Neutral Citation No.: [2008] NIQB 138 | *Ref:* **McCL7318**

Judgment: approved by the Court for handing down | *Delivered:* **27/11/08**
*(subject to editorial corrections)**

07/107304/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

DXF's Application [2008] NIIQB 138

AN APPLICATION BY DXF FOR JUDICIAL REVIEW

Headnote

*"Regional Child Protection Policy and Procedures" – Health and Social Services Trust – Children (NI) Order 1995, Article 66 - child protection – child protection case conferences – Child Protection Register – 'potential physical abuse, category – successive registrations of children accordingly – Appeals Panel determination – duty on Trust to take into account all material considerations and evidence – Article 8 of the Convention - remedies and discretion – Applicant partly successful – grant of declaration – '**Salem**' principle – Judicature (NI) Act 1978, Section 59 – court's discretion re costs.*

McCLOSKEY J

Preface

I direct that there be no identification of the names of any of the children or parents involved in these proceedings, or of any other person or body which could lead to such identification. The names of the children, the parents, others concerned and the relevant agencies have been anonymised accordingly.

I Introduction

[1] The Applicant has been granted leave to bring this application for judicial review against the Health and Social Services Trust concerned ("*the*

Trust"). He is challenging two separate entries made by the Trust in the "Child Protection Register" maintained by it. As appears from the ensuing paragraphs, the issues between the Applicant and the Trust have evolved considerably, during a period of some four years. These proceedings have similarly evolved, since their initiation. The relief which the Applicant seeks is focussed on two separate determinations of the Trust, which were the impetus for the offending entries. The first is dated 30th August 2007 and the second is dated 6th November 2007 ("*the impugned determinations*"). Each of the impugned determinations was made in the context of a child protection "case conference" conducted by the Trust's servants and agents.

[2] It is necessary, at the outset, to identify the *dramatis personae*:

(a) The Applicant.

(b) ED, the Applicant's first "partner".

(c) JM, the Applicant's second partner.

(d) CF, whose date of birth is 6th February 1999.

(e) DF, date of birth 3rd February 2003.

(f) NS, date of birth 25th November 2003.

(g) BF, date of birth 24th August 2005.

The paternal relationships are as follows:

(i) The Applicant is the father of CF, DF and BF.

(ii) JM is the mother of NS and BF.

(iii) ED is the mother of CF and DF.

[3] The impugned determinations were made against the background of the various relationships outlined above. The terms of the *first* impugned determination are recorded in the Trust's case conference report dated 30th August 2007 thus:

> "*The author would recommend in the light of the current information that the names of CF and DF be placed on the Child Protection Register under the category of Potential Physical* [abuse] *and the issue of contact be urgently addressed*".

[It was agreed between the parties that the word "*abuse*" has been inadvertently omitted from the text and should properly be inserted]. This recommendation was duly adopted by the case conference personnel and implemented accordingly.

[4] The terms of the *second* of the impugned determinations are recorded in the minutes of a child protection case conference conducted by the Trust's agents on 6th November 2007, as follows:

> "*CF and DF's names will be placed on the Child Protection Register under the category of Potential Physical Abuse.*
>
> ***Child Protection Plan***
>
> *1. The childrens' names will be placed on the Register under the category of Potential Physical Abuse …*
>
> *5. The Applicant and ED are advised to give consideration to specialist protection work for both children …*
>
> *9. It is recommended that* [the Applicant's] *contact with the children commences and finishes at the paternal grandparents' home and for* [the Applicant's] *own protection as well as the childrens' potential safety it is suggested that unsupervised contact is limited*".

The registration of the two children concerned duly ensued.

[5] At the substantive hearing of the judicial review application, the grounds of challenge to each of the impugned determinations were refined and elucidated. They are, in essence, threefold:

(i) The impugned determinations are irrational in the ***Wednesbury*** sense.

(ii) Further, or alternatively, the impugned determinations are vitiated by a failure to take into account relevant factors and information.

(iii) The impugned determinations infringe the Applicant's right to family life under Article 8 of the Convention, contrary to Section 6 of the Human Rights Act 1998.

[6] In the complex and protracted history of this affair, there were certain material events and decisions prior to the making of the first impugned determination, between the dates of the two impugned determinations and

subsequent to the second impugned determination. I shall address the nature and significance of these further events and decisions below. I would add that on the date when these proceedings were initiated, 2nd October 2007, only the first of the two impugned determinations was in existence. On the date when leave to apply for judicial review was granted, 28th November 2007, the second impugned determination had materialised.

II "Regional Child Protection Policy and Procedures"

[7] This is a guide, or code, published in April 2007, within the framework of which the impugned determinations were made (hereinafter described as "*the Code*"). Each of the four Health and Social Services Boards in Northern Ireland has an Area Child Protection Committee. The Code was jointly produced by these four committees. As appears from its title, the subject matter of the Code is child protection and it contains a series of policies and procedures designed to secure this objective. The Code acknowledges, in its Foreword, that it is sometimes necessary for statutory agencies "*… to intervene in family life without invitation when it is necessary to safeguard a child from harm*". This statement can be linked to Article 66 of the Children (Northern Ireland) Order 1995, which provides that where a Trust has reasonable cause to suspect that a child is suffering, or likely to suffer, significant harm there is a duty to make enquiries or cause enquiries to be made, with a view to taking any child welfare action considered appropriate. A court may make a Care Order or a Supervision Order only if satisfied that the child is suffering, or is likely to suffer, significant harm and that this is attributable to a lack of adequate parental care or control [Article 50]. The text continues:

> "*These Procedures detail the process that will be followed in such cases throughout the Region and the context in which the work is undertaken*".

[8] Chapter 2 of the Code contains a series of definitions and classifications of child abuse. It also prescribes guidance in relation to "*significant harm*". In this context, the role of the "child protection case conference" is explained:

> "*[2.16] The recognition and identification of child abuse can be difficult and usually requires information from individual sources including detailed social and medical assessments. The final decision will be made at a Child Protection Case Conference, which will also decide if a child's name should be placed on the Child Protection Register and under what category of abuse*".

As this passage indicates, the Code establishes several categories of "child abuse".

[9] Chapter 6 of the Code is dedicated exclusively to Child Protection Case Conferences. The case conference is described as "*central*" to the child protection process and it functions thus:

> "[*6.1] It is a multi-disciplinary/multi-agency meeting that brings together the family and professionals concerned with child protection and provides them with an opportunity to exchange information and plan together* ".

The immediately following paragraph is also of some significance:

> "[*6.2]* ***With the exception of decisions on registration and de-registration,*** *it is not an executive body. The results of the discussion are recommendations to individual agencies for action. The decision to implement the recommendations must rest with the individual agency concerned.*"

[Emphasis added].

A Child Protection Case Conference can be stimulated by any one of a series of events. One of these is described as:

> "[*6.3] … where the concerns are substantiated after a child protection investigation and the child is assessed to be at continuing risk of significant harm*".

The relevant Trust is expected to take the initiative in convening a case conference. The quorum provisions stipulate that there should be a chairperson, a social services representative and representatives of at least two other agencies or disciplines with knowledge of or direct contact with the child, in attendance. Affected parents and children will also normally be given the opportunity to attend.

[10] There is an extensive series of provisions regulating the information to be considered by those attending a case conference. In this respect, the responsible official is the investigating social worker, who is required to prepare an initial report containing all material information, including the author's analysis and recommendations. This report should be provided to the professionals scheduled to attend and the parent/s concerned at least one working day prior to the case conference. The Code continues:

> "[*6.57] All those providing information must take care to distinguish among fact, observation, allegation and opinion. Reports should highlight strengths as well as concerns and avoid jargon and unnecessary detail.*

> *Opinions and interpretations are important but must be evidenced.*"

This part of the Code also contains the following important provision, regarding the outcome of the case conference:

> "[*6.61] The Case Conference should consider if the child is at continuing risk of significant harm. The test to be applied is whether future significant harm is likely (see chapter 2).* ***This decision should be based on all available evidence obtained through existing records, the initial assessment and from inquiries and research.*** *It should take into account the views of all agencies attending the Case Conference and any written contributions*".

[My emphasis].

[11] Chapter 7 of the Code is dedicated to the topic of the Child Protection Register. This is explained in the following terms:

> "[*7.1] Each community Health and Social Services Trust is required to keep a register of every child in its area who is considered to be suffering from, or likely to suffer, significant harm and for whom there is a child protection plan. The Register is not a list of names of children who have been abused but of children for whom there are unresolved child protection issues and who are currently the subject of an inter-agency child protection plan*".

The purpose of the Register is to maintain a record concerning any child about whom there are unresolved protection issues and in respect of whom there exists an inter-agency child protection plan; to provide a source of information for relevant professionals; and to generate statistics which will inform current trends, training and resource needs. The Code provides that the Child Protection Plan is to be formally reviewed at intervals of six months maximum. Moreover, the Register should document all identified "incidents of concern", in order to inform risk evaluation [paragraph 7.4].

[12] The criteria for registration of a child's name are formulated thus:

> "[*75] The entry of a child's name on the Child Protection Register should only occur as a result of a decision made at a child protection Case Conference where it has been agreed that* ***there is a risk of significant harm, leading to the need for a child protection plan***".

[Emphasis added].

Registration can be stimulated by one of a broad range of forms of abuse. These include, as a freestanding category, "*potential physical abuse*". Also listed, for example, are potential sexual abuse, emotional abuse and potential neglect. The Code continues:

> "[*7.7] The criteria* [sic] *for registration is that the child is suffering or is likely to suffer from significant harm and requires a Child Protection Plan to safeguard him from harm*".

[13] Under the Code, parents can bring an appeal against the outcome of a child protection case conference: see paragraphs 6.77 – 6.78 and Appendix 4. The appellate body is labelled the "Appeals Panel". According to Appendix 4, the appeal process is designed to be "*a clear procedure which enables complaints to be dealt with sensibly, thoroughly and without delay*" [paragraph 4.1]. It is to be invoked "*… only for appeals which relate to decisions about placing a child's name on the Child Protection Register*" [paragraph 4.2]. One of the recognised grounds of appeal is:

> "[*4.5] … information presented at the case conference was inaccurate, incomplete or inadequately considered in the decision making process*".

This may be linked to paragraph 6.1 in Chapter 6. The "process of appeal" is described as follows:

> "[*4.6] While an appeal is being heard the decision of the case conference stands. The recommendations and Child Protection Plan will continue to be followed …*
>
> *[4.13] If the criteria for an appeal is* [sic] *met, an appeals panel should meet within fourteen days of the decision to grant the appeal …*
>
> *[4.17]* ***Appeal Upheld***
>
> - *Where the Panel upholds the appeal the Trust will reconvene the case conference within 15 working days.*
> - *The reconvened case conference should be chaired by a different senior officer from the Trust.*

- *The reconvened case conference must demonstrate that it has taken account of the recommendations from the Appeal Panel.*
- *The decision of the reconvened case conference will be final.*
- *If the parent is still dissatisfied he should be advised of his right to contact the Ombudsman or Commissioner for Children or seek legal advice*".

