Neutral Citation no. [2007] NIQB 113 | *Ref:* **GIL7009**

Judgment: approved by the Court for handing down | *Delivered:* **20/12/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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

AND IN THE MATTER OF A DECISION OF THE NORTH WEST BELFAST HEALTH AND SOCIAL SERVICES TRUST

GILLEN J

Introduction

[1] This is an application by the mother of two children aged 5 and 2 to quash a decision of the North West Belfast and Social Services Trust ("the Belfast Trust") that it will not undertake the control and supervision of care order proceedings concerning these children. She seeks further relief by way of an order of mandamus compelling the Belfast Trust to do so or to reconsider the decision not to do so and to furnish the applicant with reasons for the decision. Finally a declaration is sought that the decision was unlawful and in contravention of Article 6 and 8 of the European Convention of Human Rights and Fundamental Freedoms ("the Convention"). I have amended the title of these proceedings to anonymise the name of the applicant in order to protect the identity of the children

Background

[2] Difficulties arose in the personal life of the applicant prior to 2006 and she became homeless. She had been living in Ballykelly. Accordingly in or about August 2006 she passed the children into the care of Foyle Health and Social Services Trust ("the Foyle Trust"). These children were then accommodated under Article 21 of the Children (NI) Order 1995 ("the 1995 Order") and have been in voluntary foster care since August 2006 in Strabane under the aegis of the Foyle Trust.

[3] In May 2007 the Foyle Trust issued care proceedings ("the proceedings") under the 1995 Order in Londonderry Family Proceedings Court because the children reside within the jurisdiction of that court and that

Trust had been dealing with the matter. It should be noted that as the children are currently in voluntary accommodation the Foyle Trust does not share parental responsibility at this stage. The sole person with parental responsibility is the applicant. However Ms O'Flaherty who appeared on behalf of the proposed respondent Belfast Trust indicated that should the applicant seek to remove the children from voluntary accommodation there is a high probability that the Foyle Trust would ask the court to make an interim care order.

[4] At paragraph 3 of her affidavit the applicant states:

> "Prior to the children entering voluntary care I had been residing in Ballykelly with the children. However, difficulties arose when I had problems with finding accommodation and, as a result, I now reside in Belfast. The current foster placement for the children is in Strabane."

I pause to observe that the reasons why she had moved to Belfast were somewhat vague. Mr McAllister who appeared on her behalf indicated that she had felt isolated in Ballykelly and the only place where she could find stable accommodation was Belfast. I therefore found the applicant's reasons for moving to Belfast to be somewhat less than compelling and I did not receive any positive reassurance that she could not have found accommodation in the Derry/Strabane area.

[5] It is the applicant's case that towards the beginning of 2007 the Foyle Trust began undertaking multidisciplinary comprehensive assessment and engaged in case conferences in respect of the future welfare of both children should they be returned to the applicant. A child protection case conference review was convened on 28 February 2007.

[6] At this time discussions began as to the possibility of transferring the children to the jurisdiction of the proposed respondent the Belfast Trust. The reasoning behind this, according to the applicant, was to allow regular contact between her and her children during the course of the proceedings. It is her case that due to the distance between her and the children and the difficulties involved in travelling between Belfast and Strabane, her ability to maintain regular contact has been severely hampered thereby straining her relationship with the children. Travelling between Belfast and Strabane is made all the more difficult owing to the fact that she has to rely on public transport. Counsel informed me that it is necessary to undertake two separate bus journeys from Belfast in order to reach Strabane. When I enquired as to whether or not Foyle Trust could arrange for contact to take place at a facility in Derry, thus facilitating a one bus journey, counsel informed me that Foyle Trust had indicated that this was not feasible. I confess I found this somewhat

difficult to understand given that in correspondence dated 22 February 2007 from the solicitor on behalf of the applicant to a representative of Foyle Trust the following paragraph had occurred:

> "We understand from our client that she was living in the Ballykelly area at the time and consequently the care provision for the children was transferred from Social Services at Lower Crescent, Belfast to yourselves. Our client instructs that the children are in foster care but she maintains contact with them which occurs every alternative Tuesday from 2.30 pm to 3.30 pm. This contact takes place at a Social Services facility in either Strabane or Derry.
>
> Our client instructs that she has been experiencing great difficulty in arranging contact visits. This is primarily due to the fact that she is now residing in Belfast and has no access to a car. She therefore has to make her way to Strabane or Derry by public transport which is very costly and difficult to arrange due to limited timetables".

