

Neutral Citation No: [2021] NIFam 19

Ref: McF11553

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

ICOS: 15/106061/05

Delivered: 17/06/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

BETWEEN:

A MOTHER

Applicant

-v-

A HEALTH AND SOCIAL CARE TRUST

-and-

A FATHER

Respondents.

IN THE MATTER OF AN APPLICATION FOR INJUNCTIVE RELIEF  
PURSUANT TO THE HUMAN RIGHTS ACT 1998

IN THE MATTER OF PO A BOY AGED 11½ YEARS

Mr O'Donoghue QC with Ms C McKeown BL (instructed by Finucane Toner solicitors)  
for the mother

Mr A Montgomery BL (instructed by the Directorate of Legal Services) for the Trust

Ms N Devlin BL (instructed by Emma Lyons solicitors) for the father

Ms L Murphy BL (instructed by the Official Solicitor) for the Official Solicitor and  
representing the interests of PO

McFARLAND J

**Introduction**

[1] This judgment has been anonymised to protect the identity of the child. I have used the cipher PO for the name of the child. These are not his initials. Nothing can be published that will identify PO.

[2] PO is now 11½ years of age. He was made the subject of a care order on the 28 March 2019, although he had been out of the care of his parents for approximately 3 years at that time. The mother has made an application to discharge that care order and a hearing has yet to be fixed. The mother has also applied for injunctive relief pursuant to the provisions of the Human Rights Act 1998 (“the 1998 Act”). She is seeking a declaration that a decision of the Trust to place PO in an institution (which I will call “Home 3”) was unlawful and in breach of the rights of PO and the mother under Article 8 of the ECHR (the right to respect for private and family life). She also seeks an order quashing the decision, an order preventing the placement of PO in Home 3, an order requiring the Trust to reconsider its care plan, and damages.

### **Background facts**

[3] PO was most unfortunate in that he was born into a largely dysfunctional family unit, which included exposure to unpredictable and frightening caregiving from both parents. Social work reporting suggests an exposure to physical violence between his parents, and possible violence perpetrated against him within the home. This culminated in a removal of PO and his four siblings from his father’s home with whom they were residing at the time. The initial placement was with an aunt and then a great-aunt. Two foster placements followed, before PO was moved to Home 1. In due course PO was moved to Home 2 in July 2018.

[4] In what has been described as unique circumstances, PO had developed a very positive relationship with a social worker in Home 2, and after much planning and preparation, in October 2020, PO was moved to a foster placement with the social worker.

[5] It is not necessary to set out in detail the behaviour being displayed by PO during this period, but given his early childhood it is not surprising that caring for him was a most challenging experience for all adults concerned.

[6] Unfortunately the foster placement with the social worker began to break down, with PO using violence against his carer. An intense support package was put in place in the period after Christmas 2020, but the position failed to improve and the matter came to a head on 11 March 2021 after a serious physical assault by PO on his foster carer which necessitated police intervention to protect the carer. Respite care was provided but on 13 March 2021 there was another incident of extreme behaviour and it had become clear that despite the very high hopes for this foster placement, it could not be sustained.

[7] The decision was then made to terminate the foster placement.

[8] The detail of the move was planned on the 16 March 2021, with the move scheduled for the 18 March 2021. PO would reside with his carer and leave for school that morning, and would then be picked up from school by a social worker and brought to Home 3. The Trust’s evidence indicates that Home 3 was the only

viable option, as Home 2 was both full and was considered as not appropriate given that PO had previously lived there and the foster carer worked there.

[9] The primary purpose of the placement at Home 3 was for assessment over a short term.

[10] The Trust did not tell PO about the move until he was returning from school on the 18 March 2021 when he was on his way to Home 3. The reason for this was that there was a fear that PO would injure adults and children in his company and himself should he have any prior knowledge of the move.

[11] The Trust did not tell the father as he had largely disengaged with the Trust. He was not attending Looked after Child (or LAC) meetings and was not having contact with his son. The Trust had a contact address for the solicitor who had acted for the father in the past.

[12] In relation to the mother, the Trust advised her of the deterioration of PO's behaviour on the 12 March 2021, and she was advised that consideration was being given for other placements. On the 16 March she was advised of the decision to terminate the foster placement and of the planned move to Home 3, together with the reasons for these decisions.

[13] The mother has reported to the Trust that prior to the move she visited Home 3 and had spoken to the staff at Home 3. She did not express any concerns or objections to the staff, and when she relayed this information to the Trust on 18 March she did not express any concerns to Trust staff.

[14] On the 18 March, the Trust updated the mother about the move later that day and after the move had been completed she was told that it had taken place.