The provisions of paragraph 4.17 are to be contrasted with those of paragraph 4.18, which are arranged under the heading "Appeal Not Upheld". In this eventuality, the decision of the Appeals Panel is stated to be "*final*". I interpret paragraph 4.17 to mean that where an appeal is "*upheld*", the Appeals Panel does not make a final decision. Rather, it makes recommendations, triggering an obligation on the part of the Trust to arrange a reconvened case conference, under the direction of a different chairperson, for the purpose of *taking account of* the Panel's views and reconsidering the case, with the aim of making a fresh, final decision.

[14] The composition of the Appeals Panel should also be noted:

> "[*4.14] The Appeals Panel will be made up of three people. The members of the Panel should be:*
>
> *(i) Chair – a member of the Trust Child Protection Panel;*
>
> *(ii) Two senior officers from agencies other than that of the Chair of the Appeals Panel; and*
>
> *(iii) One member must be from Social Services.*"

The materials considered by the Appeals Panel are "*the relevant Child Protection Case Conference Reports and minutes*", any written representations on behalf of the parent/s and "*a copy of the record of the meeting among the parent, case co-ordinator, his line manager and case conference chairperson*". The function of the Panel is to consider the written material, to meet with the parent (and child, if appropriate) if necessary, to interview the case conference chairperson, to interview any other case conference members, as necessary and, finally, to formulate a reasoned recommendation [paragraph 4.16]. These provisions are of some importance in the context of the present challenge.

[15] In the protracted history of this affair, there has been a series of child protection case conferences, spanning the period October 2004 to January 2008. There was also an appeal to the Appeals Panel, which ensued following

the initiation of these proceedings. Each of these events will be outlined in appropriate detail in the following paragraphs.

III The October 2004 Child Protection Case Conference

[16] The child who was the focus of the Trust's attention at this stage is NS, son of JM, with whom the Applicant was then living. NS was born on 25 November 2003. Mr M, a social worker, prepared a report, dated 1 October 2004, for consideration by the case conference. This described the "nature of referral" in these terms:

> *"NS was admitted to [the hospital] ward with a skull fracture. Explanation given was that mother's partner was with child when NS fell from the bed, striking his head on a bedside cabinet. Hospital staff also noted two burn marks to NS, one old burn mark reported to have occurred when NS fell against a radiator and another more recent burn to NS's hand".*

The preparation of Mr M's report was stimulated by a notification from the hospital which, in turn, was prompted by concerns about the cause of NS's injuries. A police investigation had commenced at this stage.

[17] According to the report, the Applicant and JM had been cohabiting since July 2004. He was then aged 23 years. He had previously cohabited with ED, between 1998 and May 2004, during which period CF and DF were born. The report documents a history of violence and alcohol consumption during the Applicant's somewhat irregular relationship with ED. The milestone events during this phase included a non-molestation order. The Applicant gave Mr M a detailed account of the circumstances in which NS sustained his head injury on 25 September 2004. This, the Applicant claimed, was an accidental injury. Both the Applicant and JM asserted that the burns to NS's hand and ear had also occurred accidentally by reason of contact with a radiator.

[18] Mr M's report contains the following medical opinion regarding the aetiology of NS's injuries:

> *". . . such an injury is unlikely to have been sustained as a result of the reported fall, especially given the noted bruising to the brain and the noted bleeding into the brain tissue. Medical opinion is that such injury would require a degree of force being applied, not consistent with the explanation given".*

As regards the burn injuries, investigations were incomplete. Mr M made the following comments:

> "*Of significant concern is that NS has, within a short period in his young life, sustained three injuries, the skull fracture and the burn to his hand are by far the most serious injuries and, to date, satisfactory explanations are not forthcoming*".

Having rehearsed the available medical opinion, coupled with perceived inconsistencies in the accounts given by the Applicant and JM, Mr M's report concludes:

> "*I would recommend that the case conference place NS's name on the Child Protection Register under the category of physical abuse*".

This recommendation was duly implemented.

[19] As the further history of this saga indicates, the assessment by the Trust's social services personnel in October 2004 that NS had been the victim of physical abuse, suffering injuries of unquestionable gravity and the consequential inclusion of this child in the Child Protection Register overshadowed all material events which occurred subsequently. There was no challenge by the Applicant to the case conference decision and resulting registration of October 2004.

IV <u>The August 2005 Child Protection Case Conference</u>

[20] The child who was the subject of the Trust's attention at this stage was BF, then unborn. His birth occurred on 24 August 2005 and he was the subject of registration *en ventre sa mere*. Once again, the relevant social work report was compiled by Mr M, who described the impetus for the referral in these terms:

> "*This agency was notified that JM was booked into hospital to deliver unborn child, EDC 23.8.05–30.8.05. Referrer aware of ongoing involvement regarding JM's first child NS, following injuries sustained by NS whilst in the care of JM and* [the Applicant]".

The report noted that the police investigation remained uncompleted. The Applicant and JM were apparently cohabiting at this stage. NS had been living with his maternal grandmother (Mrs G) since his discharge from hospital on 1 October 2004, which had been followed by a Residence Order. The Applicant disclosed that he had some continuing contact with the two children from his previous relationship, CF and DF, who lived with their mother, ED. Both the

Applicant and JM continued to assert emphatically that NS's injuries had been sustained accidentally. Mr M's report continues:

> "*Concerns centre around* [the Applicant] *and JM's ability to ensure the safety of the unborn child in light of the on-going and unresolved PSNI investigation into injuries sustained by NS while he was in the care of* [the Applicant] *and JM . . .*
>
> [The Applicant] *and JM do not recognise there are risks to their unborn child as the injuries sustained by NS whilst in their care were accidental . . .*
>
> *Recommendations*
>
> *In light of the highlighted issues of concern, I would recommend that the Case Conference give consideration to the need to place the name of JM and* [the Applicant's] *unborn child on the Child Protection Register under the category of Potential Physical Abuse'".*

[21] The case conference personnel duly considered Mr M's report. According to the minutes, they noted in particular the Applicant's on-going unsupervised contact with CF and DF. Mr McA, an Assistant Principal Social Worker, made the following contribution to the deliberations:

> "*Mr McA stated that the skull fracture was the major injury and the impact required was extremely severe, suggesting the occurrence of a very violent incident. Mr McA further explained that the impact had taken place on one side of NS's head and that he had bled from the other. Mr McA advised that this was an extremely severe injury, requiring extreme force, and could not have been sustained accidentally".*

He further emphasised that "*medical opinion*" was clear about these matters. While it seems evident that his contribution must have been based on the opinion of medically qualified personnel, no such personnel attended the meeting and there is no indication that any medical report was available or considered. The outcome of this conference was the following determination:

> "*The unborn child would be put on the Child Protection Register at birth, under potential physical abuse, and that an EPO* [Emergency Protection Order] *would be sought".*

BF was born six days later and this recommendation was duly implemented.

V Dr Rs' report

[22] This report is dated 4 October 2005 and represents, chronologically, the next significant milestone in the chain of events. Dr R is a consultant paediatric neurosurgeon. According to the report, he had available to him all material medical records, together with transcripts of police interviews. His review of these records indicates that the burns sustained by NS occurred on 23 September 2004, prompting treatment by a general medical practitioner who, apparently, noted the possibility of abuse. NS's head injury was sustained the following day. This is described as a comminuted fracture in the occipital region, with an associated contusion within the intra-cranial substance. Dr R noted that when interviewed by the police, the Applicant's account of the incident was that NS, while sitting on a bed, threw himself backwards, possibly causing the back of his head to strike a table and falling on to the uncovered floor. Upon attending hospital, NS was found to have significant extra-cranial swelling, a complex comminuted skull fracture and an underlying cerebral contusion.

[23] Dr R describes these findings as "*features associated with significant impact . . . a hard blow to the right occipito-parietal region*". In his view, a fall from a bed would "*rarely*" cause such injuries. He continues:

> "[*4.4] The degree of extra-cranial swelling is highly unusual for such as short fall. The presence of a comminuted skull fracture as opposed to a short linear fracture is highly unusual for such a short fall. An underlying contusion, which indicates that the force of the blow not only has fractured the skull but has been transmitted to the underlying brain would be unusual for such a short fall.*
>
> *[4.5] I therefore consider the described mechanism of the injury to be highly unlikely. I would consider it far more likely that an impact of significantly higher force would be required to cause such injuries. In my experience I have seen injuries of such severity in falls from heights from first floor windows or in inflicted head trauma.*
>
> *[4.6] It must be accepted, however, that in any biological system variability does occur. Therefore, whilst considering it highly unlikely that the mechanism described caused the injuries with which he presented, I don't think it can be said that it is impossible that these injuries were caused by the simple domestic fall described by the witness. However, I would be extremely surprised if that were the case."*

Dr Rs' views are expressed with commendable clarity. They require no interpretation and invite no paraphrase. However, as will become apparent, in the events which occurred subsequently certain members of the social services personnel engaged in exercises of this kind. Most significantly, this occurred in the context of a further case conference in May 2006.

VI The Public Prosecution Service Decision

[24] It is apparent that the final decision on whether to prosecute in relation to NS's injuries awaited receipt of Dr Rs' report. The date of the PPS decision was 22 November 2005. The Public Prosecutor concerned compiled a "notification" to the police which (it would appear), in turn, was copied to the Trust's social services personnel. This notification describes the opinion expressed in Dr Rs' report as "*compelling but not categorical*". On the basis that Dr R had acknowledged the *possibility* that NS's injuries could have been sustained in the accidental manner asserted by the Applicant, the PPS conclusion was that the evidential test for prosecution (viz whether there was a reasonable prospect of conviction) was not satisfied. As regards the burn injuries, the notification records the view that a prosecution under section 29 of the Children and Young Persons Act (NI) 1968 would be appropriate, but was not viable as this is a summary offence and the statutory time limit had expired due to an oversight on the part of the police. Accordingly, the Public Prosecutor's conclusion was that there should be no prosecution of anyone with regard to NS's injuries.

[25] According to the evidence before the court, the opinion of Dr R and the PPS decision were first considered by Trust personnel, in the context of a further child protection case conference, in May 2006.

VII The May 2006 Child Protection Case Conference

[26] On 11th May 2006, the Trust conducted a child protection case conference in relation to one child only – BF (son of the Applicant) The purpose of the conference on 11th May 2006 was expressed to be to "*… review the need for BF's name to be retained on the Register*". The Applicant and JM, BF's mother, were in attendance. In accordance with the Code, a further report was prepared in advance by Mr. M. This report explains the registration which occurred on 18th August 2005 as follows:

> "*18.8.05 – name of BF placed on Child Protection Register under category of 'Potential Physical Abuse' at birth*".

