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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR60's Application [2013] NIQB 93

IN THE MATTER OF AN APPLICATION BY JR60 FOR JUDICIAL REVIEW

HORNER J

Introduction

[1] The applicant brings this judicial review to challenge the right of the Western Health and Social Care Trust and the Southern Health and Social Care Trust (hereinafter called "the Trusts") both to keep and use various records generated when the applicant was a resident of children's homes and a training school between the years 1978-1991. The applicant has a Protective Costs Order by agreement. She has no legal aid and has been represented at the various hearings by counsel, Mr Brian Kennedy QC and, primarily, by Mr Ciaran White BL from the Bar's Pro Bono Unit because of her inability to pay any legal costs. All members of the applicant's legal team are to be congratulated for the effort that they have put in on her behalf without seeking any monetary reward. Indeed both sides deserve praise for the comprehensive submissions and the assistance given to the court in what has turned out to be a very protracted matter. I have been content to allow the applicant's application for judicial review to evolve and have accepted substantial amendments to the Order 53 statement as requested by counsel and permitted the filing of additional affidavits and skeleton arguments from both sides. The issues raised by the applicant have been ventilated in court and I have taken account of her limited means and the position of her legal team in adopting this flexible approach. The respondents' legal team has reciprocated and not sought to take advantage of the applicant's more limited means.

Background facts

[2] The applicant was born in 1975. To describe the applicant as having a difficult childhood would be a serious understatement. Her mother had significant mental health problems contributed to by her addiction to alcohol. The applicant does not know who her father is. It is likely he also had significant health and

alcohol problems. Apparently, he led an itinerant life and had a chaotic lifestyle. The applicant had a sister, K, who was one year older. The applicant has since discovered for certain that she has two other older siblings with whom she may share the same father, although she cannot be certain. These siblings were given up for adoption by her mother. She still knows nothing of their personal circumstances, including their gender.

[3] The applicant and her sister as infants were looked after by their grandmother when their mother was imprisoned at Armagh Prison in February 1980. Following their grandmother's death reasonably shortly afterwards, they were resident at various children's homes run by the Trusts' predecessors in title. They became "looked after children." These periods of care were interspersed with intervals when they lived with their mother. These were fraught times as their mother found difficulty in coping with her children's needs. Their clothes were dirty, their living accommodation squalid and their mother was often drunk. When she was intoxicated, the applicant and her sister were often beaten.

[4] The applicant and her sister's time together in care ended both abruptly and unhappily when K was taken away to be fostered. The applicant was left behind to cry "… not because K had left but because she hadn't taken me with her". This separation did not encourage the applicant to conform to the regime in place at the home. After she had led a rebellion of some other girls against the way in which the care home was being run she was sent to a training school in September 1988. Although the youngest at the training school, she did enjoy her time there. She returned to the children's home in 1988 but could not settle and was sent back to the training school in 1989. The applicant would run off from time to time and visit her sister without permission in order to maintain some contact with her. An attempt to place the applicant with foster parents failed, partly, the applicant would acknowledge, because of her own failure to engage with them.

[5] The applicant on her own admission was a particularly difficult teenager being both truculent and rebellious. It is therefore not surprising that she ended up in a training school. However, it was while resident at the training school that her life was transformed. The nun in charge of her House, Sister C, was younger than the other nuns, wore trendy clothes and trainers and was a role model for the applicant. Sister C gave extra tuition in mathematics to the applicant and she prospered at school. Sister C encouraged the applicant to participate in a number of different sports for which she had an aptitude. Sister C taught her how to play badminton and they played together on a regular basis. Sister C attended the sports events in which the applicant was involved, parent teacher meetings and for the first time in her life offered the applicant praise, reassurance and, also, some monetary rewards for assisting her. In the summer of 1990, while the applicant was on holiday in Donegal with her classmates from the training school, Sister C was murdered. She was travelling behind army vehicles when the Provisional IRA attempted to blow them up. The bomb missed its intended target and Sister C became another

victim of terrorist violence. Like so many others during the "Troubles", she simply happened to be in the wrong place at the wrong time. As a consequence the applicant disengaged from school and sport and picked fights with the other girls. Sister C's sister wrote to the applicant after her death and explained to the applicant that she owed it to Sister C to make a success of her life. The applicant worked hard, passed her exams and began work for her A levels. However, she found it difficult to keep on the path to scholastic achievement especially after she left training school. She resided first with her aunt and uncle and then in independent accommodation. She met up with her sister K, who at that time was in the first year of a degree course in Belfast. However, the applicant fell into bad company and ended up on the streets, sleeping rough. She was helped by charitable individuals who found her somewhere to live. Eventually she obtained accommodation from the Housing Executive. The applicant found a boyfriend and became pregnant. She gave birth to a son, P, and the applicant realised that she had to reorder her priorities and concentrate on him and what was important to her. She obtained a job. Unfortunately her relationship with her son's father grew more distant. After her partner was jailed for assault, he lost all contact with his son and the applicant.

