

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered:	3/9/2010
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR30's (HN, a minor) Application [2010] NIQB 86

AN APPLICATION BY JR30 (HN) (A MINOR)

BY HIS MOTHER AND NEXT FRIEND (HP) FOR JUDICIAL REVIEW

TREACY J

Introduction

Publication of the name of the applicant or of any member of the family is prohibited as well as any information which would serve to identify the applicant and any of the family.

[1] By this application for judicial review the applicant now seeks only declaratory relief against the respondent arising out of its alleged failure to comply with its statutory duties under Arts 18 and 18(A) of the Children (Northern Ireland) Order 1995 ("the Order").

[2] This judicial review has evolved substantially since its original conception, as a consequence of which the Court is now only called upon to make legal pronouncements upon essentially undisputed issues of fact. This is of course the traditional home of judicial review.

[3] Following the oral hearing I made three declarations in the terms set out in this judgment and indicated that I would deliver my detailed written reasons later.

Factual Background

[4] While the background to the application had been factually contentious, many of the disputed areas have now wisely been agreed between the parties. It is now possible to summarise the relevant agreed facts as follows. The family

background is that HN's mother and father have been separated for approximately 10 years. They have 4 children in total. HN is their third child, born on 3 December 1995. As appears from HP's first affidavit he has a diagnosis of autism and ADHD. He also has psychotic tendencies and a particularly intense dislike of females, especially his younger sister, HM. At the time when these judicial review proceedings were commenced HN did not have any contact with his father. He lived with his mother, HP and his younger sister HM who was born on 19 October 1998. HM was on the child protection register because of the danger HN posed to her due to his psychotic dislike of females. HN was also on the child protection register because of the danger he posed to himself due to his combination of learning difficulties and possible other conditions.

[5] HP has been his main carer for most of his life and the difficulties his conditions generate have taken a heavy toll on her health and well being. On 18 November 2008, Sarah Dickson, a Social Worker employed by the Trust, carried out a carer's assessment in respect of HP. That assessment recorded the impact the caring role has had on her in the following terms: 'The caring role has led to HP having a complete breakdown. Has been off work since March. All aspects of health have been affected' (see para 3 of assessment p737). In a section of the document entitled "Outcome of the Assessment" under the title "Areas of Unmet Need" Sarah Dickson stated:

"HP has no family to assist her, urgently needs time out from her caring role. This is currently being explored by child care team..... Identified need one evening/week, one day/month."

[6] Despite the fact that this report is dated 18 November 2008, and that it clearly stressed the urgency of her need for respite, HP heard nothing more about this until almost four months had passed. In simple terms the unmet need identified in November 2008 was not met by the Trust. Eventually a response to the carer's assessment was sent in a letter dated 12 March 2009 by Ms Deirdre McGrenaghan, Head of Service for Children's Mental Health. The full terms of this letter have been set out at para 23 below. For now it is sufficient to say that this letter informed HP that there was no budget available to meet her assessed needs.

[7] By the time this response to the original carer's assessment was sent there had already been important factual developments in the case. These included the fact that in late 2008 HN made a series of serious threats to his sister HM. Also, on Christmas Day 2008, HN tried to hang himself from a banister in the family home. When this happened HP states in her first affidavit:

"I telephoned the out of hours emergency number for social services but they were unable to assist."

[8] As a result of the Christmas *events* HN was sent to a residential unit, M, in Belfast for assessment. The terms of his care plan provided that he would remain in

the residential unit on a full time basis every week but would return home to his mother's care each weekend. This arrangement remained in place until the Summer of 2009.

[9] Because HP was having great difficulty coping with her son's needs on his weekend breaks from M she was driven to contact Eamonn McNally, a Solicitor in the Children's Law Centre in Belfast. On 29 January 2009 he wrote to the Trust in the following terms concerning HN:

"We refer to the above minor, upon whose behalf we have been consulted by his mother HP. HN is currently a resident at M, Belfast for the purposes of assessment under the Mental Health (Northern Ireland) Order 1986.

HP instructs us that HN has certain specific needs and that each weekend he is being returned to his mothers care at home. HP instructs us that she has requested that a care package be offered to assist her with transportation of HN from M to (his home) and to assist HP with HN's needs once at home. To date we understand that no care package has been offered for HN.