[27] Mr. M's report outlines the earlier incident in these terms:

> "*This matter initially came to the attention of Social Services on 25 September 2004 when NS, child of JM and previous partner, LS, was admitted to* [hospital] … *with a head injury received, whilst in the care of JM and her current partner,* [the Applicant]. *NS was upon examination found to have a skull fracture and contusion. The explanation given by JM and* [the Applicant] *was that the child had fallen from a bed and struck his head upon a metal bedside cabinet. Upon admission, staff noted two burns upon NS, an old burn mark upon his ear and a more recent burn to NS's hands*".

The report then documents a referral of the case to social services by hospital personnel and a subsequent police investigation, together with an initial child protection case conference. The report continues:

> "*PSNI pursued the matter of the injuries sustained by NS and sought reports from experts regarding the injuries to the child. This matter was not resolved by PSNI until January 2006*".

The narrative then continues:

> "*This agency was advised by the PSNI in January 2006 that reports they had requested regarding the injuries sustained by NS had returned. The investigating officer had advised that regarding the burns sustained by NS, that it was the opinion of the investigation that the burns were consistent with the explanations given. Indeed tests undertaken upon the Economy 7 storage heaters in the flat indicated that the temperatures fluctuated at various times, reaching a maximum temperature of 93 degrees centigrade …*
>
> *PSNI had sought and obtained a report from a consultant neurosurgeon regarding the fracture sustained by NS. The writer was advised by PSNI that the neurosurgeon, having reviewed the x-rays and medical notes, was of the opinion that whilst sustaining a fracture from a fall in the manner described is unusual, it is possible, given biological system variability …*
>
> *PSNI advised that consequently the matter would not be progressed*".

[28] Mr. M's report further noted that the Applicant and JM had been fully co-operative with Social Services and he commended them accordingly, also describing them as fully committed to each other and to BF, concluding with the following recommendation:

> "*Presently the social worker, through his dealings with the family, would have no anxieties regarding the care of treatment [sic] given to BF by his parents. This would be supported by the health visitor …*
>
> *Consequently, I would recommend that in light of the current information, that BF's name be removed from the Child Protection Register. Furthermore, that there be no difficulties regarding* [the Applicant's] *children visiting him in his own home rather than in his parents' home*".

Accordingly, Mr. M recommended (a) deregistration and (b) unsupervised contact between the Applicant and his children. In simple terms, the social worker was satisfied that BF was not in need of child protection measures.

[29] It is appropriate to observe that, on the face of Mr M's report, none of the following was considered by him:

(a) Dr Rs' report.

(b) The hospital notes and records.

(c) The evidence obtained by the police regarding the aetiology of the burning injuries.

(d) The PPS "notification" to the police.

I consider that these were, indisputably, important sources of information. However, they were not accessed by Mr M, for reasons that are unclear. On the face of Mr M's report, he acquired a limited portion of the information contained in these sources by communicating, probably verbally, with an unidentified police officer. The information thus obtained by Mr M is compressed into some ten lines in his report.

[30] Mr. M's report was duly considered by those in attendance at the case conference held on 11th May 2006. The minutes of these deliberations record that the only reports considered by those in attendance were Mr M's report and a report compiled by the health visitor. There is no mention of any other reports. The minutes contain an extensive résumé of Mr. M's report, as well as the following passage:

> "*Mr. M reinforced that* [the Applicant] *and JM have welcomed the involvement of the Trust and have been fully compliant: they fully accept that BF's name was placed on the Child Protection Register because of issues hinged to [sic] NS's injuries. The couple have always been adamant that NS's injuries were accidental and were most definitely not deliberate. Despite this traumatic time for the couple, they have maintained their relationship and remained extremely close to one another*".

Under the heading "Risk Analysis" the following entry is found:

> "*No indication presently that BF is being or has been injured or is likely to suffer significant harm …*
>
> *No* [previous incident of abuse or neglect] *involving BF*".

The minutes also contain a list of factors in favour of deregistration, with but one negative factor, described as "*alleged domestic violence by ED (historic)*". The conference then considered whether the risk of physical abuse to BF was very likely, likely, not very likely or unlikely, making an assessment of "unlikely".

[31] The consideration given by those in attendance to the medical issues and medical evidence in noteworthy. Firstly, one learns from the minutes that the registration decision made previously, on 18 August 2005, had been influenced by a medical opinion. I would observe that this is not clear from the minutes of the earlier case conference, which records that no medically qualified person (other than a midwife) was in attendance and also documents an apology from Dr B, a general practitioner, albeit one finds reference to "medical opinion". The minutes of the May 2006 case conference include the following material passage:

> "*In relation to the head injury sustained by NS, the consultant neurosurgeon investigating concluded that while the injury was uncommon it was not unlikely given NS's 'biological system variability', i.e. his physical make up. Mr McA stated that the neurosurgeon's opinion would be contrary to the view presented at the Initial Child Protection Case Conference in August 2005. Mr M confirmed that this was the case and that the doctor giving evidence at the previous Case Conference had stated that NS would need to have been dropped either from a considerable height or indeed been hit by a car to have sustained such an injury.*

Notwithstanding, Mr M stated that this view was not upheld by further investigation by the PSNI".

[32] The following observations regarding the passage set out above are appropriate:

(a) None of the important source materials listed in paragraph [29] above was considered by the case conference members.

(b) No medically qualified person was in attendance.

(c) Dr R did <u>*not*</u> opine that the mechanism of NS's head injury asserted by the Applicant was "*unlikely*": rather, he described it as "*highly unlikely*" and further stated that he would be "*extremely surprised*" if the injury had occurred as described.

(d) Dr Rs' report repeatedly opines that it would be "*highly unusual*" for a head injury of such severity to have been sustained in the manner asserted by the Applicant.

(e) Dr R further considers that it would be "*far more likely*" for the head injury to have been inflicted by "*an impact of significantly higher force*".

(f) Dr Rs' report contains no comments about <u>NS's</u> biological system variability

(g) No further views from the doctor who (apparently) contributed to the previous case conference were solicited.

(h) The previous contribution by the aforementioned doctor was dismissed, without further ado, by non medically qualified persons.

[33] The outcome of the case conference conducted on 11th May 2006 is documented in the minutes in the following terms:

"*The meeting was unanimous that* [the risk of neglect of or abuse to BF] *would be unlikely. Professionals highlighted no concerns and* [the Applicant] *and JM's parenting of BF is extremely positive …*

> ***On the basis of level of risk identified, should the child's name be retained on the Child Protection Register? ...***
>
> ***No ...*** *The meeting was unanimous in its decision that BF's name should be removed from the Child Protection Register, however in the absence of a quorum this cannot be progressed. It was therefore proposed that the case conference will convene again in four weeks time with the presence of the PSNI and a nurse manager …*
>
> *Mr. McA* [Assistant Principal Social Worker] *stated that there were no outstanding areas of work and there was no objection to* [the Applicant] *moving back in with JM. In relation to* [the Applicant's] *contact with his other children and ED, Mr. McA advised this was at* [the Applicant's] *own discretion …*
>
> ***Child Protection Plan***
>
> *1. BF's name to be retained on the Child Protection Register pending the reconvened case conference …*
>
> *4. Contact between* [the Applicant] *and his children to be flexible as appropriate.*
>
> *5. The conference has no objection to* [the Applicant] *cohabiting with JM and BF.*
>
> *6. A review child protection case conference to be convened as soon as possible in order to consider deregistration*".

As appears from these passages, the unanimous view in favour of de-registration could not be given effect, as the meeting was not quorate. However, the approval given to unsupervised contact between the Applicant and BF was not similarly suspended, but was apparently to be activated immediately.

[34] In the event, the aspiration to reconvene the case conference promptly did not bear fruit. The evidence before the court indicates that the next case conference did not materialise until 15th December 2006. According to the Applicant's affidavit, the case was being handled by a new social work team at this stage. He describes a hardened, stricter and more hostile approach by the new team members. He claims that they demanded that he leave the family home and confined him to supervised contact only. His relationship with JM seemingly disintegrated during this period.

VIII The December 2006 Child Protection Case Conference

[35] A further child protection case conference was convened on 15 December 2006. Once again, the subject of attention was BF. It is clear from the minutes that a new social services team was dealing with the case. The senior responsible member of personnel was by now Mrs L, Assistant Principal Social Worker. There are two immediately striking features of the minutes. Firstly, those in attendance included Dr P, a consultant paediatrician. Secondly, according to the record:

> "*Reports were prepared by Ms MP, Social Worker. Mrs EC, Health Visitor and should be read in conjunction with these minutes. The medical report in relation to NS's injuries and the report from the DPP (with some deletions) were also available at the meeting.*"

[36] The minutes demonstrate that Dr P made a number of material interventions during deliberations. For example:

> "*Dr P said that the fracture was on one side of his head and the bleeding was on the other side. In order for this to happen, there would need to have been great force used*".

The opinion expressed by Mrs L, on behalf of social services personnel, was –

> "*. . . that on balance, it is more likely that* [the Applicant] *was responsible for the injuries to NS, who was either accidentally injured, or he was hit against something, or with something*".

The main "weakness" or "limitation" identified was the following:

> "*Unexplained serious injuries to NS which on balance of probability were non-accidental*".

The conference members expressed themselves unable to make any estimate of the probability of abuse or neglect occurring in respect of BF. However, they assessed the level of risk of abuse or neglect as "*very high*", giving rise to the conclusion that the assignment of BF to the Child Protection Register should be maintained, in the category of "*potential physical abuse*". The "Child Protection Plan" contained the following provisions:

> "*4.* [The Applicant] *is asked not to live in the same house as JM and BF and not to have unsupervised contact with BF . . .*

6. *JM is not considered a suitable person to supervise* [the Applicant's] *contact with BF.*

7. *An assessment of the parenting capacity of both parents will be carried out separately . . .*"

It would appear that this outcome was unanimous. It contrasts markedly with the May 2006 case conference.

[37] The next landmark date was 22nd March 2007, when the Trust initiated care proceedings in respect of BF. The Trust's application for a care order was based on the injuries suffered by NS on 29th September 2004 which, it was asserted, were non-accidental. In due course, these proceedings were withdrawn by the Trust, on 28th September 2007. This followed the making of the first impugned determination.

IX The First Impugned Determination [30 August 2007]

[38] The first of the impugned determinations is documented in an "Initial Case Conference Report", bearing the above date. The report describes the reason for convening the conference as follows:

> "[The Applicant] *is having unsupervised contact with his two children, CF and DF. Previous police and social services investigation into non-accidental injuries received by NS when in the care of* [the Applicant] *and his partner at that time*".

