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

IN THE MATTER OF AN APPLICATION BY JR282
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF
THE WESTERN HEALTH AND SOCIAL CARE TRUST

Re JR282's Application
(Trust removal of child from jurisdiction)

Maria Mullally (instructed by Roche McBride, Solicitors) for the Applicant
Matthew Corkey (instructed by the Directorate of Legal Services) for the proposed Respondent

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SCOFFIELD J

Introduction

[1] By this application the applicant seeks to challenge a decision on the part of the Western Health and Social Care Trust ("the Trust"), made on 21 July 2023, to remove her daughter from the jurisdiction and place her in the care of Social Services in the Republic of Ireland without having applied to the court for an order permitting it to do so. For its part, the Trust accepts that it acted unlawfully. The child is the subject of ongoing care proceedings in the Republic of Ireland. The key issue in these proceedings is whether an application for judicial review in this jurisdiction relating to the legality of what occurred on 21 July will serve any useful purpose in these circumstances.

[2] Ms Mullally, who appeared for the applicant, submitted that it was important for the case to proceed for a number of reasons. Mr Corkey, who appeared for the Trust, contended that the application should be dismissed in light of the frank concessions made by the Trust and the availability to the applicant of alternative remedies for the purpose of seeking further redress. I am grateful to both counsel for their submissions.

[3] The applicant has been anonymised in these proceedings in order to protect the identity and privacy of her young daughter, in respect of whom family proceedings are ongoing.

Factual background

[4] For present purposes, the factual background to this case may be briefly stated. The applicant's daughter ("S") was born in October 2022. The family are members of the travelling community. There is an issue in relation to the child's habitual residence. The applicant avers that, prior to the birth of S, she was residing in Northern Ireland. However, S was born in England whilst her parents were visiting relatives there. On the applicant's case, the family returned to Northern Ireland shortly afterwards but soon went to visit relatives in County Roscommon and then County Galway in the Republic of Ireland.

[5] The applicant also avers that, in or about March 2023, she went to register S with a health centre when again visiting relatives in the Republic of Ireland. She recalls social workers from Tusla (the Child and Family Agency in Ireland) and the Gardaí arriving some time later at the relevant address in Castlerea, stating that they had concerns as to S's safety due to a referral from Social Services in England where she had been born. The applicant says that she cooperated with this check and that a further welfare check was made. In any event, in July 2023, when the applicant contends that she was residing in Northern Ireland, her solicitor (who represents her in care proceedings which are in train in the Republic of Ireland) contacted her to state that the Child and Family Agency had made an ex parte application to the District Court for the Area of Galway, without notice to her or her solicitor, seeking an emergency care order (ECO) under section 13 of the Child Care Act, 1991. This order was granted by a judge of the District Court on 17 July and directed that S was to be placed under the care of the Child and Family Agency for a period of eight days from the date when the child was delivered into its custody. However, the applicant avers this order was not served upon her; and it is common case that it was not executed at that point.

[6] The applicant further avers that she was contacted by social workers from Tusla and told to return to the Republic of Ireland with S. At that time, she says that she, her partner and S were residing in a property in County Tyrone (although the property was not registered to her). On 21 July she went to the shop and on her return discovered that the police had entered her property. Her partner had been arrested in respect of an outstanding bench warrant and S had been removed by the police pursuant to the power contained in Article 65 of the Children (Northern Ireland) Order 1995. The exercise of this power is commonly referred to as the making of a police protection order (PPO). The applicant says that she was later informed that Tusla had contacted the PSNI stating that a care order was in place in the Republic of Ireland, having been granted on 17 July.

[7] From the paperwork completed by the PSNI relevant to the PPO, it is clear that they had been informed that there was a "high risk missing child" whose parents had "fled" with her from the Republic of Ireland to Northern Ireland once the ECO had been issued by the District Court in Galway. They located the child, having forced entry to the home when the door had not been answered. They had concerns for S's well-being and therefore "due to concerns for her immediate safety, she was taken into police protection." The Trust has indicated that it understands that the applicant has two other children who are subject to care orders and that there were significant concerns about violence in the home. The authorities here have proceeded on the basis that, when Social Services and police in the Republic of Ireland attempted to serve the ECO, her parents were avoiding service of that order. S could not be located and she was then made subject to a missing person alert, as a result of which a report was made to the PSNI.

[8] The applicant was extremely distressed on discovering that her daughter had been removed by the police. She contacted her solicitor in relation to this. She also attended the police station in Strabane in order to provide consent for a medical examination to be undertaken for daughter, as it had been noted that she had nappy rash.

