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Judgment: approved by the Court for handing down | *Delivered:* **24/1/2017**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF APPEALS FROM THE FAMILY CARE CENTRE SITTING AT BELFAST

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BETWEEN:

DMcA

Appellant;

-and-

A HEALTH AND SOCIAL CARE TRUST

Respondent.

BETWEEN:

BT being a person under a disability by her next friend the Official Solicitor

Appellant;

-and-

A HEALTH AND SOCIAL CARE TRUST

Respondent.

_____

(Refusal of Expert: Appeal)

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Before: Morgan LCJ and Gillen LJ

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GILLEN LJ (giving the judgment of the court)

Introduction

[1] The identities of the parties have been anonymised in order to protect the interests of the children to whom this judgment relates. Nothing must be published or reported which allows these children or any related adults to be identified in any way.

[2] These matters emanate from a case stated for the opinion of the Court of Appeal on a point of law by Mrs Justice Keegan couched in the following terms:

> "Was I correct in law to decide that there is no interlocutory right of appeal under Article 166 of the Children (Northern Ireland) Order 1995 of an order refusing an expert assessment and that this is compatible with Article 6(1) of the ECHR?"

[3] Mrs Justice Keegan gave judgment on 11 August 2016. She had heard the two cases together by agreement of all the parties given that they raised a common point of law in relation to the appeals.

[4] Since the point of law to be considered in these cases is a net one, the background facts can be stated briefly. In the first case, the appeal before Mrs Justice Keegan was brought in relation to a decision made on 31 May 2016 by the Recorder of Belfast in the context of care proceedings. The judge refused the mother's application for an expert namely Mr Ken Wilson, an independent social worker. The mother had already been assessed by the Family Care Centre at Belfast and concerns about her had been raised.

[5] Further work was also identified for the mother which included Sure Start and Women's Aid although it was contended by the respondent that the mother had not engaged with those services. Following the birth of another child, she did engage with such services.

[6] However the Family Centre report was not a successful report for the mother and the case was therefore timetabled before the Family Care Centre. On 5 April 2016 a provisional date for a final hearing of 30 June 2016 was provided.

[7] On 5 April it was indicated on behalf of the mother that she might seek to instruct her own expert and the judge on that occasion indicated that any such request could be brought under the rules by way of C2 application.

[8] When the case returned to court on 20 May 2016 no formal C2 application was filed on behalf of the mother to instruct an expert. However oral submissions were made that the mother required the assistance of Mr Wilson. The judge was advised that a formal application could be made and that was made and heard on 31 May 2016. On that date the judge had the benefit of a C2 application, heard oral submissions in relation to the instruction of Mr Ken Wilson and refused the application listing the case for a full hearing.

[9] The judge had refused the application on three grounds:

- The delay which he said was not purposeful in this case;
- The cost of a second report;

- His view that there was sufficient evidence before the court to make a decision and that a second expert was not necessary.

[10] In relation to the second case of BT, this matter is brought by the Official Solicitor acting on behalf of BT. This was an appeal from the decision of the Recorder of Belfast on 19 May 2016 when the judge refused the mother's application for a second expert assessment by Dr Jennifer Galbraith, a consultant clinical psychologist with an expertise in learning disability.

[11] This case is somewhat different in complexion from the first case given that BT had been found to be incompetent and was represented by the Official Solicitor. As in the case of DMcA the relevant children were living with relatives and the plans by the relevant Trusts were for kinship care.

[12] In the case of BT, the subject children were R, now aged 10 and M now aged 8. There had been a long history of social service participation since 2001 with BT involving four other half siblings in addition to the two subject children.

[13] Against the background of the two subject children having been placed on the Child Protection Register due to concerns regarding physical abuse, neglect and emotional abuse, an interim care order hearing was eventually sought by the relevant Trust. The two children were, in August 2015, placed in the care of paternal grandparents with the voluntary consent of the mother. After this an assessment was jointly agreed and on 3 November 2015 Dr McCartan, consultant psychologist, filed a report in relation to the mother's capabilities. This was a report directed by the Family Proceedings Court on joint instruction between the Trust, Guardian Ad Litem and the mother.

[14] On 16 December 2015 the case was reviewed and timetabled for full hearing on 10 February 2016. However on 8 January 2016 the mother filed a C2 seeking to appoint a Mencap advocate and a further assessment by Dr McCartan. Proceedings were transferred to Craigavon Family Care Centre on the ground of complexity.

[15] On 8 March 2016 the case was listed for first directions at Belfast Family Care Centre before His Honour Judge McFarland. The case was timetabled for a full hearing on 27 May 2016.

[16] On 10 May 2016 Dr Bunn, consultant psychiatrist, filed a report after an appointment with the mother. He referred to the mother having a mild mental retardation which met the criteria under the Mental Health (Northern Ireland) Order 1986.

