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| **Neutral Citation No: [2021] NIFam 38** | *Ref:* **ROO11615** |
| | *ICOS No:* **18/122411/A01** |
| *Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **29/09/2021** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**FAMILY DIVISION**

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**SM**

**Appellant:**

**and**

**LM**

**Respondent:**

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**Ms Walkingshaw BL (instructed by Bannon Crawford Solicitors) for the Appellant**
**Ms Overing BL (instructed by Reid & Co Solicitors) for the Respondent**
**Ms Sloane BL (instructed by the Official Solicitor) on behalf of the Children**

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**ROONEY J**

## Introduction

[1] This is an appeal by the appellant pursuant to Article 166(1) of the Children (Northern Ireland) Order 1995 against the decision of HHJ McCormick QC delivered on 26 February 2021 following a hearing on 25 February 2021.

[2] A copy of judge's oral judgment is contained within the appeal bundle. The judgment provides a comprehensive assessment of all the material facts and relevant documentation and will be considered in further detail below. It is noted that the learned judge did not hear evidence from any witnesses. However, the judge had the benefit of detailed position papers and submissions made on behalf of each party.

[3] Ms Walkingshaw BL appeared on behalf of the appellant. Ms Overing BL appeared on behalf of the respondent. Ms Sloane BL appeared on behalf of the children of the appellant and the respondent. I remain grateful to counsel for their succinct skeleton arguments and most helpful oral submissions.

**The Issue**

[4] The appellant made an application for a direct contact order pursuant to Article 8 of the Children (NI) Order 1995 ('the 1995 Order'). The learned judge denied his application for direct contact and made an order for indirect contact in respect of all the children, including the older children who were over 16 years. The judge did not prescribe the nature of the indirect contact, save to suggest that it should include an appropriately worded card or letter on each birthday, at Easter, Christmas, Halloween and at the end of the school holidays. The learned judge stated that the appellant would continue to have the opportunity to develop and to demonstrate a consistency and commitment to each child by means of a court enabled indirect contact order which would last at least a year.

**Background**

[5] The relevant background to this appeal is as detailed in the judgment of the learned judge. It is not necessary to repeat all the background information which was made available to the court. Rather, I will highlight the salient facts.

[6] The family had been known to social services for several years in relation to family support and child protection services. The social services' reports identified a history of concerns with regard to home conditions, school attendance, alcohol consumption on the part of the appellant, domestic violence and coercive control by the appellant towards the respondent. In August 2018 an allegation was made against the appellant in respect of an alleged assault on one of the children. The appellant and the respondent essentially separated on or about this date, although it is noted that they took a family holiday in Spain in or around November 2018.

[7] A social services report since the separation confirmed that the respondent had been caring for the children with support from her mother and eldest daughter and that she had been engaging well with social services during this period.

[8] The Trust convened a child protection case conference at the end of November when the subject six children were registered on the Child Protection Register with confirmed emotional abuse, neglect and in respect of one child, confirmed physical abuse. The court invited the Official Solicitor to represent the six children on 4 March 2019 which was duly accepted.

[9] It is noted that the sppellant's application for direct contact commenced on 10 December 2018. Contact was established for the children in spring 2019 and took place at Cloona Child Contact Centre. Previously, the appellant had been asked by social services to nominate a supervisor for contact, but when no supervisor was forthcoming, a referral was made to the contact centre to progress contact.

[10] The Family Care Centre directed an Article 56 investigation. A report dated 10 June 2019 advised the court that the Trust considered the threshold for public law proceedings had not been met. Nevertheless, the report advanced a number of concerns, namely that the children's basic care, safety, educational and health needs

had been neglected by their father. The children had also witnessed their father's alcohol misuse and domestic abuse of their mother. The report also highlighted that the children had been disadvantaged as a result of disruption and inconsistency within the home. It was also noted that the Trust workers had difficulty contacting the appellant with respect to discussing contact arrangements and carrying out a further assessment. Although the respondent was supportive of the children having regular contact with their father, the experience of the Trust was that the appellant was not easily contactable and formed the view that the appellant lacked commitment to the practical arrangements of contact with the children.

