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Judgment: approved by the Court for handing down | *Delivered:* **29/05/2003**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF AN APPEAL FROM THE FAMILY CARE CENTRE
RE E, E1 AND A

GILLEN J

[1] This judgment is being distributed on the strict understanding that in any report no person other than the applicants or the solicitors instructed (and any other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

[2] This matter is an appeal from His Honour Judge Lockie sitting in the Family Care Centre in the County Court for the Division of Belfast. The appeal arises out of a long-running case involving applications under Article 8 of the Children (Northern Ireland) Order 1995 by paternal grandparents seeking contact with three children namely E born on 7 August 1995, E1 born on 26 July 1997 and A born on 17 August 1998. The background to this case is that the mother and father of the children, having married on 24 June 1994, separated in April 1999. Thereafter acrimonious proceedings ensued with various applications for contact by the father and the paternal grandparents. In the course of those proceedings the mother had made allegations that the grandfather had physically or sexually abused the children and in particular E1. A lengthy hearing in the course of 2002 ensued to determine the truth of these allegations and in the course of a judgment given by Judge Lockie on 21 March 2002 he rejected the allegations concluding, inter alia, that the mother had been instrumental in keeping the issue in the mind of her children especially in relation to E1. He found that the mother had failed to convince him on the balance of probabilities that E1 had been sexually abused by the

grandfather. Accordingly he considered that immediate indirect contact would take place between the children and the grandparents with the exchange of letters, cards and presents. The progression towards other indirect and later direct contact was to depend upon the professional judgment of the social workers.

[3] Following upon this, in February 2003 the judge provided further directions consequent upon the judgment delivered on 21 March 2002. He had made supplementary directions on 19 September 2002 regarding indirect contact between the paternal grandparents and the children. He proceeded to authorise direct contact between the grandparents and the children which was to be supervised by a social worker DC. He fixed a review of the case for 3 March 2003 in order to ascertain how the first contact arrangements had gone. When the matter became before the judge again on 7 March 2003 the issue was how to progress the contact with the grandparents. I am told that on that date the social worker DC had, prior to the sitting, conveyed to the parties further allegations of alleged sexual abuse involving the grandmother (which had not been made before) and the grandfather. The judge indicated that he refused to entertain a reopening of that aspect of the case having already made a determination of those issues in his judgment of 2002. In a written document dated 28 April 2003 Judge Lockie then proceeded to set out his reasons for that decision as follows:-

> "(1) No allegation of sexual abuse by the paternal grandmother was ever mentioned to any doctor or social worker during the period of approximately 30 months which elapsed since the issue of alleged sexual abuse by the paternal grandfather was under investigation.
>
> (2) The issue of sexual abuse has been fully analysed by Dr Swan in her report and explained by her when she gave evidence on 4 February 2002.
>
> Alleged sexual abuse was a sole issue which was exhaustively examined by counsel during two full days of evidence. My judgment dated 21 March 2002 provides a full summary of such evidence and my views.
>
> (3) The mother abandoned her appeal against my findings.
>
> (4) In view of the foregoing I refuse to accept that creditable allegations of sexual abuse now emerge. The observations read by Dr Swan – see the second

> paragraph of page 17 of my judgment, and my own views – see second paragraph of page 22 of the judgment, influenced my decision".

[4] The judge proceeded to make a series of directions concerning the nature of the contact that was to ensue and in particular, at direction 3, the following appeared in the court order:

> "The court grants leave for an expert to be engaged. The following documents can be disclosed to the expert – Judge Lockie's judgment, all social worker reports and Dr Swan's report. A joint letter of instruction is to be sent to the expert detailing what is required of them, documents to be disclosed and liberty to see further documents".

It was agreed by counsel on behalf of all the parties who appeared in front of me that the directions ought to have included the following additional sentence:

> "It is agreed that the issues of sexual abuse will not be reopened with the expert".

[5] The mother now appeals against that direction. The appeal was drafted in the following terms:-

"Under Article 166(1)(b) of the Children (Northern Ireland) Order 1995 against the decision His Honour Judge Lockie QC on 7 March 2003 at Belfast Family Care Centre when he made an interim order directing that a psychologist prepare a report in order to suggest ways to progress direct contact between the children and the first-named respondents and further that the allegations of sexual abuse should not be looked at as part of this assessment or in any further court proceedings."