[9] The applicant says that she was later informed that the Gateway Team in Derry were contacted and took care of S. She says that during that day, however, she had no information as to what happened to S. Her solicitor attempted to discuss this issue with police and also with Gateway. He was intending to make an application for legal aid in order that the applicant might obtain a prohibited steps order from a court preventing any attempt by the respondent to take S out of the jurisdiction until a court in Northern Ireland had adjudicated on the matter. The applicant avers that at all times she wished to have a court within this jurisdiction adjudicate on the future of her daughter. However, sometime after 5:00 pm on 21 July 2023, the applicant was informed by her solicitor that the respondent had taken S outside the jurisdiction and was intending to hand her over to Tusla. The applicant did not consent to this.

[10] The applicant avers that she has now been allocated a property in Northern Ireland and intends to continue residing here. She believes that the removal of her daughter to the Republic of Ireland on 21 July 2023 was unlawful and complains that she was deprived of an opportunity to challenge the removal and of any right have a court in this jurisdiction adjudicate on the issues relating to her daughter's welfare.

[11] An affidavit from the applicant's solicitor was also provided in the course of this application for leave to apply for judicial review. He essentially confirms her version of events as to what transpired on 21 July, insofar as it is within his knowledge. The solicitor, Mr Roche, also avers that he made numerous telephone calls to the PSNI on that date to ascertain who the relevant social worker was. He later spoke with the relevant social worker and was told that S was in a car with

another social worker on the way to be handed over the border. He expressed his opposition to this, on behalf of his client, in trenchant terms and requested that the handover be stopped. However, the Trust indicated that the action had been approved and that they believed they were acting lawfully. He heard nothing further over the weekend but discovered first thing on Monday morning in that the handover had been completed.

[12] The applicant is legally represented in the Republic of Ireland by a Mr Robertson of the Galway Law Centre. He had been acting for the applicant in respect of care proceedings relating to S even before the grant of the ECO on 21 July 2023. He continues to act for her. Having been returned to the Republic of Ireland, S was made the subject of an interim care order for 29 days on 25 July 2023. The case was reviewed by Loughrea District Court again on 18 August and a helpful letter from Mr Robertson has recently been provided outlining what is occurring in those proceedings. On that occasion the interim care order was extended. Mr Robertson issued an application pursuant to section 47 of the 1991 Act for directions in relation to the issue of jurisdiction. That issue is to be considered by the court in due course after replying evidence on it has been filed.

Pre-action correspondence

[13] An initial pre-action protocol letter was sent on behalf of the applicant shortly after S's removal, on 25 July 2023. The thrust of that correspondence was that a court should have undertaken a detailed evaluation of the matter, including in particular where the child was habitually resident, before her removal from this jurisdiction. The applicant was said to be seeking a declaration that the Trust's actions were unlawful and in breach of her Convention rights. The Trust issued a holding response on 27 July 2023 querying the utility of any declaration which might be granted and also contending that there was no question but that S had been habitually resident in the Republic of Ireland "and was only within the jurisdiction of Northern Ireland as a consequence of the child having been potentially unlawfully transported across the border to avoid a Court Order." The Trust took issue with the suggestion that the applicant was then resident in this jurisdiction.

[14] Further pre-action correspondence was sent on behalf of the applicant on 28 July 2023. The Directorate of Legal Services replied on behalf of the Trust on 2 August 2023. This further explained the background to the case from the Trust's perspective, including its understanding that the ECO had been made on 17 July because there was an immediate and serious risk to the health and welfare of S and that that order stated the applicant's registered home address to be in County Roscommon. It outlined concerns that social workers had about S's health and welfare as a result of her condition when taken into police protection on 21 July. Importantly, however, it contained the following passage:

> "As requested we confirm that the Trust did not follow due process in arranging for social services from the

> Republic of Ireland to have care of the child [S]. It is accepted that this potentially interfered with the Article 6 and 8 ECHR rights of the Applicant."

[15] Nonetheless, since the applicant was in a position to engage in the ongoing court process in the Republic of Ireland, and was now armed with the "frank concession" made in the correspondence, the Trust considered that the threatened judicial review proceedings in this jurisdiction were neither appropriate nor necessary. This was not, however, to the satisfaction of the applicant or her legal representatives. A further letter of 6 August 2023 argued that a declaration from the court was required and that the proposed application would therefore serve a useful purpose. This was principally said to be on the basis that the applicant's solicitor in Galway would make use of such a declaration in seeking to persuade the District Court that S should be returned to Northern Ireland so that the courts here could determine arrangements for her care. The Trust joined issue with this analysis in a further short reply of 8 August. It contained this passage:

> "We again confirm in open correspondence that, on 21st July the Trust did not follow due process. We confirm as per section 9 of your correspondence that the child [S] was placed in another jurisdiction without a court order in the jurisdiction and that there was no application under the Hague Convention."