[11] It was reported that two children were reluctant to attend direct contact with the appellant. It is also noted that contact with the appellant required a high level of support for the respondent who had difficulties in transporting the children to and from the contact centre. Another complication was the fact that one child, who has complex needs, was not easily transported and would lash out during the journey. According to the learned judge, at that stage the respondent was fully supportive of the contact arrangements with her husband and, despite the difficulties described above, ensured the children were brought to see their father.

[12] On 11 November 2019, the appellant identified a family member who could supervise contact in the community. This commenced on 26 November 2019. It was reported that the appellant cancelled contact on the 15, 21 and 23 December 2019. As noted by the learned judge, despite having established direct contact, which had been facilitated, the appellant *"melted away and went to Scotland"* in or around November 2019. The learned judge further stated:

> *"nothing indicates to me that either then or now this father gave any thought to whether and how this going off radar would (sic) impact on any of the six children …"*

[13] It would appear that the appellant did not avail of any contact, either direct or indirect, from late 2019 until some indirect contact was sent by him prior to the court hearing on 14 December 2020. On this date, the court ordered the following indirect contact:

(i) The father is by 4.30 p.m. on 15/12/2020 (due to quarantine requirements), to provide Anne-Marie Rooney of the Banbridge FIT team with the following indirect contact in a batch:

   (a) Christmas indirect contact for each child by way of card and any present the father may wish to give the children.

   (b) Birthday indirect contact for (4 children) by way of a card and any present the father may wish to give the children.

(ii) The cards are to be appropriate in their content.

(iii) The social worker, Mrs Rooney, is to give the batch of indirect contact to the mother who is to distribute these as they fall due to the children at Christmas and on given birthdays. A card to (a named child) to be given to him when it is received as his birthday has just past.

[14] It seems that the appellant did not fully comply or avail of the indirect contact ordered by the court on 14 December 2020. The learned judge considers this aspect in detail at pages 4 and 5 of her judgment.

[15] Against the above background and prior to reaching her decision, the learned judge stated as follows:

> *"I have been reminded that I must focus on the children and grapple with all available alternatives before abandoning hope of achieving contact. I am also reminded that I should not come to a decision prematurely. … I am urged to come to the view that contact should only be stopped as a last resort and only once it has become clear that the subject children will not benefit from continuing the attempt. But let me make this clear. I did not stop contact. Mother did not stop contact. Father stopped contact. And even after the father walked away and took some form of transport to Scotland and remained there, this court tried to rekindle what the father had abandoned when he went to Scotland, and to no avail but silence."*

[16] In reaching her decision, it is clear that the learned judge was influenced by the attitude of the respondent. At page 5, the following is noted:

> *"I found it helpful to have the oral submissions and it is left very clear in my mind that this mother is not resisting indirect contact. Indeed, she is saying that it could and should occur and develop organically, but never needed a court order for it to happen, but that indirect contact is the vehicle whereby this father could demonstrate commitment and consistency by complying with a court order for indirect contact with all of the children in the sibling group. And she makes a strong submission that before any or all of these children should be exposed to any future or further risk of the experience of failure by the father to engage in regular contact, that, in fact, he should be allowed an opportunity to demonstrate commitment through indirect contact first. I consider that to be a very powerful argument."*

**Grounds of the Appeal**

[17] The notice of appeal filed on behalf of the appellant specifies the following grounds of appeal:

(a) The judge erred in law in failing to properly consider and grapple with the range of alternatives available (as per *In Re K [2016] EWCA 99),* such as for example contact in the contact centre before rejecting the father's application for direct contact.

(b) The judge erred in law in failing to proceed from the point that there is a presumption in favour of direct contact for a father when partners have separated, unless it can be shown otherwise.

(c) The judge erred in law in failing to give sufficient weight to the fact that supervised contact was of a good quality in 2019 when considering the various means by which direct contact should be facilitated.

(d) The judge erred in law in attaching too much weight to the break in the contact caused by the father leaving the jurisdiction of Northern Ireland to live in Scotland at the end of 2019, particularly as he requested direct contact in August 2020.

(e) The judge breached the Article 8 right to family life of the children and the father in disproportionately curtailing same by expecting the father to adhere to the indirect contact regime for one year before the court would work on a fresh application for direct contact.

