Neutral Citation Number: [2005] EWCA Civ 862
Case No: PTA /2005/0986/B4

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PRINCIPAL REGISTRY OF THE FAMILY DIVISION

Mr Justice Wilson

FD03P02333

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 14/07/2005

Before :

LORD JUSTICE WALL

A (A child)

- -

Between :

A **Appellan**

- and -

G **Respond**

- -

- -

Mr A – Litigant in Person

(assisted by **Dr Pelling –** a McKenzie Friend)

Hearing date : 8th June 2005

- -

Judgment

Lord Justice Wall :

1.
This is a renewed application by Mr A for permission to appeal against an order made by Wilson J. on 26 April 2005, following my initial refusal of permission to appeal on the papers on 6 May 2005.

2.
The context for the hearing before Wilson J was litigation between Mr A and Ms G, who is the mother of their child N, born on 22 March 2001 and thus aged 4. In those proceedings, both parents sought an order for residence in relation to N. In the alternative, Mr. A sought contact to N, and Ms G in addition sought financial provision for N pursuant to Schedule 1 of the Children Act 1989 (CA 1989, Sch. 1). By the time of the hearing before Wilson J, a date had already been fixed for the final hearing of the applications relating to N. That date was 9 May 2005, and it had been fixed since 22 September 2004. Six days of court time had been set aside.

3.
In addition, although not before Wilson J, there were cross applications for non-molestation orders, proceedings for which had originally been commenced in the Barnet County Court by Ms G. Those applications were also listed for hearing before the District Judge on 9 May 2005.

4.
What Wilson J had before him on 26 April 2005 was Mr. A' appeal against an order made by District Judge Segal on 11 March 2005. Mr. A had applied to the District Judge for a number of directions, including a direction for a psychological assessment of the family by an independent expert and for N to be separately represented in the proceedings. The District Judge had refused to make any of the directions Mrs. A sought, and had dismissed his application. Mr. A filed his notice of appeal on 30 March 2005. He sought an order setting aside District Judge Segal's order and invited the court on his appeal to make the directions which the District Judge had declined to make.

5.
When Mr. A issued his notice of appeal, the court gave 27 June 2005 as the date for the hearing of the appeal. However, as a hearing on that date would have required the court to vacate the 6 day hearing fixed for 9 May 2005, Ms G's advisers applied to the court for an earlier date. So it was that the appeal was listed before Wilson J on 26 April 2005 at risk.

6.
For reasons which will become apparent, Mr. A was not present at the hearing before Wilson J. His interests were, however, represented by Dr. Michael Pelling, whom the judge permitted to speak on his behalf. Dr. Pelling's instructions from Mr. A were limited to seeking an adjournment of the hearing of the appeal. He was not instructed to argue its merits. The order made by the judge did indeed adjourn the appeal, but only to 5 May 2005. The Judge directed that the appeal should be heard on that day by a full judge of the Family Division. He estimated the length of hearing at one half day, and he listed it at risk. The Judge went on to make the following additional order:

In that the judge at the said hearing may in his or her discretion elect to determine the said appeal even in the absence of the Appellant (and of Dr Pelling), the Appellant be hereby permitted to file and serve written submissions in support thereof, provided that such be filed and served no later than 3pm on 4th May 2005.

7.
Wilson J's order was also made on the basis that, subject to the disposal of Mr A' appeal at the adjourned hearing, the substantive hearing of the applications relating to N would proceed on 9 May 2005 and that the parties should continue to prepare for that hearing. That was, in my view, a clear indication to Mr. A that the court would be very reluctant to lose the hearing on 9 May, and that if an application was going to be made to vacate it, good reasons would be required.

8.
N's mother, Ms G, was represented by counsel at the hearing before Wilson J. The order made by the Judge was strongly resisted by counsel, who invited the Judge to dismiss Mr A' appeal against District Judge Segal's order then and there. To that extent, therefore, it may be said that Mr A succeeded before Wilson J. Mr A, however, did not agree, and sought permission from the judge to appeal. The judge refused. In his written reasons for refusing permission to appeal, Wilson J. said:

“There are very strong reasons why the Appeal should be determined prior to 9 May 2005, namely that such a date is the beginning of a six day hearing before a District Judge intended to dispose of this long running, acrimonious litigation.”

9.
Pursuant to Wilson J’s order, Mr. A’ appeal against the order of District Judge Segal came on for hearing before Bracewell J on 5 May 2005. Once again, Mr. A was not present, and Dr. Pelling appeared for him. Once again, the Judge allowed Dr. Pelling to address the court on Mr. A’ behalf. Dr Pelling applied for the hearing to be vacated on the ground that Mr. A had filed an application for permission to appeal against Wilson J’s order. Dr. Pelling also argued that the basis of the appeal against Wilson J’s order was that Mr. A had been ill and unable to prepare for the substantive hearing. Once again, Dr Pelling told the judge that he had no instructions on the merits of Mr A’ appeal against the order of the District Judge.

10.
Bracewell J. refused Dr. Pelling’s application, and proceeded to hear Mr. A’ appeal. In a judgment of which I have a transcript, she dismissed the appeal and directed that the hearing on 9 May 2005 should proceed.

