

Judicial Communications Office

11 March 2019

COURT CLARIFIES ARRANGEMENTS FOR APPLICATIONS FOR EMERGENCY PROTECTION ORDERS

Summary of Judgment

The Court of Appeal today clarified the procedure for District Judges (Magistrates' Courts) when determining applications for Emergency Protection Orders.

On 5 October 2017, the South Eastern Health and Social Care Trust ("the Trust") made an application for an Emergency Protection Order ("EPO") in respect of two children of pre-school age. The solicitor to the Trust contacted the solicitors for the mother and father advising that the application had been served and advising them to travel to Craigavon Court for the hearing. Later that afternoon the Trust advised the children's mother ("the appellant") of their intention to bring the application. During his journey to the courthouse, the appellant's solicitor received a telephone call from a member of the court staff and was told he would have to remain at the back of the courtroom and would not be permitted to speak during the application. He was also advised that the appellant would not be permitted into the courtroom during the hearing. The proceedings had started before the solicitor arrived and, in accordance with the judge's direction, he and the appellant and her witness remained outside the courtroom during the hearing.

The appellant, the Trust and the Department of Justice ("DoJ") all agreed before the Court of Appeal that the application was intended to be, and should have been, treated as an *inter partes* application. It was further agreed that there was no justification for proceeding on an *ex parte* basis and the written application did not purport to be this. Nonetheless, at the outset of the hearing on 5 October 2017 the Trust applied for leave to proceed *ex parte*. It told the Court it did so on the ground that the situation was urgent as this was the only way that it could get the EPO application heard that evening and the District Judge (Magistrates' Courts) ("DJMC") considered he had no jurisdiction to conduct an *inter partes* contested hearing when sitting alone. In his affidavit he stated that "the notion of somehow re-constituting a Family Proceedings Court ("FPC") out of hours did not occur to him". Following the hearing, the DJMC granted an EPO and the children were removed from the mother's care and fostered separately for a period of seven days (the duration of the EPO).

The appellant sought the opinion of the Court of Appeal on the following matters:

- Whether it was correct in law for the DJMC to not allow her, who had been put on notice of the hearing, to give evidence or make submissions to contest the Trust's application for an EPO which sought to remove her children from her care;
- Whether it was correct in law to dismiss the lay panel members who had been sitting in Craigavon Family Proceedings Court on 5 October 2017 at 6.20 pm and thereafter at 6.25 pm to proceeding to hear the application for an EPO *ex parte* sitting as a magistrates' court.

The DJMC sought the opinion of the Court of Appeal on the following matter:

- Whether he was correct in law in holding that a DJMC, sitting alone, whether in or out of petty sessions, does not have jurisdiction to hear an application for an EPO unless satisfied

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that the application must proceed on an *ex parte* basis and therefore cannot entertain representations of evidence from a respondent, regardless of whether or not the applicant has informed the respondent of the intended application.

Statutory Framework

The Children (Allocation of Proceedings) Order (Northern Ireland) 1996 (“the 1996 Order”) provides that applications for EPOs shall be commenced in a family proceedings court, which is defined as a resident magistrate, who shall be chairman, and two lay magistrates, of whom one, at least, must be a woman. There are only two statutory exceptions to this requirement:

- Schedule 2, paragraph 4 of the Children and Young Persons Act (NI) 1968 provides that the DJMC shall have the power to act notwithstanding that any other member “fails to attend and remain present during the sitting of the court”. The Court of Appeal said this provision had no application in this case as the lay magistrates were never asked to attend. It commented that the DJMC was aware during the course of the sitting of a properly constituted FPC that an application for an EPO was being brought, the parents had been put on notice and their solicitors were travelling to court for the purpose of the hearing. The Court said the lay magistrates could have been requested to remain to allow a properly constituted FPC to preside or, alternatively the DJMC could have directed that attempts be made to recall the lay magistrates who may have just departed. Instead, the DJMC explained in his affidavit that “the notion of somehow re-constituting a FPC out-of-hours did not occur to him”.
- Rule 2(5) of the 1996 Order provides that proceedings on an *ex parte application* can be dealt with by a DJMC sitting alone. Case law emphasises, however, the extreme gravity of such applications and the exceptional circumstances which would have to be established to justify proceeding without the involvement or input of the parent from whom the Trust proposes to remove the child. This case, however, did not fall into the principles established by case law which foresee *ex parte* applications being made when the case is extraordinarily urgent or when alerting the parents to the application could prejudice the welfare of the child. The Court noted that in this case the Trust advised the appellant of their intention to move the application that day; the Trust served a copy of the proceedings upon her solicitor; discussions occurred between legal representatives as to the venue for the hearing; the appellant attended with her witness to contest the hearing but were excluded from the court; and the legal representatives were permitted to be present but were expressly forbidden from making representations.

