Neutral Citation No: [2022] NICA 52 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE11922** *ICOS No:* **18/70913/A02** *Delivered:* **23/09/2022**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN RELATION TO AN APPLICATION FROM A DECISION OF THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (FAMILY DIVISION)

IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995

Between:

A FATHER

Applicant

and

A MOTHER

Respondent

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The Applicant appeared as a Litigant in Person
Andrew Magee KC with Shauna Trainor (instructed by Donard King & Co Solicitors) for the Respondent

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Before: Keegan LCJ and Treacy LJ

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KEEGAN LCJ (*delivering the judgment of the court*)

Nothing must be published which would identify the children or parties in this case. The case has been anonymised to protect the interest of the children.

Introduction

[1] This case has been brought to the Court of Appeal as a result of a decision given by Sir Declan Morgan sitting in the Family Division of the High Court on 29 April 2022. The decision was essentially a dismissal of an appeal against a decision of the Family Care Centre delivered by Her Honour Judge Crawford on 27 May 2020 comprised in an order which was issued on 2 June 2020. This was a

determination in a children's case in relation to the applicant's contact with his two children, a female child born in November 2003 and a male child born in April 2008.

[2] Whilst ostensibly about the contact between father and children this case has veered far away from anything substantial about the children. Rather, the case is centred on the applicant's grievance with what happened at the Family Care Centre which will become apparent as we continue this judgment.

[3] Sir Declan Morgan dismissed the appeal before him in an extempore ruling, a transcript of which was made available. That transcript sets out the reasons why the appeal was dismissed. This was because the father lodged a Notice of Appeal to the High Court out of time. That notice was lodged on 7 July 2020 which was outside the 14 day time limit prescribed by Rule 4.23 para 3(a) of the Family Proceedings Rules (Northern Ireland) 1996 for appeals from the Family Care Centre to the High Court. However, of more moment, was the fact that the Notice of Appeal whilst it had been lodged in the High Court was only sent by email to the respondent on 17 February 2021. That is some seven months after being lodged. Further, the notice was not properly served in accordance with the rules by way of personal service or service by post until 19 February 2022. That was twenty months outside the statutory time limit. Application was made to the High Court to extend the time within which he was required to lodge and serve a Notice of Appeal. Having considered the oral and written submissions of both parties the judge, Sir Declan Morgan, while agreeing that time could be extended for the lodging of the Notice of Appeal, refused to extend time for the service. As a result the father's appeal from the decision of the Family Care Centre was dismissed.

This Application

[4] This court has not received any formal Notice of Appeal. However, the applicant did, by way of correspondence, send a document to the court dated 30 May 2022. In that the applicant purports to appeal the High Court decision on three fronts described as follows:

Section 1: Matters related to the facts of the case, criminality related issues and misconduct of Her Honour Judge Crawford.

Section 2: Issues related to how the matter of delayed appeal should be dealt with in a High Court (case stated matters).

Section 3: Child B's welfare related issues.

[5] At a case management hearing on 30 June 2022 this court raised procedural issues relating to the form of appeal, the nature of the appeal and the timeframes involved. The court also reminded that father that he had a right to bring an application to the Family Care Centre if he was concerned about his son who had

recently displayed some concerning behaviours and with whom contact was interrupted.

[6] At the substantive hearing we began by requiring submissions as to the court's jurisdiction having raised the issue before and having received the skeleton argument from Mr Magee which specifically stated that the court had no jurisdiction to hear an appeal from a High Court judge on appeal from a County Court judge other than by case stated. We consider it necessary to reiterate the law in this area to guide other cases of a similar nature. We therefore set out the relevant rules as follows:

The rules related to family appeals

[7] Article 166 of the Children (Northern Ireland) Order provides:

> "166.—(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
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> (b) any refusal by a county court to make such an order,
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> 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."

[8] Article 60(3) of the County Courts (Northern Ireland) Order 1980 ("the Order") provides that save as provided in Article 62, a decision of the High Court on appeal from the County Court is final. Article 62(1) of the Order provides that the High Court may, on the application of the party, state a case for the opinion of the Court of Appeal upon a point of law arising on an appeal brought under Article 60. Article 60 states:

> "60.—(1) 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."

[9] By virtue of Article 2(2) of the Order, "decree" includes a dismiss, a decree on a counter-claim and any order, decision or determination made by a County Court in any civil proceedings instituted by virtue of any statutory provision.