[16] At the short hearing in these proceedings on 18 August – convened because the applicant considered this case to be one of some urgency given the ongoing proceedings in the Republic of Ireland and her solicitor's proposed application there – I invited the Trust to spell out more clearly what "due process" it now accepted ought to have been followed. It has now done so in an additional document provided to the Court and to the applicant. In summary:

(a) Although the Trust emphasises the highly unusual nature of this case from its perspective, it accepts that it "failed to follow the correct procedure when managing the return of the Applicant's child to the Republic of Ireland."

(b) The Trust considers there was no illegality in the PSNI removing the child into protective custody in the exercise of its powers, nor in the police's involvement of the Trust by means of removing S to its care as a means of provision of suitable accommodation for her.

(c) Thereafter, however, where the Trust believed it necessary to share parental responsibility for the child it could, and should have, sought an Emergency Protection Order (EPO) from the Family Proceedings Court (FPC). In this case, it is accepted that the Trust should have made an application for an EPO prior to the expiry of the 72-hour period of the PPO. The Trust did not make

such an application either prior to the conclusion of the 72-hour period or at all and accepts that this was a procedural failure on its part.

(d) Had an EPO been granted, giving the Trust parental responsibility for S and authority to accommodate her, it should then have made an application to the FPC for a care order (and it submits that an interim care order would have been highly likely to have been granted in this case).

(e) The Trust would then have brought an application to transfer the case to the High Court (since neither the FPC nor the Family Care Centre deal with applications under the Hague Convention). In due course, the Family Division of the High Court would have been invited to consider an application to transfer the child to the Republic of Ireland where there are ongoing care proceedings (Social Services in the Republic of Ireland having made a request to have the child placed within that jurisdiction). S would have been placed in foster care during this time.

[17] In simple terms, the Trust accepts that there should have been court involvement before the child was removed from this jurisdiction, where she and her parents both were, and that there ought to have been court proceedings here (in which the applicant could have been represented) to determine how to proceed, rather than the child simply being summarily removed from the jurisdiction against her parents' wishes.

Summary of the parties' submissions

[18] For the Trust, Mr Corkey submitted that an appropriate concession had been made in open correspondence as to the (now acknowledged) impropriety of the Trust having proceeded in the way in which it did. It would be of no additional practical benefit, in his submission, for the court to enquire further into this for the purpose of rubber-stamping the admission the Trust had already made.

[19] In response, Ms Mullally submitted that there was a variety of bases upon which the court ought to grant leave to apply for judicial review: first, because of the seriousness of the breach in this case; second, because a declaration from the court would be of greater assistance to the applicant or greater evidential weight than would a mere admission on the part of the Trust, particularly in support of her application that proceedings should be transferred from the Republic of Ireland to this jurisdiction; third, in order to give guidance to the Trust (or other Trusts) on this issue; and, fourth, because the applicant might still pursue damages for the breach of her rights.

Consideration

[20] The primary basis upon which the application for leave to apply for judicial review was advanced (and the basis upon which the need for urgency was asserted)

was that the applicant should be granted a declaration in respect of the unlawfulness of the Trust's actions in order to assist with her application in the Irish Courts that jurisdiction should be transferred to Northern Ireland. I accept the respondent's submission that this is not a proper basis for the grant of leave to apply for judicial review in light of the position which it (the Trust) has adopted in open correspondence.

[21] Mr Corkey made a powerful point in relation to the operation of the Judicial Review Pre-Action Protocol, which is annexed to the Judicial Review Practice Direction (No 3 of 2018), namely that, having made appropriate concessions in pre-action correspondence, the Trust was entitled to expect that it would thereby avoid the threatened judicial review proceedings; and that it would be unfair to penalise the Trust notwithstanding that it had done all that it could during the pre-litigation phase.

[22] The Preface to the Practice Note states that, given the nature of public law proceedings, "The parties and the Court share the common aim of processing every case in a manner which makes the best possible use of the Court's limited resources and brings about an outcome within reasonable timescales…" The Pre-Action Protocol reminds parties that litigation in this field should be a measure of last resort (see paras 4 and 7) and that there are a variety of other measures by which disputes can, and in appropriate cases should, be resolved (see para 5). Engagement in the process of pre-action correspondence is one such means. Indeed, a core purpose of the pre-action correspondence required by the Pre-Action Protocol is to "establish whether litigation can be avoided" (see para 9). That is also the reason why the Protocol requires respondents to be clear as to whether, and the extent to which, they are conceding the proposed application (see paras 16-17).