HP further instructs that no risk assessment has been carried out in relation to releasing HN into her care. HP instructs that HN has difficulty interacting with his siblings and so they cannot be used for care or transportation.

We would ask you to carry out a Carer's Assessment of HP and a UNOCINI [*Understanding the Needs of Children in Northern Ireland*] assessment in relation to HN. We would also ask you to outline to us details of the current provision made for HN's return to home at the weekends.

We await hearing from you."

[10] For several weeks no response was received by Mr McNally so on 29 February 2009 he sent a reminder enclosing a copy of his letter dated 29 January 2009 and requesting a response by return of post. No response was forthcoming so he sent further reminder letters on 12 March and 24 March 2009. On 2 April 2009 Mr McNally wrote to Ms Anne Doherty, Patients Advocate at Altnagelvin Area Hospital and lodged a formal complaint under the Complaints Procedure for the Western Health and Social Care Trust in relation to the failure of the Trust to answer any of his correspondence. On 10 April 2009 Mairead McKelvey, Complaints Officer, wrote

to Mr McNally indicating that his concerns were being investigated and that they should be able to respond within 20 working days. On 5 May 2009 Ms McKelvey wrote again to Mr McNally advising that "investigation into the concerns you highlighted is currently ongoing and it is hoped that the Trust will be in a position to respond to you by 15 May 2009".

[11] From the period 29 January 2009 when the Children's Law Centre first requested a new carer's assessment for HP until 15 May 2009 when Ms McKelvey "hoped" the Board would be able to respond to this request it is clear that no service was provided to the family to assist them in dealing with the problems that HN's autism generated for him and for his family during his weekends at home.

The Law

[12] Part IV of the Order deals with "Support for Children and their Families – Children in need and their families ". Art 17 of the Order provides, so far as relevant:

"Interpretation

17. For the purposes of this Part a child shall be taken to be in need if-

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by an authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled."

[13] Art 2(2) of the Order defines disabled as follows:

"'disabled' means blind, deaf or dumb or suffering from mental disorder of any kind or substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed;"

[14] Art 17 deals with the meaning of the term 'family' in the following way:

"'family', in relation to such a child, includes any person who has parental responsibility for the

child and any other person with whom he has been living ...”

[15] Art 18 of the Order is entitled “General duty of authority to provide [social care] for children in need, their families and others”. It provides:

“18. - (1) It shall be the general duty of every authority (in addition to the other duties imposed by this Part)-

(a) to safeguard and promote the welfare of children within its area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of [social care] appropriate to those children's needs.”

[16] Applying these provisions to the current case it is clear that HN is a child in need in that “he is unlikely to achieve or maintain ... a reasonable standard of health or development without the provision for him of services by an authority.” He also falls within Article 17(b) in that “his health or development is likely to be significantly impaired or further impaired without the provision for him of such services”.

[17] Since HN is a ‘child in need’ the Trust has a general duty under Art18 to safeguard and promote his welfare by providing a range and level of social care appropriate to his needs. Insofar as is consistent with this duty the Trust must discharge it by promoting HN’s upbringing by his ‘family’ because this is what Art 18(1)(b) requires it to do. There is no doubt that HP is HN’s ‘family’ for this purpose, both because she has parental responsibility for him and because she is the person with whom he was living at the relevant time. She is therefore covered by the definition of ‘family’ in Art 17.

[18] Art 18(3) is particularly important in relation to the position of HP as HN’s carer and family member. It provides:

“(3) Any service provided by an authority in the exercise of functions conferred on it by this Article may be provided for the family of a particular child in need or for any member of his family, if the service is provided with a view to safeguarding or promoting the child's welfare”.

[19] This provision flows logically from the policy behind Art 18 which recognises that the welfare of a child is often best promoted by securing the functional viability

of the family unit in which he or she lives. This is because, in most cases, the family unit will naturally nurture and protect the children within it. The legislation envisages making social provision targeted at the family of the child in need because that family is recognised to be the best vehicle for securing the child's welfare. It is by making the necessary provision to the family of the child that the Trust discharges its general duty under Art 18 "to safeguard and promote the welfare of children within its area who are in need". Doing so also enables the Trust to discharge its duty to the child in a way which "promotes the upbringing of such children by their families" as required by Art 18(1)(b). The child and his family are seen as one group: meeting the needs of family members is an indirect but essential mechanism for meeting the needs of the child.