[15] Home 3 is a Children's Home and regulated under the Children (NI) Order 1995 ("the 1995 Order") and the Children's Homes Regulations (NI) 2005 ("the 2005 Regulations"). The Regulation and Quality Improvement Authority (the "RQIA") is a statutory body responsible for the monitoring and inspecting the availability and quality of health and social care services in Northern Ireland. It does so by registering and inspecting health and social services. It has no role in the approving of actual placements in the facilities it registers and inspects. Home 3 is one such facility. It, in common with other similar institutions, has a Statement of Purpose ("the SofP"). At the time of PO's admission its SofP indicated that it was a five young person facility (with an extra emergency facility of one bed) for children aged between 12 years and 16 years and for a limited period up to 6 months. The evidence indicates that from time to time the SofP has been amended so that children falling outside the age limits or the anticipated duration period, can be accommodated. This is routinely changed after the child has been accommodated. The records show that an 11 year old boy was accommodated in January 2020 and later a 17 year old boy in May 2020, with the SofP amended for that purpose.

[16] After PO was accommodated in Home 3 its SofP was revised for this purpose by adjusting the lower age. Having been advised of the position on 19 March 2021, the RQIA noted the change. At no stage has the RQIA indicated that PO should not be accommodated within Home 3, or expressed an opinion that Home 3 is not a suitable facility for him.

### **The legal position**

[17] Section 6 (1) of the 1998 Act provides:

*“It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”*

Section 8 (1) provides:

*“In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.”*

[18] Article 8 of the ECHR provides:

*“1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

[19] The 1995 Order contains the relevant statutory provisions setting out a Trust’s powers and obligations. Of particular relevance to this case are the following Articles:

Article 51(2):

*“Where a care order is made with respect to a child the authority designated by the care order shall receive him into its care and keep him in its care while the order remains in force.”*

Article 52(3):

*“While a care order is in force with respect to a child, the authority designated by the order shall:*

- (a) have parental responsibility for the child; and*
- (b) have the power (subject to paragraphs (4) to (9)) to determine the extent to which a parent or guardian of the child may meet his parental responsibility for the child.”*

Article 52(4):

*“The authority shall not exercise the power in paragraph (3)(b) unless it is satisfied that it is necessary to do so in order to safeguard or promote the child’s welfare.”*

and Article 52(9):

*“The power in paragraph (3)(b) is subject (in addition to being subject to the provisions of this Article) to any right, duty, power, responsibility or authority which a parent or guardian of the child has in relation to the child and his property by virtue of any other statutory provision.”*

[20] The general duties of a Trust are set out in Article 26:

*“(1) Every authority looking after a child shall –*

- (a) safeguard and promote his welfare; and*
- (b) make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case.*

*(2) Before making any decision with respect to a child whom it is looking after, or proposing to look after, an authority shall, so far as is reasonably practicable, ascertain the wishes and feelings of –*

- (a) the child;*
- (b) his parents;*
- (c) any person who is not a parent of his but who has parental responsibility for him; and*

(d) *any other persons whose wishes and feelings the authority considers to be relevant,*

*regarding the matter to be decided.*

(3) *In making any such decision an authority shall give due consideration –*

(a) *having regard to his age and understanding, to such wishes and feelings of the child as the authority has been able to ascertain;*

(b) *to such wishes and feelings of any person mentioned in paragraph (2)(b) to (d) as the authority has been able to ascertain; and*

(c) *to the child's religious persuasion, racial origin and cultural and linguistic background.*

(4) *If it appears to an authority that it is necessary, for the purpose of protecting members of the public from serious injury, to exercise its powers with respect to a child whom it is looking after in a manner which may not be consistent with its duties under this Article, the authority may do so."*

[21] Finally, Article 27 makes provision in relation to a Trust to provide accommodation for a looked after child:

*"(1) Every authority looking after a child shall –*

(a) *when he is in the care of the authority, provide accommodation for him; and*

(b) *maintain him in other respects apart from providing accommodation for him.*

(2) *An authority shall provide accommodation and maintenance for any child whom it is looking after by –*

(a) *placing him (subject to paragraph (5) and any regulations made by the Department) with –*

(i) *a family;*

(ii) *a relative of his; or*

(iii) *any other suitable person,*

*on such terms as to payment by the authority and otherwise as the authority may determine;*

- (b) maintaining him in a home provided under Part VII;*
- (c) maintaining him in a voluntary home;*
- (d) maintaining him in a registered children's home;*
- (e) maintaining him in a home or institution provided by a government department or a prescribed public body; or*
- (f) making such other arrangements as –*
  - (i) seem appropriate to the authority; and*
  - (ii) comply with any regulations made by the Department.”*

Treacy J in *Re CM* [2013] NIQB 84 has held that this provision creates a positive obligation on a Trust to provide accommodation for a looked after child.

