

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

Delivered: 7/9/2011

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

CM

Appellant

-and-

A HEALTH AND SOCIAL SERVICES TRUST

Respondent

Before: Morgan LCJ, Higgins LJ, and Coghlin LJ

MORGAN LCJ

[1] This is an appeal by way of case stated from the Family Proceedings Court. The question stated for the Court of Appeal is:

“Where there are ongoing proceedings under Article 44 of the 1995 Children Order and the court has adjourned those proceedings by way of an Interim Secure Accommodation Order, does the court have jurisdiction to make a further Interim Secure Accommodation Order on the adjourned date where the statutory criteria are established but the child has absconded in the meantime and is not present in court on the adjourned hearing date but the Guardian and the child’s legal representatives are present.”

The appellant was represented by Ms Walsh QC and Mr McGuigan. The respondent was represented by Ms Keegan QC and Ms Simpson. We are grateful to all counsel for their helpful oral and written submissions. Nothing should be published which would identify the appellant or her family.

The statutory provisions

[2] The substantive legislation in relation to secure accommodation orders is set out in Article 44 of the Children (Northern Ireland) Order 1995 and the Children (Secure Accommodation) Regulations (Northern Ireland) 1996.

“Secure accommodation

44.-(1) In this Article 'secure accommodation' means accommodation provided for the purpose of restricting liberty.

(2) Subject to paragraphs (3) to (10), a child who is being looked after by an authority may not be placed, and, if placed, may not be kept, in secure accommodation unless it appears -

- (a) that -
 - (i) he has a history of absconding and is likely to abscond from any other description of accommodation; and
 - (ii) if he absconds, he is likely to suffer significant harm; or
 - (b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.
- (3) The Department may by regulations -
- (a) specify a maximum period -
 - (i) beyond which a child may not be kept in secure accommodation without the authority of the court; and
 - (ii) for which the court may authorise a child to be kept in secure accommodation;
 - (b) empower the court to authorise a child to be kept in secure accommodation for such further period as the regulations may specify; and

- (c) provide that an application to the court under this Article shall be made only by an authority.
- (4) A court hearing an application under this Article shall determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in his case.
- (5) If a court determines that any such criteria are satisfied, it shall make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which he may be so kept.
- (6) On any adjournment of the hearing of an application under this Article, a court may make an interim order permitting the child to be kept during the period of the adjournment in secure accommodation.
- (7) No court shall exercise the powers conferred by this Article in respect of a child who is not legally represented in that court unless, having been informed of his right to apply for legal aid and having had the opportunity to do so, he refused or failed to apply."

The Children (Secure Accommodation) Regulations (Northern Ireland) 1996 made under Article 44(3) specify that the maximum period beyond which a child may not be kept in secure accommodation without the authority of the court is 72 hours in any period of 28 days.

[3] The procedures to be followed in the Family Proceedings Court are set out in The Magistrates' Courts (Children (NI) Order 1995) Rules (NI) 1996 (the 1996 Rules).

"Solicitor for child

13. - (1) A solicitor appointed under Article 60(3) or in accordance with rule 12(2)(a) shall represent the child-

- (a) in accordance with instructions received from the guardian ad litem (unless the solicitor considers, having taken into account the views of the guardian ad litem and any direction of the court under rule 12(3), that the child wishes

to give instructions which conflict with those of the guardian ad litem and that he is able, having regard to his understanding, to give such instructions on his own behalf, in which case he shall conduct the proceedings in accordance with instructions received from the child), or

- (b) where no guardian ad litem has been appointed for the child and the condition in Article 60(4)(b) is satisfied, in accordance with instructions received from the child, or
- (c) in default of instructions under (a) or (b), in furtherance of the best interests of the child.

(2) A solicitor appointed under Article 60(3) or in accordance with rule 12(2)(a) shall serve and accept service of documents on behalf of the child in accordance with rule 9(4)(a) and (5)(a) and, where the child has not himself been served and has sufficient understanding, advise the child of the contents of any documents so served....

Directions

15. - (2) In any relevant proceedings the court may, subject to paragraph (4), give, vary or revoke directions for the conduct of the proceedings, including-

... (c) the attendance of the child;

(4) Directions under paragraph (2) may be given, varied or revoked either-

- (a) of the court's own motion and having given the parties notice in Form C3 of the intention to do so and an opportunity to attend and be heard or to make written representations,
- (b) on the written request in Form C2 of a party specifying the direction which is sought, filed and served on the other parties, or

- (c) on the written request in Form C2 of a party specifying the direction which is sought, to which the other parties consent and which they or their representatives have signed.

Attendance at directions appointment and hearing

17. - (1) Subject to paragraph (2), a party shall attend a directions appointment of which he has been given notice in accordance with rule 15(4) unless the court otherwise directs.

