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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

_____

RE C (CONTACT: GRANDFATHER)

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GILLEN J

[1] The judgment in this matter is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and any other person identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the child and the adult members of his family must be strictly preserved.

[2] In this matter, P, the grandfather of C a child born on 18 May 2002, seeks an order from the court pursuant to Article 8 of the Children (Northern Ireland) Order 1995 ("the 1995 Order") that he may have a contact order in relation to C. I have already granted leave to this applicant to make such an application and a copy of the judgment (the earlier judgment) in that matter is appended to this judgment.

Factual background to the application

[3] I have already set out at some length the factual background in this case at page 4 paragraphs 5 and 6 of my judgment when I granted leave. For ease of reference I shall repeat what I said therein.

> "The background to this case includes the fact that this applicant in February 1999 was found by the late Higgins J to have sexually abused K, the sister of D who is the mother of C. At that time K was six years of age. The court raised the possibility that he had

abused two other children. The judge at that time said:

> 'Undoubtedly the girls would be at risk from (the applicant), but, if he only has access to them, they can be protected by supervision of access visits. I think that it is in the best interests of all the children that they should visit (the applicant) provided that-
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> (a) no child will be forced to visit (the applicant);
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> (b) each visit will be supervised by a social worker; and
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> (c) visits will take place only once every three months at such time and place as the guardian may decide.
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> It is in my opinion that these arrangements will provide sufficient protection for the children.'

Higgins J at that time said of the applicant that he was a man with little regard for the truth, an unreliable witness and an untrustworthy person. There is also before me a welfare report of a social worker Mr Bernard Connolly of 30 March 2000 in which he describes the applicant as 'very threatening, obstinate and extremely difficult to work in partnership with. It has taken a lot of patience to contain his emotions within working parameters.' D has indicated that she has had very little meaningful contact with the applicant between 1991 and 2000 despite the discharge of the deemed care order made concerning her in 1991. She has alleged that the applicant has made efforts to harass her and upset her family including an allegation that he had followed her in a local store. The applicant denies these allegations (including the allegations found as proven before Higgins J) and asserts that he simply wishes to establish some degree of relationship with his grandson whom he has not seen. He asserts in paragraph 29 of his statement of 11 September 2003:

> 'My motivation in applying is to build up a rapport with my grandson and have him know that I too am part of his family and identity. I do not want my grandson to grow up unaware of who I am nor to think of me maliciously'."

[4] In the course of his application in the Form C1 prescribed by the Rules, the applicant set out his reasons for applying as follows:

> "I am the grandfather of the child. This is my first grandson and I would wish to be able to see the child and build up a relationship with him. I have been estranged from the family and the children for 14 years. I feel it would be in the best interests of the child to know his grandfather and I feel it is very important for myself to see my grandson. I will abide by the arrangements with the mother of the child in relation to the access. I feel that the previous cases 14 years ago were unfair and as a result I was estranged from my family. However I emphasise that it would be in the interests of the child to know and to have some sort of relationship with his grandfather."

[5] It is clear from this statement and the evidence before me that for years there has been very little contact between the applicant and his daughter, the mother of this child. It is equally clear that he has refused to accept the finding of the court in the past that he was guilty of sexual abuse. In a report before me from AC, a social worker with the relevant Trust, dated 14 November 2003 at page 8 of that report the following was recorded:

> "(The applicant) considered he was not aware of any reason why there should be difficulties with contact other than those 'my ex-wife, as a result of her coaxing over the years may have induced'.
>
> He referred to the allegations of physical and sexual abuse of his children and to the fact he had not been prosecuted for alleged abuse. (The applicant) considered his children 'may have been subjected to some form of abuse and to date the perpetrator has not been brought to book'.

> He commented when the wardship application was granted, the judgment 'did not come out in my favour' and he 'unreservedly refuted the findings'."

[6] I found it significant that the in course of that interview with the social worker, the following is recorded at page 9:

> "He (the applicant) understood this application was for contact with C but 'the goodwill which I wished to express to my grandson is also there for D' and 'my primary contact is with C – with the extension of that contact to D'."

[7] I had the benefit of reading statements made by the applicant for the purpose of this hearing and hearing evidence from him in person before me.

