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Judgment: approved by the Court for handing down | *Delivered:* **28/09/07**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

T L

Appellant;

-and-

A TRUST

Respondent;

AND

A K AND F McC

Notice Parties

MORGAN J

[1] This is an appeal of a decision made by a Family Care Centre on 18 May 2007 whereby a child, GK, was made the subject of a care order and freed for adoption. The appellant, TL, is the child's mother and the other represented parties are AK, the father, F McC, the mother's present partner, the Guardian ad litem and the Trust. Nothing must be reported which could lead to the identity of the child being established and to that end I have anonymised this judgment.

[2] GK was born on 24 August 2004. Prior to the birth the Trust obtained a psychological assessment of the mother by Dr McDonald. This gave rise to concerns about the mother's parenting capacity and in particular concerns about the involvement of the father of the child. After the birth the child was placed with foster parents without the need for intervention by the court. On 16 February 2006 the Trust applied for a Care Order and was granted an Interim Care Order. The hearing of the full application was fixed for 8/9 June 2006. At a review on 5 May 2006 senior counsel for the appellant applied to

adjourn the hearing until 13/14 September 2006 because the papers had just been received and there was insufficient time to prepare. The court acceded to that application. On 16 May 2006 the Trust applied for an order seeking to free the child for adoption.

[3] On 13 September 2006 senior counsel for the appellant successfully applied for a further adjournment to obtain a psychological assessment of the appellant and her new partner, the second named notice party. The appellant's relationship with the first named respondent, the father of the child, had ceased. At that hearing AK accepted that the threshold criteria were met because of his medical condition and because of his previous history of sexual abuse. The second named notice party, F McC, was joined to the proceedings on 17 October 2006. On 14 November 2006 the applications were fixed for hearing on 22/23 February 2007. On 18 January 2007 the appellant's solicitors came off record and counsel withdrew from the case because the appellant had withdrawn her instructions and new solicitors immediately came on record for her.

[4] The case proceeded on 22/23 February 2007 with the appellant represented by senior counsel. Dr Manley, Dr McDonald and another witness were examined and cross-examined. There was insufficient time to complete the hearing and the case was fixed for completion on 23/24 April 2007. Senior counsel for the appellant indicated an intention to seek leave to obtain a further psychological report and a C2 seeking leave was lodged on 6 March 2007. At a review on 7 March 2007 the second named notice party indicated that he would not agree to a joint assessment. At a further review on 16 March 2007 leave was given on the appellant's application for papers to be disclosed to Mr Furlong, an expert based in England, to enable him to prepare a report.

[5] On 2 April 2007 the appellant's second set of solicitors came off record and her second set of counsel withdrew because their instructions had been withdrawn but no new solicitors had been retained by her although it was her intention to do so. At a review on 13 April 2007, just after Easter, the appellant indicated that she had an appointment to see a solicitor on 19 April 2007 in order to gain representation. She complained that her previous solicitors had changed statements, not brought people into court, not appealed the Interim Care Order and not released her file. She did not provide any details in respect of any of these allegations. The judge advised her that it was important for her and her new solicitors to understand that the case was fixed for final hearing on 23/24 April 2007. After the hearing the Trust asked the appellant for the name of the solicitor that she proposed to instruct in order that it could forward papers to assist those solicitors preparing the case for the hearing. The appellant was not prepared to disclose the name of her proposed solicitor. This may have been as a result of the

appellant's history of concern about the actions of the Trust in respect of her and her children.

[6] The case came before the court on 23 April 2007. The appellant indicated that the solicitors she had proposed instructing would not take the case because it was part heard. She had an appointment with another solicitor the following day. She had obtained her file from her previous solicitors on Friday 20 April 2007. She was concerned that 2 reports appeared to be missing although the significance of these was not explored. Her application for an adjournment was refused. The judge said that there had to be some decision made in respect of the child who was now approaching its third birthday and in his written reasons he indicated that he had refused the adjournment because the appellant had been given ample opportunity to have representation. Over the next two days a number of Trust witnesses were called. There is transcript available in respect of the first such witness. After his examination the appellant was invited to cross-examine the witness but did not do so. The judge asked questions on the appellant's behalf. The medical evidence in respect of the appellant noted her history of emotional difficulties and her history of limited personal and functional competence. She was assessed as a person of limited intellectual efficiency and emotionally based and personality based factors significantly impinged on her fluency and notable difficulties in mentally interrogating information.