11.
The hearing of the substantive applications did indeed take place before District Judge Roberts in the Principal Registry of the Family Division on 9 and 10 May 2005. Neither Mr A nor Dr Pelling attended. On 10 May 2005 the District Judge made a number of orders. He ordered that N reside with his mother, and provided for detailed contact between N and Mr A. He also made financial orders against Mr A, including a lump sum of £20,000 payable to Ms G for the benefit of N and the settlement on Ms G for N’s benefit of £220,000 which Ms G was to use to purchase a property to house herself and N until he reached the age of 21 or completed his tertiary education, whichever was the later. Mr A’ interest in that property was expressed to be whatever percentage of the gross purchase price the sum of £220,000 represented. The District Judge also made a school fees order, and directed that Mr A pay Ms G’s costs.

12.
When I dealt with Mr A’ application for permission to appeal on paper on 6 May 2005, I refused it on the basis that Mr A had succeeded before Wilson J. in obtaining an adjournment. The Judge’s carefully drawn order had provided for Mr A’ appeal to be heard by a judge of the Family Division on 5 May 2005. It had been so heard and dismissed. In these circumstances, I took the view that Mr Justice Wilson’s Order was spent; that there was, accordingly, nothing to appeal against; and that an appeal would be academic. In any event, I took the view that the Judge’s reasoning was immaculate, and that as an exercise of discretion, his order, for the reasons he gave in his judgment, was unimpeachable. I also commented that both Wilson J. and Bracewell J. had been rightly concerned to preserve the fixture on 9 May 2005, and that the application for permission to appeal Wilson’s order provided no basis for that fixture to be vacated.

13.
Mr A did not agree with my preliminary conclusions, and, as is his right, he renewed his application at an oral hearing on 8 June 2005. At that hearing, a fresh skeleton argument by Dr Pelling, dated 6 June 2005, was produced. Unfortunately, that document was not in the papers which I had read when preparing for the oral permission hearing. In these circumstances, and in the light of Dr Pelling’s arguments contained in his skeleton, I decided that I should take time to consider my decision. I

therefore reserved judgment after hearing argument from Mr A, who, as on previous occasions, had the support before me of Dr Pelling as his McKenzie friend.

14.
In my judgment, two points need to be borne in mind throughout. The first is that I am only dealing with an application for permission to appeal Wilson J's order. I am not dealing with Bracewell J's dismissal of Mr A' appeal against the order made by District Judge Segal, nor am I concerned with the substantive orders made by District Judge Roberts on 10th May 2005. It is, however, necessary nonetheless to make reference to these hearings, in order to understand fully how Mr A advances his case in the context of this permission application. It is also necessary to look briefly at the chronology of the litigation between Mr. A and Ms G in relation to N.

15.
The second point is that whilst it is plainly the duty of the court, in Article 6 terms, to legislate for a fair hearing, and to ensure that both parties have a fair hearing, Mr. A' appeal, in my judgment, takes no account of the fact that the hearing of the substantive applications had been fixed for 9 May 2005 since 22 September 2004, and that Mr. A had disobeyed several orders to file his evidence in those proceedings. In cases involving children, time is of the essence, and orders for the filing of evidence are to be obeyed. Furthermore, when the court has fixed a final hearing date in such a case, it is very reluctant to abandon it, unless it is satisfied that there are good reasons for doing so.

16.
Clearly, if one of the parties to the litigation is unwell, and is unable to prepare for, or attend the final hearing through ill-health, that is a matter which the court will consider with care, although the burden is on the person seeking to adjourn the hearing to show that he or she is genuinely incapacitated through ill health from participating properly in the proceedings. However, what the court will examine with particular care is any attempt to obtain an adjournment by collateral means.

17.
The relevance of these observations to the instant case is that Wilson J was dealing with an appeal from a District Judge to whom, at a very late stage in the proceedings, Mr. A had made an application forsubstantive directions. The effect of those directions, if ordered and implemented, would have been the adjournment of the hearing fixed for 9 May 2005. Wilson J was not in terms being asked to adjourn the substantive hearing: he was being asked to adjourn the appeal. Wilson J's concern was to ensure that the appeal was heard before 9 May 2005. That was an entirely legitimate concern. Mr. A' state of health was less relevant to the appeal from the District Judge, since such appeals are heard on the basis of argument, not evidence, and the presence of the litigants at the hearing of the appeal is not essential. This is the context in which I approach the current application.

18.
In this latter context, the chronology is important. Ms G's application under CA 1989 Sch.1 had been issued on 17 October 2003. Mr A had issued his application for residence or contact on 17 November 2003. The first directions in Ms G's application had been given on 9 December 2003. This was, accordingly, as Wilson J said in his reasons for refusing permission to appeal "long running" litigation. One would normally expect such applications to be concluded well within a year.

19.
On 22 September 2004, Deputy District Judge Morris had given directions in the proceedings. On Mr. A' application, the Deputy District Judge vacated a two-day hearing listed for 11 and 12 October 2004: she re-fixed it for 9 May 2005, and allocated 6 days for it. She gave directions for the filing of

evidence, including a direction that Mr. A should file and serve by 10 December 2004 all the evidence on which he intended to rely at the final hearing. A report from CAFCASS was ordered, to be filed and served by 1 April 2005. There were other detailed directions (including directions relating to the non-molestation proceedings) and a review of contact arrangements was fixed for 15 November 2004.