[18] In the appellant's skeleton argument, it was further intimated that the learned judge had been biased. There was absolutely no basis for any suggestion or assertion of judicial bias. Quite correctly, in my view, Ms Walkingshaw BL. abandoned this spurious ground of appeal during the course of legal submissions.

**APPEALS FROM FAMILY CARE CENTRE TO THE HIGH COURT**

[19] Pursuant to Article 166(1) of the Children (Northern Ireland) Order 1995, there is a statutory right of appeal from the County Court to the High Court. An appeal is governed by the principles set out *G v G [1985] FLR 894,* namely that the High Court will not interfere unless the decision of the lower court was plainly wrong or the judge erred in law or principle. (See *McG v McC [2002] NI Fam 10*).

[20] The relevant principles were reaffirmed in *SH v RD [2013] NICA 44* in which the Court of Appeal stated as follows:

> *"Where an appellate court is reviewing the balance struck between several competing factors it should only intervene if the exercise of discretion or judgement is plainly wrong." (para [24])*

[21] In *SMcC v Southern Health and Social Care Trust* [2013] NI Fam 2, Maguire J summarised the relevant principles applicable to appeals from the County Court to the High Court:

> *"(i) The High Court will not interfere with the lower court's decision unless the decision was plainly wrong or the court erred in law or principle.*
>
> *(ii) In appeals the High Court will be reluctant to take oral evidence or receive additional evidence but can do so in exceptional circumstances. Decisions to take oral evidence or to receive additional evidence will be likely to be case sensitive.*
>
> *(iii) Accordingly a High Court appeal will usually not be conducted by way of full re-hearing.*
>
> *(iv) The High Court on an appeal will consider any transcript of what occurred in the court below, if available, and in particular will consider the reasons given by the lower court in support of its decision.*
>
> *(v) In hearing the appeal the High Court will pay due regard to the fact that judges work under enormous time and other pressures. Accordingly it would be quite wrong for the High Court to interfere simply because an ex tempore judgment given at the end of a long day is not as polished or thorough as it might otherwise be.*
>
> *(vi) In considering an appeal the High Court will bear in mind that in family cases there is often no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong and the best that can be done is to find an answer that is reasonably satisfactory." (para. [64])*

**[22]** Applying the above principles, the question for this court is whether the decision of the learned judge, which was not dependent on the assessment of witnesses, was vitiated by an error in the balancing exercise of the relevant and competing factors. Only if the decision was plainly wrong in that the judge gave too much weight to a particular factor, is this appellate court entitled to interfere.

**ASSESSMENT OF THE GROUNDS OF APPEAL**

[23] Ms Walkingshaw BL, on behalf of the appellant, asserts that the learned judge erred in law in failing to give any or any sufficient weight to the presumption in favour of direct contact for the father when parties have separated. It is clear from her judgment that the learned judge was cognisant of the principle that contact between parent and child is a fundament element of family life and is almost always in the interests of the child. However, as submitted by Ms Sloane BL, the learned judge was aware that direct contact for the appellant had been facilitated by the respondent, social services and an approved supervisor. Despite this, the appellant

walked away from that direct contact without any consideration of the detrimental impact on the children and the requirement for consistency in their lives. The appellant was given an opportunity to make amends and to demonstrate a commitment to the renewal of contact. In coming to her decision in weighing up the relevant factors, the learned judge was entitled to take into consideration the fact that the appellant failed to respond meaningfully to the order for indirect contact made on 14 December 2020.

[24] Relying upon *In Re K [2016] EWCA 99*, the appellant argued that the learned judge did not "*grapple with all the available alternatives before abandoning hope of achieving some contact.*" (para 32). It should be emphasised that the court was referred to the test in *Re K* and there was direct questioning by the learned judge on the range of alternatives during hearing. As emphasised by Ms Sloane BL on behalf of the Official Solicitor, the only substantive proposal put forward was contact in a contact centre and the fact that the sibling group would have to be split to achieve this aim. It is noted that the learned judge stated at page 4 of her judgment:

> "*But, in any event, I have been reminded that I must focus on the children and grapple with all available alternatives before abandoning hope of achieving contact. I am also reminded that I should not come to a decision prematurely. … However, I am urged to come to the view that contact should only be stopped as a last resort and only once it has become clear that the subject children will not benefit from continuing the attempt.*"