[6] It is sufficient to record that after further considerable struggles, the applicant managed to acquire impressive qualifications. She passed all her exams, obtained a university diploma, she was awarded an Honours Degree and she finished top of her class. She completed a post graduate degree. She is now in full-time, responsible and remunerative employment. Her son, P, has grown up and is due to start university.

[7] Unfortunately her sister K's life did not turn out as well. Her sister had a daughter, H, the applicant's niece. K developed an alcohol dependency like her mother and she also had mental health issues. She was unable to look after her daughter. K became an in-patient in Gransha Hospital. The applicant took it upon herself to look after her niece when K was receiving treatment. It became increasingly apparent that her niece required the applicant's care, guidance and support. The applicant put aside all her personal ambitions, including the opportunity to go to Australia to study for a PhD so as to ensure that her niece would receive proper care.

[8] Both the applicant's son, P and her niece, H have done well at school. The applicant is entitled to take a share of the credit for their academic success. The applicant has survived the most adverse conditions imaginable and triumphed through the force of her will. By any objective measurement she is a success. She is well qualified, she has a good job and she is the head of a happy family which includes her niece, who is now her foster child. Tragically, her sister died just before these proceedings were commenced.

[9] The above brief summary fails to do justice to the obstacles, many of them self-imposed, as the applicant would readily admit, which she has had to overcome

in making what is most certainly a success of her life. Events have been telescoped, names have been omitted and important episodes have been left out in the interests of both brevity and retaining the applicant's anonymity. But it is still a remarkable tale told of a remarkable woman.

[10] The reason why I have set out the applicant's history, albeit in a much abbreviated form, is to set the scene for the challenges which the applicant now makes against the Trusts. While applying to be a foster parent to her niece, H, it became apparent that the Trusts were intent on accessing all her records generated when she was in care. The applicant did not want her former life resurrected for obvious reasons. She has no desire to know who her father is. She does not want to be reminded of her days in care. She does not need to know in detail how her mother had let her and her sister down. In effect, she says that her time in care was a period of her life that, quite understandably, she now wants to put behind her. She wants no reminders. She is especially determined that all records of this unhappy time should not be accessed by any third parties including members of her immediate family. It is these circumstances which form the background to the present application for judicial review.

Issues

[11] The parties seek that the following legal issues be determined by the court as follows:

(i) Is there a lawful basis, in common law and/or pursuant to statute for the respondents' retention of the applicant's records now that she has left care?

(ii) If the retention of the applicant's records does engage Article 8, is the lawful basis for the retention compatible with Article 8 in that any interference is justifiable by the Trust?

(iii) Is the retention of the applicant's records a proportionate interference with her Article 8 rights, especially given the length of time for which they are to be retained and the content of these records?

(iv) Is the "Code of Practice on Protecting the Confidentiality of Service User Information" sufficiently protective of the applicant's Article 8 rights to render any interference with the applicant's rights proportionate?

(v) Was the "Code of Practice on Protecting the Confidentiality of Service User Information" applied to the applicant sufficient to render any interference with the Article 8 rights proportionate?

It will be sufficient to consider grounds (i), (ii) and (iii) together as these challenges relate to the right of the Trusts to retain records relating to the applicant's time in care. I will refer to these as Issue 1. Ground (iv) relates to the Code of Practice used by the Trusts and the issue it raises is whether it provides sufficient protection for the applicant's Article 8 rights in respect of possible disclosure and use of information relating to her period in care. I will refer to this as Issue 2. Ground (v) related to the Trust's conduct in permitting access to her records to third parties during the application by the applicant to become the foster parent of H. Originally the applicant made the case that she had not given her consent to the disclosure of her records. She claimed that any consent she had given had been vitiated by duress or undue pressure applied to her by the Trusts. This claim was abandoned during the course of the application. This is not surprising. There is a consent signed by the applicant agreeing to the Western Health and Social Care Trust obtaining all records in respect of the applicant's involvement with social services dated 29 June 2012. The applicant gave a letter to her firm of solicitors, Hilary Carmichael, dated 14 June 2010 consenting to the release of her records. This was done after a meeting with various officials from the Trusts. The letter records:

> "If I find however that my files are being made available, copied or being used by individuals other than X and Y, or that my files are being used for purposes other than to inform my fostering assessment or that my files are not being secured in a confidential manner I will opt out of the fostering assessment process and ask the court to intervene on grounds of unauthorised access and breach of confidentiality."

