching the case in such a way diverts attention from the question of the personal contact between the child and the applicant. A contact order should be viewed as a positive order that is intended to enhance and deal with contact between the applicant and the child in the child's interest rather than as a negative order directed against the person with whom the child is actually living.

[31] The Trust's argument that the proper course is either for the parent to withdraw consent and/or for the authority to move for an interim care order (which it accepts would open the door to a contact application under Article 53) likewise directs attention away from the primary focus which is the welfare of the child. Where a child is in care under a voluntary arrangement and a dispute arises as to whether the agreed arrangements for contact are being broken or should be varied, a true question arises relating to the contact between the applicant and the child. There is nothing in Article 9 or 10 that precludes the court, acting in the interests of the child, from resolving that dispute. Interim care proceedings may take time to resolve as can be seen from the chronology in the present case and a forced termination of a voluntary arrangement which, apart from an issue on contact, may be otherwise working satisfactorily and consensually could well be entirely contrary to the welfare of the child.

[32] There are within the relevant provisions clear indications that it was not intended to deprive the court of jurisdiction in a case such as the present.

Article 9(1) expressly precludes an Article 8 application where a child *is in care.* Article 25 refers to children *looked after by an authority*, a phrase which is then sub-defined by reference to children *in care* and thus covered by Article 9(1) and children *in voluntary care* who are not referred to in Article 9 at all. An express but limited exception such as that in Article 9(1) excludes an implied wider exception (*expressus facit cessare tacitum*). Article 10(9) (which deals with persons applying for leave to make an Article 8 application) specifically refers to a child being looked after by an authority. If an Article 8 contact order cannot be made in relation to such children, as the Trust argues, then Article 10(9)(d) would be entirely inappropriate. If non-parents who require the leave of the court to make a contact order application can bring contact proceedings in relation to a child in voluntary care, it would appear illogical to deprive parents of the right to bring such proceedings and require them to terminate the care arrangements (which they may not wish to do) when that may be quite contrary to the welfare of the child.

[33] The authority under Article 29 has a duty to endeavour to promote contact with the child and his parents unless it is not reasonably practicable or consistent with his welfare. If there is a dispute between the parents and the Trust as to whether the Trust is properly exercising its duties under Article 29, in the absence of a right to bring the issue before the court by way of an application for contact under Article 8, the parents are left either without a remedy (which would run contrary to Article 6 and 8 of the Convention) or their remedy would have to lie by way of a judicial review application, a procedure singularly unsuitable for the resolution of a contact dispute which in other circumstances can be efficiently and effectively dealt with by an Article 8 application.

[34] These considerations lead to the conclusion that the court has jurisdiction to make an Article 8 order in relation to children in voluntary care. This conclusion accords with the obiter view expressed by Gillen J in Re X's application [2007] NIQB 113 at paragraph 21:

> "If the withdrawal of consent triggered an application by the Trust to seek [an] interim care order under the 1995 legislation, then the applicant could seek an appropriate contact order either under Article 10 or, if an interim care order were made, under Article 53 of the 1995 legislation inviting the court to make such order as it considered appropriate with respect [to] the contact (and venue) which is to be allowed between the children and the applicant."

[35] For these reasons we dismiss the appeal.