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

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**FAMILY DIVISION**

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**IN THE MATTER OF B AND N (CHILDREN (ALLOCATION OF  
PROCEEDINGS) ORDER (NORTHERN IRELAND) 1996)**

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**GILLEN J**

This matter comes before me by way of an appeal from His Honour Judge McKay who granted an application to remit the proceedings in this matter to the Family Proceedings Court and refused an application by the guardian ad litem to have the proceedings transferred to the High Court. The guardian ad litem now seeks to appeal these decisions which were given orally on 11 January 2002 and subsequently in a written judgment on 18 February 2002.

**Background**

1. The two children in this case, namely B born on 5 April 1996 and N born 26 May 1999 are the subject of the application for a care order by a Health and Social Services Trust which I do not propose to name and which I shall refer to as the Trust. The guardian ad litem, the appellant in this case, was appointed on 2 August 2001 and has provided reports for the purpose of

the court hearing. The mother of the children is P and she, along with the Trust, was a respondent to these appeals.

2. In this case there are allegations of physical abuse of these children. There is medical evidence as to the nature of the alleged non-accidental injuries that the children have sustained. In addition both children are in receipt of extensive medical treatment. The mother herself requires specialist psychiatric input and was admitted to the psychiatric unit of Craigavon hospital on more than one occasion. The father of these children has not been represented in these proceedings and seems to have played no part.

3. By order dated 17 September 2001 Mr Bates RM at the Family Proceedings Court at Craigavon ordered that the proceedings concerning the children be transferred to the Family Care Centre at Craigavon because of the complex nature of the case pursuant to Article 5 of the Children (Allocation of proceedings) Order (Northern Ireland) 1996. When the matter came before the Family Care Judge, His Honour Judge McKay made the orders to which I have already referred. He heard submissions from the Trust representatives that the matter should be remitted to the Family Proceedings Court and from the guardian ad litem that it should be transferred to the High Court. The judge in his written judgment concluded as follows (sic):

“I came to the conclusion that the grave issues in this case had been identified and are being dealt with. I decided that the Trust was dealing with this case in accordance with the care plan and accidental injury was being investigated and that the care plan should continue as drafted and this case should be dealt with in the Family Proceedings Court before Mr Nixon. Bearing in mind the hearing volume of cases with

which the court has to deal I made an ICO for both children until 8 February and sent this case to Craigavon FPC for the attention of Mr Nixon RM.”

4. Ms Dinsmore QC who appeared on behalf of the guardian ad litem argued that the evidence relating to the welfare of these children would be complicated due to the need for extensive medical investigation of the children and indeed of the mother. The guardian ad litem anticipated the presence of conflicting evidence with reference to the arrangements for the contact between the children and their mother in circumstances where it is likely that the Trust and the guardian ad litem will not be ad idem in their views. A comprehensive skeleton argument set out the full nature of the medical evidence which she said would be required and the nature of the conflicting view between the Trust and the guardian ad litem.

### **Statutory background**

In relation to transfer of proceedings the statutory framework is as follows:

1. Article 166(14) of the Children (Northern Ireland) Order 1995 (hereinafter called “the 1995 Order”) provides:

“The Lord Chancellor may by order make provisions as to the circumstances in which appeals may be made against decisions taken by courts and questions arising in connection with the transfer, or proposed transfer, of proceedings by virtue of any order under paragraph 2 of Schedule 7.”

The Children (Allocation of Proceedings) Order (Northern Ireland) 1996, (“the 1996 Order”) where relevant, provides as follows:

“Transfer from a Family Proceedings Court to a Family Care Centre.

5(1) Subject to paragraph (2) and to Articles 6 and 7 a Family Proceedings Court shall, upon application by a party or of its own motion, transfer to a Family Care Centre proceedings of a kind mentioned in Article 3(1) where it considers that the proceedings are exceptionally grave, important or complex in particular -

(a) because of complicated or conflicting evidence about the child’s physical or moral well-being or about other matters relating to the child’s welfare;

(b) because of the numbers of parties;

(c) because of a conflict of law with another jurisdiction;

(d) because of some novel or difficult point of law;  
or

(e) because of some question of general public interest.

(2) The court shall only transfer proceedings in accordance with paragraph (1) where, having had regard to the principles set out in Article 3(2) of the 1995 Order, it considers it in the interests of the child to do so.”

I pause to observe that this was the basis upon which Mr Bates RM transferred the matter to the Family Care Centre in this instance.

“Transfer to Family Care Centre following refusal to transfer.

9-(1) Where a Family Proceedings Court or other court of summary jurisdiction refuses to transfer proceedings under Articles 5 or 8 respectively, a party to those proceedings may apply to a Family Care Centre for an order under paragraph.

(2) Upon hearing an application under paragraph (1) the court shall transfer the proceedings -

(a) to itself where, having regard to the principles set out in Article 3(2) of the 1995 Order and the criteria set out in Article 5(1)(a) to (e), it considers it is in the interests of the child to do so; or

(b) to the High Court where, having regard to the principles set out in Article 3(2) of the 1995 Order, it considers that the proceedings are appropriate for determination in the High Court and that such determination would be in the interests of the child.

