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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY K. R., A MINOR, BY HER FATHER AND NEXT FRIEND D. R., FOR JUDICIAL REVIEW

WEATHERUP J

The application.

[1] This is an application for Judicial Review of the decisions of the management of Hugomont Children's Home, Ballymena, operated by Praxis Care Group, and Northern Health and Social Services Board and Homefirst Community Health and Social Services Trust, made on 11 February 2004 concerning the respite care afforded to the applicant at Hugomont.

Mr O'Hara QC and Dr McGleenan appeared for the applicant. Mr Brangam QC and Mr M. Lavery appeared for the Northern Health and Social Services Board ("the Board") and the Homefirst Community Health and Social Services Trust ("the Trust"). Mr Conlon QC and Mr Good appeared for Praxis Care Group ("Praxis").

The applicant.

[2] The applicant was born on 2 December 1995 and is now 10 years old. She has a rare chromosome abnormality with the result that she is severely disabled in learning, autistic and epileptic with no cognitive language skills and totally dependant on her carers for all her personal needs. She requires anti-convulsant medication of types and dosages that are liable to change,

as well as other medication and homeopathic remedies. She resides with her parents and for some years occasional respite care was available with another family. Her medical advisors accord to her parents a discretion as to the medication administered to the applicant when she is at home and in family respite care. In June 2003 the opportunity arose for respite care at Hugomont.

The Childrens Homes.

[3] Praxis operates a number of units and types of facilities throughout Northern Ireland, England and the Isle of Man. They operate two homes in Northern Ireland, one of which is Hugomont. Within the area of the Trust there are three homes providing residential respite services. Whitehaven is a unit in Whitehead accommodating 70 children and is operated by the Trust. Cherry Lodge is a unit in Randalstown accommodating 30 children and is operated by Barnardos. Hugomont opened in 2003 and can accommodate 74 children and is a unit specifically for children with severe learning disabilities and challenging behaviour. Praxis contracts with the Trust to provide the services at Hugomont.

[4] In essence the applicant's parents object to the Praxis policy for the administration of medication to the applicant at Hugomont. The policy provides that medication should be recorded on a sheet known as a "kardex", with each medication signed by the prescribing GP and further that a prescription label for the medication should be provided by the pharmacist. The parents, who are familiar with the changes that occur in the applicant's condition and who determine the variations in her medication when she is at home or in family respite care, propose that they may determine variations in her medication while she is in the Home, without the need for a GP signature or a new pharmacy label with every variation. The applicant's parents' objections are based on the Praxis policy being contrary to the principle of parental consent to treatment of a child and in any event that the changes required in the applicant's medication would require repeated certifications by the GP and repeated alterations of the pharmacy labels such as to render the policy unnecessary, impractical and inconvenient to parents, doctors and pharmacists.

The legislation.

[5] The Children (Northern Ireland) Order 1995 deals with the welfare of children and the provision of homes for children.

Article 6 provides for the meaning of "parental responsibility" as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".

Article 6(5) provides that:

> "A person who –
>
> (a) does not have responsibility for a particular child; but
>
> (b) has care of the child,
>
> may (subject to the provisions of this Order) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare."

Article 72 of the Order provides that:

> "(1) Every authority shall, to such extent as it considers appropriate, provide homes –
>
> (a) for the care and accommodation of children looked after by the authority; and
>
> (b) for the purposes connected with the welfare of children (whether or not looked after by the authority).
>
> (2) Every authority should have regard to the need to make different types of provision for different children."

Article 73 provides that the Department may make regulations in relation to homes provided by an authority. The Children's Home Regulations (Northern Ireland) 1996 at Regulation 9 provide that:

> "(2) Subject to paragraph (3), the person in charge of a children's home shall ensure that no medicinal product shall be administered to a child otherwise than by a member of staff of the children's home, a registered nurse, a medical practitioner or registered dental practitioner."

(3) [excludes medicinal products stored by the child so that others are prevented from using them and those safely self - administered by the child.]

The policy statements.

[6] The Northern Health and Social Services Board's Registration and Inspection Unit published in April 1998 "Policy for the Control of Administration of Medicines in Nursing Residential and Children's Homes". Appendix J is a "Summary of the Guidelines for the Safe Handling, Administration and Storage and Control of Medicines in Children's Homes". The provisions of Appendix J include –

> In the general introduction, that care should be taken to ensure good communication about a child's medication with the family and school. This is particularly important on admission to or on leaving the children's home and where short term respite care is undertaken. All homes should have a written procedure for the administration of medicines.
>
> At paragraph 3(a), that medicines should be administered to a child only in accordance with the directions of general practitioner or dentist. No medicines should be administered without written authorisation.
>
> At paragraph 4(c), that a prescription sheet must be kept which details all medicines prescribed by the general practitioner or dentist. The general practitioner should be requested to verify and sign the record.