The applicant never did opt out of the fostering assessment process and has never made the case that either X or Y (who will remain anonymous) breached the conditions of the consent given by the applicant. In those circumstances the applicant, fully advised by her own solicitor, agreed to the release of all her care records on certain conditions, which were honoured. The applicant cannot now argue that she did not give her full consent and prudently her legal team have not sought to press this claim. It is quite clear from the affidavit of Mr Patrick Armstrong that the applicant's consent was fully informed and not obtained by coercion, whether express or implied. Accordingly, on the basis that the applicant gave her consent with the benefit of the legal advice of her solicitor to the Trusts accessing the records made while she was in care for her fostering application, it cannot be said that the Trusts acted unlawfully.

Issue 1

[12] It was originally the applicant's case that the Trusts did not have the legal power to make records in respect of her period in care. This is no longer an issue in

the case and it is accepted by the applicant and her legal team that the Trusts (and their predecessors in title) had the legal power to make such records relating to the applicant's time in care. This was a prudent concession. At the very least such a power to make a record was "reasonably incidental" to the statutory power given to the Trusts to look after children such as the applicant ("Looked After Children"): see Ashbury Railway Carriage and Iron Co Ltd v Riche (1874-75) LR 7 HL 653 and 5-098 of De Smith's Judicial Review (7th Edition).

[13] There can be no doubt that the Trusts are public authorities. Girvan LJ analysing the role the Trusts play in the application by the applicant JR47 [2012] NICA said that the Trusts are "the Departments *service Provider*". He went on to say at paragraph 16:

> "They are subject to the policy and direction of the Department but they are independent legal entities with decision making responsibilities for day to day resource allocation. In the present context the relevant Trust was the body responsible for the application of departmental policy and guidance and it bore the responsibility of making the appropriate decisions relating to the care of the appellant and the implementation of the community care policy affecting him."

It follows that the Trusts, as public authorities, must act in a way which is compatible with the European Convention on Human Rights ("ECHR"): see Section 6 of the Human Rights Act 1998.

[14] In S and Marper v UK [2009] 48 EHRR 50 at paragraph [67] the Grand Chamber of the European Court of Human Rights said:

> "The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8."

Accordingly there can be no dispute that the applicant's Article 8 rights are engaged by the storage and retention of information relating to her period in care.

[15] Article 8 provides:

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

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

In S and Marper the Grand Chamber went on to consider whether:

(a) The retention of the information was in accordance with the law (see paragraphs 95-99).

(b) Whether it was a legitimate aim (see paragraph 100).

(c) Whether it was necessary in a democratic society (see paragraphs 101-104).

In this case it is accepted that retention of the records is in accordance with the law (see above).

It is for a legitimate aim. In Gaskin v United Kingdom [1989] 12 EHRR 36 at paragraph [43] the court said that it:

> "… considers that the confidentiality of the contents of the file contributed to the effective contribution of the child-care system and, to that extent, served a legitimate aim, by protecting not only the rights of contributors but also of the children in need of care."

Accordingly, the central issue is whether or not it is proportionate. This principle requires the court to ask:

(a) Whether the object of the interference is sufficiently important to justify limiting a fundamental right.

(b) Whether measures designed to meet that objective were rationally connected to it.

(c) Whether the means used to impair the right are no more than are necessary to accomplish that objective: see Defreitas v Permanent Secretary of Ministry of Agriculture [1999] 1 AC 69 at 80 and Anthony on Judicial Review in Northern Ireland at paragraph 6.23.

[16] The parties joined issue on whether it is proportionate for the Trusts to keep the care records of the applicant for 75 years. The applicant maintains it is grossly excessive and that all her records as a Looked After Child should have been destroyed immediately after she left care. As a matter of fact the present statutory regime under both the Children's Regulations (NI) 1996 and the Children's Home Regulations (NI) 2005 provide that the care records of individuals should be retained for 75 years. This mirrors the legislation which is in force in England and Wales. It is accepted by both parties that neither the 1996 Regulations nor the 2005 Regulations apply to the present documents as they pre-date this statutory intervention. As records obviously have to be retained, otherwise they would not be records, the issue dividing the parties is whether the retention by the respondents of the records for 75 years is proportionate and lawful. It is clear that the 75 year period has been chosen to ensure that the records of a Looked After Child are retained for the period of his or her lifetime.