#### Transfer from a Family Care Centre to the High Court

10. Where proceedings have been transferred to a Family Care Centre under Article 5 or 8 the court shall transfer the proceedings to the High Court where, having had regard to the principles set out in Article 3(2) of the 1995 Order, it considers that the proceedings are appropriate for determination in the High Court and that such determination would be in the interests of the child.

#### Transfer from a Family Care Centre to a Family Proceedings Court or other court of summary jurisdiction.

12-(1) Subject to paragraph (3) a Family Care Centre shall transfer to a Family Proceedings Court before trial, proceedings which were transferred by that court under Article 5 where it considers that the criterion cited by the court as the reason for transfer does not apply.

(2) Subject to paragraph (3) a Family Care Centre shall transfer to a court of summary jurisdiction, before trial, proceedings which were transferred by that court under Article 8, where it considers that the criterion cited by the court as the reason for transfer does not apply.

(3) A Family Care Centre shall only transfer proceedings in accordance with paragraphs (1) or (2) where, having regard to the principles set out in

Article 3(2) of the 1995 Order, it considers it in the interests of the child to do so.

Contravention of this Order.

16. Where proceedings are commenced or transferred in contravention of a provision of this order, the contravention shall not have the effect of making the proceedings invalid; and no appeal shall lie against the determination of proceedings on the basis of such contravention alone."

On the face of the matter therefore it seems to me clear that the Northern Ireland legislation does not provide for an appeal against the decision of a Family Care Centre judge who declines to transfer to the High Court for hearing a case of this nature. This broadly mirrors the situation in England and Wales where the Children (Allocation of Proceedings) Order 1991 makes no provision for an appeal where a County Court has declined to transfer a case to the High Court. I am also satisfied that the Northern Ireland legislation makes no provision for an appeal against the decision of the Family Care Centre transferring the case back to the Family Proceedings Court. This does not appear to mirror the situation in England under the Children (Allocation of Proceedings) (Appeals) Order 1991 but since the Northern Ireland legislation was not made until several years thereafter, I have no doubt that the draftsman was aware of both orders.

It seems to me that there is a clear logic behind the legislative intention in this regard. The 1996 Order makes references to Article 3(2) of the 1995 Order and for the need to avoid delay. Lengthy appeals on the question of

venue and which were not on the substance of the matter would potentially occasion great delay which would not be in the best interests of children.

Ms Dinsmore QC challenged the assertion that the court had no jurisdiction to entertain these appeals on the following grounds:

(1) Article 166(14) she submits indicates an intention on the part of the domestic law to provide access to court by way of an appeal in the present circumstances. She relies on the fact that Article 166(1) of the 1995 Order provides for an appeal to the High Court against any County Court order as does Article 60 of the County Court (Northern Ireland) Order 1980. I consider that this overlooks the express absence of provision for appeal on questions of transfer in the 1996 Order and in my opinion, particularly given the situation under the English legislation, is clearly intentional.

(2) It is submitted that a failure to afford a right of appeal in these circumstances is a violation of Article 6 of the European Convention on Human Rights (the Convention). Under Article 6 of the Convention everyone is entitled to a fair and public hearing within a reasonable time. However it is quite clear that Article 6(1) does not guarantee a right of appeal from a decision of a court whether in a criminal or non-criminal case which complies with the requirements of that article. Notwithstanding this, Ms Dinsmore argues that a restriction on appeal must comply with principles of proportionality and legal certainty. She submits a restriction will not be proportionate if the very essence of the right of access to the court is

impaired. She drew my attention to Article 40 of the UN Convention on the rights of the child which provides at Article 2(b)(v):

“If considered (juvenile) to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law.”

I fail to see how any of these matters should trigger an automatic right of appeal under Article 6 when questions of venue or transfer arise. I am unaware of any authority either in the United Kingdom, Ireland or Europe which lends weight to the proposition that the question of transfer in a child's case should somehow guarantee a right of appeal from a decision of a court on the question of transfer. On the contrary, the delay occasioned by such a process could well be an anathema to the best interests of children which underlies the thinking behind the 1996 Order and, for that matter, the UN Convention on the rights of the child. The advantage gained by such a process would be wholly disproportionate to the disadvantages occasioned to children caused by the delay without reference to the issue of substance. In passing I pause to observe that the 1996 Order is subordinate legislation deriving from the powers granted by the Children Order (Northern Ireland) 1995 which is an Order in Council and which is therefore defined as subordinate legislation under the definition in Section 21 of the Human Rights Act 1998. Had I considered that this subordinate legislation was incompatible with Convention rights, that incompatibility not being required by primary legislation, then this court would have interpreted the



subordinate legislation compatibly with Convention rights under Section 3(1) of the 1998 Act or I would have set aside the subordinate legislation under Section 6(1). In the event that does not arise in this instance because I do not consider that this legislation is in anyway incompatible with Convention rights.