[8] I formed precisely the same view as that held by Higgins J that this man was untruthful and untrustworthy. His answers were evasive and disingenuous. I have concluded that his real motivation in mounting this application is to perpetuate the battle that he found years ago and lost in front of Higgins J. Oblivious to the consequences for D he has engaged on a campaign to pursue the issue of contact with his daughter and this current application is but one avenue for that pursuit. There was before me a report from D's general practitioner outlining the traumatic effect that this man's pursuit is having upon her. His report of 9 October 2003 records:

> "D is a patient of mine and tells me that her father is seeking access to her son. I understand that D was abused by her father and was in fact made a ward of court when she was 9 years old and has had no contact with her father since that time. She is finding this application by her father for access to her son extremely stressful in view of the experiences which she has experienced. This is adversely affecting her sleeping pattern and lifestyle at the moment. I feel that a decision needs to be made in the fairly near future in order to avoid unnecessary stress for D."

[9] All the evidence before me is that this young woman, despite having had a very difficult family background, is now not only a good mother to this child but is seeking to make a life for herself and C free of the influence of this applicant. I have concluded that the applicant is bent on frustrating that wish on her part and seeks now to insert himself unhappily back into her life through the vehicle of this application. In evidence before me he categorically stated that D had told lies about him about the sexual abuse and he refuted the court findings in all its aspects by Higgins J. He readily

admitted that he had only seen her perhaps five or six times over a number of years and that this present application was likely to have caused her distress. He conceded that the rest of the family are of the same view as her. Indeed I had before me a signed statement by D's siblings outlining the distress that this was causing D and their wish to make it known that in the event of any one of them becoming parents they would not permit this man to have contact with their children. Poignantly the statement concludes:

> "He has not had any involvement in our lives for many years and we feel that his current actions are not born out of any desire to see C but rather yet another attempt to cause distress to D and indirectly to all of us. We believe that his intrusion in her life is unwarranted and very unwelcome."

[10] I watched this man carefully as he gave evidence before me and I found it chilling to observe the evident indifference that he exhibits to the present plight and feelings of this mother and to her concerns about the abuse that he has visited upon this family in the past. I formed the clear impression that he was prepared to leave no stone unturned in order to try to achieve his ends and to intervene in the life of a family who have now rejected him because of his sexual abuse of them. Observing him, I was left without the slightest doubt that his assertion that he simply wishes to establish some degree of relationship with his grandson is disingenuous and that his real motive is to reassert himself into the life of D and her siblings.

[11] The mother did not give evidence in this case and I confess that this did not surprise me in light of the contents of the medical report. However I did hear evidence from the social worker AC who had prepared a report for this court and to which I have already adverted. It was his firm conclusion that there should be no contact, either direct or indirect, between the applicant and C. It was his view that this would not only occasion distress to the mother but it would have an impact upon the child who would recognise his mother's distress in these circumstances. D trenchantly described to the social worker how it was her view that the applicant did not really want contact but that this application "was his way of keeping hell going". Whilst I accepted that the Trust could facilitate indirect contact by being a receptacle for cards and presents, the mother was unequivocally opposed to this. AC declared that indirect contact would simply keep the history of abuse "going" and would prevent this mother starting her life afresh clear of influence and contact with this applicant. It was AC's view that "what meets her interests, will meet the child's interests". This mother has had a great deal of social work involvement in the past and in AC's opinion the reintroduction of social services yet again into her life would be detrimental to her well being given the abuse and cruelty that she alleges occurred to her as a young child at the hands of this applicant. His denial that he was the perpetrator was in AC's

opinion, a major obstacle to any reconciliation. This has all rendered her a vulnerable young adult. Her turbulent childhood, this whole process and the application itself has distressed her enormously. This all carries a resonance of the findings of Dr Keenan, child psychologist, who when interviewed in March 1989 for the proceedings before Higgins J stated that she "has obviously undergone severe emotional distress" and "the prognosis for this child is good if her father ceases to have any contact with her ". It is my firm view that the best prospect for this young woman's continued welfare and therefore that of her child is to respect her right to have no involvement with the applicant so long as she wishes that to be the case. C has had no contact whatsoever with the applicant and therefore is unlikely to experience any significant lose by this position continuing. In any event, his abuse of children in the past renders any benefit of contact with this child as highly questionable.

Legal principles governing this application

[12] The influence of the Human Rights Act 1998 has been strongly felt in the context of family proceedings. Apart from the articles of the European Convention, to which I will shortly turn, there has also been an increasing receptiveness to the perspectives of other disciplines, namely mental health professionals and social science researchers. The courts must recognise that those from other disciplines are becoming indirect agents of change albeit that the extent of their influence must be controlled by the courts.