[10] Therefore, in the absence of a case stated, this court has no jurisdiction to hear an appeal from a High Court order which is final if made following appeal from the Family Care Centre. When invited to provide oral submissions on this issue at hearing the applicant could do nothing else than repeat the arguments about his sense of grievance from what happened in the Family Care Centre. His principal contention was that there was a breach of Article 6 of the European Convention on Human Rights ("ECHR") given how he said he was treated at the Family Care Centre. He maintained that counsel appearing against him and the judge engaged in criminality and lied, and that he was refused audio recordings of the Family Care Centre hearing.

[11] On the day of hearing we announced our decision that we had no jurisdiction to hear this appeal and explained this to the applicant. The reasoning that we gave ex tempore on that day is encapsulated in the paragraphs above and is self-evident from recitation of the relevant law that we have set out in relation to the jurisdiction of the Court of Appeal to hear appeals. There is no appeal as of right.

[12] In reaching our judgment on this preliminary issue we have taken into account that the appellant is a personal litigant. Being a person litigant presents a challenge, however, in this case the appellant was informed by the Family Division Office by email when sent a copy of the ex tempore decision of Sir Declan Morgan of the correct appeal route as follows. The email is dated 12 May 2022 and reads:

> "The father is appealing an order of the County Court to the high Court. Article 166(1) of the Children (Northern Ireland) Order 1995 provides that any appeal from the High Court should be treated as if made in exercise of the jurisdiction under Article 60 of the County Court (Northern Ireland) Order 1980. Article 62 of that Order indicates that the decision of the High Court is final subject to any case stated made by the court for the consideration of the Court of Appeal. Order 61 rule 5 of the Rules of the Court of Judicature suggest that any application for a case stated must be lodged within 24 days."

[13] Despite being informed of the correct process by which he could seek to challenge the decision of the High Court by way of case stated, the applicant did not apply to the High Court to state a case for the opinion of the Court of Appeal.

[14] The applicant seemed surprised that we, in this court, would raise a procedural issue. However, he should not be surprised because the Rules of Court apply to every litigant before the court. The Court of Appeal cannot simply hear an appeal when it has no jurisdiction to do so. Appropriate latitude is given to litigants in person but that does not extend to creating a wider jurisdiction for them. This applicant is a professional man with a medical qualification. He clearly has a grasp

of law from his written papers which include reference to Article 6 of the ECHR, the Guide to Article 6 and many case law extracts and extracts from the Supreme Court website in relation to Article 6.

[15] After we delivered this jurisdictional ruling Mr Magee applied for costs against the applicant. In this case neither party has the benefit of legal aid funding. We reserved on this issue because the applicant raised an objection to costs. He did so on the basis that he said he did not know about the correct process and that he was paying child maintenance. We also allowed both parties to file additional submissions dealing with costs which we have considered. Our ruling on costs is as follows.

Costs

[16] First, if it was not obvious, we confirm that this court is only dealing with the costs of the appeal taken before the Court of Appeal. There is no valid appeal before us regarding the costs order made by the High Court although the father seeks to raise that in his additional written submissions. That order will stand. We can only deal with the issue of costs occasioned due to the proceedings before us.

[17] The award of costs in this court as in any other is a matter of discretion for the court taking into account the circumstances of this case. As this is family case costs do not automatically follow the event but may be awarded to a successful party in certain circumstances.

[18] Mr Magee claims costs on behalf of his client on the basis that he says the applicant issued another set of frivolous proceedings when he had no basis to do so. In support of his argument Mr Magee relied upon on *Re S* [2015] UKSC 20, a Supreme Court decision which sets out some principles in relation to costs in family cases. In that case the Supreme Court applied the dicta of Wilson J in *Sutton London Borough Council v Davis (No.2)* [1994] 1 WLR 1317 at 139 which reads as follows:

> "Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the welfare of the child from participating in the debate. … Thus, even when a local authority's application for a care order is dismissed, it is unusual to order them to pay the costs of the other parties."

[19] As the Supreme Court said in *RE S* the principles found in the foregoing quotation applies in both public and private law.

[20] A further authority which is of use in this area is *Re G* [2013] EWCA Civ 1017. In that case Sir Andrew McFarlane, President of the Family Division in England & Wales, discusses costs issues. This was a private law case and so has particular resonance to the case we are dealing with although in Northern Ireland there are not the same set of specific costs rules. Nonetheless, the principles still apply that usually in family proceedings caution is applied in relation to costs and they do not naturally follow the event as in other areas. That is because there is a third party involved in any children's case, namely the child.

