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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR188
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF THE NORTHERN IRELAND HEALTH AND SOCIAL CARE TRUST ON 18 JULY 2021

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Ms Charlene Dempsey for the Applicant
Mr Andrew Montgomery for the Respondent

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COLTON J

Introduction

[1] I am obliged to counsel for their well-marshalled and ably presented written and oral submissions.

[2] The applicant has had a troubled history arising from mental health issues, substance misuse and periods of instability. As a result she has had involvement with social services under the direction of the respondent Trust.

[3] On 19 May 2021 she attended a pre-birth case conference organised by the Trust in respect of the pending birth of her third child. The meeting was attended by a number of multi-disciplinary professionals who were tasked with identifying if and how the applicant should care for her baby following birth. At the meeting it was decided that the applicant's unborn baby's name should be placed on the Child Protection Register at birth under the category of "Confirmed Neglect." This was primarily on the basis that in the course of her pregnancy she had consumed alcohol and ingested a line of cocaine.

[4] The applicant availed of the Trust's internal appeal process challenging the categorisation of "confirmed neglect." As part of the appeal she sought to have the categorisation "quashed" and "eradicated" from the Trust's records.

[5] Before the appeal was heard, the Trust advised the applicant's solicitor by letter dated 10 June 2021 as follows:

> "Please note that the Trust does not have the power to quash the decision of the conference or to eradicate this information from [X's] files as you request. The appeals process reviews the decision about registration made at the conference and will determine whether the grounds for appeal have been met or not."

[6] At this stage the applicant's child had been born and to protect his identity he shall be referred to as 'X.'

[7] On 17 June 2021, the applicant's appeal was upheld and the categorisation was replaced with that of "Potential Neglect." In response to the applicant's pre-action letter, the Trust confirms the position:

> "At this stage 1 process, the chair agreed to uphold the request for appeal on the grounds of incorrect category of registration on the basis the baby was in utero. No legally recognised entity having yet been born, the category of 'Confirmed Neglect' should not have been used."

[8] The Trust has maintained its position that it will not agree to erase the reference to the incorrect categorisation from the files. It is this decision that is challenged in these proceedings.

[9] In the course of case management directions it was agreed to deal with this application by way of a "rolled up" hearing. In addition to the applicant's affidavit and exhibits the court had the benefit of affidavits filed on behalf of the Trust, together with all relevant records relating to the application. These included, in particular, the records/files relating to X, which contains the references which the applicant says should be expunged. The applicant raises no complaint with the "Potential Neglect" categorisation.

What do the records show?

[10] The challenged entries are contained in a file which relate to the applicant's son. They are extensive and typical of files and records relating to children embraced by social services. They include minutes and reports of Child Protection Conferences attended by numerous social workers and health professionals which record decisions made in relation to the care of child X.

[11] The court has been provided with a hard copy of the file. The file contains a preface in the following terms:

"Please note

Upon appeal, a subsequent Child Protection Case Conference amended the category of registration for child to "Potential Neglect."

These records are held for reference purposes:

C, Social Work Service Manager
Antrim Family Support and Intervention Team
July 2021"

[12] On the following page the child's name and date of birth is set out on the top left hand corner. Below that there are two columns set out in tabular form. The left hand column is headed "Date" the right hand column is headed "Significant Event." The relevant entries are as follows:

Date	Significant Event
19.05.201 (sic)	Initial pre-birth Child Protection Case Conference. Decision made to place child's date (sic) on CP Register under category of Confirmed Neglect when child is born
05.2021	[X] born
24.05.2021	[X's] name placed on the Child Protection Register under category of Confirmed Neglect
15.06.2021	Child Protection Core Group meeting. [JR188] advised the meeting she had made an appeal in writing via her solicitor against the initial case conference decision and registration.
17.06.2021	An appeal meeting was facilitated for [JR188] and her solicitor to meet with Emma Millar SSW and Collette McCartney SWSM.
05.07.2021	Following the initial Conference proceeding to Appeal. The appeal was upheld on the grounds of the category not being correct. A Child Protection Case Conference took place and [X's] name was placed on the Register under category of "Potential Neglect."
21.09.2021	Review Child Protection Case Conference. [X's] name retained on the CPR under category "Potential Neglect."