[20] In light of this analysis I now grant the declaration agreed by the parties in the following terms:

"A declaration that the duty on the Western Health and Social Care Trust imposed by Article 18 of the Children (NI) Order 1995 includes a duty to provide a range and level of personal social services to the children in need within its area *and* to the families and carers of those children in order to safeguard and promote the welfare of the children and the upbringing of those children by their families."

Assessments

[21] Clearly the Trust cannot know what range and level of social services are appropriate to a child's needs until it carries out a careful assessment of what those needs are. Art 18(A) therefore provides for conduct of assessments. Insofar as relevant it provides:

"Assessments: carers of disabled children

18A. - (1) Where-

(a) the carer of a disabled child who has parental responsibility for the child requests an authority to carry out an assessment of the carer's ability to provide and to continue to provide care for the child; and

(b) the authority is satisfied that the child and his family are persons for whom it may provide services under Article 18,

the authority-

(i) shall carry out such an assessment; and

(ii) shall take the results of that assessment into account when deciding what, if any, services to provide under Article 18."

[22] This duty to carry out assessments is a mandatory statutory obligation, subject only to the condition that the Trust is first satisfied that "the child and his family are persons for whom it may provide services under Article 18,". As noted above HN and his mother are such persons so this condition was satisfied in their case. The Trust therefore had an unconditional statutory obligation to conduct the assessments requested by HP in the letter of 29 January 2009.

[23] The applicant's representatives submitted that on the evidence there was a point in 2008 when the Trust fulfilled its statutory duty to assess HP. They asserted that the Trust then failed to act on that assessment by delivering any form of social service to meet HP's assessed needs. They alleged that this was because there was no dedicated budget within the Trust to meet the needs of children with autism. In support of this argument they refer to a letter dated 12 March 2009 from Deirdre McGrenaghan, Head of Service for Children's Mental Health, in which she acknowledges receipt of the Carers Assessment of HP completed by Ms Sandra Dixon, Social Worker in November 2008. Ms McGrenaghan, then states:

"I am writing to you as requested to acknowledge the completion of the Carers Assessment completed by Ms Sandra Dixon, Social Worker.

In response to receipt of this assessment I wish to advise that at this time there is no dedicated budget within the sub-directorate for Children's Mental Health and Disability Service to provide a service relating to children with Autism.

However, the Trust Governance Team are currently collating information relating to unmet need in this particular area and will ensure that this information is used as a means of influencing the commission of future services.

Should you have any queries regarding this information please do not hesitate to contact this office."

[24] This response must be understood in the context of a carer with two children on the at risk register due to difficulties attributable to autism and of a social work assessment which referred to that carer's "complete breakdown" and her "urgent"

need of respite care. Viewed in this way I hardly need to comment on the level of inadequacy of this response from this applicant's point of view.

[25] The accuracy of Ms McGrenaghan's statement was contested by Mr Kieran Downey, Assistant Director of the Western Health Trust, in an affidavit sworn on 22 January 2010 in which he wished to reiterate in the clearest terms that the contention that the Trust does not have a dedicated budget for autistic children was incorrect. He asserted that there was confusion or misunderstanding operating on the part of the applicant in this respect. He emphasised that the Trust does have a specific budget for autistic children services. This specific budget, he averred, is used to meet the assessed needs of the child including a wide range of services such as therapeutic work, mental health support and summer schemes. He further averred that: "Needs of carers which are assessed in carers' assessments do not, fall within this budget. What this means is that any need identified for an autistic child will be met from the dedicated children's autism budget. Carers' (usually parent's) needs which are identified in carers' assessments do not come within the dedicated children's autism budget but are funded, where possible, from the general budget available." In relation to Ms McGrenaghan's letter he states that he "can confirm that this was a simple error on her part" and asserts that the letter should have stated "at this time there is no dedicated budget within the sub-directorate for Children's Mental Health and Disability Service to provide a service to carers of children with autism". Accordingly, he states that the applicant's references to the Trust failing to provide a dedicated budget for autistic services to children are fundamentally incorrect.

