

Neutral Citation No. [2010] NIQB 64

Ref: WEAH4976.T

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

Delivered: 24/03/10

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

Caldwell's (William) Application (Leave Stage) [2010] NIQB 64

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY

**WILLIAM CALDWELL (A MINOR)
BY CHARLOTTE CALDWELL, HIS MOTHER AND NEXT FRIEND,**

WEATHERUP J

[1] This is an application for leave to apply for Judicial Review of a decision of the Minister for Health, Social Services and Public Safety of 8 September 2009 by which it is contended on behalf of the minor applicant that the Minister agreed, on behalf of the Department, first of all to provide medical treatment for the applicant at John Radcliffe Hospital, Oxford, England for a condition of severe epilepsy, secondly, for the funding of therapies at the Footsteps Centre in Warborough near Oxford and thirdly for reasonable accommodation costs for the applicant and his mother in the neighbourhood of the Centre. Ms McGreenera QC and Mr McBrien appeared for the applicant and Mr Maguire QC for the Minister.

[2] The affidavit sworn on behalf of the applicant sets out the background. The applicant was born on 26 July 2005 and members of his family have campaigned for some time for funding for certain medical treatment for the minor. Ultimately, this led to a meeting with the Minister and officials and two MPs at Castle Buildings, Stormont, on 8 September 2009. Mrs Caldwell had identified a specialist at John Radcliffe Hospital in Oxford, a Dr McShane, who was an expert in epilepsy and had also identified a therapy centre known as the Footsteps Centre in Warborough, which is eleven miles from the hospital, and she wished to secure funding for her son to attend those institutions.

[3] Mrs Caldwell states that at the meeting with the Minister on 8 September 2009 she asked the Minister whether or not she could take her son to England so that he could go to John Radcliffe Hospital and the Footsteps Centre and that she could reside in Oxford during the week and return home at the weekends. She states in her affidavit that the Minister said clearly and unambiguously in the presence of

everyone at the meeting that the proposed treatment and accommodation would be funded and that no condition attached to the Minister's assurance.

[4] Mrs Caldwell's account continues that she and the applicant went to Oxford and rented a house. By letter of 29 October 2009 from Dr Heather Steen, the associate Medical Director of the Belfast Health and Social Care Trust and the Minister's senior medical adviser, it was indicated to the applicant that the funding, which the applicant believed had been secured at the meeting with the Minister, was not available. On Tuesday 3 November 2009 Mrs Caldwell had a phone call from Dr Steen in which it was stated that she would not be receiving any funding for the treatment in Oxford or the accommodation. It was stated that the applicant would be referred to a Community Paediatrician who would decide what treatment was to be allowed for the applicant.

[5] There were supporting affidavits from the two MPs who were present at the meeting with the Minister. Mr Pat Doherty MP indicated that he made a note of the discussion at the meeting which indicated that there would be a Care Plan for the applicant and the Care Plan would be funded and that the family would receive the cost of treatment, accommodation and flights. Mrs Iris Robinson MP confirmed that at one point the Minister stated to the applicant's mother that the costs of accommodation in England would be met, the costs of treatment at the hospital in Oxford would be met and the costs of the Footsteps Therapy Centre would be met.

[6] At the first listing of the leave hearing Mr Maguire QC was present on behalf of the Minister and informed the Court that the applicant's version of the events at the meeting of 8 September 2009 would be disputed and that there had not been an assurance from the Minister in the terms contended for on behalf of the applicant. Given the urgency of the situation which required a conclusion on whether the arrangements made by Mrs Caldwell for the treatment of the applicant in England would be funded by the Department it was directed that affidavits should be filed at that stage on behalf of the proposed respondent.

[7] Thus, on behalf of the Minister, an affidavit was filed by Dr Michael McBride, Chief Medical Officer for Northern Ireland, which presents a different picture of the arrangement that was said to have been reached between the parties. Dr McBride was present at the meeting with the Minister on 8 September 2009 and states that the applicant's mother had, prior to the meeting, made arrangements for the applicant to be seen by Dr McShane at the hospital and at the Therapy Centre. Dr McBride states that the Minister indicated that anything that was recommended by Dr McShane following his assessment of the applicant would be provided for the applicant. He confirms that this extended to accommodation for Mrs Caldwell during the assessment process. He reiterates that the Minister simply stated that whatever treatment Dr McShane thought was necessary would be provided and accommodation would be funded accordingly. Dr McBride states that it was clearly acknowledged that the key was the development of a Care Plan, which would be the basis on which the treatment would be provided.