[13] Below that table there is a "discoverable" index setting out the papers which are contained in the file. In relation to the initial Child Protection Conference Report the reason for convening the conference is set out as follows:

> "[JR188] is currently pregnant with her third baby, her two older children are residing with their paternal families under an Interim Residence Order and a Joint Residence Order respectively. [JR188] acknowledges that there are concerns around her mental health, substance misuse and lack of engagement/honesty with services."

[14] There then follows a very comprehensive record of the discussions that took place at that time.

[15] A decision was taken to place X on the Child Protection Register on the grounds of "Confirmed Neglect." As a result the child was duly placed on the register following his birth in May 2021.

[16] This categorisation is confirmed on pages 18 and 19 of the first Understanding the Needs of Children in Northern Ireland ("UNOCNI") report. Under the column headed "Categories" the words "Confirmed Neglect" are depicted showing the opinions of a number of health care professionals who attended at the conference on 25 May 2021.

[17] A subsequent record of the Child Protection Case Conference dated 5 July 2021 records a categorisation of "Potential Neglect."

[18] The hard copy file also includes letters in relation to the request for an appeal, the response to this and the minutes of the appeal meeting held on 5 July 2021.

[19] In addition to the hard copy records Ms McCartney, in an affidavit sworn on behalf of the Trust, has reviewed the electronic records relating to Baby X [known as "SOSCARE"]. In paragraph 6 of her affidavit she explains as follows:

> "6. By way of annotation to these images it can be added:
>
> - "Green screen" system – this is the basic information screen and is an older system which may be accessed only by social workers who are authorised to use SOSCARE. It can be seen that the image exhibited shows only the current category of registration, which is "Potential Neglect." Anyone opening the file will see the correct current status of potential neglect only.
>
> - "Blue screen" system – the blue screen images are examples of what appears for the subject child when accessed by social work staff working in

> childcare who have higher authorisation. This system is used to record reports. It is a more updated and modern system than the "Green Screen" and can only be accessed by staff working in childcare. A number of images are shown, including one older from the summer of 2021 and more recent images. It can be seen from these under "Categories" (which relates to categories of registration) that the classification has been changed from "Confirmed Neglect" to "Potential Neglect."
>
> When a social worker uses this system it will show a list of child protection reports. Any viewer will see dates of meetings and that there were two child protection conferences held within a short timeframe – indicative of an appeals process. In addition to this, letters in relation to the request for an appeal, the response to this and the minutes of the appeal meeting held on 5/07/2021 are also held on file and also clearly demonstrate the appeals process and the outworking of same."

The Applicant's Case

[20] The applicant alleges a breach of her Article 8 ECHR rights.

[21] The court accepts that the retention of the information by the Trust engages and interferes with her Article 8 rights. The leading case law on this topic relates to law enforcement records but, nonetheless, the principle established in those authorities supports this contention.

[22] The leading case is that of *R(On the application of Catt) (Respondent) v Commissioner of Police of the Metropolis and another (Appellants) and R(On the application of T) (Respondent) v Commissioner of Police of the Metropolis (Appellant)* [2015] UKSC 9. As Lord Sumption said at paragraph [6] of his judgment:

> "But it is clear that the state's systematic collection and storage in retrievable form even of public information about an individual is an interference with private life."

[23] Article 8, being a qualified right, the issue for the court is whether the interference in question is in accordance with law, pursued for a legitimate aim and is proportionate.

[24] There is no real issue in relation to the first two limbs.

[25] The lawful basis for the retention of the applicant's information is dealt with in the affidavit of Ms Nicola Lyons who is a senior manager within the Trust and holds the post of Information Governance Manager. At paragraph 4 she avers:

> "All health and social care records are public records under the terms of Public Records Act (Northern Ireland) 1923. Therefore, a prime purpose for retention of records is the accountability of the Trust as a public authority to ensure that the Trust fulfils its statutory obligations and that clients/service users receive appropriate services in accordance with the relevant policies and procedures."