(3) Ms Dinsmore QC urged on me that I should invoke the inherent jurisdiction of the court to permit an appeal notwithstanding what appears to be the clear statutory provision to the contrary. She drew my attention to the recent Court of Appeal decision in Northern Ireland in R -v- Stobie (unreported and delivered 20 November 2001). That case arose out of an application on behalf of a witness in a criminal trial to set aside or declare ineffective a witness summons served upon him to give evidence at the trial of an accused. In the course of his judgment the Lord Chief Justice said at page 4:

“The cases in which a court may exercise powers conferred by its inherent jurisdiction are diverse and not confined to a settled list. In essence they are those required to enable to function effectively as a court, to fulfil itself as a court, by maintaining its authority and preventing its process being obstructed and abused.”

The court quoted with approval an extract from an article by Master I H Jacob “The inherent Jurisdiction of the Court” Current Legal Problems 970 23 at 28 where the inherent jurisdiction of the court was defined as:

“The reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression,

to do justice between the parties and to secure a fair trial between them.”

I find no warrant whatsoever for exercising such a power in this instance. To do so would be in clear defiance of the intention of Parliament. Article 166(15) of the 1995 Order expressly states that no appeal may be made against any decision of a kind mentioned in sub-article 14 save whereunder that sub-article the Lord Chancellor has made provision for appeals against decisions taken by the courts in question arising in connection with the transfer of proceedings by virtue of any order under paragraph 2 of Schedule 7 of the 1995 Order. In my view the legislature could not have spoken more clearly. To invoke the inherent jurisdiction in such circumstances would be unjustifiable and an unrestrained abuse of judicial activism. As Mr O’Hara QC on behalf of the mother in this case convincingly demonstrated, there is ample protection of an applicant’s rights within the 1996 Order. Under Article 10, where proceedings have been transferred to a Family Care Centre there is a mandatory injunction to the judge to transfer the proceedings to the High Court when he considers that the proceedings are appropriate for determination in the High Court and that such determination would be in the interests of the child. Family judges hearing cases in the Family Care Centres in Northern Ireland are extremely experienced family court judges and, as in this instance, mature consideration will invariably be afforded to such applications. Similarly under Article 12, a Family Care Centre shall transfer to a Family Proceedings Court before trial proceedings which were transferred by that court under Article 5 (as

occurred in this instance) where it considers that the criterion cited by the court as a reason for transfer does not apply. Once again this is only done in the interests of the child. Parliament has therefore ensured that the most careful of consideration will be afforded to these matters by a judge in the Family Care Centres and I consider that this provides sufficient protection.

(4) Counsel then submitted that I should invoke Article 16 of the 1996 Order which reads:

“Contravention of this Order.

16. Where proceedings are commenced or transferred in contravention of a provision of this order, the contravention shall not have the effect of making the proceedings invalid; and no appeal shall lie against the determination of proceedings on the basis of such contravention alone.”

It was submitted that this article provided a legal framework whereby the High Court could deal with the matter and therefore circumvent any contravention of the legislation. I reject this argument. The saving clause is clearly to cater for judicial or legal oversights. It would be quite inconsistent with a purposive construction of this Article to permit it to embrace a deliberate defiance of the statutory intention.

(5) Finally Ms Dinsmore urged on me, that if there is no right of appeal in the matter then I should treat these proceedings as a judicial review of the decision taken by the judge in the Care Centre proceedings. I consider that Order 53 Rule 9(5) of the Rules of the Supreme Court (Northern Ireland) 1980 is a rare example where the court may order proceedings to continue as if they had been begun by way of a different procedural avenue. In the present

case none of the procedures for application for a judicial review has been adopted by the appellant and I do not believe that there is any basis for permitting the matter to be considered as if it was a judicial review.

I therefore conclude that this court has no jurisdiction to hear the appeal in this matter on any of the grounds stated.

I pay tribute to counsel in this case who have produced extremely comprehensive and informative skeleton arguments. From reading them, and having permitted submissions on the substance of the matter in this appeal, I can state in addition that even I had permitted this appeal to proceed, I would have dismissed it on the merits for the following reasons:

I share the view expressed by the learned judge that the grave issues in this case have been fully identified. The care plan seems tolerably clear and the threshold criteria have been conceded. Accordingly I see nothing exceptionally grave, important or complex in this matter. Resident Magistrates in the Family Proceedings Centres in this jurisdiction are extremely experienced and regularly and capably deal with Article 8 issues of contact which essentially is the outstanding matter in this case. Ms Sholdis, who appeared on behalf of the Trust, cogently argued that already the delay may have impacted on this case and the children involved in that there has been no resolution as to the contact notwithstanding that the matter is ripe for determination. I am satisfied that on the substance of the matter the learned County Court judge arrived at a reasoned and considered decision on both

his determination to refer the matter to the Family Proceedings Court and to refuse to transfer to the High Court.

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