20.
It will thus be seen that the hearing due to take place on 9 May 2005 was, as I stated in paragraph 2 above, fixed as long ago as 22 September 2004, giving the parties more than seven months to prepare. Mr. A did not, however, file his evidence as directed by the District Judge, and there were a number of additional hearings. District Judge Bassett-Cross conducted the review of contact on 15 November 2004. Mr. A was dissatisfied with the order he made, and appealed successfully to Baron J on 15 December 2004 in relation to part of it. On 10 January 2005 Deputy District Judge Stanton made an order which, amongst other things, extended Mr. A' time for filing his evidence to 4 February 2005. Mr. A unsuccessfully appealed against that order to Bracewell J on 26 January 2005.

21.
On 3 March 2005, Mr. A issued the application for directions which ultimately came before District Judge Segal on 11 March 2005. On that day District Judge Black directed that it be listed on notice on 11 March 2005 at risk.

22.
I have been provided with a transcript of the hearing before District Judge Segal, at which Mr A appeared in person (with the assistance of a McKenzie Friend who is not identified, but whom I assume to be Dr. Pelling). Counsel appeared on behalf of Ms G. Mr A attempted to advance a number of points, which he had set out in a letter dated 3 March 2005 attached to his application. Taking the relief he sought from his subsequent notice of appeal, Mr. A wanted: (1) a psychological assessment of the family by an independent expert; (2) for N to be made a party to the proceedings and for a guardian ad litem appointed for him: (3) the CAFCASS officer to obtain and disclose certain police reports; (4) an order that Ms G disclose details of the therapist and / or psychologists or psychiatrists who had treated her or were treating her: (5) the trial date of 5 April 2005 of the cross applications under Part IV of the Family Law Act 1996 to be vacated and those cases conjoined with the residence case under CA 1989 and heard by the same District Judge; (6) an extension of time to file his residence case evidence; and (7) such other timetabling and case management directions as the court saw fit.

23.
The District Judge refused each and every one of Mr A' applications for further directions, and he ordered Mr A to pay Ms G's costs. In his notice of appeal, Mr. A asked that the High Court deal with these matters by way of complete rehearing.

24.
The burden of Mr A' appeal against the District Judge's order relates very substantially to the conduct of the District Judge. Mr A complains that the conduct of the hearing was unfair and in breach of the rules of natural justice in that the District Judge was plainly under pressure to deal with several cases before close of business, and in Mr A' phrase "decided to rush through the case at breakneck speed finishing in ten minutes at around 4.40 pm". Mr A complains that this made it impossible for the issues to be adequately presented and argued.

25.

Mr A also complains that the District Judge had not read the bundle, and declined to read the essential documents in it. This forced Mr A to address the court orally in an “extremely circumscribed manner” which Mr A said he found it impossible to cope with. He had been prevented from adequately putting his case. He also complains that the District Judge bullied him with pre-emptory and hectoring demands, which only made it more difficult for him to address the court. By contrast, he says the District Judge “accepted any and every assertion of the Respondent’s counsel without considering the facts and the background of the case and whether those assertions made any merit”. Mr A says that the District Judge also gave him no opportunity to reply.

26.
I am not, of course, concerned with the merits of Mr. A’ appeal against the order made by District Judge Segal. However, I have a transcript of the hearing before the District Judge, and I understand the nature of Mr. A’ complaint. The District Judge’s manner was plainly brisk if not brusque. He certainly appears to cut Mr A short on a number of occasions, and for several of the decisions he makes he does not appear to give any reasons. He also appears to accept what Counsel says without any questioning.

27.
When the appeal came before Wilson J. on 26th April 2005 Mr A was not present. This was for reasons I shall elaborate upon in a moment. Wilson J. summarised the background succinctly in the following two paragraphs:

“The proceedings primarily surround the son of the parties, namely N, who was born on 22 March 2001 and so is aged four. N currently resides with the mother in the home of his maternal grandparents and he has regular contact with the father. The proceedings include the father’s application for an order for residence of N or, alternatively, for contact with him and the mother’s application for the father to make financial provisions for N pursuant to schedule 1 to the Children Act 1989. Those applications, which were issued in November and October 2003 respectively, were originally fixed to be heard by a District Judge of the Principal Registry on two days in October 2004. But, by order dated 22 September 2004, a deputy District Judge vacated those dates and directed that the hearing be re-fixed to take place over six days beginning on 9 May 2005. A CAFCASS officer has also been directed to report on the issues as to residence and contact. Her report was supposed to have been filed yesterday and no doubt is about to be disseminated to the parties. There are also cross-applications by the parties for non-molestation orders against each other. These applications have now been placed on the agenda for disposal of the hearing on 9 May 2005, subject to the discretion of the District Judge at that hearing to direct otherwise.

It can thus be seen that the hearing due to start on Monday week has been fixed for eight months. I am persuaded by what has been written and said on behalf not only of the mother but also of the father that the principle set out in section 1 (2) of the Act of 1989 is fully applicable to N’s case and that, unless there is some other factor of major potency which militates in favour of an adjournment of that hearing, it should take place on those dates. Informal enquiries which I have just caused my clerk to be undertaken with the listing office at First Avenue House, give me to understand that, were those dates adjourned, a substitute six-day hearing before a District Judge would be unlikely to be able to be offered prior to January 2006”.