Six grounds of appeal were thereafter set out as follows:

> "(1) That the learned judge erred in law in that he failed to pay any radical attention to the fresh sexual abuse allegations made by the children against the first-named respondents.
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> (2) That the learned judge erred in law in that he failed to permit the fresh sexual abuse allegations made by the children to be taken into consideration when determining the issue of contact between the first-named respondents and the children.

> (3) That the learned judge erred in law in that he failed to apply the welfare checklists and to give effect to the paramountcy of the interests of the children.
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> (4) That the learned judge erred in law in that he failed to take into consideration as to whether the direct contact between the children and the first-named respondents is in the best interests of the children in light of these fresh allegations.
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> (5) That the learned judge erred in law in that he failed to permit Dr Alice Swan or some other appropriate expert to consider the issue of the sexual abuse allegations and to prepare a report on the basis of same.
>
> (6) That the learned judge made a decision that should not have been reasonably made".

[6] Mr O'Hara, who appeared on behalf of the grandmother with Ms McKee, and Ms Quinn who appeared on behalf of the grandfather with Ms Steele submitted, in the course of careful skeleton arguments augmented with comprehensive legal submissions before me, argued that this court did not have jurisdiction to hear such an appeal, it being the exercise by the judge of his powers under Rule 4.15 of the Family Proceedings Rules (Northern Ireland) 1996 ("the 1996 Rules") and not an order made under the Children (Northern Ireland) Order 1995 ("the 1995 Order"). Mr Orr QC, who appeared on behalf of the appellant mother with Ms Simpson, in the course of an equally careful skeleton argument and cogent legal submissions, submitted that this did constitute an appeal or decision under Article 166 of the 1995 Order. He submitted that the decision as regards sexual allegations was not an interim but a final order and could therefore be subject to appeal.

[7] Statutory Background

Article 166 of the 1995 Order provides, where relevant, as follows:

> "(1) Subject to any express provisions to the contrary made by or under this Order, an appeal shall lie to the High Court against –
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> (a) the making by a County Court of any order under this Order; or

(b) any refusal by a County Court to make such an order,

as if the decision had been made in the exercise of the jurisdiction conferred by Part III of the County Courts (Northern Ireland) Order 1980 and the appeal were brought under Article 60 of that Order."

The County Courts (Northern Ireland) Order 1980 (hereinafter called "the 1980 Order") provides, where relevant, at Article 60:

"(i) Any party dissatisfied with any decree of a County Court made in the exercise of the jurisdiction conferred by Part III may appeal from that decree to the High Court."

Article 2(2) of the 1980 Order where relevant, defines a "decree" as including:

'A dismiss, a decree on a counterclaim in any order, decision or determination made by a County Court in any civil proceedings instituted by virtue of any statutory provision …'.

Article 60 only creates a jurisdiction in the High Court to hear appeals under Part III of the 1980 Order and accordingly in order to ensure that there were appeals to the High Court from the Family Care Centres under the 1995 Order, Article 166 of the 1995 Order specifically refers to Part III of the 1980 Order. Mr O'Hara argued, and I agree, that there would be no general right of appeal in a children's case from the County Court to the High Court in the absence of Article 166. In other words, orders made under any statutory jurisdiction are excluded from Article 60 unless, as in the case of Article 166 of the 1995 Order, it is specifically stated to be included.

(3) The Family Proceedings Rules (Northern Ireland) 1996, made in exercise of the powers arising out of Article 12 of the Family Law (Northern Ireland) Order 1993 ("the 1993 Order") provide at Rule 4.15, where relevant, as follows:

'Directions

4.15–(2) In proceedings to which this Part applies the court may, subject to paragraph (3) give, vary or revoke directions for the conduct of the proceedings, including –

(a) the timetable for the proceedings;

(b) varying the time within which or by which an act is required, by these rules or other rules of court, to be done;

(c) the attendance of the child;

(d) the appointment of a guardian ad litem …

(e) the service of documents;

(f) the submission of evidence including experts' reports;

(g) the preparation of welfare reports under Article 4;

(h) the transfer of the proceedings to another court;

(i) consolidation of other proceedings."