The Board's guidance corresponds with the publication of the Royal Pharmaceutical Society of Great Britain paper on "The Administration and Control of Medicines in Care Homes and Children's Services" published in June 2003.

[7] Praxis policy is said to rely on the Board guidelines and appear under the title "Policy for Administration of Medicines" and in relation to residents generally includes -

> At paragraph 1 under the heading "Prescribing" that prescribing is by the GP and prescriptions are ordered and sent to the pharmacy well in advance of being needed.

At paragraph 2 under the heading "Checking" that when medication is collected from the pharmacy it is checked against the prescription for correct drug, quantity, use by date, dosage, frequency and the correct person (named on container).

At paragraph 8 under the heading "Residents' Kardexes" it is stated:

> "Each resident should have an individual kardex containing the information regarding the medication that has been prescribed him/her. This kardex should be written clearly and legibly. The generic name for the medicine should be used. The time of administration, the route of administration and the dosage should be clearly marked. No additional information should be written on the prescription sheet. Each individual medication should be countersigned in the appropriate box by the prescribing doctor. No medication should be dispensed which does not have the doctor's signature."

[8] Irene Sloan, Director of Care within Praxis stated that it was important to minimise the prospect of errors and in order to achieve consistency and avoid mistakes the policy sought to achieve a common position with all users of facilities and their parents ensuring that the individual medical needs are met; without medical signatures on the kardex professional staff were placed in the invidious position of having to judge whether parents instructions were in the best interests of the child and whether those instructions should be followed contrary to the user instructions provided by the pharmacist.

<u>The application of the policy</u>.

[9] By a letter sent in June 2003 by Dirk Halfenberg, Manager of Hugomont to the applicant's parents, a place for the applicant was confirmed. A copy kardex was enclosed to be completed by the GP. The Praxis policy was set out whereby all medications must have an up-to-date pharmacy label with the child's name and dosage printed clearly and further the GP was asked to sign a home remedies sheet and delete anything the applicant could not receive. In a reply dated 1 July 2003 the applicant's father complained of the impracticability of the Praxis policy in relation to repeated doctors' certificates and pharmacy labels in dealing with medication changes. Meetings were held in an attempt to resolve the problems but that did not prove possible. A further letter from the applicant's father dated 22 July 2003 set out the practical problems in

securing new doctors' certificates and pharmacy labels and objection in principle was made to the Praxis policy in that it was said to represent an abdication of parents' responsibilities. In a letter to the Registration and Inspection Unit dated 10 August 2003 Mr Ryder referred to the Praxis policy which had been stated to him to be in accordance with requirements of the Board but in his opinion was at variance with the law governing parental rights and responsibilities. This letter was forwarded to the Board who replied on 22 August 2003 indicating an intention to consult on the issue of the rights of parents and offering clarification of the guidance relating to the kardex that included the acknowledgement that a GP was not obliged to sign the kardex but that the Board considered it to be good practice.

[10] Events in October 2003 gave rise to complaints by the parents about Hugomont and in a report dated 7 January 2004 the Registration and Inspection Unit upheld a number of the complaints. In the meantime a meeting took place on 24 October 2003 to clarify existing Board policy for the use and control of medicines, to consider whether Hugomont's procedures were compatible with Board policy and to consider the implications for the applicant's respite care. On the matter of Board policy a review was indicated on the absence of reference to parental consent in the guidelines which it was stated represented best practice to safeguard the child and staff administering medicines. The representative of the Registration and Inspection Unit was satisfied that the Hugomont policy met the requirements of Boards policy guidelines and best practice statements.

[11] Proposals were made that were designed to meet the problems raised by the parents. On behalf of the Board it was accepted that a consultant's letter rather then a GP signature would satisfy the requirements of a signed kardex; that a parent's signature was not sufficient; that further consideration would be given to a "sliding scale" of medication if directed by the consultant or GP. A further meeting took place on 17 November 2003 and by letter dated 21 November 2003 to Mr Halfenberg, the applicant's father stated the position as being that signatures would be accepted from the GP or a consultant; a signed schedule would be supplied governing the changeover from one medication to another; any changes would be notified in writing and signed by the physician; pharmacy labels need not be changed. By e-mail on 11 December 2003 the applicant's father stated that the conditions pertaining to the administration of medication went far beyond anything contained in the guidelines and set out his objections. By letter dated 2 January 2004 to Hugomont the applicant's father stated that the Board's guidance did not require the Praxis policy; that doctors could not be compelled to certify medication; that the policy was Praxis internal policy only; that the policy was impractical. By letter dated 11 February 2004 the manager of

Hugomont confirmed Praxis policy and required a signed kardex from GP or consultant for prescribed and homeopathic medications. Since June 2004 the applicant has not received respite care at Hugomont and arrangements have been made with another Home.