28.
The Judge then recorded that Dr Pelling’s appearance on behalf of Mr A was for a limited purpose, namely to seek an adjournment of Mr A’ appeal. As I have already explained, this is important. Wilson

J was not concerned with the merits of Mr A' appeal. He makes that very clear. Indeed, Dr Pelling had told the Judge that he was not currently instructed to argue the merits of the appeal on Mr A' behalf, although he indicated that on some future occasion he might well, if permitted, want to be involved in the presentation of Mr A' arguments in relation to its substance.

29.
Wilson J. specifically recorded that it had not been necessary for him to consider in depth the nature of Mr A' applications to District Judge Segal. He pointed out, however, that they arose in the context of applications relating to a child which had already been proceeding for some sixteen months and were due to be heard within two months. The applications, accordingly, came very late. Once again, these were apt observations by the Judge.

30.
Having recorded in outline the applications made by Mr A to the District Judge, Wilson J. then explained why the appeal had come before him when it had. He noted that Mr A had sought a fixed date for the hearing of his appeal from District Judge Segal. He had been given 27 June 2005. That, plainly (if maintained) would disable the District Judge from conducting the hearing fixed for 9 May. Accordingly, following representations made on Ms G's behalf, the Clerk of the Rules had re-listed the appeal for 26 April 2005 in front of Wilson J. Dr Pelling reported that Mr A was unable to be present, and asked the Judge to adjourn the hearing of the appeal for a significant period of time.

31.
That Application was strongly resisted by Counsel for Ms G, who submitted that it was "a brazen tactic" designed to secure the consequential abortion of the hearing fixed for 9 May.

32.
Wilson J. then examined the reasons for Mr A' inability to be present to prosecute the Appeal. In paragraph 11 of the Judgment, the Judge gives the background:-

"Why then can the father not allegedly be here to present his appeal? It appears that for more than two years the father has suffered a skin condition, primarily affecting his leg but also possibly affecting his eye, as a result, so Dr Pelling has told me, of a most unfortunate exposure of the father to fleas. In that regard, the father had an operation in June 2003; and Dr Pelling tells me that the father was supposed to have a second and final operation in relation to the condition about a year thereafter, namely in about June 2004. In fact he did not have his second operation at around that time; and, as I understand it from Dr Pelling, the operation did not then take place because of the dependency of this litigation. In fact the father had his second operation very recently, namely on 4 April 2005. Mr Cronshaw (counsel for Ms G) has effectively demonstrated that it was the father's choice to have the operation performed then. I am perfectly prepared on the evidence that I have been shown to accept that this has been a very genuine and debilitating problem for the father; but the evidence before me does not even purport to suggest that it was necessary for the operation to be conducted on 4 April as opposed to on some later date."

33.
It also appeared that Mr A felt able to undergo the second operation on 4 April 2005 on the basis that the date he had been given for the hearing of his appeal, namely 27 June 2005, was sufficiently distant for him to be confident that he could attend the later hearing. As the Judge pointed out, however, when Mr A went into hospital for the operation on 4 April 2005, the fixture of 9 May 2005 had not been vacated, and in my judgment it was extremely unwise for Mr A to assume that the date given for his appeal would automatically bring about the adjournment of the 9 May hearing.

34.
The case advanced by Dr Pelling on Mr A' behalf was that Mr A could not attend to prosecute his appeal because of a disabling post-operative condition. The Judge was shown three documents. There was a letter from Mr A' surgeon, Mr Harrison, dated 28 April 2005: there was a sick note from Mr A' general practitioner, dated 21 April 2005, and the third was a letter from the surgeon to Mr A himself dated 8 April 2005.

The first document is short and reads:

"This gentleman has an area of lichen planus on his right prelibial area which has been causing him considerable irritation.

It was excised on 4 April 2005 but there is an area of delayed healing which will need to epithelialise spontaneously. He will be best to keep this foot up for at least another two weeks in order to hasten the healing. It might be best if he refrain from work in order to achieve it.

I have made an appointment to see him again on 29 April."

35.
The sick note from the doctor dated 21st April 2005 is in common form and reads, where relevant, "I examined you today / yesterday and advised you that (a) you need not refrain from work (b) you should refrain from work for …. or until ….. one month. Diagnosis of your disorder causing absence from work ….. Doctor's remarks….. post-op stress, R leg open wound".

36.
The letter from the surgeon, Mr Douglas Harrison FRCS dated 8th April 2005 is more informative, and I set it out in full.

" Dear Mr A

Re: Excision lichen planus right pretibial region and lesion of right upper eyelid 4 April 2005

We confirm that an appointment has been arranged at the Clementine Churchill Hospital at 13.30 pm on Monday 18 April 2005 for the removal of the stitches from your eyelid and leg.

We would remind that as explained by Mr Harrison the stitches in your leg must remain in place for the full period of 14 days due to the extent of the surgery. During this period we ask that at the very least for the first full 7 days (and preferably longer) it is essential that you keep your leg elevated in a horizontal position. At night the leg should be raised on a pillow and you should severely restrict your walking activities, staying at home, until the stitches are removed. The tension on the skin for this type of surgery, in this instance, has meant that all the lichen planus could not be removed this time.