Thus there were two interlinked precipitating factors. It is further documented that the Applicant's relationship with JM was of some two months duration only when the hospital admission in respect of NS occurred, on 25th September 2004. The report purports to summarise the report of Dr R, consultant neurosurgeon, in these terms:

> "*Dr. R, consultant neurosurgeon, reported that in his opinion he considered the described mechanism of the head injury to be highly unlikely. Dr R stated that he considered it to be more likely that an impact of significantly higher force would be required to cause such injuries. Dr R related that he had seen injuries of such severity in falls from heights from first floor windows or on inflicted head trauma. In summarising Dr R did accept that in any biological system variability does occur, whilst he felt that it was highly unlikely, he could not say it was impossible.*"

The report continues:

> "*The Public Prosecution Service directed that there was insufficient evidence to meet the directing test with respect to NS's head injury. It was acknowledged, however, that it was highly unlikely that the method in which the injury was allegedly caused was true, but not impossible*".

The report further notes:

> "*With respect to the burn injuries there was also insufficient evidence to lay charges of positive abuse, as again the directing test was not made. There was sufficient evidence to pursue the charge of 'exposing a child under twelve years old to the risk of burning'. This charge however could not be pursued due to a clerical error on the part of the PSNI.*"

It is tolerably clear from these passages that the author of the report (Ms McK) had at her disposal both Dr Rs' report and the PPS "notification" to the police. Moreover, her portrayal of these reports is demonstrably more accurate than the previous attempts at the May 2006 case conference.

[39] The summary of Ms McK's views is expressed in the following terms:

> "***Conclusion***
>
> *NS sustained a fractured skull consistent with a high fall or use of significant force and believed to be of a non-accidental nature. Whilst the PSNI were initially involved in investigating this matter this involvement has now ended. Given that these injuries are believed to be of a non-accidental injury* [sic] *and neither* [the Applicant] *nor his partner at the time fail to accept* [sic] *that the injuries to NS were anything other than accidental* [sic] *this would suggest that* [the Applicant] *could be a potential risk of physical harm to his children, CF and DF. This risk is further exacerbated by ED's inability to view* [the Applicant] *as a potential risk to CF and DF. The author would recommend in the light of the current information that the names of CF and DF be placed on the Child Protection Register under the category of Potential Physical* [Abuse] *and the issue of contact be urgently addressed*".

On the face of the minutes, no medically qualified person was in attendance. Notably, neither Ms McK's report nor the corresponding case conference minutes refer to the deliberations and conclusions of the May 2006 case conference. They are equally silent about the December 2006 case conference. While the attention of each of the earlier case conferences was focused on a different child (BF) and while the attentions of the August 2007 case conference were occupied by two other children – CF and DF – this omission is striking, given that the injuries to NS were the common thread of all of these conferences and the Applicant was at all times the adult mainly under suspicion.

[40] This recommendation of the social worker was duly accepted by the case conference in strikingly bare terms and gave rise to the following entry in the Child Protection Register:

> "*Date registered – 30 August 2007 …*
>
> *CP Code A – potential physical abuse …*
>
> *Reason regd. – father*".

This entry relates to DF, in respect of whom there is a further entry describing the Applicant as a "*suspected abuser*", guilty of category 1 "*suspected abuse – physical*". As regards CF, there is an entry in the Register corresponding to the initial entry concerning DF, but no second entry.

X Appeals Panel Determination

[41] The Applicant duly exercised the right of appeal enjoyed by him under the Code. He was assisted by his solicitors, who submitted a detailed written "Statement of Appeal", which emphasized in particular the outcome of the child protection case conference on 11th May 2006 [in paragraphs 12 and 13]. It is clear from the evidence that this "Statement of Appeal" was duly considered by the Appeals Panel, which convened on 19th October 2007. The Panel was constituted by representatives of the BHSC Trust, the SEHSC Trust and an Assistant Director of Barnardos. According to the minutes, the Panel considered "*detailed evidence*" from Mrs. L, Assistant Principal Social Worker, who had chaired the case conference on 30th August 2007. The Panel also conferred (by telephone) with the Child Protection Nurse Adviser who had attended the previous case conference.

[42] It its conclusions, the Appeals Panel recorded its "*significant concern*" regarding the injuries sustained by NS, which it described as "*serious and unresolved*", constituting "*a major consideration*" in any decisions about the welfare and protection of CF and the Applicant. The text continues:

> "*The content of paragraphs 12 and 13 of* [the Applicant's] '*Statement of Appeal*' *was noted. This referred to social services evidence presented to a Child Protection Case Conference held on 11th May 2006 in respect of BF* [viz. BF]. ***The Panel considered that this was significant evidence which warranted but was not afforded consideration and analysis at the case conference held on 30th August 2007 in respect of CF and DF ...***
>
> *The Panel also noted that the Case Conference Social Work Report prepared for and presented to the Case Conference on 30th August 2007 included an initial assessment of strengths, risks, needs and resilience and protective factors.* ***The Panel concluded that there was not evidence of analysis of these factors by the Case Conference held on 30th August 2007 in reaching its conclusions.***
>
> ***Outcome***
>
> ***The Panel was not convinced that the information presented at the Case Conference on 30th August 2007 was complete and adequately considered in the decision making process. The Panel was therefore also unable to express a view as to whether it considered that the threshold for registration was met...***
>
> ***The Panel consequently recommends that*** **[the Applicant's]** ***appeal should be upheld***".

[Emphasis added].

The approach and conclusions of the Appeals Panel can be readily related to paragraph 6.61 of the Code and paragraph 4.5 of Appendix 4.

XI The Second Impugned Determination [6 November 2007]

[43] The conclusion of the Appeals Panel was the impetus for a further child protection case conference, convened by the Trust on 6th November 2007. The minutes of this meeting contain the following passage relating to the case conference held in May 2006 and its outcome:

> "*… a report had been received from the consultant neurologist and the PSNI concluded their investigation. The PSNI stated that it was their opinion that it was unlikely NS sustained his injuries in the way explained by JM and* [the Applicant] *however there was no significant*

> *evidence to suggest exactly how the injuries were sustained. The meeting (case conference) was not quorate and whilst de-registration was discussed at length, no decision could be made without a quorum. Ms D advised that in December 2006 a further conference was convened and it was decided that as a consequence of the unresolved issues and given consideration that there was a significant potential for risk, the decision was taken that the case would transfer to the Children and Families Team at the relevant Family Centre.*"

The minutes document, in some detail, the issues discussed and the contributions from those in attendance. As the meeting progressed, the Applicant (who was present, with ED) reaffirmed his unwillingness to submit to contact with his children fully monitored by his parents.

[44] The outcome was a majority decision in favour of registering CF and DF on the Child Protection Register, following an acknowledgement of both risks *and* "*protective factors*". It was recorded that registration would probably not be justified if the Applicant were willing to submit to arrangements whereby contact with his children would be supervised by his parents. The minutes continue:

> "*Given this Ms McA* [Assistant Principal Social Worker] *confirmed the children's names would be added to the Child Protection Register …*
>
> ***Decision***
>
> *CF and DF's names will be placed on the Child Protection Register under the category of Potential Physical Abuse.*
>
> ***Child Protection Plan***
>
> *1. The childrens' names will be placed on the Register under the category of Potential Physical Abuse …*
>
> *9. It is recommended that* [the Applicant's] *contact with the children commences and finishes at the paternal grandparents' home and for* [the Applicant's] *own protection as well as the childrens' potential safety it is suggested that unsupervised contact is limited*".

[45] At this juncture, these proceedings intervened and leave to apply for judicial review was granted by Weatherup J, on 28th November 2007. An amended Order 53 Statement, designed to challenge both determinations,

was duly submitted. This was further amended in the course of the substantive hearing.

XII The January 2008 Child Protection Case Conference

[46] This was a review case conference. Those in attendance included the Applicant and ED, who made appropriate contributions. The minutes record:

> "*It was noted that if* [the Applicant] *had consented to a supervised contact arrangement, the childrens' names may not have been placed on the Register at the last Case Conference. ED has moved to a position where she will not allow unsupervised contact until the issues are resolved satisfactorily. ED is providing excellent care for the children and she would like* [the Applicant] *to have consistent contact with them.*"

Thus a significant change of circumstances had occurred: ED was no longer allowing the Applicant to have unsupervised contact with the children. Unsurprisingly, a unanimous decision to "de-register" the children, based on the altered circumstances then prevailing, ensued.

The decision is documented in the following terms:

> "***Decision***
>
> *CF and DF's names are removed from the Child Protection Register.*
>
> ***Family Support Plan***
>
> *1. There will be a minimum six month social work involvement hereafter to ascertain how the situation progresses and to link in with the work of* [the Applicant] *… at* [the relevant Family Centre] …
>
> *2. A post de-registration meeting will be held on 16th June 2008 …*
>
> *3. If the outcome of the work is not positive or there is a deterioration in the familial circumstances there may be a need to meet again before that date …*
>
> *7.* [The Applicant] *is asked to reconsider the whole issue of contact with regard to endeavouring to make this more regular.*"

[47] As foreshadowed at the case conference conducted on 30th January 2008, a "post de-registration" case conference proceeded six months later, on 16th June 2008. [This was the reason for the adjournment of the scheduled substantive hearing of this judicial review application, on 10th June 2008]. In the event, this conference was unproductive, from the Applicant's perspective, as documented in the Trust's minutes:

> "*Recommendation that contact will remain supervised. The issue of contact is being dealt with in court …*
>
> *To reconvene case discussion if any concerns arise*".

The reference to "court" denotes a contact application initiated by the Applicant, which was then outstanding. It was further recorded that the Applicant "*… wished to avail of further work at* [the relevant] *Family Centre in order to complete the parenting assessment*". He continued to eschew any suggestion of voluntary supervised contact with the children, with the result that, apparently, his interaction with them was by then virtually non-existent.

XIII <u>The Course of These Proceedings</u>

[48] As appears from the foregoing, the pendulum swung backwards and forwards several times during the period August 2007 to January 2008. The decision on 30th January 2008 precipitated an argument advanced on behalf of the Trust (by Mr. Toner QC, appearing with Ms Sholdis) that the judicial review application should be dismissed *in limine*, applying the principle in ***Regina –v- Secretary of State for the Home Department, ex parte Salem*** [1999] 2 All ER 42. At an interim hearing on 8th October 2008, I ruled that I would consider this submission in the context of the substantive hearing. I did not consider it appropriate to rule on this issue as a preliminary matter, given the protracted and complex history of this affair.

[49] By 30th January 2008, the original impugned determination had been superseded, twice. Thereafter, the proceedings limped along, to some extent. During the intervening period of some nine months there were certain further developments. I would observe that this was virtually inevitable, given the fluidity and fluctuation which habitually characterise cases of this kind. This court then conducted review hearings, on 8th and 23rd September and 8th October 2008. The outcome of these was the generation of further affidavit evidence (with documentary exhibits) on behalf of both parties and, latterly, the submission of a further amended Order 53 Statement.