[17] The mother then filed a C2 application seeking a new psychological report to be prepared, given the conclusions of Dr Bunn, with Dr Galbraith being the appropriate expert sought.

[18] The application for a second expert assessment was refused for the following reasons:

- The cost of a second report;
- The delay in the case if a second expert were to be instructed;
- The mother did not need the assistance of a second expert given the report that was already there from Dr McCartan.

The issue before this court

[19] There are two issues to be determined:

(i) Is there an interlocutory right of appeal under Article 166 of the Children (Northern Ireland) Order 1995 ("the 1995 Order") of an order refusing an expert assessment? ("The first issue")

(ii) If not, is this compatible with Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms ("the Convention")? ("The second issue")

The first issue

[20] The relevant statutory and regulatory provisions relevant to this appeal are as follows.

[21] *The Children (Northern Ireland) Order 1995 which provides where relevant:*

> "57(6) Where the court makes an interim care order or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child: but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment.
>
> (7) A direction under paragraph (6) may be to the effect that there is to be—
>
> (a) no such examination or assessment; or
>
> (b) no such examination or assessment unless the court directs otherwise.
>
> ……

165.—(1) An authority having power to make rules of court may make such provision for giving effect to—

(a) this Order;

(b) the provisions of any regulations or order made under this Order; or

(c) any amendment made by this Order in any other statutory provision,

as appears to that authority to be necessary or expedient.

166.-(1) Subject to any express provisions to the contrary made by or under this Order, an appeal shall lie to the High Court against—

(a) the making by a county court of any order under this Order; or

(b) any refusal by a county court to make such an order,

as if the decision had been made in the exercise of the jurisdiction conferred by Part III of the County Courts (Northern Ireland) Order 1980 and the appeal were brought under Article 60 of that Order."

[22] *Article 60 of the County Courts (Northern Ireland) Order 1980 provides where relevant:*

"60.—(1) Any party dissatisfied with any decree of a county court made in the exercise of the jurisdiction conferred by Part III may appeal from that decree to the High Court.

(2) In the interpretation section of the County Courts (Northern Ireland) Order 1980, decree includes any order, decision or determination made by a County Court in any civil proceedings. In the interpretation section order includes any decree or other order whatsoever of a county court."

[23] *The Family Proceedings Rules (Northern Ireland) 1996*

These are the rules which give effect to the Children (Northern Ireland) Order 1995. In the heading of the Rules, it states:

> "We, the Family Proceedings Rules Committee, in exercise of the powers conferred on us by Article 12 of the Family Law (Northern Ireland) Order 1993 hereby with the concurrence of the Lord Chancellor, make the following Rules."

[24] *Rule 4.15 is extensive under the title "Directions" and includes where relevant:*

> "(2) In proceedings to which this Part applies the court may, subject to paragraph (3), give, vary or revoke directions for the conduct of the proceedings, including -
>
> (a) the timetable for the proceedings;
>
> (b) varying the time within which or by which an act is required by these rules or by other rules of court, to be done;
>
> (e) the service of documents;
> (f) the submission of evidence including experts' reports;
>
> (h) transfer the proceedings to another court.
>
> (3) Directions under paragraph (2) may be given, varied or revoked either –
>
> (a) of the court's own motion …….
>
> (b) on the written request in Form C2 of a party specifying the direction which is sought, filed and served on the other parties, or
>
> (c) on the written request in Form C2 of a party specifying the direction which is sought, to which the other parties consent and which they or their representatives have signed."

[25] *Rules 4.19, under the heading "Expert Evidence – Examination of a Child" provides where relevant:*

> "(1) No person may, without the leave of the court, cause the child to be medically or psychiatrically examined, or otherwise assessed, for the purpose of the preparation of expert evidence for use in the proceedings.
>
> (2) An application for leave under paragraph (1) shall be made in Form C2 and shall, unless the court otherwise directs, be served on all parties to the proceedings and on the Guardian Ad Litem.
>
> (3) Where the leave of the court has not been given under paragraph (1), no evidence arising out of an examination or assessment to which that paragraph applies may be adduced without leave of the court."

[26] *Rule 4.24, under the heading "Confidentiality of Documents" provides*:

> "(1) Notwithstanding any rule of court to the contrary, no document, other than a record of an order, held by the court and relating to proceedings to which this Part applies shall be disclosed, other than to—
>
> (a) a party,
> (b) the legal representative of a party,
> (c) the guardian ad litem,
> (d) the Legal Aid Department, or
> (e) a welfare officer
>
> without leave of the judge."

[27] *Article 12 of the Family Law (Northern Ireland) Order 1993 provides as follows:*

> "**12.** There shall be a committee known as the Northern Ireland Family Proceedings Rules Committee which may make rules of court in accordance with Article 12A for the purposes of family proceedings."

