

Neutral Citation No: [2019] NICA 11

Ref: TRE10906

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 11/03/2019

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

M (MOTHER)

Appellant/First Respondent

and

SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST ("The Trust")

First Respondent/Applicant

and

F (FATHER)

Second Respondent

and

DEPARTMENT OF JUSTICE

Notice Party

Before: TREACY LJ and MAGUIRE J

TREACY LJ (*Delivering the Judgment of the Court*)

Reporting Restrictions

[1] The identities of the Appellant's children should not be identified in accordance with Article 170(2) of the Children (NI) Order 1995 ("the 1995 Order"). The identities of the Appellant (mother) and the Second Respondent (father) are prohibited from being named to prevent jig-saw identification.

Introduction

[2] The Appellant appeals by way of case stated under Article 146 of the Magistrates Court (NI) Order 1981 ("the 1981 Order") against the decision of District Judge ("DJ") Meehan dated 5 October 2017 to grant leave to the Trust to apply *ex parte* for an Emergency Protection Order ("EPO") pursuant to Article 63 of the 1995

Order and to then hear the application *ex parte* without hearing evidence or representations from her notwithstanding that she had been put on notice of the application and had attended the court in order to participate in the hearing.

Background

[3] On 5 October 2017 the Trust made an application for an EPO in respect of the Appellant's two pre-school children. Contact was made by the Directorate of Legal Services (the solicitor for the Trust) with the solicitors for all parties advising that an application for an EPO had been served and advising all parties to travel to Craigavon Court for the hearing of the application.

[4] During the afternoon of 5 October 2017, the Trust advised the Appellant of their intention to bring the application. Further, the Trust served the application upon the Appellant's Solicitor at 16.39 on that date. During a telephone call between the Trust Solicitor and Appellant's Solicitor it was agreed that the parties and their legal representatives would convene at Craigavon Courthouse for the purposes of the application being moved.

[5] During his journey to the courthouse the Appellant's solicitor received a telephone call from a member of staff at Craigavon Court Office. He was told that he would not be permitted to speak during the application. He was told that he would be permitted to remain at the back of the Courtroom during the hearing but could not speak. Further, he was advised that the Appellant would not be permitted into the courtroom during the hearing and would have to remain outside.

[6] The proceedings had commenced prior to the arrival of the Appellant's solicitor in Craigavon. In accordance with the judge's direction the Appellant and her witness were required to remain outside the courtroom during the hearing.

[7] A properly constituted Family Proceedings Court had been sitting that day in Craigavon for the purposes of dealing with family matters. DJ Meehan concluded the Family Proceedings Court list at or about 6.10pm. DJ Meehan, sitting alone, commenced the proceedings at or about 6.25pm.

[8] The Appellant, the Trust and the Department of Justice ("the DOJ") (Notice Party) all agreed before this court that the application was intended to be and should have been treated as an *inter partes* application. It was further agreed that there was no justification for proceeding on an *ex parte* basis. The written application did not purport to be *ex parte*. Nonetheless, at the outset of the hearing the Trust applied for leave to proceed *ex parte* on the ground that "the situation is urgent". It appears that this approach became necessary because it was the only way the Trust could get the EPO application heard that evening as the DJ considered that he had no jurisdiction to conduct an *inter partes* contested hearing when sitting alone. His view was that he could only grant the EPO if he was sitting *ex parte*. The DJ states, without elaboration or explanation, in para 2(d) of the Case Stated that "the notion of

somehow re-constituting a Family Proceedings Court *out-of-hours* did not occur to him” (our emphasis).

[9] Following the hearing from which the mother was excluded the DJ granted an EPO in consequence of which her two pre-school children (aged 3 and 1) were removed from her care and fostered separately during the period of the EPO. This Order was granted for a period of 7 days.