In addition, in order to avoid the complications of last time, namely the wound splitting after stitches removed, we recommend you to plan to go somewhere where you will not walk too much, such as a holiday hotel, for a further 10-14 days thereafter. We hope that this will avoid any problems.

We have made a further appointment for Monday 9 May 2005 at 2pm.

Yours sincerely"

37.
The Judge's analysis of these documents is contained in paragraph 17 of his judgment.

“I am not satisfied by the evidence which the father has put before me that he is medically unable to be present and that he has been medically unable to prepare this appeal. Although it is unnecessary for me to make any positive finding in this regard, with the result that I refrain from doing so, I consider that the medical material placed before me flowing from an elective procedure early in April may well be part of a delaying tactic on the part of the father to preclude the hearing of the appeal and to force an adjournment of the hearing fixed to begin on 9 May”.

38.
In my judgment, the judge was fully entitled to take the view that the medical evidence presented to him did not render Mr. A medically unable to be present. The Judge, however, had to decide what to do. Although he was tempted to proceed to discern where the merits or demerits of the appeal lay, he came to the conclusion that the safer course, and perhaps the just course, was one which gave Mr A the opportunity to attend to present his appeal, or at least to put in written submission in support of it, provided that it was a course which, (unless the appeal were to be allowed) would not prejudice the beginning and indeed the conclusion of the substantive hearing on 9 May. That course involved the adjournment of the appeal until a date in the following week.

39.
The Judge recorded that his decision to adjourn had been vigorously opposed by counsel on behalf of Ms G, who was not publicly funded, and for whom further hearings were creating a substantial burden of costs.

40.
Dr Pelling informed the Judge that Mr A would not do any litigation work until 21 May 2005, basing himself on the GP’s sick note. The Judge was not impressed, and regarded the GP note as lacking weight as well as being ambiguous. He regarded the adjournment as giving Mr A a full opportunity to make such points as he wished to make on the short interlocutory issues determined by the District Judge.

41.
As I have already recorded, the Appeal was listed before and heard by Bracewell J. on 5 May 2005. Mr A did not appear but the Judge gave Dr Pelling full permission to address her. As I have already recorded, Dr Pelling made a further application to vacate the hearing. The basis of that application was that Mr A had filed an application in this court for permission to appeal against Wilson J’s order, and that the basis of the application for permission to appeal to this court was that Mr A had been ill. Dr Pelling made it clear to Bracewell J. that he had no instructions on the merits of the appeal in respect of the various directions and orders made by District Judge Segal on 11 March 2005, and that his application was for the hearing to be vacated because of Mr A’ ill health.

42.
Bracewell J. declined to vacate the hearing. She pointed out that Mr A had still not filed his final evidence in either the residence or the financial proceedings and that he was in default, despite extensions having been given to him. She recorded Mr. A’ explanation, namely his ill-health. She pointed to the medical advice to go away on holiday over Passover, and she said that although he had not gone away, his illness had not prevented him from preparing an appeal bundle for this court and communicating with the CAFCASS Officer. She concluded on this part of the case: -

“In those circumstances, it appears plain to me that there is no evidence before the court that this father is prevented by reasons of ill-health from participating in the proceedings and from preparing necessary documentation. He had had ample time to do so and has not done so to date and therefore I

do not accede to the application for this hearing to be vacated on the basis of the father's inability to participate fully in the proceedings. "

43.
Bracewell J. went on to hear and dismiss the Appeal. Having set out the directions which Mr. A sought, she continued: -

"The substantive matters in respect of which the father appeals before me that been the subject of consideration in the very careful report of the CAFCASS officer. It is plain from that detailed and considered report that there is no recommendation for N to be made a party or for a guardian to be appointed. Indeed the recent Practice Direction from the President, in a case such as this, would counter-indicate any such appointment, and there is no reason for N to undergo any form of psychological or psychiatric investigation having read the abundance of papers which are involved in these proceedings.

The obtaining and disclosing of police reports does not, in my judgment, have any relevance, and the mother has no condition for which she is currently being treated, and the CAFCASS report does not in any way recommend that there is any necessity for any investigation of the mother's state of mental health.

I find that there is no merit in any of these application where were made at a very late stage of the proceedings on 11 March 2005 and therefore I dismiss the father's appeal …"

44.
Although I am not concerned with an application for permission to appeal against Bracewell J's dismissal of Mr. A' appeal, it is plain from her Judgment that she had read the papers thoroughly, and was fully seized of the issues.

45.
I do not propose to examine the orders made by District Judge on 10 May 2005, although I have been provided with a transcript of his judgment, which I have read.

46.
Before me, Mr A effectively took two points. The first, in summary, was that Wilson J. had acting unfairly and in breach of natural justice in refusing to accept the medical evidence and requiring Mr A to proceed with hearings when he was medically unfit to do so. Secondly, and basing himself on a further skeleton argument by Dr Pelling, Mr A argued that my preliminary view that Wilson J's order was spent (with the consequence that there was nothing to appeal against so that an appeal would be academic) was wrong.