[22] Much of the case law in relation to the 1995 Order (and its English equivalent) and the 1998 Act has focussed on the duty placed on a Trust when exercising parental responsibility in respect of a looked after child in the care of the child's parents, and the consequences that flow from the decision of a Trust to remove the child. The authors of the distinguished text *Hershman & McFarlane - Children Law and Practice* at C [1382] specifically refer to this case law on the basis that there had been a challenge by parents to a “*radical alteration of the court approved care plan (for example where the plan was for the child to reside at home, but the local authority subsequently decided to remove the child permanently).*”

[23] The core principles are, however, the same, and require that parents are properly involved in the decision-making process not merely before the care proceedings are launched and during the period when the care proceedings were before the court, but also after the care proceedings have come to an end and whilst the Trust is implementing the care order (see Munby J in *Re G* [2003] EWHC 551 at [36]). In *Re G* Munby J was clear that Article 8 afforded to parents who are involved in care proceedings not merely substantive protection against any inappropriate interference with their private and family life by public authorities but also significant procedural safeguards (at [30]).

[24] The procedural safeguards will, of course, depend very much on the individual circumstances of each case. In cases involving removal from a birth family placement or from a kinship placement, the case law speaks of the requirement to give the parents, or kinship carers, at least 14 days' notice and for a

rigorous analysis of all realistic options to be undertaken (see *Re DE* [2014] EWFC 6, *Re T and others* [2016] NIFam 5, and *Re Mark & Tim* [2020] NIFam 5). Baker J in *Re DE* set out a detailed list of procedural safeguards at [34] establishing what was the application of the ‘nothing else will do’ principle (see *Re B* [2013] UKSC 33) at the post-care order stage.

[25] However urgency in a child’s situation can dictate and require a more rapid approach which can lead to the abridging of time for notice and the removal of certain steps in the process of engagement with the parents. This was acknowledged by Baker J in *Re DE* at [49](iv) and also by Munby J in *Re G* at [58]:

*“There may be occasions of emergency or extreme urgency when, for one reason or another, it is not possible for a local authority to involve parents as fully in the decision-making process as would normally be appropriate. Circumstances necessarily change cases.”*

[26] It is, however, important to bear in mind that when a court is dealing with issues of this type it should avoid straying into care planning for the child. That is a function for the Trust not the court (see *Re S* [2002] UKHL 10).

### **PO’s Article 8 rights**

[27] I can deal with this in very short order. PO was 11½ at the time. In October 2020 he was moved to a foster placement and this move was an extremely positive step following a significant period of institutionalised living. He was to live in what could be regarded as a normal domestic situation. Incidents started to occur in December which included physical assaults on the carer and by late December the carer was suffering from a high level of stress. This culminated in the incident of 11 March 2021 which required the involvement of the police. A further incident on 13 March 2021 in a motor car being driven by the carer could have resulted in her loss of control of the vehicle.

[28] There was a deliberate decision not to involve PO in any discussion about a potential move, or indeed about the detail about the move, until it was happening. The reason for this was that there was a concern that PO would react aggressively and put social workers and himself in danger.

[29] I consider that this was not an interference with PO’s private or family life. As an 11½ year old in the care of the Trust he had a right to be accommodated in an appropriate and safe environment. The Trust have endeavoured to do this. Once it became impossible for the foster placement to continue, an immediate decision was required. Involving PO in that decision making, even to the level of merely informing him as to what was planned and what was happening, would have served no purpose at that time, but it would have created a high likelihood of adverse reaction by PO.



## **The mother's Article 8 rights**

[30] Mr O'Donohue QC attacked the Trust's decision making on three main grounds. Firstly, there had been no contingency planning for a breakdown during the period when PO was with the foster carer in late 2020 and early 2021. Secondly, the mother was not sufficiently involved by the Trust in the decision making process to place PO in Home 3. Thirdly, the placement of PO in Home 3 was inappropriate as Home 3 was not approved by the RQIA for accommodating 11 year olds and that approval was only sought retrospectively.

[31] I am entirely satisfied that the care planning for PO in late 2020 and early 2021 was appropriate and consistent with PO's welfare. There was an emergency case planning meeting on 29 December 2020 when the issues were starting to escalate and a high degree of Trust intervention was put in place to support the placement. Placement breakdown must have been at the forefront of the decision making given the amount of effort and resources poured into the intervention. Detailed planning for an urgent intervention is always very difficult given the unpredictability as to when the emergency will actually arise. When the event occurs no amount of planning can allow for a situation of the non-availability that night of suitable specialist accommodation. The nature of modern children's homes is that they are small units, and such is the demand, it would be an unreasonable application of resources to routinely keep beds free based on a contingency plan that a placement might breakdown. During this period there was no complaint from the mother about any lack of involvement by her in PO's care planning or the lack of any contingency planning. I conclude that there is very little substance to this aspect of complaint.