[26] Ms Lyons also deals with the retention of these records under data protection principles, to which I will return.

[27] The court considers that it is plain that records are retained in the public interest and for the purposes of the provision of health and social care treatment. Specifically, the records are retained to ensure compliance with the Trust's general obligations to child X under the Children (Northern Ireland) Order 1995 and the Health and Social Care (Reform) Act (Northern Ireland) 2009.

Is the Retention Proportionate?

[28] The real issue in the case relates to whether or not the decision by the Trust to retain the specific records complained about by the applicant is proportionate. In this regard it is important to record the applicant's concerns. These are that professionals involved in an ongoing care case involving another child of hers may access the records and see the incorrect reference to "Confirmed Neglect." She is also concerned that in the future her son could gain access to the records and see the incorrect categorisation.

[29] Ms Dempsey complains that in assessing proportionality the Trust has failed to carry out any balancing exercise in terms of the applicant's individual request to erase references to the incorrect categorisation. She asserts that the Trust adopts an inflexible approach by applying its Good Management Good Records ("GMGR") policy which prevents the applicant applying to have the incorrect categorisation erased irrespective of the passage of time. She argues that this inflexible approach renders the current regime incompatible with her rights under Article 8. In relation to the passage of time and the period for which the Trust retains the records this is analysed through the prism of data protection principles in paras [57] and onwards of this judgment.

[30] In relation to the Trust's policy it has adopted and applies the Department of Health's GMGR policy in relation to the disposal of records. This succeeds earlier versions and is a publicly accessible document.

[31] Ms Lyons on behalf of the Trust avers as follows:

> "6. GMGR is a legal document, approved by the Northern Ireland Assembly, authorising the disposal of records that fall into one of the disposal classes listed in the schedule. The time limits for retention of records are set out within GMGR and are based within legislation and policy. Records made pursuant to the Children Order have a retention limit of 75 years where a Child Protection Case File (GMGR Ref: P13) after which time the Retention and Disposal Schedule indicates that they may, on review, transfer to the Public Records Office for Northern Ireland.
>
> 7. GMGR states that:
>
> > 'All DoH, HSC and Public Safety Records are public records under the terms of the Public Records Act (Northern Ireland) 1923 (PRA 1923). The PRA 1923 established PRONI as the place of deposit for public records, created the roles of Keeper and Deputy Keeper of the records as well as defining NI Public Records. The PRA 1923 sets out the broad responsibilities for everyone who works with such records. Organisations have a statutory duty to make arrangements for the safe keeping and eventual secure disposal of their records.'
>
> The PRA 1923 made PRONI responsible for the records of any Court, Government department, Authority or Office in Northern Ireland over which the Parliament of Northern Ireland (NI) has the power to legislate. It is therefore a statutory requirement for the HSC and Public Safety to implement records management as set out in the PRA 1923 and in the Disposal of Documents (Northern Ireland) Order 1925."

[32] The predecessor to the current version of GMGR guidelines was considered by the High Court in the case of *JR60* [2013] NIQB 93. In that case the applicant was seeking the destruction of the entirety of her records relating to periods in which she

was in care. The target in that case was the 75 year duration of retention for such records (which also applies in this case). In his judgment in that case Horner J endorsed the rationale for retaining records in relation to children subject to care concerns, considering it lawful and proportionate, stating that:

> "[21] There can be no doubt that if the Trusts observe (Good Management Good Records policy) they will be compliant with their common law and convention obligations."

[33] In the course of submissions Mr Montgomery pointed to a range of factors which he says clearly demonstrate that the retention of the impugned records is in fact proportionate.

[34] The assessment of proportionality is a fact sensitive one. In the court's assessment there are a number of factors to be weighed in the balance in this application.

[35] The starting point is to recognise that these records relate to child X. Therefore, any redaction or destruction of the records would impact on his rights to have a full history of his interactions with the Trust maintained. As Horner J said in *JR60* at para [16] of his judgment:

> "[16] 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."