[7] On behalf of the appellant Mr Long QC who appeared with Ms Hannigan B. L. submitted that the decision of the trial judge to proceed on 23 April 2007 was a breach of the rights guaranteed by article 6 of the European Convention on Human Rights. He grounded this submission on the decision of the European Court of Human Rights in P,C and S v United Kingdom [2002] 2 FLR 631. In that case the applicant mother had lost custody of her son because of allegations that she had deliberately caused the child numerous illnesses by the administration of laxatives and was subsequently convicted in respect of that. When she became pregnant again the local authority convened a case conference and an assessment was carried out by an expert. On foot of that an emergency protection order was obtained and the child removed into foster care on the day of her birth. The authority applied for a care order on the basis of a care plan which proposed that the child be placed with an adoptive family as soon as possible. Shortly after the commencement of proceedings the applicant's legal representatives withdrew on the basis that they were being required to conduct the case unreasonably. The trial judge allowed an adjournment of four days and then refused a subsequent application for a further adjournment by the applicant to enable her to get legal representation. The applicant thereafter conducted the case with the help of a McKenzie friend. At the end of the hearing the judge made a care order and fixed the freeing order proceedings for the following week. He subsequently made an order freeing the child for adoption and providing for indirect contact only with the mother. The Court Of Appeal refused the

mother permission to appeal but the European Court of Human Rights held unanimously that there had been a breach of her article 6 and article 8 rights. The court set out the general principles which should inform the position in the case of this sort.

> "1. General principles
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> 88. There is no automatic right under the Convention for legal aid or legal representation to be available for an applicant who is involved in proceedings which determine his or her civil rights. Nonetheless, Article 6 may be engaged under two interrelated aspects.
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> 89. Firstly, Article 6 § 1 of the Convention embodies the right of access to a court for the determination of civil rights and obligations (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36). Failure to provide an applicant with the assistance of a lawyer may breach this provision where such assistance is indispensable for effective access to court, either because legal representation is rendered compulsory as is the case in certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or the type of case (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-16, §§ 26-28, where the applicant was unable to obtain the assistance of a lawyer in judicial separation proceedings). Factors identified as relevant in *Airey* in determining whether the applicant would have been able to present her case properly and satisfactorily without the assistance of a lawyer included the complexity of the procedure, the necessity to address complicated points of law or to establish facts, involving expert evidence and the examination of witnesses, and the fact that the subject matter of the marital dispute entailed an emotional involvement that was scarcely compatible with the degree of objectivity required by advocacy in court. In such circumstances, the Court found it unrealistic to suppose that the applicant could effectively conduct her own case, despite the assistance afforded by the judge to parties acting in person.
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> 90. It may be noted that the right of access to a court is not absolute and may be subject to legitimate restrictions. Where an individual's access is limited

either by operation of law or in fact, the restriction will not be incompatible with Article 6 where the limitation did not impair the very essence of the right and where it pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). Thus, although the pursuit of proceedings as a litigant in person may on occasion not be an easy matter, the limited public funds available for civil actions renders a procedure of selection a necessary feature of the system of administration of justice, and the manner in which it functions in particular cases may be shown not to have been arbitrary or disproportionate, or to have impinged on the essence of the right of access to a court (see *Del Sol v. France*, no. 46800/99, ECHR 2002-II, and *Ivison v. the United Kingdom* (dec.), no. 39030/97, 16 April 2002). It may be the case that other factors concerning the administration of justice (such as the necessity for expedition or the rights of others) also play a limiting role as regards the provision of assistance in a particular case, although such restriction would also have to satisfy the tests set out above.

91. Secondly, the key principle governing the application of Article 6 is fairness. In cases where an applicant appears in court notwithstanding lack of assistance by a lawyer and manages to conduct his or her case in the teeth of all the difficulties, the question may nonetheless arise as to whether this procedure was fair (see, for example, *McVicar v. the United Kingdom*, no. 46311/99, §§ 50-51, ECHR 2002-III). There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, *inter alia*, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures. "

Although there were extensive submissions on behalf of the Trust and the Guardian ad Litem opposing the adjournment and relying on authority which

predated this decision it is most unfortunate that this important decision which now governs the principles applicable in a case of this sort was not drawn to the attention of the trial judge at the time of the application. When opposing applications by unrepresented applicants it is particularly important to ensure that all relevant authorities are drawn to the attention of the court. The authority on which the Trust relied is one which Hershman and McFarlane expressly states "must now be read in the light of P, C and S v UK".