[50] The court also received evidence about parallel contact proceedings, initiated by the Applicant. The hearing of this judicial review application was completed on 11th November 2008, by which stage the proceedings in the

Family Division were progressing, but were uncompleted, having reached the point where the Trust had prepared a report under Article 4 of the Children (Northern Ireland) Order 1995, which I received in evidence. This report evinced the Trust's persisting opposition to the Applicant having unsupervised contact with CF and DF.

[51] The chronology outlined above prompts some reflection on the propriety of invoking, and continuing to invoke, the supervisory jurisdiction of the High Court by an application for judicial review in a case of this nature. There are two long recognised features of an application for judicial review. The first is that it is designed to provide an expeditious and effective remedy, in cases where the application is meritorious. The second is that the judicial review jurisdiction of the High Court is ill suited to fact finding in many circumstances and, in consequence, may be inappropriate where there are significant or extensive disputed factual issues. In the events which occurred, the substantive hearing of the Applicant's challenge did not materialise until almost one year after the grant of leave to apply for judicial review.

[52] In cases where the grant of leave is not followed by an expeditious hearing, as in this instance, the following observations are apposite:

(a) The Applicant is not obliged to take up the grant of leave to apply for judicial review.

(b) The Respondent is at liberty to press for a substantive hearing at any time.

(c) The Respondent can also consider the option of an application to set aside the grant of leave to apply for judicial review or, where so advised, to convene a preliminary hearing to consider the application of the ***Salem*** principle.

(d) In certain circumstances, the court may, of its own volition, review the propriety of the grant of leave to apply for judicial review.

(e) The Applicant's legal advisers must at all times bear in mind that the grant of remedies in judicial review is discretionary, being less likely to occur as time goes by.

(f) The Applicant should at all times review the propriety of keeping judicial review proceedings alive in circumstances where they <u>may</u> be overtaken by other proceedings which have come into existence and which <u>could</u> provide a more suitable vehicle for resolution of the Applicant's main concerns and/or

where an expeditious, practical and effective remedy is no longer possible.

XIV The Parties' Arguments

[53] The case advanced on behalf of the Applicant by Mrs. Keegan QC (appearing with Ms McKenzie) is reflected in paragraph 3 of the latest amended Order 53 Statement. The Applicant challenges both of the Trust's determinations to make entries in the Child Protection Register in respect of CF and DF on the ground that they were unreasonable in the ***Wednesbury*** sense, in the following respects:

(a) The Trust had known about the injury to NS from the outset, but did not intervene in respect of CF and DF until 30th August 2007, some three years later.

(b) There was no intervening event causing increased concern to justify this asserted change in attitude by the Trust.

(c) In making the first impugned determination, the case conference did not afford consideration and analysis to the social service evidence presented to the case conference held on 11th May 2006.

(d) In making the second impugned determination, the case conference did not take into account adequately or at all the recommendations of the Appeal Panel, dated 19th October 2007 or the social service's evidence presented to the case conference held on 11th May 2006.

The second ground of challenge ultimately promoted on behalf of the Applicant was that the impugned determinations infringed the rights of the Applicant and the two children concerned under Article 8 of the Convention, contrary to Section 6 of the Human Rights Act 1998.

[54] The argument that both impugned determinations were vitiated by ***Wednesbury*** irrationality involved a detailed examination and critique of the minutes of four successive case conferences, spanning the period May 2006 to November 2007, together with an assessment of the deliberations and recommendation of the Appeals Panel in October 2007. With regard to the first impugned determination, Mrs. Keegan highlighted particularly the absence of any reference to or consideration of the social worker's report generated in May 2006, the deliberations of the May 2006 case conference and the conclusions and recommendations made at that time. This is exemplified in the August 2007 social work report, prepared by Ms McK, which omits these significant events and materials from the background chronology and

affords no consideration to them. Similarly, they did not receive any consideration, analysis or debate in the minutes of the ensuing case conference on 30th August 2007. Mrs. Keegan further highlighted the absence of any reasoning or elaboration in the case conference decision, as documented in the minutes. Reliance was also placed on the criticisms which the Appeals Panel, some two months later, made of the deliberations and outcome of the August 2007 case conference.

[55] As regards Article 8 of the Convention, it was accepted on behalf of the Applicant that each of the impugned determinations was in accordance with the law and had the legitimate aim of protecting children and promoting their welfare. It was argued, however, that they were disproportionate in their effect, since they gave rise to a need for unduly intrusive supervision, by the Applicant's parents, of contact between him and the two children concerned, in circumstances where an established and satisfactory father/child relationship existed. The Applicant's complaint of a want of proportionality relies also on the particulars of asserted ***Wednesbury*** irrationality. It highlights the Trust's alleged earlier knowledge of the contact between the Applicant and CF and DF and the Trust's failure to intervene much sooner. It is suggested that the decision to convene the case conference on 30th August 2007 and the outcome thereof were influenced by the consideration that the Trust was then involved in care proceedings in respect of BF before the High Court, which suffered from such frailties that an impending withdrawal was likely. As a discrete facet of the asserted breach of Article 8, Mrs. Keegan also relied on the inability of the appeal process to provide the Applicant with an effective remedy.

[56] The second of the impugned determinations was attacked on grounds similar to those founding the challenge to the first. Once again, reliance was placed on the comments, reasoning and conclusions of the Appeals Panel. It was argued that neither the social work report nor the minutes of the ensuing case conference gave adequate consideration to the criticisms and conclusions of the Appeals Panel. This, it was argued, is borne out particularly by the minutes which, on their face, reflect no consideration of the deliberations, views and conclusions of the May 2006 case conference. Thus, it was suggested, the November 2007 case conference had fallen into the same errors as its August 2007 predecessor.

[57] On behalf of the Trust, Mr. Toner QC sought to argue that the interventions which occurred in August and November 2007 and the sharply differing approach which these entailed, when compared with the May 2006 case conference, were explicable on the basis that the Trust did not realise until the summer of 2007 that supervised contact between the Applicant and CF and DF was taking place. Emphasis was placed on the deliberations and outcome of the December 2006 case conference (which concerned BF). It was suggested that the December 2006 case conference and those which followed

in August and November 2007 were better informed than their predecessor in May 2006, since the evidence established that Dr R's report and the PPS "notification" to the police were both available and considered. Furthermore, the December 2006 case conference had the conspicuous benefit of the presence of and contributions from Dr. P, a consultant paediatrician. It was argued, in terms, that the three case conferences postdating the May 2006 case conference were better informed and more robust than their predecessor and had outcomes which could, objectively, be readily explained and justified.

[58] It was further argued that the May 2006 case conference placed undue weight on the co-operation of the Applicant and JM with the social services and the apparent strength of their relationship with each other, while failing, conspicuously, to properly and critically examine Dr Rs' report and the question of whether the injury to NS had been non-accidental. Furthermore, the May 2006 case conference did not have the benefit of input from any medically qualified person. It was acknowledged, realistically, that the Appeals Panel findings in relation to the August 2007 case conference were appropriate and could not be criticised or challenged, with the result that had this substantive application for judicial review been heard between the date of the Appeals Panel report (19th October 2007) and the date of the subsequent, further decision of the case conference (6th November 2007) an order quashing the August 2007 determination would probably have been made – subject to arguments about alternative remedy and continuing process. It was also contended that intervention by the High Court in the exercise of its jurisdiction in a case of this nature should be restrained and should, in particular, take into account the informal and non-legalistic nature of the child protection case conference and the Child Protection Case Register system.

[59] Finally, it was submitted on behalf of the Trust that the court should decline to grant relief, applying what has become known as the "***Salem***" principle: see ***Regina –v- Secretary of State for the Home Department, ex parte Salem*** [1999] 2 All ER 42. The substance of this argument was that the first impugned determination had been overtaken by the Appeals Panel finding and recommendations, coupled with the ensuing second impugned determination and that all of these decisions had, subsequently, been superseded by the outcome of the further case conference held on 30th January 2008. This discrete argument also highlighted the highly fact specific nature of this case and the more recent private law contact proceedings initiated by the Applicant, which are currently progressing through the Family Division of the High Court and are capable, in principle, of providing the Applicant with the remedy which he ultimately seeks, namely unsupervised contact with CF and DF. This argument further drew attention to the undesirability of two divisions of the High Court potentially reaching conflicting issues on the same issue.

[60] Replying to this discrete argument, Mrs Keegan drew attention to the decision in ***Re DPP's Application*** [2000] NI 174, contending that even if the Applicant should be successful in the currently uncompleted contact proceedings in the Family Division, this will not undo the wrongs or extinguish the adverse impact arising out of the two impugned determinations. It was argued that there is nothing academic or theoretical about the Applicant's continued challenge to these determinations and that a declaration or an Order of Certiorari would constitute a remedy of real and substantial benefit to him. It was further contended that the enduring impact of the two impugned determinations is evidenced by the Trust's continuing opposition to unsupervised contact between the Applicant and CF and DF.

XV <u>Consideration</u>

[61] The starting point is that a decision by any Trust to make an entry in the Child Protection Register is, in principle, vulnerable to challenge by an application for judicial review. Decisions of this *genre* are made by a public authority exercising public law powers and are, hence, justiciable. They also have a statutory dimension, having regard to Article 66 of the Children (Northern Ireland) Order 1995.

[62] It is trite that in judicial review proceedings, the High Court exercises a supervisory jurisdiction and does not act as a court of appeal. The intensity of review in the exercise of this supervisory jurisdiction varies from one context to another. This was emphasized in a celebrated passage in ***Regina –v- Secretary of State for the Home Department, ex parte Daly*** [2001] 3 All ER 433, paragraph [28] (recently described as the *ipsissima verba* of Lord Steyn: ***In Re E (a child)*** [2008] UKHL 66, paragraph [53], per Lord Carswell).

[63] In principle, while bearing in mind the contextually orientated variable nature of the threshold for judicial intervention, a challenge based on ***Wednesbury*** unreasonableness (or irrationality) is invariably difficult to make good. A modern treatise of the ***Wednesbury*** principle is contained in ***De Smith's Judicial Review*** (6th Edition), paragraph 11-018) in these terms:

> "*That formulation attempts, albeit imperfectly, to convey the point that judges should not lightly interfere with official decisions on this ground. In exercising their powers of review, judges ought not to imagine themselves as being in the position of the competent authority when the decision was taken and then test the reasonableness of the decision against the decision they would have taken. To do that would involve the courts in a review of the merits of the decision, as if they were themselves the recipients of the power. For that reason, Lord Greene in* ***Wednesbury***

> *thought that an unreasonable decision under his definition 'would require something overwhelming' (such as a teacher being dismissed on the ground of her red hair)*".