[8] An affidavit from Ms Diane Mulligan, the Private Secretary to the Minister, exhibits her notes of the meeting of 8 September, which are relied on to confirm the version of events set out by the Chief Medical Officer. A further affidavit from Dr Miriam McCarthy, Deputy Secretary and Head of the Healthcare Policy Group of the Department, is to the same effect as that of the Chief Medical Officer. At paragraph 14 she refers to a letter from Dr Steen to the applicant dated 9 September 2009 (the day after the meeting with the Minister) which stated –

“There is full funding support for Billy’s referral to Radcliffe Hospital and we will be asking Dr McShane to provide us with recommendations for Billy’s ongoing care. On receipt of these recommendations we will work with yourself and commissioners to ensure a care package within appropriate settings for Billy. If Dr McShane feels that a referral to Footsteps Centre is appropriate I can assure you that we will act immediately to facilitate this.”

Dr Steen indicates that this letter was consistent with the Minister’s comments which were recorded in Ms Mulligan’s notes. She also states that the letter was consistent with the briefing note to the Minister that was provided prior to the meeting.

[9] The applicant’s rejoinder affidavit does not accept the proposed respondent’s version of events. The applicant’s position is that the Minister gave assurances that funding would be provided for treatment at the John Radcliffe Hospital and the Footsteps Centre and that funding for related accommodation would be provided. The proposed respondent’s position is that a medical assessment of the needs of the applicant was to be undertaken by Dr McShane, the specialist medical practitioner identified by Mrs Caldwell, and were he to recommend the proposed treatment then that treatment would be funded by the Department.

[10] Attempts were made in correspondence to secure from Dr McShane what his recommendations were for the treatment of the applicant. Perhaps the manner in which this was addressed indicated to Dr McShane that he was being engaged by the applicant’s family as an expert witness rather than as was intended, as the treating medical practitioner. His response reflected the belief that he was being drawn into the position of an independent expert medical witness in court proceedings, a role he did not wish to adopt. The indications from the correspondence from Dr McShane are that were the applicant and his mother residents in the Oxford area he would have referred them for consideration by the Community Paediatrician and that assessment would take account of the therapies required and would contribute to the preparation of a Care Plan, which would then be implemented.

[11] By letter 9 March 2010 from Dr McShane to the applicant’s solicitor it is stated that it is not the role of the Paediatric Neurologist to instruct therapists.

“I have many patients who require therapy but usually leave it to the therapist to decide how much they can give. Physiotherapists, Occupational therapists and speech therapists are all professionals in their own right. It is for them to decide what therapy is required and how much should be given.

I am not prepared to make any further comment on Billy’s therapy programme. I have already clearly stated that if Billy was a resident in Oxfordshire he would not be funded for therapy at the Footsteps Centre through the NHS.”

In a further letter from Dr McShane on 17 March 2010 he states -

“You do specifically ask if this child has been seen by a Community Paediatrician in Oxford. The answer to this question is no. I have been waiting to see if the family are going to decide to stay here long-term. If they decide to stay here I would make a referral to the Community Paediatrician. If Billy was seen by a Community Paediatrician here he would be assessed by our therapists and a Care Plan devised. This is happening in Northern Ireland. As I pointed out before no child undergoing NHS treatment in Oxfordshire would be referred to a private centre for therapy.”

The reference to assessment in Northern Ireland suggests that Dr McShane understood that the Community Paediatrician and Care Plan assessments were being made in Northern Ireland.

[12] Dr McShane is not recommending that treatment at the hospital or the Centre be undertaken. Were he to do so I read the record of the meeting with the Minister and the affidavits sworn in this application as indicating that funding for the treatment and the related accommodation costs would be provided by the Department.

[13] Having considered the papers and arguments of Counsel the inescapable conclusion is that the Minister agreed to funding for the applicant if the treatment were to be recommended by Dr McShane, the medical practitioner identified by the family and accepted by the Minister as appropriate to undertake the assessment of the needs of the applicant. This arrangement appears to have been made on 8 September 2009 without Dr McShane being fully aware of the position in which he was being placed or being fully aware of the nature of the role that was being accorded to him when the dispute developed that led to this application.

[14] Dr McShane has not recommended treatment in the hospital or the Clinic and that being the case the applicant, as matters stand at the moment, cannot seek to enforce any agreement in relation to funding for that treatment or the related accommodation costs. I can readily understand how the family are concerned to secure for the applicant all the care and treatment that they feel is appropriate. The best treatment may be available outside Northern Ireland. There may not be universal agreement on what constitutes the best treatment. However Dr McShane was agreed as the relevant expert who would conduct an assessment of the applicant's needs and he has not recommended the treatment that Mrs Caldwell would wish her son to receive. No therapy assessment has been completed. No Care Plan has been devised.

[15] The present application must establish that there is an arguable case with a reasonable prospect of success. As stated above the inescapable conclusion is that the Minister's assurances on 8 September 2009 related to funding for the proposed treatment and accommodation costs upon the recommendation of Dr McShane of the need for such treatment and that recommendation has not been made.

[16] It is apparent that there are further steps required to be taken in order to achieve a Care Plan and when that is done the Minister's undertaking provides that the recommended treatment and related accommodation costs will be funded by the Department.

[17] I refuse leave to apply for judicial review.