[32] The mother was first advised of the urgent planning meeting on the day of the meeting, the 12 March 2021. She was appraised of the reasons for the urgency and that following the meeting the case had been referred to the Trust resources panel. She was then advised on the 16 March that a decision had been made based on the risk to the health and safety of the foster carer and of PO. She was advised of the intended move to Home 3.

[33] The mother had the opportunity to visit Home 3 and to speak to the staff. She was therefore permitted to engage in the process. She did not make any complaint to the staff at Home 3, or to the Trust's social work staff in a later telephone conversation, about the unsuitability of Home 3 for PO's needs or as to the reasons why PO was moving to Home 3.

[34] There is a discrepancy in the evidence of the mother and the social worker in respect of the mother's knowledge concerning Home 3. In the Human Rights Notice and in her grounding affidavit, the mother makes no mention of her being aware on the 16 March that PO was moving to Home 3. The first reference to her knowledge of Home 3 is on the 18 March. She also makes no mention of ever visiting Home 3 or speaking to staff. This conflicts with the Trust's evidence that she was specifically

told on the 16 March. I am satisfied that the mother was aware that Home 3 was the intended accommodation on the 16 March.

[35] Although the period between the 12 March and 18 March comprises 7 days, the period includes a weekend of 13 and 14 March and the public holiday on 17 March.

[36] I am satisfied that this was a genuine emergency which required urgent decision making and action. No amount of contingency planning could have predicted when this event would occur. The only realistic accommodation was either another foster placement or an institutional setting. Given PO's extreme behaviour a domestic foster placement, even with someone who could be regarded as a specialist, would have been impossible given the breakdown of what had been a specialist placement. The Trust were left with one alternative and that was attempting to find a place in an institution. Home 2 was not available and for good reason was considered to be unsuitable. Home 3 was the only realistic option bearing in mind the Trust's duty to find accommodation and to protect PO's welfare.

[37] Given the urgency involved during this period, I consider that the Trust acted appropriately. Once the decision had been made on the 12 March, the mother was advised. She was not invited to the planning meeting that day, but it was convened on an urgent basis. When the final decision was made on the 16 March, again she was advised of the use of Home 3, and the mother was able to visit and view this home. Arguably, the mother should have been invited to the meeting of 16 March, but I consider that to have been a minor feature.

[38] In all the circumstances I consider that the mother was sufficiently involved, at a procedural level, in the process whereby PO was moved from the foster placement to Home 3. Mr O'Donoghue characterised this as the mother being presented with a *fait d'accompli*. In reality all the adults in this case, including the Trust staff were dealing with a *fait d'accompli*. Once the placement broke down there was only one realistic outcome and all care planning was inexorably driven to that conclusion.

[39] The final objection was to the use of Home 3 when it was not considered to be approved by the RQIA for 11 year olds. This argument is not based on a correct factual analysis.

[40] The SofP is a document which is prepared by the registered provider (i.e. the person running the home). Regulation 4 of the 2005 Regulations requires the home to be run in a manner consistent with the SofP. Regulation 5 provides that the SofP must be reviewed from time to time. The RQIA is to be sent a copy of the SofP, and on revision, it should be sent a copy of the proposed changes within 28 days. The RQIA is a body which registers institutions and inspects them. It does not approve individual placements within the institutions. The SofP for Home 3 did refer to its use for 12 - 16 year olds, but the evidence clearly shows that Home 3 has

temporarily adjusted the SofP to change the age limits and other details from time to time. The RQIA were advised of the temporary change of the SofP after contact from the Trust on the 19 March, the day after PO's arrival. No issue was taken by the RQIA concerning the temporary change.

[41] There is no evidence placed before the court to indicate that the RQIA do not regard Home 3 as a suitable institution to accommodate PO.

[42] In the final analysis, I am satisfied that the mother has not shown, on the balance of probabilities, that her rights under Article 8(1) of the ECHR have been interfered with. The key issue is that the termination of the foster placement and the placement of PO on a temporary basis in Home 3 could not be regarded as a radical change to the care plan. The full procedural safeguards set out in *Re DE* and *Re G* are not appropriate in dealing with this case. I consider that she was sufficiently engaged in the process which had developed as a reaction to the breakdown of the foster placement.

[43] If I am wrong in my assessment that the mother's and PO's Article 8 rights have not been interfered with, I would consider that any interference that did occur was in accordance with the law, it was necessary and it was proportionate. The Trust had a positive duty to accommodate PO as he was in its care. That duty necessitated finding accommodation for PO.

[44] I therefore dismiss the mother's application which includes the application made by her on behalf of PO.

[45] I will hear the parties in respect of costs.