Discussion of the first issue

[28] In our view it is clear law that the creation of a right of appeal requires legislative authority. An appeal does not lie unless expressly given by statute (see re G An Infant [1960] NI 35 and Great Northern Railways Board v Minister of Home Affairs [1962] NI 24).

[29] Article 166 of the 1995 Order provides the sole mechanism by which a party to an action can appeal against a decision of a Family Care Centre judge acting under the Children (Northern Ireland) Order 1995. (See Re E and Others (Appeal from the Family Care Centre) [2003] NI Fam L ("Re E") at paragraph [7]).

[30] We do not consider that the rules above set out under the Family Proceedings Rules (Northern Ireland) 1996 are made under the 1995 Order. They are made, as stated in the introduction, by the Family Proceedings Rules Committee in the exercise of their powers under Article 12 of the Family Law (Northern Ireland) Order 1993. This therefore distinguishes them for example from orders made under Articles 57(6) and (7) of the 1995 Order (see Re E at paragraph [10]-[11] and in Re O (Minors) (Medical Examination) [1993] 1 FLR 860).

[31] We agree with the finding of the learned trial judge that Article 165 of the 1995 Order, which refers to rules, merely allows for rules to be made to give effect to the 1995 Order. Article 12 of the 1993 Order is a legislative provision providing for the Rules Committee to make the rules set out under the Family Proceedings Rules (Northern Ireland) 1996.

[32] The rationale behind this conclusion is that cited by the learned trial judge arising out of Re E at paragraph [13] where the court had indicated that if an appeal was to be allowed for the entire genre of matters set out in Rule 4.15 inordinate delay could be occasioned in very important cases in the wake of appeals against a plethora of minor directions given by the trial judge.

[33] Ms McGrenera posited the argument that it would be unconscionable to permit an appeal against a ruling under Article 57(6) and (7) of the 1995 Order but not to allow an appeal in the present instance.

[34] We do not agree. If authority were needed for our view that the two concepts are quite different and are rationally covered by different legislation, it is found in the judgment of Baroness Hale in Kent County Council v G [2005] UKHL 68 where the court considered the issue as to the circumstances in which a court might direct a local Social Services authority to pay for a family's admission to a centre for assessment. Describing the purpose of the English legislation comparable to that under Article 57 of the 1995 Order, Baroness Hale said at [64]:

> "The purpose of these provisions is, therefore, not only to enable to court to obtain the information it needs, but also to enable the court to control the information gathering activities of others."

[35] This, she said at paragraph [69], is with a view to enabling the court to make the decision which it has to make under the Act with the minimum of delay and to control the number of examinations of the same child by different doctors. It is quite

different from the exercise being performed in the instant cases and under different legislation.

[36] It is not relevant to the findings that we make in this appeal that the law is different in England and Wales. For example in that jurisdiction section 54 of the Access to Justice Act 1999 addresses appeals in civil proceedings. It states that the rules of court may provide that any right of appeal to County Court, High Court or Court of Appeal may be exercised only with permission.

[37] The Family Procedure Rules (FPR) – updated on 17 July 2015 – provide for the procedure in respect of appeals. Part 30 establishes the procedures to be followed in respect of appeals to the High Court and to the Family Court. Rule 30.4(3) of the FPR states that where appeals are against a case management decision the appellant must file the appellant's notice within seven days of the decision of the lower court. Rule 30.5 allows for the respondent to serve "a respondent's notice" and where the appeal relates to a case management decision that must be done with seven days.

[38] Where permission is required to appeal, this may only be given where the court considers the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. Permission to appeal may be granted or refused without a hearing under Rule 30.3 and, where the court considers the application is totally without merit, the judge may make an order that the person seeking permission to appeal cannot request that the decision be reconsidered at a rehearing (see Rule 30.3(5)). None of these provisions applies in Northern Ireland.

[39] Accordingly these clearly go far beyond the established practice in Northern Ireland and since the Northern Ireland legislation has not been significantly amended since 1995, there is nothing about the Northern Ireland legislation that suggests that similar provisions apply.

[40] It may well be that this is a matter that requires urgent attention by the legislature in Northern Ireland to introduce similar legislation and rules to those which pertain in England and Wales. Indeed it is a matter under current consideration by the Civil and Family Justice Review Body which is due to shortly report.

[41] However in the interim, we are satisfied that the interlocutory orders made by the trial judge in both these cases were not made under Article 166 of the 1995 Order and accordingly there is no right of appeal. We therefore affirm the judgment of Mrs Justice Keegan in that regard.