[10] Art 64(9) of the 1995 Order provides that there is no appeal against the making of an EPO. Under Art 64(7) the parents can apply to the court for the EPO to be discharged. However, this is limited by Art 64(10) which precludes such an application being made by someone who had been given notice of the hearing at which the order was made and was present at that hearing.

Case Stated

[11] In the Case Stated DJ Meehan states at paragraph 2:

“2. The circumstances in which I did not take either evidence or representations from or on behalf of either of the Respondents were as follows:

(a) There had been a sitting of the Craigavon Family Proceedings Court that day, comprised of two Lay Magistrates and myself as Chairperson. At upwards of 5.00pm, during a recess, the Clerk approached me in chambers to make me aware, in the presence of the Lay Magistrates, that Social Workers wished to bring an ex-parte Application for an Emergency Protection Order at some point later that evening. The Clerk’s purpose was to establish whether I would be willing to stay back after the Court was finished in order to deal with it. I confirmed that I would do so. No specific time for the Application was indicated.

(b) I was meanwhile made aware by the Clerk in a further exchange that the Solicitor for each parent was making his way to the Court from some distance. I pointed out that I could not hear either of them. I asked the Clerk to try to contact the lawyers concerned as a matter of courtesy and to make them aware that I could only deal with the application on an ex-parte basis (if leave to proceed were granted) and that I would not be allowing any submissions to be made on behalf of the respondent parents.

(c) Craigavon Family Proceedings Court finished late. I am informed by Court staff and I believe that this would have been at or about 6.10pm. There had been no application by any party to have the Application which is the subject of this Appeal added to the List. I was not made aware of any Summons issued in the instant case, nor was there ever any application by the First Respondent/Applicant to abridge time for service of any such Summons. The only papers I received in chambers were copies of the Application Form C1 and the Supplement Form C8.

(d) The Clerk had let me know at one point that the Solicitor from the Directorate of Legal Services would be staying back for the instant Application. I cannot say whether the Lay Magistrates, or either of them, were still present when the Clerk finally returned to let me know that the Social Workers had arrived and were ready to proceed. In any event the notion of somehow re-constituting a Family Proceedings Court out-of-hours did not occur to me.

(e) I re-entered the courtroom at or about 6.25pm to hear the leave application. I directed that an electronic recording of the proceedings be made. At or about 6.31pm the Clerk intervened to make me aware that the Appellant/1st Respondent was in the precincts and that her Solicitor was expected to arrive in about 10 minutes. I continued nonetheless with my consideration of the application for leave and came to the conclusion that I was compelled to grant it. I expressed myself "discomfited" by the fact that the Appellant was in the courthouse and that I was proceeding notwithstanding that her Solicitor was still making his way to join her. At that point only the 2nd Respondent's Solicitor was present in the courtroom. I explained that I did not consider that I had jurisdiction to conduct a contested Hearing between the parties in an Application for an Emergency Protection Order when sitting alone. I did go on to state, however, that I saw no reason why the Solicitor for each party should not be permitted to be in attendance as observers, able to take a note of the evidence (as one at least was able to do), but on the strict understanding that no representations could be received from either. I added that Social Workers who notified

parents after making arrangements to attend before either a District Judge or Lay Magistrate for the purpose of such ex-parte applications were operating under a persistent misconception. (I have since been made aware that the notification in this instance may in fact have been given by the Trust's legal representatives). Finally, though restating my discomfiture about the circumstances and aware that the Appellant's Solicitor was still not present, I also stated that I did not consider myself required to wait for that Solicitor's arrival before continuing. The Social Worker was then called to give evidence at 6.41pm. The ex-parte proceedings concluded at or about 6.57pm."

Questions Posed by the District Judge

[12] The questions asked by the Appellant in her application to state a case were:

"1. (A) The Appellant seeks the opinion of the Court of Appeal as to whether it was correct in law for the District Judge to not allow the Appellant, who was put on notice of the hearing, to give evidence or make submissions to contest the Trust's application for an emergency protection order which sought to remove her children from her care.