The grounds for Judicial Review.

[12] The applicant's grounds for Judicial Review are as follows:

(i) Parental consent to treatment.

The decisions of the Home, the Trust and the Board are unlawful by excluding the consent of the applicant's parents to treatment for the applicant in breach of the applicant's right to private and family life under Article 8 of the European Convention on Human Rights.

(ii) Procedural impropriety.

The decisions of the Home, the Trust and the Board are procedurally improper by -

(a) requiring the applicant's parents to agree to waive their right to give or withhold consent to medical treatment.

(b) imposing a requirement for a GP or consultant certificate when the parents could not compel the same.

(c) failing to take into account parental responsibility and its exercise during family placement respite care.

(c) failing to consider reasonable exceptions or adjustments to the policy on medication.

(iii) Unreasonableness.

The decisions of the Home, the Trust and the Board are unreasonable and are not required by Regulation 9 of the Children's Homes Regulations (Northern Ireland) 1996 or Appendix J of the Board's policy on the control and administration of medicines.

(iv) Disability discrimination.

Acting in breach of Section 21 of the Disability Discrimination Act 1995.

[13] In the course of the hearing of the Judicial Review the applicant's parents discharged the applicant's Counsel and elected to represent the applicant themselves. It was apparent that they are both caring and devoted parents with genuine concerns about the effects of the Praxis policy on the welfare of the applicant and about the appropriate conditions for respite care of the applicant. Behind many of the difficulties that have emerged in the discussions between the parents and Praxis and the Trust and the Board lies some lack of clear communication on a number of issues. Some differences emerged in the responses of the respondents which only served to confuse and distract the parents and that in turn generated increasing dissatisfaction on the part of the parents.

(i) Parental consent to treatment.

[14] On behalf of the applicant the complaint was made of interference with parental consent to medical treatment for the applicant. The position on parental consent is stated by Ward LJ in Re A (Children) (Conjoined Twins – Surgical Separation) (2000) 4 All ER 961 at 991 to 993.

> There is a right and a duty of parents to determine whether or not to seek medical advice in respect of their child, and having received advice to give or withhold consent to medical treatment.
>
> Parental responsibility as defined in the [Children (Northern Ireland) Order 1995] means that the right and duty to give consent to medical treatment is an incident of parental responsibility vested in the parents.
>
> A hospital is no more entitled to disregard the parents' refusal of medical treatment for their child than to disregard an adult patient's refusal.
>
> Because parental rights and powers exist for the performance of their duties and responsibilities to the child they must be exercised in the best interests of the child. Such rights are not sovereign or beyond review and control – overriding control is vested in the Court.

[15] The above propositions were not in dispute. However the applicant contends that the Praxis policy disregards the principle of parental consent. I am unable to accept that characterisation of the position. This is not a dispute about parental consent but about parental prescription. Hugomont,

the Trust and the Board recognise the principle of parental consent (although it had not been set out in the guidelines). None of them was proposing to administer medication without the consent of the parents. However, what each required was medical authority for the administration of medication. It was assumed in each case that parental authority was present. Indeed the parents' objection was not to the administration of particular medication but to the requirement for confirmation of medical approval. Mr Brangam QC for the Trust and the Board described the Praxis policy as operating a "double key" namely, medical authority and parental consent in the administration of medication. The dispute is about the requirement for medical authority for medication.

[16] The applicant contends that the Praxis policy involves an interference with parental consent to treatment and thereby amounts to a breach of the right to respect for private and family life under Article 8 of the European Convention. If the present case involved medical treatment without parental consent then Article 8 would be engaged. However, in view of the finding that parental consent is not the issue in the present dispute, Article 8 is not engaged on the basis of interference with parental consent.

[17] It is the case that the Board guidelines do not address the issue of parental consent. That matter is being addressed and consideration given to amendment of the guidelines to give expression to the principle of parental consent. For the reasons set out above such amendment will not deal with the dispute that has arisen between the applicant's parents and Hugomont, the Trust and the Board.

(ii) Procedural Impropriety.

[18] First, the issue of the waiver of parental consent to treatment. For the reasons discussed above it is not accepted that the dispute impacts on parental consent to treatment. The Praxis policy does not involve any requirement for waiver of parental consent.