[23] Insofar as the applicant seeks to establish that the Trust acted unlawfully by bypassing the usual process and simply removing a child (in respect of whom it did not enjoy parental responsibility), without an order of the court, to another jurisdiction, that has been conceded by the Trust in a response to formal pre-action correspondence. Nothing is to be gained by the court merely endorsing that position on foot of an application for judicial review which is likely to be unopposed. I fail to see how this court's confirmation of the Trust's concession would add anything material to consideration of matters by the appropriate family court (whether in this jurisdiction or in the Republic of Ireland). The Trust has accepted it acted wrongly and without proper authority in removing the applicant's daughter from this jurisdiction. That is, of course, not of itself determinative of the jurisdictional question; but the Trust's concession is quite adequate to establish that point in the applicant's favour. The additional benefit (if any) to be gained by a declaration to that effect is not sufficient, in my view, to warrant the instigation and prosecution of fresh High Court proceedings. Indeed, that is the antithesis of what is intended in the Judicial Review Pre-Action Protocol. There is no formal legal determination in this case which can only be set aside by way of a quashing order, thus necessitating the issue of proceedings. The applicant merely seeks vindication in relation to past

events, which the proposed respondent has already provided. It is well established that the court will require good reason to entertain a judicial review challenge where the issues have become academic (see, for instance, Fordham, *Judicial Review Handbook* (7th edition, 2020, Hart) at section 4.5). One such instance may be where the subject of a declaration which is sought has already been conceded by the proposed respondent.

[24] I also do not consider that any of the remaining bases advanced on behalf of the applicant as to why the court should proceed to hear and determine this application have sufficient merit to warrant the grant of leave. The Trust's actions may have been egregious (even if well-intentioned) but that, of itself, is not sufficient to require the court to hear and determine an application for judicial review where the proposed respondent has already conceded that it acted unlawfully. Insofar as the applicant wishes to claim damages for an alleged breach of her Convention rights, she is at liberty to pursue that remedy in normal civil proceedings issued by way of writ or civil bill. Any such claim may require a degree of fact finding which is not well suited to the judicial review procedure. This court could not properly consider the other key factual issue, the disputed issue of residence, which will be considered and resolved in the appropriate family proceedings in any event, which is the proper forum for resolution of that issue. That is already the subject of proceedings in the Republic of Ireland (further to the applicant's solicitor's recent application) and could also be the subject of appropriate proceedings brought in this jurisdiction seeking the return of the child under the Hague Convention.

[25] I also reject the suggestion that guidance is needed from the High Court on this issue for the benefit of future Trust practice. This is not a case which involves a disputed issue of law, such as an issue of statutory interpretation, which needs to be resolved for future cases. I accept the Trust's submission that the circumstances of this case were highly unusual and that decisions were made in a context of urgency and at short notice, on the understanding that S had been removed to Northern Ireland in order to evade the consequences of a court order made in the Republic of Ireland. The Western HSC Trust has accepted that it acted wrongly in those circumstances. There is no evidence before me suggesting that this type of situation will arise frequently or that this Trust, or indeed any other, intends to proceed in the same way again if faced with a similar situation. Indeed, this short ruling and the proposed respondent's concessions are likely to highlight the issue sufficiently in any event.

Conclusion

[26] For the reasons given above, I will dismiss the application for leave to apply for judicial review. This is primarily because the declaration which is sought as to the Trust's previous actions is unnecessary. It would add little, if anything, to the frank concession already made by the Trust. The question of where the applicant's daughter should reside and of the arrangements for her care are matters to be dealt with in the family courts – either in the Republic of Ireland where proceedings are

ongoing or in the Family Division of the High Court in this jurisdiction if an application is pursued there for transfer of jurisdiction. Any remaining matters can be dealt with in the family proceedings or, if necessary, ordinary civil proceedings issued for that purpose.

[27] The concession made by the Trust in this case was an example of the Judicial Review Pre-Action Protocol working as it should. Although the initial concession could have been more candid and detailed, and perhaps ought to have been, the Trust is correct in its basic point that such a concession generally obviates the need for proceedings (at least where the primary relief sought is a declaration to replicate or underscore the concession already made in correspondence).

[28] I will hear the parties on the issue of costs. It provisionally seems to me that this may be a case where, departing from the usual practice at the leave stage, it may be appropriate to make an award of costs against an unsuccessful applicant seeking leave to apply for judicial review. Parties should be discouraged from bringing proceedings where appropriate and adequate concessions have been made by a proposed respondent in pre-action correspondence. I am aware, of course, that the applicant has to some degree secured what she sought – by means of the expression in this ruling (which she is free to share) of the view that a declaration from the court would add nothing material in light of the Trust's concession. Again, however, parties are to be discouraged from instituting proceedings for the tactical purpose of securing such confirmation.