2. (B) The Appellant further seeks the opinion of the Court of Appeal as to whether it was correct in law to dismiss the lay panel members who had been sitting in Craigavon Family Proceedings Court on 5th October at 6.20pm and thereafter at 6.25pm to proceed to hear the application for an Emergency Protection Order ex parte sitting as a magistrate's court."

[13] The question for the Court of Appeal has been posed by DJ Meehan in the following way:

"1. Was I correct in law in holding that a District Judge (Magistrates' Courts), sitting alone, whether in or out of petty sessions, does not have jurisdiction to hear an application for an Emergency Protection Order unless satisfied that the Application must proceed on an ex-parte basis and therefore cannot entertain representations or evidence from a Respondent, regardless of whether or not the Applicant has informed the Respondent of the intended Application?"

Statutory Framework

[14] What emerges from the statutory framework set out below is that EPOs must be commenced in a properly constituted family proceedings court as defined ie a resident magistrate, who shall be chairman, and two lay magistrates, of whom one, at least, shall be a woman [see para [17] below]. There are only two statutory exceptions to this requirement (i) Schedule 2, para 4 of the Children and Young Persons Act (Northern Ireland) 1968 (“the 1968 Act”) which provides that the DJ shall have the power to act notwithstanding that any other member “fails to attend and remain present during the sitting of the court” [see para [19] below] and (ii) Rule 2(5) of The Magistrates’ Courts (Children (Northern Ireland) Order 1995) Rules (Northern Ireland) 1996 [“the 1996 Rules”] which provides that proceedings for an EPO on an *ex parte application* under Art 63 are proceedings in respect of which a resident magistrate or member of a juvenile court panel may discharge the functions of a court of summary jurisdiction [see para [21] and [22] below].

[15] Art 63 of the 1995 Order sets out the circumstances in which a court may grant an EPO. By virtue of Art 63(4) the EPO authorised the removal of the children to accommodation provided by or on behalf of the Trust and conferred on the Trust parental responsibility for the two children. Art 64(1) specifies that the maximum duration of the EPO shall be for a period not exceeding 8 days. Art 64(3) authorises the Applicant Trust to seek an extension to the Order but such an extension may not exceed 7 days (Art 64(4)) and may only be made once (Art 64(5)). Under Art 64(6) the court hearing an EPO application may take account of any statement contained in any report made to the court in the course of, or in connection with, the hearing, or any evidence given during the hearing, which is, in the opinion of the court, relevant to the application.

No Right of Appeal and Qualified Right to Apply for Discharge of the EPO

[16] Art 64(9) provides that there is no appeal against the making of an EPO. Under Art 64(7) the parents can apply to the court for the EPO to be discharged. However, this is limited by Art 64(10) which precludes such an application being made by someone who had been given notice of the hearing at which the order was made and was present at that hearing. An application by the appellant to discharge the EPO was refused on this basis.

Composition of the Court

[17] The Children (Allocation of Proceedings) Order (Northern Ireland) 1996 states at Art 3(1) that applications for EPOs shall be commenced in a family proceedings court. A family proceedings court is defined by Art 164(4) of the 1995 Order as being a juvenile court (that is to say, a court of summary jurisdiction constituted in accordance with Schedule 2 to the 1968 Act sitting for the purpose of exercising any jurisdiction conferred by or under this Order.

[18] Schedule 2 of the 1968 Act provides that:

“3. Subject to the provisions of paragraph 4, a juvenile court shall be constituted of a resident magistrate, who shall be chairman, and two lay magistrates, of whom one at least shall be a woman.

4. A juvenile court at which the chairman is present shall have power to act notwithstanding that any other member *fails to attend and remain present during the sitting of the court* and all acts done by the court shall notwithstanding any such failure be as valid as if that member had so attended and remained.