47.
In relation to the first point, Mr A produced three further documents. In chronological order, the first was another letter from Mr Harrison dated 13 May 2005, which reads as follows:-

"This man had excision of a hyperplasic area of lichen planus from his right pre-tibial area on 4 April 2005. He had had previous excisions in the past and in consequence the skin was under some tension in order to achieve closure. A small area at the lower end had necrosed and required secondary intention healing. Over the last week there was also some delay at the upper end of the wound and this may have been due to the presence of a problem suture underneath the skin which should have been removed. Hopefully, now this foreign body has been removed it will enhance epithelialisation. I would expect this to heal over the next two weeks and clearly the more that he elevates his leg the

more rapidly this will be achieved. The delay in healing added to the court case has made him rather stressed and depressed and has made it difficult for him to function normally".

48.
Mr Harrison also wrote to Mr A on 23 May 2005 confirming that the lesion he had excised from the canthus of Mr A' eye showed no evidence of malignancy. Finally, Mr A produced a letter dated 3 June 2005 from a Consultant Psychiatrist, Dr Lester Sireling which concludes that he is suffering from a depressive episode, and met the criteria for mild to moderate severity. The doctor's conclusion is contained in the final two paragraphs in the letter:-

"The most important psychological factors in maintaining this condition are the continued difficulties of access to his son, the hostile relationship with his ex-partner and the plethora of legal issues which he faces regarding the access case. This seems to have developed into a vicious circle where because of his anxiety and poor concentration he is not dealing with the legal issues adequately, making him feel yet more stressed. From the history supplied by him and my examination, I can see no medical reason why he should not have access to his son.

Mr A is reluctant to accept an antidepressant, but was interested in the idea of cognitive behaviour therapy, which is also an evidence based treatment for clinical depression. Any psychological therapy would have to start with focusing on reducing his level of anxiety, there will also need to be an element of support of therapy, and I have referred him to Mr Simon Birke for this. If he is not feeling better after three or four sessions I would wish to review him again".

49.
In considering the medical evidence, I have to remind myself once again precisely what it is I am hearing. I am hearing an application for permission to appeal against an Order made by Wilson J. adjourning the hearing of Mr A' appeal from 26th April 2005 to 5th May 2005 in order to give Mr A an opportunity to present his case. Mr A' case is that he was medically incapacitated from doing so. On the material before him, the Judge rejected that argument. Is it arguable that he was wrong to do so and thus wrong to refuse to adjourn the hearing of the appeal beyond 9 May 2005?

50.
Wilson J. was hearing the case on 26th April 2005. Like the Judge, I am not impressed with the documents Mr. A produced on that date, particularly the sick note. The judge in my view was right to hold that a pro forma document which states that a litigant should refrain from work for a month because of a post-operational open wound on his right leg and because of stress is wholly inadequate material upon which to obtain an adjournment. The letter of 20 April 2005, which tells Mr A "he would be best" to keep his foot up for at least another two weeks to hasten the healing, and which states that "it might be best if he refrained from work" is, in my judgment, likewise not a basis upon which a Judge can be satisfied that the litigant is unable to attend court. The letter of 8 April 2005 certainly does not explain why Mr A could not attend court either on 26 April 2005 before Wilson J. or on 5 May 2005 before Bracewell J. It simply advises that the stitches must remain in the leg for fourteen days following the operation on 4 April 2005 and that at the end of that period it would be sensible for Mr A "to go somewhere" where he would not have to walk too much, such as a holiday hotel.

51.
In my judgment, the judge's analysis of the medical evidence, and his rejection of it as a basis for refusing to accede to Dr. Pelling's application cannot be faulted, and certainly does not provide a basis for the argument that Mr. A has a reasonable prospect of success in mounting an appeal.

52.
I must keep firmly in my mind what the appeal was about, and what it was not about. I remind myself once again about the nature of the orders Mr. A was seeking. The proceedings had been going on since 2003. There had been a number of detailed orders for directions in both the child and the financial applications as the detailed chronology demonstrates. Thus Mr A' difficulty on this part of the case seems to me to be that he is attacking the wrong target. If Mr. A wanted the hearing on 9 May 2005 postponed, what he should have done was to apply to the District Judge for an order to that effect.

53.
It is very difficult for Mr. A to criticise what Wilson J. did. He did not dismiss his appeal; he adjourned it. He therefore gave Mr A a further opportunity to present material in support of his appeal. Mr A' physical presence was not necessary at the hearing of the appeal. The appeal would take the form of argument on the exercise of the District Judge's discretion. If Mr. A felt unable to attend in person, he could have instructed Dr Pelling to appear on his behalf and to request the court to give him permission to argue the appeal rather than to ask for an adjournment. Whilst it is, of course, possible that Dr. Pelling's application might have been refused, it is to be noted that both Wilson J and Bracewell J allowed Dr Pelling to speak on Mr. A' behalf. Bracewell J gave Dr. Pelling "full permission" to address her on the issues he had raised.

54.
Mr. A also argues that Dr Pelling's commitments did not enable him to prepare the case on that basis. I am not impressed with that argument. If a solicitor is instructed at the last moment, it may be possible for that solicitor to apply for an adjournment on the basis that he or she has been latterly instructed and has not had time to prepare. The District Judge's order was made 11 March 2005. The appeal was not heard until 5 May. That was a little under two months either for Mr. A to prepare the matter himself, or to instruct Dr. Pelling or to instruct a solicitor. In my judgment, that is ample time.