[8] Rule 4.15 is contained in Part IV of the 1996 Rules under the heading "Children (Northern Ireland) Order 1995". These Rules make provision therefore for, inter alia, various procedures under a number of statutes including for example the Matrimonial Causes (Northern Ireland) Order 1978, the Matrimonial and Family Proceedings (Northern Ireland) 1989, the Child Support (Northern Ireland) Order 1991 as well as the 1995 Order.

[9] These Rules are therefore not made under the 1995 Order. Accordingly any direction given by a court under Rule 4.15 in the Care Centre does not come within the ambit of Article 166 of the 1995 Order and accordingly cannot be appealed under that Article.

[10] This does not apply to all directions. There are directions which clearly can be made under the 1995 Order and these are subject to appeal. An illustration of this is Article 56(6) of the 1995 Order which states:

> "(6) Where the court makes an interim care order or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child …".

[11] In re O (Minors) (Medical Examination) 1993 1FLR 860, dealing with the comparable rule in Section 38(6) of the Children Act 1989, Ratte J said:

> "The proposition that a direction under Section 38(6) is not within the right of appeal under Section 94 (*of the 1989 Act which is comparable to Article 166 of the 1995 Order*) depends upon a distinction sought to be drawn between an "order" referred to in Section 94(1) and a direction referred to in Section 38(6). In my judgment, such an distinction is misconceived, because any direction made by the magistrates under Section 38(6) is plainly comprised in an order made by that court and I have no doubt that on its true construction Section 94 gives a right of appeal to this court against, inter alia, any direction by magistrates under Section 38(6) of the 1989 Order".

[12] I respectively concur with the view held by that court. To that extent I consider that the reference in the publication issued by the Department of Health and Social Services 1996 entitled "The Children Order, Guidance and Regulations, Volume 1, Court Orders and Other Legal Issues" is incorrect at paragraph 10.14 in stating that such directions under Article 57(6) and Article 57(7) are not appealable. I consider they are appealable because they are orders made under the 1995 Order but that directions made under the 1996 Rules at paragraph 4.15 are not appealable for the very same reason.

[13] I consider that this is a broad and purposive approach to the language of the rules and to Article 166 of the 1995 Order. One of the statutory duties under Article 3(2) of the 1995 Order is to ensure that the courts will have regard to the general principle that any delay in determining a question with respect to the upbringing of a child is likely to prejudice the welfare of the child. Rule 4.15 of the 1996 Rules deals with the manner in which a judge in the Care Centre conducts the proceedings. If an appeal was to be opened for a matter such as his timetabling, his transfer of proceedings to another court, his variation on the time within which rules are to be complied with and other similar matters of conducting the case then there could well be inordinate delay in these very important cases being processed. Parliament can never have intended that that would be the case and hence I believe that is the reason why there is no statutory provision for appeals against such directions to the High Court. Of course when the substantive order is made under the Children Order eg a contact order, a residence order, a supervision order/care order etc, then an appellant may invoke various aspects of the conduct of the hearing as grounds of appeal on the substantive issue. If, for example, the Care Centre judge has been plainly wrong in refusing to admit medical evidence or refused the attendance of a child at the hearing, these can form a basis for material grounds of appeal on the order made pursuant to the 1995 Order. In this way an appellant is not deprived of his right of appeal in a

matter of substance including his rights under Article 6 of the European Convention on Human Rights and the right to a fair trial.

[14] Consequently, I reject the argument of Mr Orr that the directions given by the judge in this instance constituted a final order which could not be revised either by way of variation or revocation. The judge described this as a direction and I have no doubt that it was made pursuant to Rule 4.15. It is not possible therefore to characterise it as an order, whether final or interim, pursuant to the 1995 Order. The fact that the genesis of these proceedings is an Article 8 application for contact under the 1995 Order, does not render these directions, made as I have found pursuant to Rule 4.15, as having been made under the 1995 Order.

[15] I therefore conclude that this appeal should be refused.

[16] I did invite the parties to address me on the substantive issue in the case. However, since it is conceivable that this whole matter may come before me on yet a further appeal on the substantive issues on the hearing, I consider it inappropriate that I should make any further comment at this stage. Accordingly the appeal shall stand dismissed.