5(1) The decision of a juvenile court upon any matter before it shall be by a majority of the members and shall be pronounced by the chairman, or other member at the request of the chairman, and no other member of the court shall make any separate pronouncement thereon; but where the chairman and one other member only attend and remain present during the sitting of the court the decision of the court shall in the event of disagreement between the chairman and that other member be the decision of the chairman and shall be pronounced by the chairman.”

[19] Under paragraph 3 of Schedule 7 to the 1995 Order the Department of Justice may, after consultation with the Lord Chief Justice by order specify, that the jurisdiction of a court of summary jurisdiction to make an EPO may be exercised by a District Judge (Magistrates’ Courts) or a member of a juvenile panel. The DOJ has confirmed that no provision has been made under this power.

Jurisdiction to make *ex parte* EPO Applications

[20] Art 165(2)(i) of the 1995 Order provides that:

“(2) The rules may, in particular, make provision—

(i) authorising a resident magistrate or a [lay magistrate] to discharge the functions of a court of summary jurisdiction with respect to such relevant proceedings as may be prescribed.”

[21] Rule 2(5) of the 1996 Rules states:

“(5) Where, in accordance with the Allocation Order an application is required to be commenced in a family proceedings court the following proceedings are prescribed for the purposes of Article 165(2)(i) –

(a) *proceedings on an ex parte application under Article 63; 67 and 69; and under rule 5 are proceedings with respect to which a resident magistrate or member of a juvenile court panel may discharge the functions of a court of summary jurisdiction;...*”

[22] Rule 5(1) of the 1996 Rules states any application for an EPO may be made on an *ex parte* basis with the leave of the court. Rule 5(2) provides for the service time of the relevant documents and applications after the *ex parte* hearing has occurred (within 48 hours).

Abridgement of Time

[23] Service of an application for an EPO should be effected one day before the hearing (Schedule 2 of the Rules). However, an application to abridge time for service can be made under Rule 9(8)(b).

Discussion

[24] The legislative framework provides that applications for EPOs must be commenced in a properly constituted family proceedings court as defined: a resident magistrate, who shall be chairman, and two lay magistrates, of whom one, at least, shall be a woman. The composition of the competent court for such applications and the circumstances in which the composition requirement can be departed from are spelt out in the statutory provisions. Plainly the definition of the competent court and the restriction on the circumstances in which the overarching composition requirement can be relaxed in tightly defined circumstances is the manifestation of the legislative intent behind these provisions. The requirement for a three person court with a legally qualified chairperson and two lay magistrates is jurisdictionally necessary for the proper determination of EPO applications. There are only two statutory exceptions to this requirement which we deal with below.

First statutory exception

[25] Schedule 2, para 4 of the 1968 Act provides that the DJ shall have the power to act notwithstanding that any other member “fails to attend and remain present during the sitting of the court”. This provision has no application in the present case. The lay magistrates did not fail to attend. They were never asked to attend. In the present case the composition requirement was capable of fulfilment without doing damage to the interests of the child which the EPO application was intended

to protect. The DJ was aware during the course of the sitting of a properly constituted Family Proceedings Court that (a) the application for an EPO was being brought, (b) that the parents had been put on notice of the application and (c) that the parents' Solicitors were travelling to court for the purposes of the hearing. The properly constituted Family Proceedings Court concluded its business at in or about 6.10pm. The DJ proceeded to hear the EPO application at 6.25pm in the absence of either lay panel member who had been sitting with him earlier. The lay panel members could have been requested to remain to allow a properly constituted court to preside. Alternatively, the DJ could have directed that attempts be made to recall the panel members who may have just departed. None of these or any other steps were contemplated. As the DJ frankly explains in para 2(d) of the Case Stated "the notion of somehow re-constituting a Family Proceedings Court out-of-hours did not occur to him".