[13] Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the European Convention") confers the right to respect for private and family life potentially to be enjoyed by all family members. Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

The Convention rights must be considered in private law proceedings such as this under the 1995 Order by virtue of Section 3 of the Human Rights Act 1998 ("the 1998 Act"). This so called "horizontal effect" has been expressly acknowledged in this context by the Court of Appeal in Payne v Payne (2001) 1 FLR 1052. Hokkanen v Finland (1996) 1 FLR 289 is authority for the proposition that parents' (and indeed grandparents') rights to family life with children under the Convention include contact but it must also be recognised that a child has rights of his own. (See Marckx v Belgium (1979) 2 EHRR 330). Self-evidently, no individual's right can be absolute. It is necessary for the courts to carry out a balancing exercise that must be undertaken in relation to the potentially conflicting rights of various family members. However the child's right is to be accorded special weight. (See K and T v Finland (2001) 2 FLR 707. The matter has been summed up well in the context of contact cases in Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence) (2000) 2 FLR 334 where Dame Elizabeth Butler Sloss P observed:

> "Article 8(2) provides the crucial protection for the child .. who also has rights under the Convention … In Hendricks v Netherlands (1983) 5 EHRR 223 the court held that where there was a serious conflict between the interests of a child and one of its parents which could only be resolved to the disadvantage of one of them, the interests of the child had to prevail. The principle of the crucial importance of the best interests of the child has been upheld in all subsequent decisions in the European Court of Human Rights."

I must be conscious therefore that in this application under Article 8 of the 1995 Act, the best interests of the child are paramount.

[14] I am satisfied that "family life" within the meaning of Article 8 of the European Convention can include the relationship between grandparent and grandchild. The European Court of Human Rights in Bronda v Italy 40/1997/824/1030 concluded as follows at para 51:

> "The court recalls that the mutual enjoyment by parent and child of each others company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8. That principle applies, too, in cases like the present one in which the court is concerned with the relations between a child and its grandparents, with whom it had lived for a time."

In that case there was no dispute that family ties existed between the grandparents and the child and came within the notion of family life pursuant to the meaning of Article 8. Mr Long QC, who appeared on behalf of the applicant with Mr Ritchie, properly drew my attention to the more recent authority of Kutzner v Germany (2003) 1 FCR 249 where the European Court of Human Rights dilated upon the principle. The court recorded at paragraph 61 the following:

> "Although the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life. Thus, where the existence of a family tie has been established, the State must in principle act in a manner calculated to enable that tie to be developed and take measures that will enable parent and child to be reunited."

That same case is clear authority for the proposition that any interference with the right to respect for family life entails a violation of Article 8 unless it was 'in accordance with the law', has an aim or aims that is or are legitimate under Article 8(2) and are necessary in a democratic society for the aforesaid aims. The notion of necessity implies that the interference corresponds to a pressing social need and in particular that it is proportionate to the legitimate aim pursued.

[15] I am satisfied that there has been a growing acceptance within both domestic and international law that, as Ward LJ said several years ago in Re H (Paternity: Blood Test) (1996) 2 FLR 65:

> "Every child has a right to know the truth unless his welfare clearly justifies the cover up."

The United Nations Convention on the Right of the Child 1989 which the United Kingdom has ratified provides that every child has "as far as possible, the right to know and be cared for by his or her parents" and the right to "preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference". It is noteworthy that the United Nations Committee on the Right of the Child has criticised on a number of occasions the secrecy that traditionally surrounds "western" adoption practices in this regard (See Children and Family law Quarterly (2001) p. 414). In Gaskin v UK (Access to Personal Files) (1990) 12 EHRR 36 the ECrtHR endorsed the view of the Commission that "respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be

obstructed by the authorities from obtaining such very basic information without specific justification". On the other hand I am equally satisfied that that right is not absolute and must be balanced against a variety of competing interests in accordance with Article 8(2) of the Convention. The court must balance adult Convention rights, whether of a grandparent or other relative, with the welfare of the child concerned. The locus classicus of the proposition is found in Z County Council v R (2001) 1 FLR 365 where, in the course of adoption hearings, the court held that local authorities were under no obligation to inform or consult the child's wider family. Any right of the child to family life with relatives who did not know of the child's existence in that instance was thought to be outweighed by a combination of the mother's right to confidentiality (an aspect of respect for her private life) and the child's own right to be protected.