[36] Turning to the records themselves it is important that there is actually no challenge to the categorisation of "Potential Neglect." The basis for both categorisations remains the same; primarily the use of drugs by the applicant in the course of her pregnancy. This will be apparent to anyone who has access to the records.

[37] There is a live debate as to whether in fact the records are inaccurate. In the court's view they are not. It is right that the first categorisation of "Confirmed Neglect" was deemed to be "incorrect." That is clear from the records and the basis for the change in categorisation is also clear. Thus, the records are accurate.

[38] Returning to the assessment of proportionality it is important, in the context of what are accurate records, to note that they clearly highlight a change in categorisation and the reason for the change. No one who has access to the records could be in any doubt about this.

[39] It is also important to consider the extent of potential access to the records. It is clear from the evidence of the Trust that access will be extremely limited and only available to authorised professionals who are subject to regulation and who access

the records for the purposes of child protection. The only other person who may have access to the files will be child X himself.

[40] All of this has to be seen in the context of the alleged harm or prejudice to the applicant. In view of the limited access and in view of the steps taken to ensure a proper and accurate account of what took place it is difficult to point to any significant prejudice suffered by the applicant. This is particularly so when there is no challenge to the factual basis for the two categorisations and where the categorisation of "Potential Neglect" is not challenged.

[41] In practical terms it is important, in the court's view, that records are properly retained to ensure that they disclose a full history of what took place. It is difficult to see how the destruction or redaction of parts of the records could be achieved in practice. To do so is bound to affect both the integrity and sense of the records. The court agrees with Mr Montgomery's submission that it is essential in these circumstances to have an accurate trail of decision making and ensure an accurate corporate memory of all relevant events in relation to child X.

[42] Taking all these matters into account the court considers that the retention of the impugned records is proportionate. The interference with the applicant's Article 8 rights is, in the court's view, lawful.

Data Protection Principles

[43] At the hearing the case was argued primarily through the prism of the applicant's Article 8 rights. In the Order 53 Statement the applicant also pleaded a breach of Article 5(1) and (6) of the General Data Protection Regulations ("GDPR") and Part 1 of Schedule 1 to the Data Protection Act 2018 ("the 2018 Act"), on the grounds that the retention and processing of the purported incorrect categorisation fails to comply with the data protection principles set out therein.

[44] It seems to the court that in fact the relevant part of the 2018 Act are sections 86 to 91 which set out the six data protection principles in relation to data processing.

[45] The starting point in assessing whether there is a breach of data protection legislation is the overview provided in section 85 of the 2018 Act which sets out the six data protection principles in relation to those who process data.

[46] Before turning to the specific principles relevant to this application in terms of the lawfulness of the processing of the applicant's data in these circumstances the court has regard to the first principle set out in Article 86 and Article 6(1)(e) of the GDPR. It is clear and not in dispute that the processing in this case is lawful and necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

[47] Turning to the data principles at play in this case the relevant ones are the fourth data principle – set out in section 89 of the 2018 Act and the fifth data protection principle set out in section 90.

[48] Section 89 provides that:

> "The fourth data protection principle is that personal data undergoing processing must be accurate and, where necessary, kept up to date."

[49] This provision should also be read in the context of Article 5(1)(d) of the GDPR which provides that:

> "Personal data shall be accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy')."

[50] Additionally, Article 17 of GDPR ("Right to be forgotten") permits erasure of records in some circumstances subject to certain exemptions.

[51] Turning to the records challenged in this case, it seems to the court that, as a matter of fact, the personal data retained is accurate, as per the analysis set out above. Even if there is an inaccuracy it clearly has been rectified.

[52] In this regard the guidance of the Information Commissioner's Office ("ICO") is of assistance. In relation to the right to rectification the ICO guidelines say at page 113:

> "Determining whether personal data is inaccurate can be more complex if the data refers to a mistake that has subsequently been resolved. It may be possible to argue that the record of the mistake is, in itself, accurate and should be kept. In such circumstances the fact that a mistake was made and the correct information should also be included in the individuals data."