[17] The applicant makes a number of different arguments which include:

(i) She is not making nor does she intend to make in the future any claim for ill-treatment or abuse while she was a Looked After Child. There was no question of her holding the authorities accountable in any way for the treatment she received during her period in care. Accordingly, the records do not have to be retained for this purpose.

(ii) She does not want to retrieve her life story.

(iii) She does not want the records to be used to carry out checks on her as persons who were not in care would not be burdened by such records in respect of their early lives.

(iv) She does not want other persons, including her own child, P, to have access to these records.

[18] I note that in her affidavit sworn on 19 January 2013 the applicant said at paragraph 5:

> "I have a host of questions and queries about the identity of my two siblings and whether we were all in care at the same time together and want to explore the possibility of making letter contact with them. And about how this information was within the Trust's knowledge but not properly revealed until now."

At paragraph 18 she then goes on to say:

> "In setting out what the Trust considers to be the practical difficulties in excising my information from the other files that Trusts hold on my sister and my mother Ms Logan does not appear to appreciate that I too have rights of privacy and my niece should not be entitled to access information about me in her mother's files. I would hope that if my niece did seek her mother's file, with that of her grandmother, that the Trust would redact those elements relating to me before allowing my niece access to those files. It can't be the case that just because my niece asked to see her mother's file that she would get access to everything in it, including information relating to other people. There is an assumption in Ms Logan's affidavit that the rights of others, for example, my niece, will trump my right to privacy and my right not to have my time in care exposed in records as well as my right to ask for removal and return of documents to me."

Ms Logan points out at paragraph 13 of her affidavit of 8 March 2013:

> "It is completely unrealistic to expunge references to siblings and parents in the files of other siblings and vice versa."

[19] Even if the applicant does not want to know at present what is in her records, it does not follow that she may not want to find out in the future what they contain for all sorts of reasons. She may, following the birth of a grandchild, be interested in her personal history for that grandchild's sake. She may want to find out about her genetic inheritance because she may discover, for example, that she, or her off-spring, is genetically predisposed to a certain illness whether mental or physical. She may want to know whether or not this has been passed down through her mother's side or her father's side. There may be other reasons about which it is unnecessary to speculate that will make her want to seek out her lost siblings. There are any number of reasons why she may change her mind in the future about accessing her care records. Of course, if the records are destroyed then the opportunity to consider them is lost forever.

[20] The respondent argues that the retention of the applicant's care records for 75 years is necessary on a number of different grounds. These are -

(a) **Accountability**

The Trusts state that these records are its corporate memory "providing evidence of actions and decisions in representing a vital asset to support daily

functions and operations". The Trusts go on to claim that they are vital to support "its current and future business" and "for awareness and understanding of its history, policies and procedures".

(b) **Subject access requests**

The Trusts claim that more and more Looked After Children want details of why they were placed in care, family background information and the like. With children who are not in care, this information is provided in most circumstances by the grown up child's parents. Looked After Children obviously cannot ask their parents and discover their life story. These requests for access occur, according to the Trusts:

(i) while they are being looked after;

(ii) as young adults recently left care;

(iii) at the time of their marriage or the birth of their children;

(iv) at times of crisis in their lives, such as when they are suffering from health problems or family difficulties;

(v) after the death of their foster or adoptive carers.

I pause to note that in Gaskin v United Kingdom [1989] 12 EHRR 36 the court recorded at paragraph 39 that the Commission had said that:

> "Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification."

This right for an individual to be able to establish details of his or her identity applies not just to the Looked After Child but also, inter alia, to that child's offspring.

(c) **Background Information**

The records, it is claimed, can provide important background information. When, for example, a Looked After Child seeks approval as a Foster Carer of a sister's child ("a kinship placement"), the Trust can access the records **with the Looked After Child's consent**, to ensure that they are able to carry out a full family placement assessment/home study to ensure that the Trust, when

it makes its decision, will be acting in the best interests of the child who is being fostered.