(2) Relevant proceedings shall take place in the absence of any party including the child if-

- (a) the court considers it in the interests of the child, having regard to the matters to be discussed or the evidence likely to be given, and
- (b) the party is represented by a guardian ad litem or solicitor;

and when considering the interests of the child under sub-paragraph (a) the court shall give the guardian ad litem, solicitor for the child and, if he is of sufficient understanding, the child, an opportunity to make representations.

(3) Subject to paragraph (4) below, where at the time and place appointed for a hearing or directions appointment the applicant appears but one or more of the respondents do not, the court may proceed with the hearing or appointment.

(4) The court shall not begin to hear an application in the absence of a respondent unless-

- (a) it is proved to the satisfaction of the court that he received reasonable notice of the date of the hearing; or
- (b) the court is satisfied that the circumstances of the case justify proceeding with the hearing."

By virtue of Rule 26 of the 1996 Rules the clerk of petty sessions shall, if practicable, arrange for copies of all written reports before the court to be made available before the hearing to-

- (a) the applicant,
- (b) the parent or guardian of the child,
- (c) any legal representative of the child,
- (d) the guardian ad litem, and
- (e) the child, unless the court otherwise directs.

The history of the case

[4] The appellant, CM, was born in 1993. She was placed in a Trust residential unit in Belfast in March 2009 on a voluntary basis and her name was placed on the Child Protection Register on 4 June 2009. She has a history of absconding from her family home and residential care and engaging in sexual behaviour, associating with much older males, substance abuse and self harm. She is vulnerable to sexual exploitation and there is a risk to her physical and mental health and well being. In July and August 2009 she absconded on a regular basis from the residential unit and was missing for a total of 17 days. On the first occasion she was missing for 7 days and returned in the company of a 23 year old man. She was found in his company on two further occasions after she absconded again. In August CM disclosed that she was thinking about hurting herself and later told staff that she had taken unidentified tablets which resulted in her being admitted overnight to hospital. She absconded from the unit a couple of days later, staying away for 2 days. When found it appeared that she had been sleeping rough and she was wearing clothes that did not belong to her. Shortly after this she absconded again for 3 days and on her return the Trust took the decision to place her in secure accommodation at Lakewood and apply for a secure accommodation order.

[5] The Family Proceedings Court sitting in Belfast adjourned the application and made an interim secure accommodation order on 21 August 2009 authorising the Trust to keep CM in secure accommodation until 8 September. CM's legal representative and the Guardian ad Litem agreed that the statutory criteria in Article 44 (2) of the Children (NI) Order 1995 had been met. Further interim orders were made by agreement of both the Guardian ad Litem and CM's solicitor in respect of the period up to 27 October 2009.

[6] In the period leading up to 27 October 2009 the appellant was spending some time in the trust residential unit in Belfast with a view to the discharge of her secure accommodation order on that date. She went missing from the unit on the night of 22/23 October and returned at 4 pm that afternoon. She explained that she had been in the company of an 18 year old male ex resident

of the unit. On 26 October information was obtained that the appellant had sent explicit sexualised text messages to another resident's mobile phone and requested a substantial quantity of drugs. She was returned to the residential unit on the basis that if she absconded a further secure accommodation order would be sought. She absconded from the unit within hours of her return.

[7] On the 27 October 2009 the appellant did not attend the court hearing. Her solicitor and the Guardian ad Litem were present at court. The Guardian sought another interim order but the appellant's solicitor opposed this in the absence of CM. The court having heard the representations was satisfied that the statutory criteria were met, adjourned the application and made a further interim order until the 3rd November 2009. The appellant was subsequently detained by police on 29 October and returned to secure accommodation.

[8] The decisions in relation to this child no longer need determination by the court but the parties were both anxious that the issues in this appeal should be determined as this situation arises not infrequently and there is a need for clarity as to the manner in which courts should deal with applications in such circumstances. We decided that we should hear the substantive arguments.

The case law

[9] There are three relevant decisions in this jurisdiction which examine the need for the presence of the child when the court is considering the making of an order under Article 44. The first is Re AK [2000] NI 205. This was a first application for a secure accommodation order in respect of a child who was the subject of a care order but residing with her parents having just been released from prison on bail. She had a history of absconding from local authority accommodation. The issue was whether an order under Article 44 could be made if the child had not already been taken into secure accommodation. It is not clear from the report whether the child was present or represented at the original hearing. Higgins J noted the provisions of Article 44(7) which contemplate the presence or representation of the child. He accepted the analysis of the corresponding legislation in England and Wales in Re M (Secure Accommodation Order) [1995] FLR 418 and concluded, therefore, that the court's role was essentially to control the exercise of the power to detain by the relevant authority. That suggested, therefore, that in most cases the application to the court would follow from the exercise of the power. He accepted, however, that there may be exceptional cases where in the interests of the child the application may be made before the power was exercised. That might arise if the authority had concerns about whether the conditions for the exercise of the power were met. He did not consider that the fact that the child had absconded would normally constitute such exceptional circumstances. The circumstances may have changed in the interim and in any event because the implementation of the power to detain

did not require prior court approval the interests of the child on detection could be secured.