[21] At para [6] of *Re G* Sir Andrew McFarlane refers to previous case law starting with *R v R Costs Child Case* [1997] 2 FLR 95. That is a Court of Appeal decision decided by Hale J which established the principle in law that where a party is seen to have acted unreasonably in relation to the proceedings then a family court may order that party to pay some or all of the costs. As Sir Andrew confirms that decision has been followed and endorsed in a number of cases, in particular, *Re F Family Proceedings: Costs* [2008] EWCA Civ 938.

[22] In *Re G* the decision of the lower court in relation to costs was upheld. The court validated the three reasons for the trial judge making a costs order which were as follows. Firstly, in that case the judge had found that it was not necessary to launch the proceedings. Secondly, she found that the father had used the proceedings as a vehicle for getting at the mother. Overall, she found that there was absolutely no merit in the case. Therefore, Sir Andrew considered that as a matter of law the judge was justified in making an order for costs as he found no error in the exercise of discretion.

[23] In support of the application for costs in this case Mr Magee raises three core points. First, he highlights the fact the applicant resolutely maintains his position that the trial judge and counsel for the respondent had engaged in criminality to undermine his case and that is his main focus. Second, he contends that there was always an alternative remedy open to the father, namely to apply to the Family Care Centre. Third, he argues that this would cause financial hardship to his client who is not legally aided.

[24] In response to the application the father states that he has a right to bring a case such as this to validate his rights which he said have been affected by the way the trial was conducted. He also maintains his right to access to justice and a fair trial is breached and that he has no remedy if denied this appeal. Second, he says that he pays child maintenance and so objects to costs. Third, he states that he was wrongly directed by court staff in relation to making an appeal.

[25] We have considered both sides of the argument and reached the following conclusion. In this case there are a number of factors which point towards making an order for costs. First, the father by his own actions has not brought a valid appeal to this court having been made aware of the correct appeal route. That is in circumstances where that the father has previously, before the High Court, adopted

a procedurally inappropriate route by taking an appeal well out of time. We are satisfied that the father knew what to do by virtue of the e mail of 12 May 2022. In addition, we reject the father's criticism of court staff as once the father had the email it was reasonable that he would follow it. Clearly the staff have tried to assist but it is not their role to give legal advice to litigants.

[26] As we have said the father is an intelligent man who could and should have applied to the High Court judge to state a case if that is what he wanted to do.

[27] In addition to the procedural failing we have identified the purported appeal papers do little to highlight any issue regarding the welfare of the children. In fact, during the hearing, it was really only at the instigation of the court that issues as to the current position of the male child of the family achieved any attention and there was no focus at all on the other child. This leads us to the inexorable conclusion that the father is blinkered by a need for personal vindication and that this application was most likely brought as a vehicle for getting at the mother rather than anything to do with contact.

[28] Allied to the first point is the next that this court has consistently raised with the applicant, which seems to have been ignored, is that the order of the Family Care Centre is now two years old. The applicant has a right to vary the terms of the order. No objection is raised to this suggestion as it is repeated at para [48] of the respondent's skeleton argument by Mr Magee. This court has consistently said during case management and at the final hearing that the father should, in fact, if he is really concerned about the welfare of the children bring an application immediately to the Family Care Centre particularly as the landscape has changed in relation to his son who has since then absconded from the family home and required psychiatric treatment.

[29] It is also entirely wrong of the applicant to say that in some way his access to justice is being denied by virtue of his own failings in bringing a proper appeal. Our courts apply particular care and attention to hear children's cases often hearing them at short notice in order to assist families who need adjudication. There is no denial of access to justice. In our view the father should concentrate on the welfare of the children, if that is what he wants, and bring an application to the Family Care Centre about contact which has been interrupted.

[30] Finally, we consider that a litigant should not escape a costs penalty in circumstances where there has been unreasonable conduct as here. The respondent should not be put to financial hardship for having to defend such a case. It is not sufficient for the applicant to rely on the fact that he pays child maintenance to defeat a claim for costs.

Overall Conclusion

[31] We dismiss the application before us for want of jurisdiction. We make an order for costs against the applicant to be taxed in default of agreement. We also reiterate the fact that the father may make an application to the Family Care Centre, if he so wishes, in relation to contact with his children.