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Judgment: approved by the Court for handing down | *Delivered:* **27/10/04**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (CROWN SIDE)

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WK (A CHILD)

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McLAUGHLIN J

[1] This is an application for judicial review brought by WK (a minor) acting by Brenda Mary Donnelly, the Official Solicitor, as his next friend. It arises out of proceedings conducted at Coleraine Family Proceedings Court by Mr Robert Alcorn, Resident Magistrate, and two lay assessors. The proceedings were launched initially in respect of a decision made by him on 26 April 2004 and also a decision of Causeway Health and Social Services Trust dated 23 April 2004. In the event the proceedings against the Health and Social Services Trust were not pursued.

[2] The applicant was born on 3 December 1989 and thus was 14 at the relevant date. The proceedings consisted of an application for a Secure Accommodation Order (hereinafter referred to as a SAO) by the Trust and was based on the circumstances relating to the breakdown of the relationship between WK and his parents. The matter was complicated by virtue of the inability of the Trust to deal with the applicant whose behaviour had been so unruly that he might reasonably have been described as unmanageable. He had committed quite serious assaults on staff and inmates of various facilities wherein he had been accommodated and had also carried out similarly vicious assaults on his own parents: they had admitted they were unable to manage or control him and were unwilling to have him return home to their care. He was made subject of an Interim Care Order in separate proceedings on 7 April 2004. The application for a SAO came before the court on 16 February 2004 when an order for a three day period was made. This was reviewed on 19 February and renewed. A further order was made on 22 February when there was no objection made to the application by the Trust. The matter next came before the court on 22 March when he was not present

but he was represented by a solicitor who indicated that she had no instructions to agree to or oppose the application. An order was then made. The case was due for further consideration on 26 April when the events which transpired which gave rise to the present application. In the period after the making of the order in March the Trust was made aware by the applicants solicitor that objection would be raised to making a further order at the court in April. Due to the many difficulties which were being presented to the Trust by the behaviour of WK the question arose as to whether or not they would be able to produce him to the court. I do not propose to rehearse at this stage the details of his behaviour. The conduct of the applicant has never been disputed and included assaults on staff, fellow inmates and threatening behaviour of various kinds and he clearly presented as a threat to anyone in contact with him.

[3] A detailed risk assessment was carried out by the Trust, the rigour and accuracy of which is not disputed. The conclusion was that they could not expose their staff to the risk of escorting him to court in the interests of both members of staff and himself, that no suitable alternative was available and the difficulty presented was obvious. The outcome of the risk assessment was made known to his legal representatives. I incorporate the entirety of the risk assessment into this judgment and accept its conclusions.

[4] No application was made to the court by the applicant for directions and there was no warning given to the magistrate that when the court was convened on 26 April that a difficulty was likely to arise due to his anticipated absence. Since it was the intention to contest the application for an order which was to be made that day by the Trust it was incumbent upon the applicant and his representatives to ensure that his statement of evidence was before the court, in accordance with the rules, or to seek directions from the magistrate. No pre-hearing directions were sought and the matter proceeded.

[5] On the day of the hearing objections to making an order were made and indeed the applicant's legal representatives sought an adjournment on the basis that his absence constituted a breach of his human rights contrary to Articles 5 and 6 of the European Convention on Human Rights.

[6] The magistrates then conducted a hearing which Mr Alcorn describes in his affidavit (page 100 of the bundle) in the following terms:

> "The court decided to hear evidence in relation to the circumstances of the application and the application itself. Prior to the hearing the court had received reports from the Trust Mr Paul Johnston, senior social worker and Ms Kelso. social worker, gave evidence in line with the written evidence of the Trust. In particular the court was told that the subject of the

> application had been aggressive in Lakewood to such an extent that he had frequently to be supervised away from other detainees to protect them from being harmed by him. Because of his disruptive and aggressive behaviour the subject of the application was having to have one to one supervision nearly all the time. The court was further told that the subject's sole objective was to get out of Lakewood. The court, moreover, was told that the Trust was investigating possible specialist placements in England and Scotland for the subject as there was no establishment in Northern Ireland which was suitable to cope with him. The witnesses were cross-examined by Ms Kerr (counsel for the applicant). Although the mother through her solicitor, Mr McLernon, supported the child's request to be present in court, it was indicated that she did not oppose the Secure Accommodation Order. The guardian ad litem supported the Trust's application."

[7] The learned Resident Magistrate then sets out that following submissions and receipt of evidence the court retired. On return to court the Bench announced its decision to grant a further interim SAO. They decided not to adjourn the proceedings as a failure to deal with the substantive application would mean the subject of the application, who in the court's view met the criteria for a SAO, would have to be discharged in circumstances where he would have no home to go to and there was no suitable institution in Northern Ireland which would take him.

[8] It should also be underlined that in the course of the proceedings before the Bench the applicant was represented by both solicitor and counsel and a guardian ad litem had been appointed to act on his behalf. It was the guardian's role to be his voice in all proceedings and the guardian, Mr Peter McAllister, was a most senior and experienced officer well used to arguing points in court, disagreeing with a Trust where necessary and arguing any relevant point on behalf of an applicant.

[9] The learned Resident Magistrate has also pointed out that having heard the material put before the Bench it was obvious that the criteria for the making of a SAO, set out in Article 44(2) of the Children (Northern Ireland) Order 1995, had been met which had the effect of rendering it mandatory that the court should make such an order. It is hard to see how any other outcome could possibly have resulted. It would have been unthinkable to simply adjourn the case with the consequence that the Trust would have had no lawful authority for holding WK for his own protection, or the protection of others with the consequence that he would have been cast onto the streets.

