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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **31/08/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND FAMILY DIVISION

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BETWEEN:

SB (A MOTHER)

Appellant

and

A HEALTH AND SOCIAL SERVICES TRUST

Respondent

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Ms S Simpson QC with Ms Clarke (instructed by Sara Edge Solicitors) for the Appellant
Ms Smyth QC with Ms Murphy (instructed by DLS Solicitors) for the Respondent

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Before: Morgan LCJ, Treacy LJ and O'Hara J

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MORGAN LCJ (delivering the judgment of the court)

Nothing must be published which would identify the child or her family. The cipher given to the child's mother does not represent her real initials.

[1] This is an appeal from a decision of Mrs Justice Keegan made on 16 December 2020 when she declined to make a declaration that the respondent Trust had breached the Article 8 rights of the appellant and her child by prohibiting the appellant from physically holding the subject child the day after she was discharged from hospital after the child's birth and prohibiting skin to skin contact for a period of four weeks.

Background

[2] The context of this case is the incremental set of steps beginning in the middle of May 2020 easing the COVID-19 lockdown which commenced on 23 March 2020.

The various iterations of the Regulations created challenges for children, families, Trusts and courts.

[3] The appellant has a diagnosis of emotionally unstable personality disorder which exhibits itself as anxiety, depression and self-harm. Her four previous children have been freed for adoption. On 8 June 2020 she was expecting her fifth child. She recognised that her home conditions were not conducive to the care of the baby and there is no dispute that it was necessary that the child be removed from the mother's care shortly after birth. It was proposed by the Trust that she would have contact with her baby for one hour per day five days per week, Monday to Friday.

[4] On 18 June 2020 she was advised by the social worker that during contact she would not be allowed to touch the child, that the contact had to be outside, that the social worker would push the pram and that the appellant would have to wear full personal protective equipment ("PPE"). The child was born on 20 June 2020. The appellant and child were discharged from hospital on 22 June 2020 and an Emergency Protection Order was granted on that date.

[5] On 22 June 2020 the Chief Medical Officer ("CMO") had been consulted about skin to skin contact involving another mother who was breast feeding whose 5 month old child was in Trust care. He was asked if there was a policy that any direct contact including physical touch between a parent and a child in foster care and specifically breast feeding would be in contravention of the public health guidance. He responded on 23 June stating that the physical contact described was low risk provided none of the parties was experiencing any symptoms of COVID-19. There was no impediment in either guidance or regulations to prevent this. That correspondence was available to the Trust in this case on 24 June but was not shared with the appellant until the middle of August 2020 when the CMO gave permission for its disclosure. It appears, however, that her solicitors were broadly aware that the correspondence concerned skin to skin contact.

[6] On 23 June 2020 the respondent had completed a risk assessment and concluded that contact should be as indicated on 18 June. The following day, in light of the CMO advice, a further risk assessment concluded that that the appellant could have physical contact with the child as long as she wore full PPE but she was not permitted to enjoy skin to skin contact. The risk assessment noted that there were two persons within the foster family who were vulnerable by reason of their medical conditions. The Trust also noted that the appellant resided in shared accommodation which was likely to increase the potential for exposure to others with COVID-19.

[7] An interim care order was made by the Family Proceedings Court on 26 June 2020 and the case was reviewed on 3 July 2020. At both hearings the representatives of the appellant sought a direction that the CMO correspondence be provided and that skin to skin contact be permitted. The District Judge refused both applications. On 8 July 2020 the appellant issued proceedings in the High Court contending that

there had been a breach of her Article 8 rights by reason of the prohibition on skin to skin contact.

[8] At the suggestion of the trial judge the appellant's solicitor emailed the CMO who replied that evening indicating:

> "the current restrictions are unnecessary and disproportionate particularly so at the present time given very low levels of community transmission. There may be additional factors which I may not be aware of for instance the health or otherwise of the current carer or foster parent."

The CMO followed that up with a letter the following day, 9 July 2020, stating:

> "On consideration of the information provided I believe that while the risk assessment and measures taken may have been proportionate at a point in time it is my professional view that the current requirements and recommendation for avoidance of direct skin contact are now unnecessary and disproportionate…
>
> I am mindful of the potential negative impact on maternal bonding which is crucially important in these early neonatal months and the absence of "skin to skin" contact between mother and baby may have longer term adverse consequences for both. In that regard I believe the current requirement to use PPE is disproportionate and may impact materially on future attachment, relationship and family life between mother and baby.
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> In respect of individual risk assessments and wider application, all risk assessments must be dynamic and subject to regular review in the current circumstances. It is essential that responsible HSC teams review these assessments on an ongoing basis and in doing so seek the relevant expert advice from professional nursing and medical colleagues in the relevant specialities…. This is essential as such local assessment may have additional relevant factors and information of which I may not be aware of, for instance, the health or otherwise of the current carers or foster parents."