[10] The second case was North West Belfast Health and Social Services Trust -v- DH [2001] NI Fam 17. In this case the application was for a fourth consecutive secure accommodation order. The child had absconded and was not in attendance at the hearing although he was legally represented by his solicitor and counsel who had been involved in the earlier applications. The Trust argued that the hearing should proceed in the absence of the child. The child in this case had been at large for more than three weeks and had not contacted the Trust or his legal advisers. Higgins J concluded that in the absence of the child he could not be satisfied that the circumstances surrounding the child remained the same as had been the case when the previous order had been made. The appellant relies on these cases to support the proposition that either the court has no power to make a Secure Accommodation order in the absence of the child or alternatively that the circumstances in which such an order could be made are so exceptional that it ought not to have been made in this case.

[11] The third case is Re WK (a child) [2004] NIQB 76. This was an application for judicial review of the decision of the Family Proceedings Court to make a further interim secure accommodation order in the absence of the child at the hearing. The Trust had decided in light of the child's behaviour that the risks to the child and its staff of escorting him to the court were too great. The child was legally represented and objections were made to the making of an order. An adjournment was sought on the grounds that the child's Article 5 and 6 convention rights were infringed.

McLaughlin J considered the procedures adopted by the lower court. On the issue of the attendance of the child he stated:

“[15] It is not always in the best interests of children that they should attend court but I am prepared to act on the assumption that in a case of this kind, which involves involuntary confinement, it is appropriate to have the subject of the proceedings in court in ordinary circumstances. Very much must depend on the individual circumstances of the child, particularly its age and understanding. If bringing it to court is simply going to cause further distress and anxiety, or perhaps induce further disruptive, possibly criminal, behaviour, then the argument against the presence of the subject of the proceedings can be overwhelming”

It is apparent, therefore, that this was not a case arising from absconding. The child was available to the guardian ad litem and legal representatives and the

court concluded that the child's convention rights were adequately protected. The court did, however, note that there was no absolute rule in the earlier decisions which required the presence of the child before an order could be made.

[12] The only other authority to which we want to refer is Re AS [1999] 2 FCR 749. The local authority made a first application for a secure accommodation order in relation to a 13 year old child. The authority did not seek to exercise its statutory power to place the child in secure accommodation before making the application. The child was not notified of the hearing and no guardian ad litem was appointed. The child was legally represented at the hearing but his representatives had not been able to take any instructions from the child. Bracewell J considered that it was implicit in the statutory provisions that legal representation in order to be effective must involve the taking of instructions. In those circumstances the making of the order was fundamentally flawed.

Consideration

[13] The purpose of the statutory requirement to bring the application before the court either prior to the detention or within 72 hours is to ensure that there is an independent and impartial determination of the lawfulness of the interference with the liberty of a vulnerable child which this legislation permits. The application does not involve the determination of a criminal charge (see Re K [2001] Fam 377). Given what is at stake for the child it does, however, involve a high degree of procedural protection. This includes the opportunity for the child to avail of legal advice and to have the assistance of a Guardian ad Litem.

[14] In order to make those protections practical and effective both the Guardian and the solicitor must have access to the relevant papers and information. The Guardian will need to have access to the child to advise the court on the issues and the solicitor must be in a position to take instructions from the child. If necessary, witnesses can be called or challenged. Although the 1996 Rules indicate that the solicitor should act in the child's best interests in the absence of instructions it would not be procedurally fair for the solicitor to so act in the absence of a recent opportunity for the solicitor to obtain instructions from the child on the issues in the application.

[15] Where an application is made for an initial order all of these procedural protections must normally be in place. If the child has absconded before the hearing there will often have been no opportunity for the Guardian and solicitor to speak to him. In those circumstances the court is highly unlikely to make the order and the Trust will have to rely on its power to detain the child when found and bring the matter before the court within 72 hours.

[16] Where the child has absconded during the period of an interim secure accommodation order additional considerations may come into play. The court will want to look at the circumstances in which the child left the accommodation. It will be relevant to examine the most recent opportunities for contact between the child, the solicitor, the Guardian and the Trust. Where there has been no recent contact with the child there is a real risk that the information before the court will not reflect the child's current circumstances and that will point towards leaving the Trust to come before the court when the child is found. It may be relevant to take into account that experience suggests that the child is likely to be found within a short time. If there has been recent contact with the child that may make it appropriate to adjourn the application for a short period as happened in this case and make an interim order.

[17] We accept, therefore, that there are circumstances where it is appropriate to make an interim secure accommodation order even though the child has absconded and is not present but for the reasons given we consider that such a course should be exceptional and the period of the order should be limited as it was in this case. We do not consider that any further answer is appropriate for the question posed.