[19] Second, the issue of the absence of compulsion for a medical signature. The respondents accept that a GP or a Consultant can not be compelled to sign medication lists. However it is considered good practice to do so. The policy requires the voluntary cooperation of the medical profession. Outside the present case the respondents are not aware of any difficulties with the operation of the Praxis policy or any lack of cooperation from the medical profession. The voluntary character of the policy does not amount to procedural unfairness.

[20] Third, the issue of parental responsibility during family placement respite care. The Praxis policy is not applied by the Board or the Trust in relation to family respite carers. Ms Rolston for the Trust states that the Department are currently looking at standardising risk assessments for all situations and it is only a matter of time before standards that apply at Hugomont will also have to apply in family based respite schemes. In any event Praxis support a policy of enhanced measures in Homes where there are various children with particular needs requiring different medication being dealt with by changing members of staff. Further, the applicant relies on the Praxis policy not being applied by the other Homes in the area. Indeed the applicant now attends one of the other Homes in the area where the terms of the Praxis policy are not applied. Praxis specialises in care cases arising from brain injury and learning disability and it is stated by Ms Sloan that its policy development and implementation aims at achieving consistency in the safe administration of an individual's medical needs and if different or looser policies were applied within the various Praxis Homes then the risks of mistakes being made may become all the greater with the prospect of harm to those for whom Praxis remains responsible. Accordingly Praxis considers the policy to be appropriate to the needs of their Homes. There is no procedural unfairness arising from the fact that other facilities for respite care do not apply the same standard as the Praxis policy.

[21] Fourth, the issue of the flexibility of the Praxis policy. The applicant contends that the Praxis policy is inflexible and does not meet the individual needs of the applicant. However at meetings with the parents there were proposals for variation of the policy in relation to the signature of the GP, amendment of prescription labels and adjustment of doses. Ms Rolston for the Trust stated that the Trust would have been happy with a scheme whereby the GP and consultant would set up a schedule of the dosages of medicines to be administered to the applicant, with the parents being permitted to vary the doses for the medicines within the parameters set down in the schedule. This was considered to be workable and not to cause any undue burden on doctors or family. Similarly Dr Morrison for the Board who proposed the scheme did not accept that the Praxis policy was rigid and inflexible. There was some uncertainty on the part of the applicant as to the nature of the schedule proposed by the Board as the parents considered the matter in terms of lists of increasing and decreasing doses of medication over a period of time. However, Counsel confirmed that either scheme would have been contemplated had there been signed approval by the GP or the consultant. In any event no schedule was brought into being because the parents considered it to be impracticable. Nevertheless the approach of the Home and the Trust and Board does demonstrate a degree of flexibility and the Praxis policy was not applied rigidly as there was preparedness to accept a consultant's signature rather than a GP's signature and to dispense with the written variation of the

pharmacist's label and to contemplate a schedule of ranges of doses within which the parents would determine the actual dosage.

(iii) Reasonableness.

[22] However, the parents consider the approach involved in the Board's proposed schedule to be impractical. In a medical report the consultant outlined a proposal that a parental change of medication would be e-mailed or faxed to the consultant and she or another consultant would fax a kardex to Hugomont. It was stated that this was not a satisfactory long term measure but was an interim measure. The consultant's proposed measure appears to apply to the initial requirement for a medical signature for all variations rather than the Board's proposal for a signature on a schedule, within the parameters of which parental variation would be accepted without the need for further certification. However, by replying affidavit the applicant's father relied on the consultant's letter as a basis for rejection of the proposed schedule. I am not satisfied that the consultant has rejected the proposed schedule, whether operated on the basis of parameters or of lists, as impractical. Nor am I satisfied that a scheme for certification of ranges of medicines within which the parents may vary the dosage would be impractical. If the consultant had certified the range of variation accorded to the parents then Praxis and the Trust and the Board would have accepted such a schedule as the basis for the administration of medication.

[23] The applicant had understood that the Praxis policy was a requirement of the Board and the Trust. However, the policy adopted by Praxis is not obligatory. Neither the Order nor the Regulations require Praxis to adopt the terms set out in the policy. The Board's guidelines are not mandatory but are guidelines only, and do not preclude the adoption of additional measures. On the other hand the Praxis policy is not prohibited by the Order or the regulations. The policy goes beyond the terms of the guidelines by including additional measures and this is an approach that Praxis is entitled to take.