The second exception

[26] Rule 2(5) of the 1996 Rules provides that proceedings on an *ex parte application* under Art 63 can be dealt with by a DJ sitting alone. The applicable principles governing the making of an EPO and the exceptional circumstances in which it can be determined on an *ex parte* basis are not in dispute in this case. They are to be found in the judgment of Mumby J in X Council v B (Emergency Protection Orders) [2004] EWHC 2015 (Fam) and McFarlane J in Re X: Emergency Protection Orders [2006] EWHC 510 (Fam). In short, because of the draconian nature of an EPO the jurisprudence emphasizes the extreme gravity of such applications and the exceptional circumstances which would have to be established to justify proceeding without the involvement or input of the parent from whom the Trust proposes to remove the child.

[27] X Council v B foresees the need for *ex parte* applications to be made when (a) the case is extraordinarily urgent resulting in the parents not being able to be served with proceedings or (b) when alerting the parents to the application could prejudice the welfare of the child. It is agreed by all the parties that the instant case fits into neither of these categories: (i) the Trust advised the Appellant mother of their intention to move the application that day; (ii) the Trust served a copy of the proceedings upon the Appellant's solicitor; (iii) discussions occurred between legal representatives as to the venue for the hearing and subsequent arrangements; (iv) pursuant to the notice the appellant attended with her witness to contest the hearing but were both excluded from the court; (v) the legal representatives were permitted to be present but were expressly forbidden from making any representations.

[28] In light of the circumstances set out in the preceding paragraph the DJ was plainly wrong to proceed on an *ex parte* basis. A properly constituted court in accordance with the applicable legislation should have been convened. The indications are that this would have been readily achievable by taking the simple step of asking the lay members to remain to allow the existing properly constituted Family Proceedings Court to preside over the case. Alternatively, the DJ could, if

necessary, have directed attempts to have the lay members recalled. Had the jurisdictionally required court been convened the appellant's common law and Art 6 & 8 Convention rights could and would have been fully protected. In that scenario there would have been, as the Trust intended, an *inter partes* hearing, with the appellant and her witness present in court, able to fully participate and contest the EPO with the benefit of expert legal advice and representation. An *inter partes* hearing is the presumptive starting point of an application for an EPO. Such a hearing is generally necessary to vindicate the common law and art 6 and 8 rights of the parent. Such a hearing enhances the rigour and fairness of the proceedings by ensuring that the court is as fully informed as possible before being tasked with deciding whether the draconian step of removing a child from its parent(s) is necessary and justified. By proceeding *ex parte* and failing to convene a properly constituted court the DJ acted unlawfully with the consequence that the appellant was denied her right to a fair hearing before a properly constituted court.

[29] As a result of the manner in which the DJ proceeded the appellant suffered further prejudice by reason of the operation of Art 64(7), (9) and (10) of the 1995 Order. These provide that there is no appeal from the making of an EPO. The effect of this provision is mitigated by the ability of the parent to make an application to discharge the Order. However, a parent is not entitled to bring such an application if she was given notice of the hearing and was present at the hearing. It is not clear to us that the latter condition applied in the present case since she was excluded from the hearing. However, we were informed by the appellant that an application to discharge was brought the following day but was not able to be listed in light of Art 64(10).

[30] Given that there is specific provision under the rules for *ex parte* EPO applications to be heard by a DJ (Magistrates' Courts) or lay magistrate sitting alone but no such provision for *inter partes* applications we were surprised to learn that it is not uncommon for some DJ's, even within normal hours, to sit alone to determine *inter partes* EPO applications. Whether in or out of normal hours the legislative requirement is clear: EPO applications must be commenced before a properly constituted Family Proceedings Court. If the urgency of an EPO application required an *inter partes* application to be heard out of hours there is no legislative restriction on the ability of the DJ to convene the requisite court. The Northern Ireland Courts and Tribunals Service ("the NICTS") would, in discharge of its duties, be required to make the necessary arrangements to operate the legislative scheme and ensure the attendance of the lay magistrates as necessary. If a lay magistrate failed to attend the court could invoke the provisions in para 4 of Schedule 2 of the 1968 Act to continue in that member's absence. Such out-of-hours applications would in any event only be warranted where some urgency required it. The rules already allow for expedited hearings within normal hours. In light of what we were told DJ's should be reminded of their duties under the current legislative provisions.