(d) **Public interest**

The ability to access previous records can be critical as is demonstrated by a number of different enquiries in cases of alleged historical abuse which are being carried in the United Kingdom. Indeed, Sir Anthony Hart is at present due to chair an Inquiry into Historical Institutionalised child abuse in Northern Ireland for the period from 1922 to the present day. Such an inquiry is highly dependent on records which provide contemporaneous records to support or undermine testimony given by persons whose memory is bound to have been affected by the passage of years. There is no doubt that memory is unreliable and that a court (or indeed anyone) having to choose between the memory of someone about an event that occurred many years before and a contemporaneous record of that event which is inconsistent with that memory is highly likely to prefer the contemporaneous written record.

[21] I note from Ms Logan's affidavit that all care records are maintained today in accordance with the requirements laid down in the "Good Management, Good Records 2011". This applicant has not made any express criticism of the policy document. I note that the Code purports to be based "on professional best practice and reflects the current legal requirements". Pages 147-150 sets out in full, for example, the requirements which have to be observed in respect of Article 8 Convention Rights. There can be no doubt that if the Trusts observe this policy they will be compliant with their common law and convention obligations. I am satisfied from the affidavits primarily of Ms Logan, that this policy has been put in place, that there has been adequate training given to staff to ensure that the policy is followed and that there are proper safeguards to ensure that it cannot be circumvented. In the circumstances I have had no difficulty in concluding on Issue 1 that the retention of the records of Looked After Children by the Trusts for a period of 75 years is the minimum necessary to ensure that the trusts can carry out their functions successfully. I consider it to be proportionate and necessary.

Issue 2

[22] It became clear during the course of the application that the applicant's main concern related not to the retention of the records when she was a Looked After Child but to the fact that those records might be accessed by some other third party. Accordingly, the focus of the application changed from the actual retention of confidential information relating to the applicant's period in care to the confidentiality of that information. Access to information retained by the Trusts of Looked After Children is governed by the Code of Practice on Protecting the Confidentiality of Service User Information. This is based on consent.

At common law a public body owes a duty to ensure that where it acquires information which relates to an individual, and is potentially harmful, that that public body will not disclose that information except where it is "necessary for the performance of its public duties" or "enabling some other public body to perform its public duty": see R v Chief Constable for North Wales ex parte Thorpe [1999] QB 396.

[23] It is clear that whenever any third party seeks access to the confidential records of the applicant, her Article 8 rights will also be engaged. Indeed, rights of those seeking access to these confidential records may also be engaged. Examples might be where P, the applicant's son, or H, the applicant's niece, seek access to these records to find out their life story: see Gaskin v UK. But it is not a question of one person's rights trumping another person's rights as is suggested in the arguments made on behalf of the applicant. The issue of whether a particular record should be disclosed will be evidence based. It may involve, inter alia, the balancing of various competing interests. This is a sensitive and highly fact specific task. There are good reasons for concluding that a court should not be asked to address this and similar questions in a vacuum. It is possible that no one will require access to the applicant's records as a Looked After Child in the future. In that case no issue about disclosure arises and whether there are adequate safeguards in place becomes a hypothetical issue. There is much force in the following arguments:

(a) The courts require evidence of competing interests so they can reach a final decision on the evidence. It would be highly embarrassing if the courts reached a different conclusion on a hypothetical issue to the conclusion they reached on the hard facts of a real case.

(b) The courts may not receive the full arguments they would have if there were opposing parties.

(c) Real life cases are frequently fact sensitive.

(d) The hearing of the hypothetical case is a waste of court time and the very antithesis of the overarching imperative of Order 1 Rule 1(1a).

Certainly the courts in Northern Ireland have in many instances been far from sympathetic to the hearing of hypothetical cases: see eg Ray McConnell's Application [2000] NIJB 116. I consider that the matter is well summarised by the Court of Appeal in England in R (Burke) v General Medical Council [2006] QB 273 at (21):

> "There are great dangers in a court grappling with issues such as those that Mumby J has addressed when these are divorced from a factual context that

> requires their determination. The court should not be used as a general advice centre. The danger is that the court will enunciate propositions of principle without full appreciation of the implications that these will have on practice, throwing into confusion those who feel obliged to attempt to apply those principles in practice. This danger is particularly acute where the issues raised involve ethical questions that any court should be reluctant to address, unless driven to do so by the need to resolve a practical problem that requires the court's intervention. We should commend, in relation to the guidance, the wise advice given by Lord Bridge of Harwich in Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112-193-194:
>
> **"The occasions of a departmental non-statutory publication raising … a clearly defined issue of law, unclouded by political, social or moral overtones, will be rare. In cases where any proposition of law implicit in a departmental advisory document is inter-woven with questions of social and ethical controversy, the court should, in my opinion, exercise its jurisdiction with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid either expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority of proffering answers to hypothetical questions of law which do not strictly arise for decision."**
>
> The judge himself cited this passage with approval. Unfortunately, he did not follow it."