[26] From the perspective of children with autism and their carers what budget a service comes from is entirely irrelevant. The important thing from their perspective is that a service which has been assessed as being both necessary and urgent should be delivered, in a timely way, when it is needed. HP had a Carer's assessment which established that she needed respite services urgently. The uncontested fact is that by the date of Ms McGrenaghan's letter and for some time thereafter the respondent Trust failed to deliver any service from any budget to meet these assessed needs.

[27] Moreover after these initial needs were established but unmet, and the acuteness of the situation that HN and his family faced was underlined further by his attempt to hang himself and by the psychotic threats he issued to his sister as a result of his autism and related conditions. In the light of these new facts his mother requested a fresh assessment of the family's needs, as she is entitled to do under Art 18(1)(A). As noted above the Trust had an unconditional statutory obligation to conduct the assessment she requested because HN and his family satisfied the condition in Art 18(A)(1)(b). Despite this the Trust did not reply to HP's initial request for assessment and indeed a series of further letters were not even responded to. Given the crisis situation this family faced the failure to respond to these letters was simply shameful.

[28] What the Trust has done in this case has been to relegate the carer's position as something inferior or secondary to that of the autistic child. For the reasons discussed above this was an incorrect approach to carer assessments. In taking this

approach the Trust failed to recognise that the needs of the carer, the child and indeed the family are interlinked. This is clear from an examination of the language, structure and clear statutory purpose of the legislative provisions. Children in need are part of a protected group under the Order. The Trust misconceived their obligations under the Order. In light of all the above I grant the declaration agreed by the parties which is in the following terms:

“A declaration that the Western Health and Social Care Trust was in breach of its duty under Article 18A of the Children (NI) Order 1995 by failing to carry out an assessment on the applicant’s mother as the carer of a disabled child within a reasonable time following her request to do so on 29 January 2009.”

[29] The applicant’s representatives have provided a considerable body of evidence that the failure to respond to the request for carer’s assessment and a UNOCINI report for this family is only one example of the *systematic* failure of the respondent Trust to conduct such assessments in its area. This body of evidence runs to several lever arch files and includes numerous official reports which it is impossible to summarise here. I do however commend the Children’s Law Centre for their diligence in bringing together such a comprehensive and compelling picture of the scope and intensity of the difficulties in this field, of which the present case is just one example.

[30] These broader issues are summarised in para.6 of the applicant’s skeleton argument which refers to “a letter from a Mrs Dunne of the Trust ... dated 23 July 2009 in which she gave information about carers’ assessments. As appears from that letter, from 1 April 2007 until the date of the letter, there had been 73 requests to carry out such assessments of which 32 had been dealt with and 41 had not. In respect of those 32 assessments, 54 unmet needs had been identified and 13 of those 54 had been addressed, leaving 42 outstanding. ... reference was made to the letter which had been sent to 41 families indicating ‘a lack of current capacity to carry out carers’ assessments’”.

[31] For the reasons already discussed in relation to HP, the requests for assessment of these 41 carers of disabled children should have been addressed differently by the respondent Trust. The Trust did not dispute the accuracy of the applicant’s description of its handling of these carers’ assessment requests. I therefore grant the declaration agreed by the parties which is in the following terms:

“A declaration that the Western Health and Social Care Trust acted in breach of its duty under Article 18A of the Children (NI) Order 1995 by failing to carry out assessments within a reasonable time of carers of disabled children who had requested such an assessment during the period 2007-2010.”

Conclusion

[32] In summary the Court granted the following declarations:

1. A declaration that the duty on the Western Health and Social Care Trust imposed by Article 18 of the Children (NI) Order 1995 includes a duty to provide a range and level of personal social services to the children in need within its area *and* to the families and carers of those children in order to safeguard and promote the welfare of the children and the upbringing of those children by their families.
2. A declaration that the Western Health and Social Care Trust was in breach of its duty under Article 18A of the Children (NI) Order 1995 by failing to carry out an assessment on the applicant's mother as the carer of a disabled child within a reasonable time following her request to do so on 29 January 2009.
3. A declaration that the Western Health and Social Care Trust acted in breach of its duty under Article 18A of the Children (NI) Order 1995 by failing to carry out assessments within a reasonable time of carers of disabled children who had requested such an assessment during the period 2007-2010.