The authors also make the following interesting observation [paragraph 11-036]:

> "*Although the terms irrationality and unreasonableness are these days often used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification …*
>
> *Absurd or perverse decisions may be presumed to have been decided in that fashion, as may decisions where the reasons given are simply unintelligible. Less extreme examples of the irrational decisional include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decision , or where there is absence of evidence in support of the decision. Mistake of material fact may also, according to recent cases, render a decision unlawful.*"

[64] It is equally well settled that one facet of ***Wednesbury*** unreasonableness is the failure of the public authority concerned to take into account a material consideration. This can embrace material facts or relevant evidence. In principle, it is less difficult for a judicial review challenger to establish a defect of this kind than perversity, absurdity or irrationality. In certain cases, this failure can be demonstrated objectively, usually by analysis of the determination under challenge and the relevant surrounding evidence. In ***Administrative Law*** (Wade and Forsyth, 9th Edition, p. 380), the authors observe:

> "*There are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to have failed to take account of relevant considerations, so that its action is ultra vires and void. It is impossible to separate these cleanly from other cases of unreasonableness and abuse of power, since the court may use a variety of interchangeable explanations, as was pointed out by Lord Greene. Regarded collectively, these cases show the great importance of strictly correct motives and purposes. They show also how fallacious it is to suppose that powers conferred in unrestricted language confer unrestricted power*".

Broadly, a fact or a factor qualifies as a material consideration – and, hence, something which the decision maker must take into account – if, where the exercise of statutory powers is concerned, the statute expressly or impliedly confers this status on it. See ***Creedenz –v- Governor General of New Zealand*** [1981] 1 NZLR 172, per Cooke J, at p. 183:

> "*What has to be emphasized is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision …*
>
> *There will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the Ministers … would not be in accordance with the intention of the Act*".

These formulations were cited with approval by the House of Lords in ***Re Findlay*** [1995] AC 318, at p. 333-334, where they were described by Lord Scarman as "*a correct statement of principle*". I would further observe that this doctrinal approach is considered the correct one, irrespective of whether the decision making context has a statutory character.

[65] The evidence in the present case establishes that the Child Protection Register and its surrounding procedures are a process of some vintage, common to the jurisdictions of Northern Ireland and England and Wales. Challenges to registration decisions by applications for judicial review are not without precedent. There are several reported decisions which provide guidance on the intensity with which the High Court should, generally, exercise its supervisory jurisdiction in this type of case.

[66] In ***Regina –v- Harrow London Borough Council, ex parte D*** [1990] 1 FLR 79, the following observations were made about the child protection case conference [at p. 82]:

> "*It is normally a re-requisite of entry on the register that a case conference has been called, but the case conference is not a decision making body. However, its recommendation will in practice be followed by the local authority or the NSPCC, which is the decision making body and has the responsibility for keeping the register. The guides and*

> *circulars are advisory in tone, but expected in practice to be followed…*
>
> *There is no statutory basis for the case conference or the register, but both are considered by the DHSS to be good social work practice and necessary elements for, inter alia, protection of children at risk*".

Responding to the argument that registration decisions of this kind are not susceptible to an application for judicial review, Butler-Sloss LJ stated [at p. 84]:

> "*Although the contents of the register are confidential, a significant number of people inevitably have to be aware of the information contained in it. As the* ***Norfolk*** *case demonstrates, the effect upon outsiders may be dramatic.* ***If the decision to register can be shown to be utterly unreasonable, in principle I cannot see why an application to review the decision cannot lie.*** *In coming to its decision, the local authority is exercising a most important function which can have serious consequences for the child and the alleged abuser …*
>
> ***It would also seem that recourse to judicial review is likely to be, and undoubtedly ought to be, rare***".

[Emphasis added].

In support of this thesis, Her Ladyship highlighted the "*unstructured and informal*" nature of the decision making process, emphasizing that "*… it is not a judicial process*" and stressing the paramountancy of the welfare of the child concerned. She continued:

> "*All concerned in this difficult and delicate area should be allowed to perform their task without looking over their shoulder all the time for the possible intervention of the court.* ***The important power of the court to intervene should be kept very much in reserve, perhaps confined to the exceptional case which involves a point of principle which needs to be resolved, not only for the individual case but cases in general, so as to establish that they are not being conducted in an unsatisfactory manner***".

[Emphasis added].

Continuing, Her Ladyship cautioned:

> "*In the normal case where criticism is made of some individual aspect of the procedure which does not raise any point of principle, leave should be refused …*
>
> ***In this area unbridled resort to judicial review could frustrate the ability of those involved in their effort to protect the victims of child abuse***".

[Emphasis added].

Finally, Her Ladyship highlighted that an entry in the Register must not be considered "*… in any way a finding of fact, even less a finding of guilt, nor should it be seen as such*" [at p. 85].

[67] An example of a successful application for judicial review in this sphere is provided by ***Regina –v- Hampshire County Council, ex parte H*** [1999] 2FLR 359, where a mother and stepfather challenged the registration of five children, on the grounds of physical and emotional abuse, following a child protection case conference. The factual matrix (in common with the present case) included the involvement of the Appeals Panel. In considering the challenge to the initial registration decision, arising out of a case conference, Butler-Sloss LJ highlighted a number of defects in the approach and deliberations of the Panel and observed [at p. 365]:

> "*The absence of knowledge of the child, of assessment of her actual situation, of her relationship with the stepfather and her position in the home, and no information from other sources, left the case conference with serious gaps in the necessary material upon which to come to an initial decision whether to register her in the category of emotional abuse*".

Her Ladyship also highlighted the absence of medical or psychological evidence. This combination of factors prompted the conclusion that "*… there was not the material upon which to place RK in the category of emotional abuse*" [at p. 366]. Notwithstanding, the court declined to grant relief, on the grounds of (a) alternative remedies (the appeals and complaints procedures), (b) substantial delay and (c) the tactical nature of the judicial review application.

[68] In ***Ex parte H,*** the initial registration decision was followed by intervention by the Appeals Panel which, in turn, stimulated a further case conference and resulting registration decision (a sequence to be compared with that in the present case). Addressing the challenge to the latter, Butler-Sloss stated [at p. 369]:

> "*In our view the conference in April 1997 fell between two stools. Its primary function was to reconsider the appropriateness of entering RK's name in the register in the category of emotional abuse in the light of the findings of the Appeal Panel. It should have considered registration* ***de novo****. It would be expected usually to give effect to the decision of the Appeal Panel unless there was some good reason for not doing so …*
>
> *The members of the case conference should have paid more attention to the conclusion of the Panel that the category of emotional abuse was inappropriate …*
>
> *We are concerned as to the lack of weight being given to their conclusions in the child protection procedure. We hope that the conference of 9th April 1997 was not typical of conferences held consequent upon findings of an Appeal Panel and that in other cases the views of this senior and authoritative body are properly respected*".

Having referred to the earlier decision in ***Ex Parte D***, the court determined to grant a declaration, in terms that there was insufficient material to justify the impugned registration, while emphasizing simultaneously the continued validity of the ***Ex parte D*** philosophy and explaining [at p. 372]:

> "*This case demonstrates that in order to register the name of a child in a category there has to be some material upon which to base the decision to register relevant to the category identified*".

The court brusquely refused the application for an Order of Certiorari, on the ground that in light of the subsequent de-registration of the child "*… such relief is now academic and therefore unnecessary*" [at p. 372].

[69] Another reported judgment belonging to this sphere is ***Regina –v- Norfolk County Council, ex parte M*** [1989] 2 All ER 359, where the Applicant was a fifty-year-old married man of good character whose name was placed on a child abuse register by the local authority concerned. The authority also notified his employer, resulting in suspension from his employment. The Applicant challenged these decisions by an application for judicial review. The judgment of the court illustrates the kind of circumstances in which intervention by the High Court may be appropriate in this field. Waite J made an Order of Certiorari quashing the impugned decisions. In the course of his judgment, he stated [at p. 366]:

> "*I accept that a case conference deliberating whether or not to place a name on the register as an abuser is not acting judicially so as to make the rules of natural justice automatically applicable to its procedures as though it had been functioning as a tribunal. Nevertheless, the consequences of registration for M were in my judgment sufficiently serious … to impose on the Council a legal duty to act fairly towards him. The Council's case conference acted unfairly and in manifest breach of that duty when it operated a procedure which denied him all opportunity of advance warning of its intention, or of prior consultation, or of being heard to object, or of knowing the full circumstances surrounding its decisions*".

On the separate issue of reasonableness, His Lordship continued:

> "*The Council's behaviour towards M offended not only the most basic notions of fair play but was also so un reasonable as in my judgment to come well within the* ***Wednesbury*** *principle*".

Waite J made two further statements of note. Firstly [at p. 365] he acknowledged:

> "*The courts are always slow to censure local authorities in cases of this kind, because judges are aware of the difficulties (including resource problems) with which social workers have to contend. Nevertheless, the circumstances of the present case are exceptional and extreme. M is entitled to a finding, which I make regretfully, that the Council's conduct towards him was obtuse, unfeeling and unfair*".

Secondly, His Lordship, in rejecting a submission that the impugned decisions were not justiciable, stated [at p. 365]:

> "*I have been wholly unable to accept that argument. The section of the public entitled to access to the register is certainly limited, but it is a significant section and it includes people with powers of choice and decision capable of working to M's disadvantage …*
>
> *The absolute confidentiality of a child abuse register cannot, moreover, be entirely guaranteed and the advantage of a good name, which M enjoyed before registration, is now in daily jeopardy through the risk that*

> *inquisitive minds or wagging tongues may breach the security of the register*".

This passage has some resonance with regard to the Trust's discrete submission in the present case that the January 2008 de-registration decision triggers the "***Salem***" principle in respect of the Applicant's challenge to the two earlier registration decisions.

[70] Most recently, in ***Regina (A) –v- Enfield London Borough Council*** [2008] EWHC 1886 (Admin), the local authority concerned registered a three-year-old child on the ground of neglect by his parents, who challenged this by an application for judicial review. The court dismissed the application. The Applicant's case was advanced on the grounds of (a) ***Wednesbury*** unreasonableness and (b) procedural unfairness. Blair J applied the approach of Butler-Sloss LJ in ***Ex parte D*** (paragraph [66], *supra*), observing that "*… recourse to judicial review should be rare in the field of child protection*": paragraph [23]. His Lordship's reason for rejecting the challenge is encapsulated in the following sentence:

> "*[26] … in my view, there was sufficient material to justify the decision that was reached by the local authority that registration was necessary to protect the child*".

Later in his judgment, he added that "*… there was a proper evidential basis for the decision reached …*": see paragraph [28].