[24] The Code requires the applicant in normal circumstances to be given notice if there is a request to see her records. Therefore, the applicant will have an opportunity to challenge any application to access her records while she was a Looked After Child. Should H, her niece, for example, want to know more about her background, which she is entitled to do in accordance with her Article 8 rights, her request for information may well engage the Article 8 rights of the applicant, who will not want some of her confidential information to be disclosed. It would be much better if the issue of disclosure in those circumstances was decided in the light of arguments offered by the applicant, her niece and the Trusts. It would, in my opinion, be premature, unhelpful and potentially unfair for the court to offer the applicant an answer to a question that is not evidence based and does not involve all

the parties who have an interest in either obtaining or preventing disclosure of the records. Decisions in this area should be fact sensitive and highly nuanced.

[25] The principles which the Code of Practice applies are set out as being three core principles. These are:

> "Individuals have a fundamental right to the confidentiality and privacy of information relating to their health and social care.
>
> Individuals have a right to control access to and disclosure of their own health and social care information by giving, withholding or withdrawing consent.
>
> When considering whether to disclose confidential information, health and social care staff should have regard to whether the disclosure was necessary, proportionate and accompanied by any undue risks."

[26] The Code goes on to make clear that:

(a) Service users must be kept informed in an accessible manner about the uses and disclosure of their information.

(b) Service users should also be informed of the circumstances in which they can give, withhold or withdraw consent to the use of their information.

(c) Service users should be given an opportunity to discuss any concerns they may have about possible use of the information.

(d) Service users should be informed that without their consent personal information cannot be used unless, exceptionally, a justification other than consent exists."

[27] The Code of Practice also deals with the use and disclosure of personal identifiable information for purposes of health and social care not directly related to care of that service user, ("secondary uses"). There the following principles for good practice are set out in some detail and include a requirement that organisations should seek to have such information "anonymised and pseudonymised".

[28] I have considered the Code of Practice in full. On the face of it, the advice proffered seems lawful and, if followed, Convention compliant. However, on

reflection, I do not think that it is for this court to give judgment on an issue which has not yet arisen. Accordingly, I decline to do so.

Further Discussion

[29] It is significant that no challenge has been made to the Trust's storage of personal information of the applicant on the basis that such storage constitutes a breach of the Data Protection Act 1998. This act strengthens the safeguards under the 1984 Act which it replaced. The Act protects "personal data which is data relating to a living individual who can be identified from data whether taken alone or read with other information which is the possession (or is likely to come into possession) of the data controller: see 12-63 of Clayton and Tomlinson on The Law of Human Rights (2nd Edition). It will be noted that "personal" has been interpreted as almost meaning the same as "private": see Durant v Financial Services Authority [2004] FSR 28 at paragraph [4].

[30] The applicant originally suggested or at least strongly hinted that she had been discriminated against when she made her application to become the foster parent of her niece so that she could assume full responsibility for H's care. The suggestion was that those persons who had been Looked After Children were required automatically to make much greater disclosure than persons who had not been in care. This argument was not pursued in this application and assurances were given to the court by Mr Montgomery BL on behalf of the Trusts that all of his clients acted even-handedly in requiring disclosure of records kept by the Trusts in respect of Looked After Children. Further that at all times the Trusts acted on the basis that the welfare of the child, who is the subject of the fostering application, is paramount. Although there is no dispute between the parties, my provisional view is that someone who has been in care should not be subjected to a more onerous disclosure regime than someone who has not been in care. Disclosure can only be justified on the basis that disclosure of all the documents is necessary to permit the relevant authority to make a decision as to what will be in the best interests of the child who is to be fostered. Any attempt to impose automatically a more burdensome regime on a putative foster parent simply because she had been in care will require a detailed explanation and justification from the Trusts.

Conclusion

[31] On the basis of the facts, and the relevant legal authorities, I do not consider that the Trusts have acted unlawfully in retaining the applicant's records and in intending to keep those records for a period of up to 75 years. Accordingly, I conclude in respect of Issue 1 that the retention of the applicant's records in accordance with the Code of Practice, Good Management, Good Records 2011 is proportionate and lawful.

[32] In respect of Issue 2, I decline to answer it as the Issue is hypothetical and is not grounded on evidence. My provisional view, and I stress that it is a provisional view, is that the Code is not only Convention compliant but is also in accordance with the common law.