The Court of Appeal held that, in light of the above circumstances, the DJMC was “plainly wrong” to proceed on an *ex parte* basis:

“A properly constituted court should have been convened. The indications are that this would have been readily achievable by taking the simple step of asking the lay members to remain to allow the existing properly constituted FPC to preside over the case. Alternatively [the DJMC] could, if necessary, have directed attempts to have the lay members recalled.”

The Court said that an *inter partes* hearing is the presumptive starting point for an EPO. Such a hearing is generally necessary to vindicate the common law and Article 6 and 8 ECHR rights of the parent. It also enhances the rigour and fairness of the proceedings by ensuring that the court is as

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fully informed as possible before being tasked with deciding whether the draconian step of removing a child from its parent(s) is necessary and justified: “By proceeding ex parte and failing to convene a properly constituted court the DJMC acted unlawfully with the consequence that the appellant was denied her right to a fair hearing before a properly constituted court.”

The Court also noted that the appellant had suffered further prejudice as the legislation provides that there is no appeal from the making of an EPO although the legislation does allow the parent to make an application to discharge the order. However, a parent is not entitled to bring such an application if he/she was given notice of the hearing and was present at the hearing.

The Court of Appeal said it was surprised to learn that it is not uncommon for some DJMCs, even within normal court hours, to sit alone to determine inter partes EPO applications:

“Whether in or out of normal hours the legislative requirement is clear: EPO applications must be commenced before a properly constituted FPC. If the urgency of an EPO application required an inter partes application to be heard out of hours there is no legislative restriction on the ability of the DJMC to convene the requisite court. The NICTS [Northern Ireland Courts and Tribunals Service] would in discharge of its duties be required to make the necessary arrangements to operate the legislative scheme and ensure the attendance of the lay magistrates as necessary. If a lay magistrate failed to attend the Court could invoke the provisions of the [1968 Act] to continue in that member’s absence. Such out-of-hours- applications would only be required where some urgency required it. The rules already allow for expedited hearings within normal hours. In light of what we were told DJMCs should be reminded of their duties under the current legislative provisions”.

NICTS Circular

The Court expressed surprise as to why the notion of convening an out-of-hours court did not occur to the experienced DJMC and said the explanation may lie in the NICTS Circular No. 26/2009 which set out revised arrangements for the conduct of out of hours emergency applications under the Children (NI) Order 1995 as a consequence of the recommendations endorsed by the Children Order Advisory Committee. The revised arrangements provided for the participation of DJMCs in the out-of-hours service rather than only lay magistrates and the hearing of such applications at designated courthouses rather than at the lay magistrate’s home. The Circular said nothing about out-of-hours inter partes applications.

In a section entitled “Inter Partes Hearing”, the Circular noted that there was no legislative authority to make provision for a lay magistrate to deal with an inter parte application and stated that there was no legislative provision for a DJMC to deal with an inter-parte application out-of-hours. The Court of Appeal commented, however, that court listings and sittings are matters for the judiciary and there is no limitation on when a court may be convened. The role of the NICTS is to provide administrative support for the arrangements which the judiciary directs in order to give effect to the legislative requirements surrounding the exercise of judicial authority:

“We have serious concerns about [the provision in the Circular which states that if the applicant [trust] considers that it is appropriate to give notice of the hearing to any other party, this should be indicated to the duty clerk and be communicated by the duty clerk to the DJMC who will determine if such notice should be given] and the

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imposition via administrative circular of a role and jurisdiction which the DJMC does not possess by virtue of any statute. Not only is this role not envisaged by statute, it is in fact inconsistent with the applicable legislative scheme. The decision whether to move the application with notice is a matter for the Trust, not the DJMC. The only judicial supervision required by the legislative scheme is if the Trust apply to move the application ex parte in which case leave is required.”

The Court of Appeal also commented that the Circular is inconsistent with established case law as to the exceptional circumstances required to justify an ex parte application. This is because the process envisages, as happened here, the conversion of an inter parte application into an ex parte application. The Court said the role of the court in an inter parte application is confined to determining that application in the proper way with a properly constituted court. If an ex parte application is made the DJMC or a lay magistrate sitting alone are empowered under the 1996 rules to deal with the ex parte application for an EPO. Such ex parte applications, for which leave must first be obtained, will only be justified in exceptional circumstances. The Court of Appeal said the DOJ should reconsider the Circular as a matter of urgency.

Conclusion

The Court of Appeal concluded that the DJMC in this case was plainly wrong to proceed and order as he did. The DJMC was required in the circumstances of this case to convene the properly constituted FPC to determine the Trust’s inter parte application for an EPO and he failed to do so.

NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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