[53] The ICO provides further clarification in the following statement (echoing the fourth principle):

> "Individuals have the right to have incorrect personal data rectified. Individuals do not have the right to erasure just because data is inaccurate."

[54] Article 17 of GDPR provides individuals with the right to erasure. However, this is not an absolute right and only applies in certain circumstances. Thus, Article 17(3)(b) states that right to erasure:

> "Shall not apply where processing is necessary for compliance with a legal obligation which requires processing … for the performance of a task carried out in the public interest … vested in the controller."

[55] In summary, therefore, the court's analysis of the relevant data protection legislation and principles leads it to the conclusion that there has been no breach of the fourth principle. The court concludes that the records are, in fact, accurate but in any event have clearly been rectified. There is no obligation under the fourth principle upon the Trust to erase or destroy the record challenged by the applicant.

[56] The court turns now to the fifth data principle.

[57] Section 90 of the 2018 Act provides:

> "The fifth data protection principle is that personal data must be kept for no longer than is necessary for the purpose for which it is processed."

[58] In relation to this principle the applicant draws on a number of authorities in support of her argument that the Trust's policy is unlawful in that it does not provide for a review period in respect of retention of the records. Thus, in the *Catt* case the Metropolitan Police had a policy of retention of material for 7-12 years. The fact that the material in question was only retained for 2½ years before the decision to delete it was made was sufficient for the Supreme Court to come to the conclusion that there had not been a breach of the applicant's Article 8 rights. At paragraph 76, Lord Mance stated:

> "76. … I do not consider it to be unlawful for the police to adopt a standard practice of retaining a record of such complaints for several years, but with a readiness to be flexible in the application of the practice."

[59] The court further held in *Catt* that:

> "Safeguards must enable the deletion of any such data, once its continued retention becomes disproportionate." (See page 93)

[60] In this jurisdiction the court considered the retention by the PSNI of disruption notices in respect of the applicant in relation to alleged activities in cash and transit robberies in the case of *Cavanagh's (Mark) Application (No.2)* [2019] NIQB

89. Ultimately, the court held that the policy of the PSNI (which was not accessible on the internet) was not compatible with Article 8 as the retention period was 100 years without any stipulated review. Ms Dempsey points out that the current PSNI (Review, Retention and Disposal Schedule) has been updated as of May 2020. Records retained for 100 years now have a review period of 10 years.

[61] It must be noted, however, that the cases of *Cavanagh* and *BM1* dealt with data retention for law enforcement purposes, unlike the present case. Significantly, the fifth data principle insofar as it relates to law enforcement purposes includes the following at section 39:

> "…
> (2) appropriate time limits must be established with a periodic review of the need for the continued storage of personal data for any of the law enforcement purposes."

[62] No such provision applies in relation to the retention/storage of the records under consideration in this case.

[63] In relation to such records the High Court in this jurisdiction in the case of *JR60* has already endorsed the lawfulness of the retention policy (which is accessible to the public), namely GMGR, which has been discussed above.

[64] The court agrees with the conclusion reached by Horner J in *JR60*.

[65] In this regard, the court is influenced by the consideration set out in its analysis of the applicant's Article 8 rights. These records are child X's records. They are retained for an important and essential public service. Access is restricted to authorised and regulated professionals or to child X himself, who at any stage in the course of his life would be entitled to seek access to the records. This is why the 75 year retention period has been chosen and is justified in the court's view. In such circumstances it is in the court's view proportionate and essential that they are retained in an accurate form. The court does not lightly dismiss the applicant's submission in relation to the potential to review the records, but considers that when all matters are taken into account the retention policy is valid and lawful. It considers that the retention of the records complained of by the applicant is proportionate and that it would be disproportionate to order that they be erased or destroyed as requested by the applicant. The court comes to this conclusion both in its analysis of the applicant's Article 8 rights and her rights under the data protection legislation.

[66] The court, therefore, grants leave to the applicant to seek judicial review but dismisses the claim on the merits.