[71] Registers of various kinds are a familiar phenomenon in the contemporary world of child protection. In ***Regina –v- Secretary of State for Health, ex parte C*** [2000] 1 FLR 1073, the register under consideration was the Department of Health's Consultancy Service Index, which constitutes a list of persons whose suitability for employment in the field of child care is considered questionable. The Applicant was dismissed by the Social Services Department of a County Council as a child care worker, following allegations that he had sexually assaulted a foster child in his care and had abused his own children. His unfair dismissal claim was rejected by both the Industrial Tribunal and the Employment Appeal Tribunal. The Department of Health then informed him that his name had been placed on the Consultancy Service Index. The Applicant complained that this decision was unreasonable and unfair. Rejecting this argument, Richards J stated [at p. 1083]:

> *"As observed on behalf of the Secretary of State, the case put forward for the Applicant is tantamount to a submission that only 'hard' information (i.e. a conviction or a finding to an equivalent standard of proof) can be used for the purposes of the index and that the Department should constitute itself as a tribunal of fact for the purpose*

of deciding whether the allegations against a person have been so established before he is included on the index. In my view, however, the lawful operation of the index cannot be dependent on the adoption of such an approach. It must be open to the Secretary of State, when acting to protect the welfare of children, to take into account the difficulty of proving allegations of sexual abuse to the criminal standard and indeed the difficulty of establishing a real likelihood of harm. He has to strike a balance between the interests of the individual concerned and the interests of the children whom the index is designed to protect. The precise approach to be adopted is a matter for him, provided he acts within the limits of rationality. It cannot in my view be irrational for him to rely on findings made to the lower standard of balance of probabilities. Nor can it be irrational for him to approach the matter by determining whether it was reasonable for the employer authority to make the findings that it did, rather than have the Department acting as a tribunal of fact. I do not accept that the policy adopted in relation to the index produces a result that is manifestly unfair. The court will be slow to intervene in relation to the striking of the balance in this general area (see ***R v Norfolk County Council ex parte M*** *(cited above) at 630D and 1 30D-D respectively, and* ***R v Harrow London Borough Council ex parte D*** *[1990] Fam 133, 138D-139A, [1990] 1 FLR 79, 84D-H) and I do not consider that the present case approaches the threshold where intervention might be justified.*"

[72] A central theme in many of the decisions summarised above is a strong preference on the part of the court to leave matters of factual investigation, factual findings and evaluative judgment to the local authority concerned. In ***Puhlhofer –v- Hillingdon London Borough Council*** [1986] AC 484, judicial review proceedings involving a decision under the Housing (Homeless Persons) Act 1977, Lord Brightman stated, at p. 501:

"My Lords, I am troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their functions under the 1977 Act. Parliament intended the local authority to be the judge of fact…

Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court

> *to leave the decision of that fact to the public body to whom Parliament has entrusted the decision making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely*".

While the context was a different one, I consider that the philosophy identifiable in this passage is applicable to the present context of child protection registration decisions, which are replete with evaluative judgments in fact sensitive contexts by the professionals concerned.

[73] In considering the context in which the decisions were made in the present case, it is appropriate to recall the words of Lord Nicholls in ***JD (FC) – v- East Berkshire Community Health NHS Trust and Others*** [2005] UKHL 23 and …:

> "*[71] … In the ordinary course the interests of parent and child are congruent. This is not so where a parent wilfully harms his child. Then the parent is knowingly acting directly contrary to his parental responsibilities and to the best interests of his child. So the liability of doctors and social workers in these cases calls into consideration two countervailing interests, each of high social importance: the need to safeguard children from abuse by their own parents and the need to protect parents from unnecessary interference with their family life.*
>
> *[72] The first of these interests involves protection of children as the victims of crime. Child abuse is criminal conduct of a particularly reprehensible character: children are highly vulnerable members of society. Child abuse is also a form of criminal conduct particularly hard to combat, because its existence is difficult to discover. Babies and young children are unable to complain, older children too frightened. If the source of the abuse is the parent, the child is at risk from his primary and natural protector within the privacy of his home. This both increases the risk of abuse and means that investigation necessitates intrusion into highly sensitive areas of family life, with the added complication that the parent who is responsible for the abuse will give a false account of the child's history*".

Lord Nicholls next formulated the countervailing interest:

> "*[73] The other, countervailing interest is the deep interest of the parent in his or her family life …*

> *Interference with family life requires cogent justification, for the sake of children and parents alike. So public authorities should, so far as possible, co-operate with the parents when making decisions about their children. Public authorities should disclose matters relied upon them as justifying interference with family life. Parents should be involved in the decision making process to whatever extent is appropriate to protect their interests adequately*".

His Lordship then made the following observation about the child protection system:

> "*[74] … Public confidence in the child protection system can only be maintained if a proper balance is struck, avoiding unnecessary intrusion in families while protecting children at risk of significant harm …*
>
> *Clearly, health professionals must act in good faith. They must not act recklessly, that is without caring whether an allegation of abuse is well founded or not. Acting recklessly is not acting in good faith …*
>
> *[77] … In this area of the law, concerned with the reporting and investigation of suspected crime, the balancing point between the public interest and the interest of a suspected individual has long been the presence or absence of good faith. Good faith is required but not more.*
>
> *[86] But the seriousness of child abuse as a social problem demands that health professionals, acting in good faith in what they believe are the best interests of the child, should not be subject to potentially conflicting duties when deciding whether a child may have been abused, or when deciding whether their doubts should be communicated to others, or when deciding what further investigatory or protective steps should be taken. The duty they owe to the child in making these decisions should not be clouded by imposing a conflicting duty in favour of parents or others suspected of having abused the child* ".

These statements were made in the context of a negligence action by parents against a hospital trust and a consultant paediatrician. At every judicial tier, it was held that no duty of care was owed to the parents. This stimulated an application to the European Court of Human Rights: see ***RK and AA –v- The United Kingdom*** [Application No. 38000(1)/05]. The outcome was a finding of a breach of Article 13 of the Convention (only), accompanied by an award of £10,000 in just satisfaction. While the context was somewhat different, I

consider the words of Lord Nicholls fully applicable to the realm of the child protection case conference.

[74] A particular feature of the present case was the voluminous and highly detailed nature of the evidence which the court, ultimately, received. The evidentiary materials grew as the hearing progressed, when it became apparent that certain significant items had not been exhibited to the parties' respective affidavits. As the summary in paragraphs [16]–[47] above indicates, the materials before the court consisted mainly of case conference reports, case conference minutes and related materials, including Dr Rs' report, a PPS report and an Article 4 report. Further, while the Trust's affidavit evidence was mercifully brief (its brevity being highlighted critically in certain of the Applicant's arguments), three lengthy affidavits were sworn by the Applicant. In these circumstances, it is appropriate to record Lord Bingham's observations about applications for judicial review in ***Tweed –v- Parades Commission for Northern Ireland*** [2006] UKHL 53, at paragraph [2]:

> "*Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises*".

While recognising that in some judicial review applications "*the precise facts are significant*", Lord Bingham characterised such cases a "*minority*": paragraph [3]. Also worthy of note is the recent observation of Lord Carswell in ***In Re E (a child)*** [2008] UKHL 66, at paragraph 31:

> "*A substantial part of the affidavit evidence was devoted to conflicting accounts of meetings …*
>
> ***Factual disputes of this kind cannot readily be resolved in judicial review proceedings and it is not possible for the House to attempt to do so***".

[Emphasis added].

[75] The above formulations suggest that where judicial review challenges in the present context have (as in the instant case) an intensely factual character, the High Court, in the exercise of its supervisory jurisdiction, may, as a general rule, be reluctant to subject the evidence to microscopic scrutiny and is more likely, typically, to adopt a rather less interventionist approach, especially where there are factual disputes. This philosophy harmonises with that enshrined in the judgments in ***Ex parte D*** and ***Ex parte H***, discussed above. In this respect, an application for judicial review is a form of proceeding to be contrasted with, for example, a fact finding hearing in a Childrens' Order case, exemplified by the recent decision in ***Re B*** [2008] All ER (D) 168 (Nov). I would add that in the present case, three pertinent

examples of factual issues which were obscure and controversial were the timing and true causes of the breakdown of the Applicant's relationship with ED; the frequency and nature of contact between the Applicant and CF and DF; and the date when the Trust first learned that such contact was unsupervised. These issues cannot be satisfactorily resolved by the court.

[76] Having considered the reported cases discussed above, I am of the opinion that intervention by the High Court, in the exercise of its supervisory jurisdiction, in the field of child protection will be the exception, rather than the norm. However, the court must also be astute to be satisfied, in cases where leave to apply for judicial review is granted, that the decision under challenge was made in accordance with the established standards and constraints of public law. Thus it will be open to the challenging party to argue, as in the present case, that the impugned decision is vitiated by failing to take into account relevant factors or evidence, permitting immaterial factors to intrude or reaching a conclusion to which the stigma of Wednesbury irrationality attaches.

XVI Conclusions

First Impugned Determination

[77] Applying the principles and the approach expounded above, I conclude that the Applicant's challenge to the August 2007 determination succeeds. While bearing in mind that my review of this determination is that of a court exercising a supervisory jurisdiction, I would highlight the two fundamental defects in the August 2007 determination found by the Appeals Panel. These were, in summary:

(a) A failure to consider and analyse the social services evidence presented to the case conference held on 11th May 2006.

(b) A failure to analyse the initial assessment of strengths, risks, needs and resilience and protective factors contained in the social work report prepared for the purpose of the case conference held on 30th August 2007.

These shortcomings can be readily allocated to the well established judicial review framework. In short, in the opinion of the Appeals Panel, the August 2007 case conference failed to take into account material factors and evidence and failed to assess and evaluate material evidence submitted for its consideration. I have no reason to disagree with the findings and conclusions of the Appeals Panel. Indeed, quite properly, I was not invited to do so: see paragraph [58] above.

[78] I consider the proposition that the August 2007 case conference was entitled to differ from the views and conclusions of its May 2006 predecessor unassailable. In the field of child protection, there are two particular considerations which may be highlighted. The first is that professionals may reasonably hold opposing views. This is a phenomenon encountered in many professions, legal and medical included. The second is that the clock does not stop, with the result that today's child protection case conference is not merely entitled, but is obliged, to consider all of the evidence prevailing as of today and to review the totality of the evidence in the light of the circumstances obtaining at present. In the present case, the members of the May 2006 case conference were unanimous in their conclusion that BF's name should be removed from the Child Protection Register and that the Applicant should have unsupervised contact with his children accordingly. As appears particularly from paragraph [32] above, I consider that there were shortcomings in the May 2006 determination. In August 2007, it was incumbent on the members of a differently constituted case conference to identify material distinguishing factors and/or diagnose relevant frailties and defects in the predecessor case conference determination, to examine and balance all available evidence and to rationally conclude that a different view should properly be taken. The conference members were also under a duty to properly evaluate the social work report submitted for their consideration, a self-evidently fundamental obligation. As the Appeals Panel found, there were significant failings, on both counts. I would also highlight paragraph 6.61 of the Code and paragraph 4.5 of Appendix 4, in this respect. The Applicant's challenge to the August 2007 determination is, in my view, well founded in consequence.