[8] Applying the relevant principles to this case it is clear that the issues at stake concerning the child were highly emotional and that it would have been difficult for the applicant to maintain her objectivity. The consequences were potentially extremely serious. The result was an order freeing the child for adoption and removing the appellant's opportunity for direct contact. It is clear that the appellant was a highly vulnerable person as is apparent from the medical evidence above. The transcript indicates that she was unable to conduct a cross-examination although the trial judge asked questions on her behalf. It is also a significant that Dr Manley's medical report noted that she did not appreciate the importance of legal representation in a case of this sort. Added to that is the observation at paragraph 11 of the written judgment of the trial judge that she was a very confused lady. Although much of the expert evidence had been heard and tested when she was represented there was a factual issue between her and the Trust on the circumstances in which child was taken into foster care shortly after the child's birth. To some extent that depended on her ability to cross-examine the various Trust witnesses attending over the remaining two days of the trial. It seems clear that she was entirely unable to do so. There was no inquiry as to the length of time the case might be adjourned. Although it is undoubtedly right that the child also had article 6 rights requiring expedition in relation to the determination of the issues before the court, the prospect of delay and disruption to court proceedings had to be balanced against the fact that the appellant could only participate in a limited way in the remaining two days of hearing. Because of those factors I accept Mr Long's submission that the decision to adjourn this case was disproportionate and allow the appeal. That is sufficient to dispose of the case.

[9] It is, however, difficult not to sympathise with the frustration of the trial judge at the position in which he was placed on 23 April 2007. Since this is not altogether an unusual occurrence it is appropriate to look at the steps which the court might take when faced with a late application to come off record. The issue was addressed on the criminal side by McCollum LJ in R v Winward [1997] NIJB 187. That was a case in which the solicitor applied to come off record because his instructions had been withdrawn. The learned Lord Justice held that the court was entitled in the exercise of its discretion to know the circumstances in which the original defence certificate had ceased to be effective. In legally aided cases considerable amounts of public

expenditure could be involved if it was proposed to instruct alternative solicitors and counsel. McCollum LJ concluded:-

> "I take the view that when a solicitor has been assigned under a defence certificate and has instructed counsel then the legal representatives have a duty to explain to the court why they are unable to carry out their assigned duties of representation so that the court will have the information necessary to properly exercise its discretion whether to grant a new defence certificate, or to allow the case to proceed in the absence of legal representation.
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> Where the detail of what has passed between the defendant and his legal advisers is a privileged matter, or the disclosure of it might be harmful to his defence, such detail would not required to be stated, but it seems to me that a general statement of the client's reason for the withdrawal of instructions together with a general reference to the basis for that reason would not breach the defendant's right to privilege, nor would it in any way prejudice his trial. "

In England the Court Of Appeal in R v Al-Zubeidi [1999] Crim LR 906 appeared to go even further and suggested that there may be circumstances in which it would be proper to invite the defendant to waive privilege and legitimate to draw an adverse inference if he failed to do so.

[10] In the High Court an application to come off record is made under Order 67 Rule 5(2). The application is made on notice to the client but not to the other parties (In re Creehorn Ltd [1983] 1 WLR 77). That may reflect the fact that in order to provide a satisfactory reason for the withdrawal of the solicitors the client may choose to waive privilege in respect of some or all of the material the subject of legal professional privilege. Where such waiver occurs the court will have to determine its extent (Lillicrap v Nalder & Son [1993] 1 WLR 94). Where the reason for the withdrawal of the instructions by the client is a criticism of the professional services rendered by the solicitor it is arguable by analogy with wasted costs cases such as Ridehalgh v Horsefield [1994] 3 All ER 848 and Medcalf v Mardell [2003] 1 AC 120 that the client thereby waives privilege but I have been unable to find any case where this issue has been considered and since it has not been argued in this case I do not feel it appropriate to come to a conclusion.

[11] Perhaps anomalously the practice under Order 43 Rule 2(4) of the County Court Rules is different from that of the High Court in that the solicitor applying to come off record is obliged to serve notice on all of the

other parties to the proceedings. Bearing in mind the fact that the client may wish to waive privilege in the course of the application it may be appropriate to hear some parts of the application in Chambers.

[12] From this review of the authorities I consider that is possible to ascertain some propositions which should inform the approach to applications to come off record particularly where they are made late in the day.

(a) Where a solicitor applies to come off record it is for the applicant to establish good cause.

(b) It is difficult to imagine any circumstances in which it would be sufficient to state simply that the client had withdrawn his instructions.

(c) If the application is made at a stage when to accede to the application would be likely to imperil a fixed date for the hearing of the case it is material to take that into account to the extent appropriate. It is appropriate to enquire into whether alternative solicitors are ready to come on record and meet the proposed hearing date and it is often appropriate not to accede to the application until those solicitors are ready to come on record and confirm their ability to proceed with the case.

(d) Where, in order to make good the application, the client elects to waive privilege to some degree the court should consider carefully the extent to which privilege waived.

(e) Where the applicant chooses not to waive privilege it must be doubtful, despite the decision of the Court of Appeal in R v Al-Zubeidi, whether it is open to the court to invite the client to waive privilege or draw an adverse inference but the court must look at all the material available including the history of the case to see whether it is satisfied that good cause has been made out for the withdrawal of the solicitor.

[13] The overriding obligation of the court is to ensure a fair hearing for the parties within a reasonable time. The robust application of the above principles ought in my view to assist the court in achieving that objective.