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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **11/12/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL BY WAY OF CASE STATED PURSUANT TO THE MAGISTRATES' COURTS (NORTHERN IRELAND) ORDER 1981

IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995

BETWEEN:

HT

Appellant

and

A HEALTH AND SOCIAL CARE TRUST

and

BT

Respondent

_____

Ms Rice KC and Ms McKeown (instructed by Stephen Tumelty Solicitors) for the Appellant
Ms Smyth KC and Ms McKernan (instructed by DLS) for the First Respondent
Ms Connolly KC and Ms McGill (instructed by Joseph Magee Solicitors) for the Second Respondent

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Before: Keegan LCJ and McFarland J

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KEEGAN LCJ (*delivering the ex-tempore judgment of the court*)

We have applied anonymity to this case as it concerns a five-year-old child. Nothing should be published which identifies the child or family.

Introduction

[1] The appellant seeks an order from this court compelling District Judge E King to state a case on whether he was correct in law to exclude the appellant from the hearing of an application by the respondent Trust for an Emergency Protection Order ("EPO") under Article 63 of the Children (Northern Ireland) Order 1995.

[2] The application is out of time as it was lodged 16 days outside the statutory time-limit. Order 61 Rule (4) of the Rules of the Court of Judicature state that an application to the Court of Appeal, or a judge thereof, for an order directing a court or tribunal to state a case must be made by motion within a period of 14 days commencing on the date of the refusal or failure of the court or tribunal to state the case.

Extension of time

[3] In order to proceed the appellant seeks an extension of time to compel the District Judge to state a case on a point of law under Article 146 of the Magistrates Courts (Northern Ireland) Order 1981 ("the 1981 Order").

[4] The refusal to state a case (which was itself based upon delay) was finally communicated to the appellant's solicitors on 5 September 2024. Legal Aid was granted on 20 September 2024. The application to this court was transmitted on 4 October 2024.

[5] The affidavit evidence filed by the appellant's solicitor does not provide any reasons for delay beyond the grant of Legal Aid. When pressed Ms Rice KC frankly said that this was "due to correspondence" between her instructing solicitor and junior counsel.

[6] In *PPS v Bryson* [2018] NICA 11 the issue of how the court should approach the construction of the requirements of Article 146 of the 1981 Order was considered. At para [9] of the judgment, the decision of *Wallace v Quinn* [2003] NICA 48 is applied where the court concluded that the approach to the construction of the requirements of Article 146 of the 1981 Order should be that set out by Lord Woolf MR in *R v Immigration Appeal Tribunal ex parte Leyeanthan* (1993) 3 ALL ER 231 as follows:

> "I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows.
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> 1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question).
>
> 2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question). I

treat the grant of an extension of time for compliance as a waiver.

3. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question).

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

Background

[7] This may be simply stated. The appellant was recorded as the child's second female parent on his birth certificate. However the birth certificate was not available at the EPO hearing on 11 July 2023. Further, the Trust named the second female parent as the father on the C1. The judge, therefore, decided that the case should proceed with only the mother. The Trust and mother gave evidence. The judge ultimately refused the EPO. The birth certificate was made available on 14 July 2023 and thereafter the second parent who now identifies as a male has been fully part of proceedings. These are ongoing before the Family Care Centre. The child remains in a kinship placement with the grandparents, who are the parents of the appellant.

Conclusion

[8] Exercising our discretion we decline to extend time in this case for the following reasons. First, we are not satisfied that an adequate explanation has been given for the delay in bringing this application to the Court of Appeal which is surprising given the vintage of the case. Second, at the EPO hearing on 11 July 2023, whilst there was a procedural mistake made regarding the parental rights of a second female parent, the District Judge was not aided by the way in which the C1 was presented. He was also dealing with an emergency application without full proofs. Third, this procedural mistake was corrected soon thereafter, and the appellant has participated fully in proceedings since. Fourth, as the EPO was not made on 11 July 2023 no substantial prejudice was occasioned by virtue of the procedural mistake. Fifth, all practitioners before us accepted the fact that the law is uncontroversial on this issue. Sixth, we have no evidence that the issue which arises in this case is an issue which has been wrongly dealt with by District Judges dealing with family law cases.

[9] To be clear, it is accepted that the appellant acquired parental responsibility due to being in a civil partnership with the second named respondent at the time of conception and being registered as 'second female parent' on the child's birth certificate. As a result, the appellant was correctly named as a respondent to the EPO application (although not in terms of the birth certificate which would have made the situation clear), as per Appendix 3 of the Family Proceedings Rules (Northern Ireland) Order 1996 and should have had the opportunity to remain for the hearing. The appellant is named as respondent in the pending Care Order proceedings before Craigavon Family Care Centre and no issues have arisen about the appellant's participation in the proceedings. That is how it should be and so it is unfortunate how the hearing was conducted on 11 July 2023.

[10] Our only other observation is that with hindsight Sightlink was clearly not the right mode of hearing in this case. We note that the appellant's solicitor wanted the case to proceed in person. She was correct. We are confident that the procedural mistake would not have been made if all parties had attended at court in person. Any contested family proceedings absent extreme circumstances should be in person as the current guidance makes clear. Specifically, the Guidance on Physical (In-Person), Remote and Hybrid Attendance (6 November 2023) states that full hearings require in person attendance of all counsel, solicitors and witnesses unless permission is granted for remote attendance and that most substantive family hearings will require in person attendance of counsel and solicitors.