The Circular

[31] Given that the legislative framework allows for *inter partes* EPO applications out-of-hours the court was puzzled as to why the notion of convening an out-of-hours court did not occur to the experienced DJ. The explanation may lie in the NICTS Circular No.26/2009 dated 24 September 2009 (“the Circular”). The purpose of the Circular was to set out revised arrangements for the conduct of ‘Out of Hours’ emergency applications under Articles 63, 67 and 69 of the 1995 Order as a consequence of the recommendations endorsed by the Children Order Advisory Committee. The revised arrangements provided for the participation of DJ’s [MC] in the ‘Out of Hours’ service rather than only lay magistrates and the hearing of such applications at designated courthouses rather than at the lay magistrates home. The Circular sets out the arrangements only for out-of-hours *ex parte* applications and says nothing about out-of-hours *inter parte* applications. There is no Circular addressing the arrangements for out-of-hours *inter parte* applications to enable the convening of a properly constituted Family Proceedings Court.

[32] In a section entitled “Inter-Partes Hearing” it is noted that there is no legislative authority to make provision for a lay magistrate to deal with an *inter partes* application. It also states that there is similarly no legislative provision for a DJ[MC] to deal with an *inter-partes* application “out of hours”. However, court listings and sittings are matters for the judiciary. Article 11 of the 1981 Order provides for directions by the LCJ as to ordinary court sittings. The listing of matters outside of normal court hours is a matter for the presiding DJ. There is no limitation on when a court may be convened. No such legislative provision is required. The role of the NICTS is to provide administrative support for the arrangements which the judiciary directs in order to give effect to the legislative requirements surrounding the exercise of judicial authority.

[33] The circular goes on to state “however if the applicant considers that it is appropriate to give notice of the hearing to any other party to the proceedings, this should be indicated to the duty clerk and be communicated by the duty clerk to the DJ(MC) who will determine if such notice should be given”. We have serious concerns about this provision and the imposition via administrative Circular of a role and jurisdiction which the DJ does not possess by virtue of any statute. Not only is this role not envisaged by statute, it is in fact inconsistent with the applicable legislative scheme. The decision whether to move the application with notice is a matter for the applicant Trust not the DJ[MC]. The only judicial supervision required by the legislative scheme is if the Trust apply to move the application *ex parte* in which case leave is required. The provision in the Circular is also inconsistent with the established case law as to the exceptional circumstances required to justify an *ex parte* application. This is because the process envisages, as happened here, the conversion of an *inter partes* application into an *ex parte* application. In the case of an *inter parte* application the courts role is confined to determining that application in the proper way with a properly constituted court. If an *ex parte* application is made the DJ[MC] or a lay magistrate sitting alone are empowered under Rule 2(5)(a) of the 1996 Rules to deal with the *ex parte* application

for an EPO. Such *ex parte* applications, for which leave must first be obtained, will only be justified in exceptional circumstances. The DOJ should reconsider the circular as a matter of urgency.

Conclusion

[34] The question as posed by the DJ does not arise on the facts of this case since it presupposes that he was entitled to treat the application as *ex parte* and exclude the children's mother from proceedings bearing upon the treatment of her children and to thereafter order the removal of her two pre-school children without allowing her any input into the decision making process which delivered that outcome. For the reasons we have given above the judge was plainly wrong to proceed and order as he did. The DJ was required in the circumstances of this case to convene the requisite properly constituted Family Proceedings Court to determine the Trust's *inter partes* application for an EPO. He failed to do so. In the light of our conclusions the issue of Convention compatibility addressed in the Notices does not arise.