[7] It was the applicant's case that negotiations had been continuing between Foyle Trust and the Belfast Trust since February to arrange a transfer, the former being agreeable to such a transfer whilst the latter was not. In November 2007 a decision had been taken by the Belfast Trust not to assume responsibility for the case. It was alleged by the applicant that no reasons had been given.

The applicant's case

[8] Mr McAllister on behalf of the applicant submitted that:

(a) The decision of the Belfast Trust was Wednesbury unreasonable and irrational.

(b) The failure to give reasons amounted to a procedural impropriety.

(c) The decision of the Belfast Trust amounted to an infringement of the rights of the applicant under Article 8 of the Convention – the right to family life – in that her ability to maintain contact with her children was being eroded and possibilities of increased contact were prejudiced.

(d) There was a breach of Article 6 of the Convention in that the applicant's access to justice was being impeded by virtue of the care proceedings being held in Derry.

Leave hearings

[9] It is well settled that in order to be permitted to present a judicial review application the applicant must raise an arguable case on each of the grounds on which he seeks to challenge the impugned decision – see, for instance, R v. Secretary of State for the Home Department ex parte Cheblank [1991] 1 WLR 890.

Preliminary matter – Pre-Action Letter

[10] I am satisfied that there was no pre-action letter sent to the proposed respondent in this matter before judicial review proceedings were initiated. All the correspondence had been initially directed to the Foyle Trust and thereafter to the Central Services Agency who do not represent the Belfast Trust.

[11] The requirement of sending a pre action letter before initiating judicial review proceedings in Northern Ireland is not part of a practice direction or court rule, and Northern Ireland does not have the detailed Pre-action Protocol which exists in England and Wales. Nonetheless I share the view of Girvan J as expressed in Re Cunningham's application for leave to apply for judicial review (2005) NIJB 224 that:

> "Practitioners will normally be expected to follow the type of reasonable, fair preliminary procedure set out in the English Pre-action Protocol for Judicial Review."

[12] For the removal of doubt I make it clear that before making a claim for judicial review, the applicant should send a letter to the proposed respondent. The purpose of the letter is to identify the issues in dispute and to establish whether litigation can be avoided. The letter should contain the date and details of the decision, the act or omission being challenged and a clear summary of the facts on which the claim is based. It should also contain the details of any relevant information that the claimant is seeking and an explanation as to why this is considered relevant. A claim should not normally be made until the proposed reply date given in the letter before claim has passed, unless the circumstances of the case require more immediate action to be taken. The proposed respondent should normally respond to that letter within 14 days. It should be noted however that a letter before claim will not automatically stop the implementation of a disputed decision .It does not affect the time limits specified under Order 53 Rule 4 of the Rules of the Supreme Court (Northern Ireland) 1989 namely that an application for leave to apply for a judicial review shall be made promptly and in any event within 3 months

from the date when the grounds for the application first arose although it might be relevant on an application to extend time.

[13] The pre-action letter should normally contain the details of any interested parties known to the applicant. They should be sent a copy of the letter before claim for information purposes.

[14] I am of the view that even in emergency cases, it is good practice to fax a draft copy of the leave papers that it is intended to issue to the proposed defendant. Some criticism of such a step has been raised on the basis that one of the primary aims of pre proceedings correspondence is to avoid the need for proceedings and that legal aid may not be available for such a step. In my view once the pre action letter has been sent and no adequate response received, the arrival by fax or email of the draft copy leave papers may in some instances serve to further crystallise issues and provoke resolution even at the eleventh hour.

[15] I consider that the proposed respondent will also be normally expected to follow the procedure set out in the English Pre-action Protocol for judicial review. Consequently a proposed defendant should normally respond within 14 days. Failure to do so may be taken into account by the court and cost implications may follow. Where it is not possible to reply within the proposed time limit the proposed defendant should send an interim reply and propose a reasonable extension giving the reasons for such a request. This will not affect the time limit for making the claim for judicial review nor will it bind the applicant where he or she considers this to be unreasonable. However, where the court considers that a subsequent claim is made prematurely cost implications may follow.

[16] If the claim is being conceded in full, the reply should say so in clear and unambiguous terms.

[17] If the claim is being conceded in part or not being conceded at all, the reply should say so in equally clear and unambiguous terms and –

(a) where appropriate, contain a new decision, clearly identifying those aspects of the claim that are being conceded and those that are not, or give a clear timescale within which the new decision will be issued;

(b) provide a fuller explanation for the decision, if considered appropriate to do so;

(c) address any points of dispute, or explain why they cannot be addressed;

(d) enclose any relevant documentation requested by the applicant, or explain why the documents are not being enclosed; and

(e) where appropriate, confirm whether or not they will oppose any application for an interim remedy.