Article 44(2) of the 1995 Order is in the following terms:-

> "(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 –
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> (*a*) that –
>
> (i) he has a history of abscond from any other description of accommodation; and
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> (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."

[10] Following upon complaints about his previous behaviour he was arrested on 16 May 2004 and charged with criminal offences resulting in his being remanded in custody by a court at Downpatrick on 17 May 2004. He has since been discharged from custody. The effect of the later criminal proceedings was to render the SAO unnecessary and the outcome of these proceedings became academic thereafter.

[11] An appeal was entered immediately after the decision was handed down by the Bench but no step was taken to progress that appeal. Instead an election was made to pursue these proceedings on the basis that there some general point of importance to be determined. I made my own views fairly clear about that matter in the course of the hearing and I do not propose to say anything further save to add that the various health trusts in Northern Ireland have now made arrangements which have the effect of overcoming the difficulty which arose in this instance. In those circumstances the outcome of these proceedings has no useful benefit for the applicant.

[12] The argument advanced is that I should make various declarations to the effect that his treatment breached his right to a fair hearing and a fair trial by virtue of his absence. It was said that the Magistrates were under a duty to conduct a prior hearing to determine whether or not the proceedings could be fair in the absence of the applicant. In fact what did happen was that magistrates heard that aspect of the case together with all of the background facts so that they might come to a balanced decision. It is self-evident that in the ordinary course of events a clearly interested party should be entitled to

be present for the hearing of a civil or criminal matter but the right is not absolute. There are circumstances, for example, in which an injunction might be granted where the interests of justice appear to demand action by a court in the absence of one party. This is regarded as a proportionate response in particular circumstances and is coupled with safeguards of granting the injunction subject to the right to apply at short notice to have it lifted.

[13] In this case the Magistrates were faced with a dilemma which was not of their own making. In spite of all of the provisions of the rules of court requiring statements of evidence, permitting preliminary directions hearings and requiring evidence to be given in written form none of these steps was taken on behalf of the applicant. It is difficult to avoid the conclusion that there was no additional point that could have been made on his behalf which might have had any influence on the outcome of hearing. Certainly nothing has been put before me to suggest that the outcome might have been different had he been present and able to give direct oral evidence rather than to present his case on paper with the assistance of counsel and his guardian ad item.

[14] It has been argued that the Magistrates should not have taken into account factors such as the difficulty that would be created by failing to make an order that day, when deciding whether to grant an adjournment. I am simply unable to follow the logic of this. They were required to decide whether an adjournment was the appropriate course and could only have done that having regard to all of the circumstances. No doubt a very important circumstance was the absence of the applicant, but it was not the only consideration. To have conducted such a "restricted" hearing confined to whether or not an adjournment should have been granted because the applicant was absent would have been a travesty. It might also have resulted in a dangerous outcome for the present applicant when the court was under a statutory duty to act in his best interests. Not only did the Magistrates hear the evidence in court but they also had the written reports of the case social worker and the guardian ad litem. It is sometimes forgotten that a Family Court acting under its own special rules has available to it a welter of evidence which is not actually presented orally in the traditional fashion as otherwise the courts could not function effectively. The Magistrates were entitled to take into account all the evidence, they clearly gave considerable scope to the parties to argue the various points before them and indeed conducted a full hearing. During that hearing the applicant was represented throughout by experienced solicitor, counsel and the Official Solicitor, they had full opportunity to challenge the evidence and to cross-examine and all proceedings were held in open court.

[15] There was no request by the guardian that the applicant should attend court, indeed she considered it appropriate that a SAO should be made and he should not attend court. 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. This case must be distinguished very clearly from other circumstances such as that dealt with by Higgins J in *North and West Health and Social Services Trust v DH* [2001] NI 17 where a Secure Accommodation Order was sought in the absence of the proposed subject when he had absconded. Having considered the remarks of Higgins J I do not consider that he was laying down an absolute rule, indeed he made it clear that he was not, and the facts and circumstances of that case are significantly different from the present one.

[16] The applicant also sought to make the case that the magistrates ought not to have proceeded to a determination as they did but ought to have made alternative arrangements for a hearing which would have involved the applicant more directly, in particular it was suggested that a video link might have been tried or that they might have adjourned the proceedings to the Lakewood facility where he was held. In my opinion this was dealt with at the hearing when it was made clear that there were no video link facilitates at Lakewood at the time. In addition it would have been impossible for the magistrate, with his lay assessors, to have left Coleraine and to travel to Belfast when they were in the midst of conducting a list of cases before the Family Proceedings Court.

[17] I was told by counsel and accept that it is possible for a court to be convened in the Lakewood complex but that it requires three days notice in order to ensure that all relevant facilities are available not least a panel of magistrates and court officials to ensure the proper conduct of the proceedings. No prior application was ever made to the court, nor indeed was there any suggestion that a video link might be tried. These arguments were raised after the event and it was then said that it was the magistrate's duty to have considered them for himself. As a highly experienced magistrate sitting in the Family Proceedings Court Mr Alcorn would have been fully aware of the absence of any video link. He would also have been aware of the possibility of making a short term SAO in order to convene the court in Lakewood. That however was not necessary because having heard all the relevant facts they decided an order for one month was appropriate in his best interests.

[18] After giving the matter consideration I am of the clear view that the process put in place by the Bench was eminently fair and designed to meet the requirements of the particular case. Given the extent of the representation

of the applicant's voice at those proceedings, set against the difficulties that securing his presence in court presented, I am satisfied that a proper balance has been struck. There was no practical or legal alternative but to make the SAO and nothing to the contrary has ever been suggested. Since all relevant evidence was before the court, the Order and Rules of Court were complied with and he was fully represented, I do not consider that there has been any breach of the applicant's rights under Articles 5 or 6 of the Convention and dismiss the application.