The second issue

[42] Secondly, Ms McGrenera argues that if there is no right of appeal, this has occasioned a failure to provide the appellants with a fair hearing contrary to Article 6 of the Convention. Schedule 1 of the Human Rights Act 1998, states that in relation to Article 6(1) – Right to a Fair Trial – the following provisions apply:

> "In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing, within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly …"

[43] Both cases arise from the contention that an expert was necessary to offer a second opinion on the mothers' capabilities and that an immediate appeal should be allowed from the judge's refusal in order to ensure a fair trial.

[44] We commence with certain uncontroversial assertions of law. First, Article 6 does not guarantee a right to appeal. This right is only provided for in criminal cases in Article 2 of Protocol No. 7 to the Convention (See Re ES Application for Judicial Review [2008] NI 11 and JG's Application [2014] NI Fam 2).

[45] Secondly, when a State does provide in its domestic law for a right of appeal, those proceedings are covered by the guarantees in Article 6. The way in which the guarantees apply must however depend on the special features of such proceedings. Account must be taken of the entirety of the proceedings conducted in the domestic legal order, the functions in law and practice of the appellate body together with the powers and the manner in which the interests of the parties are presented and protected. In short there is no right under Article 6 to any particular kind of appeal or manner of dealing with appeals.

[46] The simple straightforward fact of the matter in each of these cases is that a hearing on the issue was given, there was no impediment to access to justice for such a hearing, the arguments were set out before the judge and in each case a reasoned decision was given. In short insofar as access to justice in this context is a structural issue, no impediments were placed in the way of either appellant. All of this is entirely Article 6 compliant.

[47] Moreover the orders made by the judges in each instance are part of a process which involves the right of appeal. These are in essence separate phases of a single proceeding. The outcome will be determined by the judge at the substantive hearing shortly to be heard – during which the directions he gave can all be revisited depending on the unfolding evidence – and if the parties are dissatisfied with the outcome, then the next stage in the process open to both of them is an appeal. The

interlocutory applications which are the subject of this appeal are but one phase in the proceedings relevant in each instance.

[48] Within that process there are a number of checks and balances including the need for the judge to keep any case management directions or orders under constant scrutiny, the requirement to give reasons for his substantive decision and ultimately the right of appeal (See (R (G v Governing Body of X School [2011] UKSC 30).

[49] As the learned trial judge said at paragraph [55], the instruction of an expert is not an automatic right and it will depend on the facts of the case in each instance. A second opinion is not guaranteed. Moreover the right to cross-examine the existing experts in each case is open to the appellants and indeed, given that Dr McCartan in Re BT was a jointly appointed witness, the Official Solicitor can speak to and clarify issues with Dr McCartan in order to process their case.

[50] Clearly of course the presence of a joint expert does not preclude parties seeking thereafter to obtain their own expert but there is no automatic right to do this (See Tiemann v France and German (Dec) Nos. 47457/99 and 47458/99, ECHR 2000 IV).

[51] A further indication of the fairness of the whole process is the nature of the appeal which would be open to the appellants. As the learned trial judge pointed out at paragraph [58] of her judgment:

> "There is effective access to an appellate court which has wide powers to determine the outcomes and appeal. This includes a power to direct expert evidence if appropriate. It has also become the practice in this jurisdiction that an appellate court may hear evidence if necessary."

[52] In these circumstances, we find no basis for the appellant's contention that it is necessary to invoke the well-trodden authority of Ghaidin v Godin Mendoza [2004] 2 AC 557 in terms of reading down the statutory provision to make it compatible. The process is Convention compliant without the need to invoke this tool.

Conclusion

[53] We have therefore determined that the learned trial judge correctly decided this case and that the question posed in the case stated should be "yes".

[54] We consider we should not let this case pass without two further comments. Despite the limited, albeit important, nature of the succinct point at issue, this court was presented with nine lever arch files and a further standard size file at the hearing. A plethora of authorities, most of which were never going to be seriously

cited, were presented. This was an instance of a complete waste of time, effort and public expense in preparing such a mountain of unnecessary documentation. The Court of Appeal is on the cusp of introducing directions to control such wasteful exercises of which this is an example. The Civil and Family Justice Review, which is soon to be published, has been at pains to allude to this mischief. It is the duty of the profession to ensure that papers are confined to those that are relevant and necessary for hearings particularly where, as in this instance, the public purse is expected to meet the costs of such wasted preparation.

[55] Secondly, there was no reason why the public and the press should not have been admitted for the purpose of hearing this judgment nor, in our view, was there any reason why the public should not have been admitted for the purpose of hearing the appeal. There are many instances, particularly in sexual offences cases, where the press and the public are admitted to hearings where the anonymity of those involved is protected. Therefore we consider that the approach of this court from now on will be that unless there is some compelling reason given for the court to be cleared, for example perhaps in cases where evidence is going to be heard, the public will be admitted to the hearing of family appeals.