[18] This response should also be sent to all interested parties identified by the applicant and contain details of any other parties who the proposed respondent considers may have an interest.

[19] In the present case, no pre action letter was sent and that is regrettable. Such an exchange of correspondence in this case might well have laid the basis for an informed compromise thereby obviating the need for costly litigation at public expense. However I was informed by counsel that representatives from the Belfast Trust had attended at one of the court hearings in Derry, were therefore aware of the issues and had been engaged in negotiations with Foyle Trust for the proposed transfer. The courts will be slow to grant leave where an applicant has failed in clear and open correspondence to address the issues I have set out above. In this case a letter had been sent to the Central Services Agency ("CSA") on 16 October 2007 and it is possible that the applicant's solicitor had thought that the CSA would have been acting on behalf of the Belfast Trust whereas in fact this is not the case. In those circumstances I propose neither to reject the leave application on this ground nor to visit a cost burden on the applicant .

Conclusion

[20] I have come to the conclusion however that the application for leave must be dismissed for the following reasons.

[21] First, I am satisfied that this applicant has an appropriate alternative remedy which should have been exhausted before embarking on judicial review proceedings. She is the sole person with parental responsibility and could withdraw her consent to the children being kept in Strabane unless they were transferred to Belfast. If that withdrawal of consent triggered an application by the Foyle Trust to seek an interim care order under the 1995 legislation, then the applicant could seek an appropriate contact order either under Article 10 or, if an interim care order were made, under Article 53 of the 1995 legislation inviting the court to make such order as it considered appropriate with respect to the contact (and venue) which is to be allowed between the children and the applicant.

[22] Secondly, in so far as the applicant has chosen to transfer from the Foyle Trust area to Belfast, it is a situation of her own making. It is this move which has created problems with the convenience of contact. She lived in the Foyle Trust district area when the children went into voluntary accommodation, proceedings were issued in the Londonderry Family Proceedings Court and all social service investigations have been made in that area. The applicant has a

responsibility towards her children and I see no basis for arguing that an inconvenience to her caused by her own decision to move to Belfast in any way infringes her Article 8 rights under the Convention. In any event, even the arrangements as they currently stand, whilst inconvenient, do not amount to an interference with her Article 8 rights. Travel to Derry or Strabane once per week creates no material impediment in my view to contact. Inconvenience in this context is not sufficient to constitute an interference with respect for family life.

[23] The extent to which article 8 of the Convention imposes on States not only a general duty to refrain from interfering in an individual's private life, but also a duty to act positively to protect private and family life was explained in Marckx v. Belgium (1979) EHRR 330 where the ECrtHR held that article 8(1)

> "does not merely compel the State to abstain from . . . interference: in addition to this primarily negative undertaking, there may be positive obligation inherent in an effective "respect" for family life."

However that positive duty does not require the state to ensure that individuals may enjoy family life to the full or in any particular manner. See Petrovic v. Austria (2001) 33 EHRR 14. All the State is obliged to do is to take all necessary steps to facilitate contact within the special circumstances of the case. I consider that Foyle Trust has arranged appropriate contact in this case. This was working tolerably well until the applicant removed herself to Belfast. The contact is still open and can still be carried out albeit with some inconvenience to the applicant. I would hope that the flexible arrangements set out in the correspondence in paragraph 6 of this judgment can be reconstituted so that on at least some occasions a one bus journey to Derry can be facilitated. I do not consider this constitutes an arguable case for interference with family life.

[24] These children have been voluntarily accommodated since August 2006. If the Belfast Trust was now to take over the matter, the child would be removed from the present foster placement. This movement could possibly be a short term one until arrangements were made to move the children into a longer term placement by virtue of an assessment which would need to be carried out. I have no evidence before me that this could be done in a manner that would ensure that children would be kept together. This could well be an essential element to protect the welfare of these children. I therefore have no evidence that the relief sought by the applicant would arguably be in the interests of these children. On the contrary I can envisage great difficulties in the change being made which could be contrary to their interests. I find nothing unreasonable therefore about the current stance adopted by the proposed respondent in this matter notwithstanding the assertion by Foyle trust in correspondence that the transfer might well be in the interests of the

children. Given the absence of information from Belfast trust this must have been a contingent conclusion .

[25] Finally, I find no sustainable argument that there has been a breach of Article 6 in that the access to justice to the applicant has been impeded. The care proceedings are properly constituted in the Londonderry Family Proceedings Court. There is no reason why the applicant cannot attend and participate in the conventional fashion.

[26] In all the circumstances therefore I refuse leave.