[24] The Praxis policy is endorsed by the Board and the Trust. Dr Denis Morrison, Director of Pharmaceutical Services with the Board referred to the discussions with the parents and stated that the difficulty for Hugomont may arise where the GP had not signed the kardex; in those circumstances the Home would have to rely on the directions given on the label or take other steps to check that the dose was in accordance with prescription; directions given by the applicant's father may not necessarily reflect prescription and the guidelines attempted to avoid a situation where the resident was effectively not being given what had been prescribed. In

relation to the guidelines it was stated that the Board endorsed the guidelines but could not require GPs to sign a prescription sheet, but the Board's position was that it amounted to good practice for GPs to do so and if the guidelines were not complied with there was a risk that a child would not be given sufficient medication; it was good practice that medication in this administration should be determined by a medical practitioner and not a parent. Marie Rolston, the Area Manager of the Trust confirmed that the Praxis policy was wholeheartedly endorsed by the Trust which was strongly of the view that it amounted to good practice. Accordingly while the Praxis policy is not obligatory it is not contrary to the legislation or guidelines and is commended by the Trust and Board as amounting to good practice.

[25] The applicant contends that the Praxis policy is Wednesbury unreasonable and should be classed as irrational. This is a policy that is not demanded by the legislation, the Regulations or the Board's guidelines. The legislation, the Regulations and the Board and the Trust leave to the Homes the power to lay down individual policy on the administration of medication within certain general principles. In the case of the Praxis policy the power has been exercised in a manner that is endorsed by the Board and the Trust. It has been applied by Praxis in all their Homes for a period of some 10 years without a dispute of the present character having arisen in other cases. Mr Conlon QC for Praxis informed the Court that the applicant's condition was not unique and that others with the same condition had operated the Praxis policy and there had been no other indication of medical difficulty. While the Praxis policy is not one that is adopted by all Homes it is within the reasonable range of approaches that might be adopted. Taking account of all the factors raised by the applicant both under this heading and as aspects of procedural impropriety it has not been established that there is a basis for a finding that the Praxis policy is unreasonable.

(iv) Disability discrimination.

[26] The Disability Discrimination act 1995 makes it unlawful to discriminate against a disabled person in connection with the provision of services. Section 21(1) imposes a duty on providers of services to make adjustments –

> "(1) Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide,

> to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect."

By section 20 it is discrimination to fail to comply with a section 21 duty without justification. Justification includes the reasonable opinion of the provider of the service that the treatment is necessary in order not to endanger the health and safety of any person (which may include that of the disabled person).

[27] The applicant contends that Praxis has a duty to take reasonable steps to change the policy on medication so as to enable the applicant to use Hugomont. The respondents contend that there is a statutory remedy for disability discrimination and that the issue should not proceed by way of Judicial Review; that there has not been sufficient evidence produced in the Judicial Review proceedings to fully address the issues of disability discrimination; that the policy does not make it impossible or unreasonably difficult for the applicant to use the service and that in any event reasonable steps have been taken to enable the applicant to use the service and finally that the policy is justified for health and safety reasons.

[28] Consideration of disputed fact based discrimination issues such as arise in the present case are more suited to proceedings that involve the oral examination of witnesses, such as occurs in Tribunal proceedings. The nature of Judicial Review proceedings are such that they generally involve affidavit evidence and only exceptionally would they involve the examination of witnesses. The present fact based discrimination dispute is not well suited to Judicial Review proceedings. However on the information available I am satisfied that Praxis has been prepared to undertake reasonable steps to alter the stated policy by accepting a medical signature from other than the GP, waiving the amended pharmacy label, acting on a schedule setting out an approved range of medication and administering medication on the basis of parental variation within the approved range. Further, the Praxis approach is based on health and safety concerns for those in the Home, and I am satisfied that there is flexibility in the policy and that the extent of the variations of the policy that were proposed by the Board and the rejection of the approach proposed by the parents was justified in that it is the reasonable opinion of Praxis that the approach is necessary in the circumstances of the Praxis Homes.

Proportionality.

[29] I have found that the right to respect for private and family life under Article 8 is not engaged on the basis that there has been no interference with the principle of parental consent to medical treatment. If Article 8 were engaged on that or any other basis then Article 8(2) provides a basis for justification where any interference is "in accordance with the law and is necessary in a democratic society ……for the protection of health …….or for the protection of the rights and freedoms of others." Had it been necessary to do so I would have found that the Praxis policy satisfies Article 8(2). The measures are undertaken for the legitimate aim of protecting the health and safety of the applicant and others in the Home, are rationally connected to that aim and are a proportionate response in the context of administration of medication to children with disabilities in respite care.

[30] The applicant has not established any of the grounds for Judicial Review and the application is dismissed.