[16] I reiterate what I have set out in the earlier leave hearing in this matter (Re C (Article 8 Order: Article 10(2): Grandparents Application for Leave) unreported GILF4036) that there is a growing awareness of the important role of grandparents in the life of children, particularly young children (See Re W (Contact: Application by Grandparents) (1997) 1 FLR 793). Nonetheless the courts can rarely determine such applications purely on the basis of the "status" of being a grandparent. Parliament has not conferred such a status and accordingly grandparents will usually have to justify on the facts the existence of real family life based on more than the blood tie simpliciter.

[17] The child's welfare is paramount and all the factors in Article 3(3) of the 1995 welfare checklist apply. The court has to consider whether the fundamental need for a child to have an enduring relationship even with parents, is outweighed by the harm which a child would risk suffering by virtue of a contact order. In Re H (Contact Order) (No. 2) Wall J held that in that instance the most important consideration in the welfare equation was the need to protect the mental and physical health of the children's primary carer which would itself impact adversely on the child. That need outweighed the children's need to have direct contact with their father. I consider that that is an important principle in this case.

[18] In deciding any contact case, the court must considering the following principles pursuant to the 1995 Order:

(a) The principle of the child's welfare shall be the court's paramount consideration.

(b) I must make no order unless to do so would be better for the child than making no order at all.

(c) I must recognise that any delay in determining any question with regard to this question of contact is likely to prejudice the welfare of the child. The avoidance of delay must be given a priority by the court.

(d) I must consider the ascertainable wishes and feelings of the child concerned (in this case the child is too young).

(e) I must apply all the various factors set out in Article 3(3) of the 1995 checklist. I do not need to set out the checklist in extenso. Suffice to say that I have considered them all in detail in this instance and in particular any harm that the child may suffer. I adopt the approach of Wall J in Re H (supra) where he adopted the helpful approach proposed by Wilson J in Re M (Contact) (Welfare Test) (1995) 1 FLR 274, 278-279 where he said:

> "I personally find it helpful to cast the principles into the framework of the checklist of considerations set out in Section 1(3) of the Children Act 1989 and to ask whether the fundamental emotional need of every child to have an enduring relationship with both his parents (s1(3)(b)) is outweighed by the depth of harm which, in the light, inter alia, of his wishes and feelings (s1(3)(a)) this child will at risk of suffering (s1(3)(e)) by virtue of a contact order."

Conclusions

[19] I have determined that in this case the applicant's application must be refused. In my view it must be for the mother to decide what contact her child has with her father and other members of the family. It must be for her to decide what the child is to be told and when. It is a considerable burden for her to bear alone but I am satisfied that as the child's primary carer she in her new life will now seek advice as and when she needs it. She will be better able to care for this child because there is no order requiring her allow the child to have contact with the applicant. In coming to this conclusion I have taken into account all the factual findings I have made and legal principles. In particular I have carried out the balancing exercise required in the application of Article 8. I have concluded that the order is in accordance with the law, is necessary for the protection of the rights and freedoms of all parties involved and is proportionate to the need to protect the welfare of this child. I do not believe that this applicant has the interests of this child at heart and as I have indicated his motivation is more attuned to inserting himself into the life of his daughter. This application is but a further unwelcome and carefully calculated intrusion by him into her life. This cannot be in the interests of the child since it will almost inevitably lead to an adverse effect on

the health of the child's primary carer with an accompanying knock on effect on the child. I propose to make no order on the father's application for indirect contact because I am satisfied that this mother will take the appropriate steps in due course to inform this child of his family background in an appropriate manner. It will be a delicate and difficult task given the findings that have been made against this applicant. However I am satisfied that the life story work that this mother will carry out with this child will meet this concern in an informed and appropriate manner at the proper stage when she considers the child is mature enough to understand the issues. I would encourage her to seek professional help if necessary on these issues and I am certain that the Trust involved in this case will be willing to supply that assistance at the appropriate time in the future. In the meantime I earnestly hope that this woman will now put this current stress behind her and fulfil the expectations of successful motherhood that are held by the social workers in this case and indeed this court. I trust that she should be able to do this without the continued interference of this applicant. Should that not prove to be the case then the parties should be aware that this court has power to consider other remedies.