[25] The learned judge noted that following the appellant's application in 2018 and following input from social services, the reinstatement of contact was arranged. Contact was initially in Cloona Contact Centre and, thereafter, arrangements were made for a relative of the appellant, who was approved by social services to move towards supervising contact in the community. The appellant claims that the contact during this period was 'good.' The Official Solicitor queries this characterisation of the contact, particularly as the children gave mixed accounts of the contact visits. Nevertheless, as stated by the learned judge, "*Having secured contact with an approved identified supervisor [the Appellant] melted away. And, thereafter, his engagement has been on his own terms.*"

[26] It is the decision of this court that the learned judge, in her evaluation and weighing up of all the relevant factors, was entitled to take into consideration the appellant's deliberate decision, without explanation, to cease direct contact. As stated by the learned judge:

> "*Remaining off radar as he did, I consider that he showed a staggering lack of insight into the potential impact and the emotional welfare of all of the subject children of the family, melting away at a time of pandemic. And so, while this mother grappled with the reality of meeting the children's complex needs in a new family home that they had established*

> *themselves in, she had to get on with that, without any practical or emotional support or enquiry from him."* (pages 3 - 4)

[27] On the basis of the above, I am not persuaded by the appellant's argument that the learned judge attached too much weight to the fact that the appellant ceased contact with his children and left this jurisdiction to live in Scotland at the end of 2019. It is clear that the learned judge was sceptical as to the appellant's reasons for leaving Northern Ireland. Nevertheless, as stated by the learned Judge:

> *"[The Appellant] chose to stay away. He stayed away and he stayed silent. And one by one, the children's birthdays went by unnoticed. And we know that he wasn't working at all, according to the material now available to this Court."* (page 3).

[28] Finally, the appellant alleges that his Article 8 ECHR rights were infringed in that access to his children was disproportionately curtailed by expecting him to adhere to an indirect contact regime for one year before a fresh application for direct contact. I reject this submission. It is clear that the appellant's Article 8 rights must be balanced against the family's Article 8 rights. As emphasised in submission by Ms Overing, BL, a court must also take into consideration the impact of Article 3 of the Children (NI) Order 1995, namely that the interests of the children are paramount. The indirect contact order did not impair the appellant's Article 8 rights. Rather, the order provided the appellant with an opportunity to demonstrate and to establish consistent contact with his children. This is a factor which clearly influenced the learned judge in her decision and, in the opinion of this court, she was entitled to rely upon this factor in the exercise of her discretion.

[29] As submitted by both Ms Overing and Ms Sloane, on the assumption that the appellant was able to demonstrate a commitment to indirect contact with the children, there is nothing to prevent the appellant to returning to the court within one year to request a direct contact order. It is noteworthy that the learned judge, when making an order for indirect contact, did not exercise its power pursuant to Article 179(14) of the 1995 Order and direct that any further application required the leave of the court.

**Decision**

[30] In reaching her decision, it is clear that the learned judge carried out a considered evaluation and a balancing exercise in respect of the competing factors. The question for this court is whether the decision of the learned judge, which was not dependent on the assessment of witnesses, was vitiated by an error in the balancing exercise of the relevant factors. As stated by Baroness Hale in *Re J (A Child)* [2005] UKHL 40:

> *"If there is indeed a discretion in which various factors are relevant, the evaluation and balancing of those factors is also a matter for the trial judge. Only if his decision is so plainly*

*wrong that he must have given far too much weight to a particular factor is the appellant court entitled to interfere."*

[31] Applying the above principles and for the reasons stated above, it is the decision of this court that the judge's consideration, evaluation and balancing of the relevant facts and issues was demonstrably fair and reasonable. I do not accept that the learned judge failed to address any key issue or erroneously gave too much weight to a particular factor. The learned judge directed herself correctly on the relevant law. The judge was cognisant of the presumption in favour of direct contact for a father and that she should consider a range of alternatives. In her judgment, it is clear that she assessed and carried out a balancing exercise with regard to the competing interests, to include the Article 8 ECHR rights of the family. Accordingly, this court is not persuaded that the learned judge erred in the exercise of her discretion and reached a decision which was so plainly wrong.

[32] The appeal is hereby dismissed.