[9] The case was mentioned before the High Court on 10 July 2020 by which stage all parties had received the most recent correspondence from the CMO. The Trust indicated that a decision or a timescale for a decision to be made regarding the

use of PPE would be provided by that afternoon. No decision was made that day and it appears that the Trust social workers dealing with the case were off on holiday the following week. From 14 to 17 July 2020 the appellant continued to see the child wearing PPE but did not have skin to skin contact. On 20 July 2020 the appellant declined to wear PPE for contact and skin to skin contact took place. The Trust formal review of the risk assessment took place the following day as a result of which skin to skin contact was approved. The Trust noted that although two members of the foster family were vulnerable they were not in the shielding group and that the appellant was trying to limit her exposure to others and had moved to accommodation where she had more of her own space although cleaning and the living room were shared.

Consideration

[10] By Article 52(3) of the Children (Northern Ireland) Order 1995 where a care order is in force in respect of a child the Trust designated by the order has parental responsibility for the child. Article 53(1) provides that where a child is in the care of an authority that authority shall allow the child reasonable contact with his parents. Article 8 of the European Convention on Human Rights protects family life and states as follows:

> "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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[11] The letter of 9 July 2020 from the CMO indicates that the prohibition of skin to shin contact between mother and child in the early neonatal months can have in particular an impact on maternal bonding which could have longer term adverse consequences for both mother and baby. The learned trial judge agreed that the limited period of prohibition in this case constituted an interference which had to be justified. The justification required that there be a legitimate aim and that the interference was proportionate. There was no dispute that the legitimate aim was the protection of health and that it was legitimate. The issue in this case was whether the interference struck a fair balance between the Trust's interest in the protection of health and the interests of the mother and child.

[12] The role of the appellate court dealing with the first instance proportionality assessment was set out by Lord Carnwath in the Supreme Court in R (AR) v Chief Constable of Greater Manchester Police [2018] 1 WLR 4079 at para 64:

> "the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34:
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> > "the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong …""

[13] There were really two issues raised by the appellant in respect of proportionality. The first was procedural. The Trust had available through its legal representative correspondence generated with the CMO in respect of the other case. The appellant's advisers were aware that it concerned skin to skin contact but did not have access to the letter of request and the CMO response and in an email of 24 June the Trust's solicitor described the advice as indicating that the CMO was "less opposed" to direct contact than the official government guidance would suggest. That characterisation did not properly reflect the opinion of the CMO.

[14] It is clear that the correspondence with the CMO in the other case fell within Rule 4.24 of the Family Proceedings Rules (Northern Ireland) 1996. The correspondence was available to the legal representative of the Trust and the appellant properly made two applications in the Family Proceedings Court for release of the advice. Those applications were refused and it was only when the appellant applied to the trial judge on 8 July that she agreed that it could be disclosed as long as the CMO gave his permission. The CMO was not asked to give his permission until an email was sent to him on 11 August 2020 and he replied the following day indicating that he was disappointed that information had not been

shared with the appellant saying he believed it would have been appropriate in this case. We agree.

[15] We agree that it is procedurally necessary in a case involving the vindication of rights under Article 8 for all parties to have access to the relevant information. It is disappointing that a mechanism was not devised to achieve that outcome promptly in this case. As the learned judge identified, however, it is also important to recognise that all parties were seeking to understand and give effect to the public health requirements which were evolving in response to the unprecedented health pandemic.

[16] The learned trial judge was satisfied that the Trust, the social workers and the appellant's advisers were faced with a very difficult situation and were acting under trying circumstances in an effort to balance issues of public protection and health against individual parental rights. We do not consider that the delay in disclosure of the correspondence calls into question that conclusion but the provision of an incomplete gist of the CMO's opinion was of considerable concern.

[17] The second challenge to the trial judge's decision concerned the trial judge's conclusion that the evaluation of risk was not disproportionate. On 23 June 2020 the Trust carried out a risk assessment based on public health guidance. There is no suggestion that in the absence of the CMO advice that assessment which prohibited physical contact was inappropriate.

[18] In light of the CMO's advice the Trust carried out a further risk assessment the following day. That assessment permitted physical touch but required PPE. In making that assessment the Trust took into account two relevant factors. The first was the potential risk to the foster family as a result of the medical condition of two members of that family. The second was the risk of infection caused by the living circumstances of the appellant.

[19] We agree with the learned trial judge that the evaluation of risk having taken into account the matters set out in the previous paragraph was well within the range of discretionary judgement available to the Trust. Particular complaint is made about the period from 10 July until 21 July. During that period there were four contacts in which the appellant was prevented from enjoying skin to skin contact.

[20] The Trust had indicated its intention to advise the appellant by close of business on 10 July what its position was in relation to skin to skin contact or when it would make a determination. We recognise that at this evolving stage of the public health debate there was considerable precedent interest in the outcome of this assessment. We accept that it was, therefore, entirely appropriate for the social workers involved to seek the advice of senior colleagues.

[21] There was a delay for one week caused by holiday arrangements and the bank holiday on 13 July. Although we can understand the anxiety of the appellant

to enjoy skin to skin contact with her child as soon as possible we accept that this was a modest delay. In light of the continued contact and holding of the child on the four days in question we have reservations as to whether the interference in this case for that period was sufficient to constitute a breach of Article 8. In any event we note that there was no commitment made to change the risk assessment on 10 July or to come to a final conclusion on that date.

Conclusion

[22] For the reasons given we do not find any flaw in the evaluation of proportionality by the learned trial judge. In light of our conclusion we do not need to consider the issues around case management raised by the judge. We dismiss the appeal.