55.
The fact also remains that Bracewell J dismissed the appeal. She gave reasons for doing so. I am not hearing an application to appeal against that dismissal, and cannot go behind it.

56.
In his latest skeleton argument dated 6 June 2005, Dr Pelling argues that the adjournment which Mr A sought was at least until 14 June 2005, and therefore it is incorrect to say that he succeeded before Wilson J. The difference between what Mr A sought and what was granted is, Dr Pelling submits, crucial. I think I have already dealt with this point. If what Mr. A wanted was an adjournment of the 9 May fixture, he should have applied to the District Judge for the fixture to be vacated. He cannot use his attempts to achieve delay in the hearing of his appeal from the District Judge as a way of avoiding the 9 May fixture. He equally cannot expect a judge to go along with such a course of action. Any judge in Wilson J's position would have done his or her best to ensure that the appeal from the District Judge's order was heard before 9 May: furthermore, whilst it was not what Mr A wanted, if what Mr. A wanted was an adjournment of the 9 May hearing, this was not the way to go about it. It was for this reason that I said that Mr. A succeeded before Wilson J. In conventional terms that is exactly what he did. He did not, however, succeed in obtaining an adjournment of the 9 May hearing – nor should he have done.

57.

Dr Pelling also argues that it is incorrect to say that an appeal would be academic because Wilson J's order has been executed and the appeal heard and disposed of. Dr Pelling argues that if this were the case, then no executed order could ever be appealed. That, he submits, is absurd.

58.
Dr Pelling further submits that by section 15 (3) of the Supreme Court Act 1981 the Court of Appeal has "all the authority and jurisdiction of the court or tribunal from which the appeal was brought". Accordingly, he argues, the instant appeal could succeed by this court (1) setting aside Wilson J's order of 26 April 2005; and (2) going on to set aside Bracewell J's consequential order of 5 May 2005. Dr Pelling further submits that the High Court has a general power to set aside judgments, orders or verdicts made in the absence of a party, and that accordingly the Court of Appeal has the like power on appeal.

59.
In the alternative, Dr Pelling argues that the Court of Appeal on a successful appeal could set aside Wilson J's order, substitute an adjournment order until at least 14 June 2005 or a later date, and consequently declare the appeal hearing on 5 May 2005 a nullity. In the further alternative, this court could set aside Wilson J's order, grant a declaration that Mr A was entitled to an adjournment until at least 21 May 2005 or whatever, and leave it to him to apply on the strength of that in the High Court to set aside the 5 May 2005 order and obtain a re-hearing of the appeal – or indeed to appeal to this court on the same ground for setting aside the order of 5 May 2005 and for a re-hearing. Dr Pelling submits that this would inevitably succeed.

60.
However, Dr Pelling submits that it is not in fact necessary for Mr A to have to leap through such time-wasting and costly procedural hoops, and that this Court is not lacking in power to do comprehensive justice if it were to find that Wilson J. should have granted a longer adjournment.

61.
As to the fact that the hearing before the District Judge went ahead on 9 May 2005, Dr Pelling points out that Wilson J. was sitting in an appellate capacity on 26 April 2005 and had the power to adjourn the hearing before the District Judge until after the hearing of the appeal against District Judge Segal's Order. He did not do so. However, Dr Pelling submitted that this court has the same power, and by similar reasoning, it followed that this court on a successful appeal could grant further and appropriate consequential relief by setting aside the Order made by the District Judge on 10 May 2005.

62.
Mr A, Dr Pelling submitted, had been denied his right to be heard. What Dr Pelling describes as Wilson J's and Bracewell J's "obsession" with the saving of the 9 May 2005 fixture, could not justify refusing an adjournment when the medical grounds and the other circumstances warranted it. The medical evidence was all the more reason for adjourning both the appeal and the hearing before the District Judge; otherwise the court was sacrificing the citizen's right to a fair trial to expediency. In these circumstances, Wilson J's reasoning was neither immaculate nor unimpeachable.

63.
I am prepared to accept, for the purposes of this argument, that there may be circumstances (although they would have to be highly unusual) in which the knock on effect of an interlocutory appeal to this court meant that a subsequent hearing in the court of trial might have to be set aside. In my judgment, however, the facts of each case need to be examined with some care, and it needs

always to be borne in mind in the instant case, that every decision, prior to the final hearing before the District Judge on May 9 2005 in the instant case, represented a separate exercise of discretion. Thus four separate exercises of discretion are engaged: District Judge Segal, Wilson J., Bracewell J. and District Judge Roberts.

64.
In my judgment, Dr Pelling's submission fails on the facts. Mr A remains under the obligation to show that it is at least arguable that Wilson J's Order was plainly wrong. At the moment, I simply do not see this. Wilson J. was faced with an interlocutory appeal against an order made in March 2005 with a final hearing due in May in proceedings which had been going on since late 2003. He did not refuse Dr Pelling's application. He granted it, but for a more limited period. It was thus plainly open to Mr A and Dr Pelling to appear before Bracewell J. and argue the merits of the appeal. In Article 6 terms, that was the opportunity which Wilson J's decision gave Mr A. He did not avail himself of it.