Article 8 of the Convention

[79] Finally, Mrs. Keegan argued that the first impugned determination was unlawful on the basis that the appeal process did not provide the Applicant with an effective remedy. Her contention was that this infringed the procedural protections of Article 8. As I have found that the Applicant's primary challenge to this determination succeeds, it is, strictly, unnecessary for me to address this further ground of challenge in detail. However, it seems to me without merit. No decision, European or domestic, was advanced in support of the argument. It is of course the case that, in certain contexts, the protections afforded by Article 8 incorporate a procedural content. This is noted by Lord Bingham in ***Regina (Begum) –v- Head Teacher and Governors of Denbigh High School*** [2007] 1 AC 100, paragraph [29] and by Lord Hoffmann in ***Miss Behavin' -v- Belfast City Council*** [2007] UKHL 19, paragraph [15]:

> *"As Lord Bingham noted, some Convention rights may have a procedural content; most obviously Article 6, but other rights as well. In such cases, a procedural*

> *impropriety may be a denial of a Convention right. Thus in* ***Hatton –v- United Kingdom*** [2003] 15 BHRC 259, *an Article 8 case, the European Court of Human Rights considered not only the effect on the Applicant's private life but whether he had had a fair opportunity to put his case*".

[80] In the sphere of child protection, the phenomena of changing circumstances, fresh evidence, successive determinations and reconsiderations by relevant agencies are an established feature. In the present case, the August 2007 determination triggered the appeal provisions of the Code, which were duly invoked, successfully, by the Applicant. The availability of a right of recourse to an independent agency constituted by suitably qualified professionals and duly empowered to make recommendations, to be considered by a further case conference which, in turn, would be required to demonstrate that it had taken such recommendations into account combined, in my view, to enhance the proportionality of the August 2007 determination. I consider that these factors also served to ensure that, procedurally, the process was a fair one. The same observations apply to the November 2007 determination, in respect of which the Applicant did not exercise his right of appeal. I have no warrant for concluding that, in the context under consideration, Article 8 conferred on the Applicant a right of appeal to an appellate agency empowered to make a final and binding decision. It follows that, in my view, no infringement of Article 8 has been established.

Second Impugned Determination

[81] The grounds on which the Applicant challenges the November 2007 case conference determination are in substance the same as those underpinning his first challenge: see paragraph [56] above. Mrs. Keegan QC argued that this further determination was similarly vitiated by irrationality, inadequate consideration of the May 2006 case conference views and conclusions and, specifically, a failure to observe the requirement enshrined in paragraph 4.17 of the Code, which provides:

> "*The reconvened case conference must demonstrate that it has taken account of the recommendations from the Appeal Panel*".

[82] I take into account that those in attendance at the November 2007 case conference included five social workers, a nurse manager, a health visitor, a school principal and a police officer. This is, *ex facie,* an impressive cast. Furthermore, the recorded deliberations and conclusions of this case conference differ markedly, in their depth and analysis, from those of its August 2007 predecessor, which suffers from the frailties highlighted by the Appeals Panel and, in its conclusions, a conspicuous lack of reasoning. I must

also take into account that the minutes, impressively detailed though they appear, are expressly stated to be "*not a verbatim record of the conference, but a summary of information presented and discussed*". I note further that those in attendance considered the three reports identified at the beginning of the minutes.

[83] On this occasion, on the face of the minutes, express consideration *was* given to the May 2006 case conference. Further, reference was made to the receipt of the consultant neurologist's report and the completion of the police investigation, together with the police views about the likely cause of NS's injuries. The minutes explicitly record that "*…de-registration was discussed at length*", while noting that in the absence of a quorum a decision could not be made. The minutes also record the August 2007 determination and the successful ensuing appeal by the Applicant. The minutes demonstrate, in my view, an adequate consideration of the material evidence and an evaluation of the various strengths, weaknesses and risks in play. The presence of both protective factors and risks was expressly acknowledged. The conclusion that the childrens' names should be placed on the Child Protection Register was, in my judgment, a classic balancing exercise, preceded by a properly informed debate.

[84] I reject the Applicant's challenge to the second determination. I consider that the November 2007 case conference had sufficient material before it to justify a rational conclusion that the childrens' names should be entered on the Register. I am satisfied that in thus concluding, the conference members took sufficiently into account the views of the May 2006 conference. The minutes also demonstrate adequate consideration of the strengths, risks and protective factors. It follows that, on the basis of the minutes, there is sufficient evidence that the conference took into account the recommendations of the Appeals Panel. It is appropriate to highlight, in this respect, that the conclusions of the Appeals Panel may be properly compared with a judgment in a successful application for judicial review: they do not speak in any way to the *merits* of the case. On the contrary, the Panel specifically declined to "*… express a view as to whether it considered that the threshold for registration was met*".

[85] In thus concluding, I have approached, and considered, the minutes of the November 2007 case conference with a somewhat broader sweep than the Applicant's challenge urged. The effect of the Applicant's arguments was to invite a microscopic dissection by the court of the minutes in question. This, in my view, is not in accord with the principles and philosophy to be distilled from the decided cases outlined above. Furthermore, minutes of this kind are not to be construed or parsed as if they were the judgment of a court or tribunal or a legal instrument of some kind. To do so would be to ignore the context in which they were generated.

Remedy

[86] As a direct result of the August 2007 determination, an entry was made in the Child Protection Register in the name of DF under the category of "*potential physical abuse*". In the "*Reason Registered*" column, the word "*father*" (viz. the Applicant) is inserted. In a further, related entry the Applicant is described as the "*suspected abuser*" and the "*suspected abuse*" is classified as "*physical*". As regards CF, the August 2007 determination gave rise to a registration in the category of "*potential physical abuse*" and the "*reason registered*" was stated to be "*father*". In a related entry, the terminology "*potential physical abuse*" is used. I have held that the decision giving rise to these entries is vitiated on the grounds elaborated above.

[87] I take into account that the August 2007 determination was the subject of a reconsideration by a subsequent case conference and, in effect, an affirmation, in November 2007. I have found nothing unlawful about the latter determination. I further take into account that each of these determinations was later superseded by a further case conference determination, in January 2008, which gave rise to de-registration of the childrens' names from the Register. Based on the materials supplied to me, the January 2008 determination does not appear to have given rise to an exercise in expunging the earlier entries. Rather, there appears to be a timeline kind of approach, whereby the earlier entries are simply updated with the addition of the current entry which, in this case, recites:

> "*Date de-registered – 30th January 2008.*
>
> *Reason de-registered: risk reduced at home*".

[88] A similar, though more cryptic, entry was made in relation to CF. In my opinion, an adverse and unfavourable stigma attaches to the Applicant by virtue of the first registration, which I have found to be unlawful. In deciding whether to exercise my discretion in favour of granting relief, I balance the subsequent registration and later de-registration and I further take into account that the High Court (Family Division) is currently seised of the core issue viz. whether the Applicant should have unsupervised contact with his children. There was, in my view, a significant denial of the Applicant's right to a determination which complied with recognised public law standards and, having regard to the findings of the Appeals Panel, the flaws in the August 2007 determination were relatively grave. While an Order of Certiorari would, in Lord MacDermott's words, "*beat the air*", having regard to the subsequent determinations, I consider that the Applicant has established a persuasive case for the making of a declaration of illegality in respect of the first impugned determination and, in so holding, I note that the English Court of Appeal did likewise in closely comparable circumstances in ***Regina –v- Hampshire County Council, ex parte H*** [1999] 2 FLR 359. I refer also to ***De Smith's Judicial Review*** (6th edition), paragraphs 18-003/004 and 18-038/039.

[89] In thus concluding, I reject the Trust's argument that the court should decline to grant a remedy by the application of the "***Salem***" principle. There is, in my view, nothing academic or innocuous or theoretical about the invalid August 2007 registration. The decision was irregular and significantly flawed. Moreover, realistically, a similarly defective decision could recur, in any case. The Applicant will, of course, continue to suffer the adverse stigma flowing from the November 2007 determination. However, I consider that the overall stigma attaching to him may be reduced by an order of the court declaring unlawful the August 2007 determination. The Applicant's "child protection record" will be enhanced in consequence. Moreover, a declaration in the present case will serve the useful function of providing advice and guidance to the Trust and should serve to lessen the prospects of a recurrence of a similarly flawed decision: see per Lord Carswell LCJ in ***Re McConnell's Application*** [2000] NIJB 116, at p. 120.

XVII Disposal

[90] I propose to make a declaration that the August 2007 determination was vitiated by a failure to take into account material evidence and considerations and was rendered unlawful in consequence. The Applicant's challenge succeeds, to that extent. The Trust's ***Salem*** argument is rejected. The Applicant's challenge to the second impugned determination fails.

XVIII Costs

[91] I remind myself of the discretion conferred on the court by Section 59 of the Judicature (Northern Ireland) Act 1978, the general rule [enshrined in RSC Order 62, Rule 3(3)] that costs should follow the event and the statement of Carswell LCJ in ***Re Kavanagh's Application*** [1997] NI 368 that "… *the discretion should be exercised along well settled lines*" [p. 382]. The immediately succeeding quotation from the judgment of Atkin LJ in ***Ritter –v- Godfrey*** speaks of "*a wholly successful defendant*". In exercising my discretion, I take in to account the following factors in particular:

(a) I have held that the Applicant's challenge to the first determination succeeds and that the court should, consequentially, make a declaration in appropriate terms.

(b) On the other hand, I have held that the second limb of the Applicant's judicial review application, which was presented to the court as the more important aspect of his twofold challenge, fails.

(c) The Trust's "**Salem**" argument has been rejected.

(d) As the hearing progressed, it became necessary for the Trust to augment its evidence to include undeniably important documentary materials which should have been, but were not, exhibited to its affidavits. This made for a somewhat fragmented hearing, with increased costs in consequence.

(e) This judicial review challenge has exposed some frailties and inadequacies in the Trust's practices concerning preparations for and the conduct of child protection case conferences.

(f) The parties are jointly of the view that neither party should recover any costs from the other.

In all the circumstances, I am satisfied that it would be a fair and reasonable exercise of the court's discretion make no order as to costs inter-partes. I commend both parties for devoting time and effort to discussing this issue realistically and sensibly.

XIX

Postscript

[92] In this application for judicial review, a lack of uniformity and certain irregularities were exposed in the Trust's conduct in relation to the following matters:

(a) The need to consider all available existing reports when preparing a child protection case conference report.

(b) The necessity to consult all relevant agencies when preparing such reports and to record the product of such consultations in the report itself.

(c) The desirability of demonstrating, in the minutes of the case conference, that all relevant extant reports have been considered by the members in attendance.

(d) The undesirability of seeking to paraphrase, or interpret, medical reports, particularly where no medically qualified person is in attendance.

(e) Conversely, as regards (d), the desirability of quoting in full material passages from medical reports.

I have no reason to doubt that practice in these respects could profitably be reconsidered by the respondent Trust and other Trusts and, hopefully, improved and strengthened in consequence, to the overall benefit of the child protection system in Northern Ireland.

[93] Finally, I record my thanks to counsel for the quality of their submissions, both written and oral.