65.
Equally, an application could have been made to the District Judge on or before 9 May 2005 to adjourn the hearing on the basis of the medical evidence now reinforced by the documents to which I have already referred (although for reasons I do not entirely understand, those documents post date the hearing before the District Judge). Mr A did not appear before the District Judge to plead ill-health, nor did he instruct Dr Pelling to do so. It seems to me, therefore, that on two occasions after Wilson J's Order, Mr A had had the opportunity to put his case to different tribunals on the merits and has declined to do so. Insofar as he sought a further adjournment before Bracewell J., she refused it for reasons which she gave, and which he has not sought to challenge on appeal.

66.
In these circumstances, I remain of the view that there is no basis upon which an appeal against Wilson J's order could possibly succeed. I say nothing as to the prospects against appeal against Bracewell J's order or of an appeal to the High Court against the adjudication made by the District Judge on 10 May 2005. From Mr. A' perspective, it is clearly the latter which needs to be attacked, since there are now substantial orders made against Mr A with which he plainly does not agree. He is, of course, out of time to appeal the District Judge's Order, but that seems to me to be his remedy.

67.
In my judgment, it would not be a proper exercise of the powers of this Court were it to grant Mr A permission to appeal with a view, if the appeal were to be allowed to setting aside the orders made by Bracewell J. on 5 May 2005 and by the District Judge on 10 May 2005. All three orders, it seems to me, involve the exercise of a separate judicial discretion, and the discretion in each case would need to be examined carefully. In other words, the mere fact that this Court might take the view that Wilson J. had not exercised his discretion appropriately would not mean that Bracewell J's Order automatically fell or that the District Judge should not have made substantive orders at a final hearing. Wilson J left the door open for Mr A, and in my judgment that was an appropriate exercise of discretion on the facts as presented to him.

68.
If the medical evidence obtained after Wilson J's order is capable of demonstrating that Mr A was not fit enough to attend before the District Judge on 9 May 2005, that may well be an argument for the proposition that the hearing before the District Judge should not have proceeded. The evident difficulty in advancing that proposition, of course, is that neither Dr Pelling nor Mr A appeared before the District Judge to put that point to him.

69.
Mr A' argument glosses over (and provides no reasonable explanation for) the fact that he was seriously out of time in putting in his evidence, despite being given several extensions. In my judgment this is a crucial consideration in the exercise of both Wilson J's and Bracewell J's discretion. Justice is a two way street. Ms G and N were as entitled to a fair and reasonably expeditious hearing as is Mr. A.

70.
I therefore say nothing to the likely outcome of any application for permission to appeal against the District Judge's final order out of time, but remain of the view that if Mr A has a remedy, it lies in that direction rather than in any application for permission to appeal Wilson J's order. In that respect I add only that in my judgment if Mr. A were to make such an application, the length of time he has been waiting for this judgment should not be held against him. Normally, I would have given an extempore judgment on 8 June. The subsequent delay in handing down this judgment cannot be laid at Mr. A' door.

71.
In these circumstances, I remain of the view, despite Dr Pelling's careful arguments, that an application for permission to appeal against Wilson J's order stands no reasonable prospect of success, and that permission to appeal should be refused.

72.
For completeness, I should perhaps say that I have, of course, read the two authorities produced by Mr A namely **Dick v Piller** [1943] 1 All ER 627 and **Telnaz v Wandsworth Borough Council** [2002] EWCA Civ 1040, (2002) The Times 21 August. Neither, it seems to me, assists Mr A on the facts of this case and as they affect Wilson J's order. I quite agree that Mr A' ECHR Article 6 rights are engaged. Wilson J was satisfied that the medical evidence did not warrant Mr. A' non-appearance, but he nonetheless gave him another opportunity to argue his appeal on a different occasions. In my judgment, Wilson J's order does not breach Mr Adam's Article 6 rights for that reason.

73.
As far as **Dick v Piller** is concerned, the county court judge had proceeded in the absence of the defendant, despite a medical certificate which stated that the defendant was "unable to leave home probably for two weeks" and in circumstances where the defendant's oral evidence was crucial to the outcome of the case. In the instant case it was, in my judgment, open to Wilson J to find as he did that he was not satisfied that Mr A was medically unable to be present or that he had been medically unable to prepare his appeal. The later medical evidence produced at the oral hearing, which for these purposes I will assume the full court would admit, makes no difference to Wilson J's decision. The only question would be whether, if the full court were to admit it, it would affect the outcome of the appeal against Wilson J's order. For the reasons I have attempted to give, I do not see how it could. Wilson J simply granted a short adjournment. The medical evidence, in my judgment, is only relevant to the final hearing. The District Judge was not asked to adjourn, and what happened before him is not before me.

74.
Finally, I do not think it appropriate for this court to enter into any debate about Dr. Pelling's commitments. Mr. A has chosen to dispense with solicitors. He is, of course, entitled to the help of a McKenzie friend, but the commitments of the McKenzie friend do not relieve Mr. A of his responsibility to get his evidence in in time, and to prepare his case.

75.

The application is, accordingly, refused.