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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR239
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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

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Ciara McKeown (instructed by Stephen Tumelty, Solicitor) for the Applicant
Tracy Overing (instructed by the Directorate of Legal Services) for the proposed Respondent
Siobhan McCrory (instructed by Thompson Crooks, Solicitors) appeared for the Guardian ad Litem as Notice Party

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SCOFFIELD J

Introduction

[1] This is an application which focuses on the failure of the Belfast Health and Social Care Trust ("the Trust") to hold a pre-proceedings meeting in advance of making an application to Belfast Family Proceedings Court (FPC) for an interim care order under Article 50 of the Children (Northern Ireland) Order 1995, with a care plan for removal of a child at birth from hospital into foster care. The applicant is the mother of that child. The applicant has been anonymized in these proceedings in order to protect the identity of the child to which the proceedings relate (and to whom I shall refer as 'Child A').

[2] It is common case that the Trust did not convene a pre-proceedings meeting (PPM) in order to enable the applicant to attend with a solicitor and discuss the concerns held by the Trust in advance of the Children Order proceedings being commenced. The Trust did propose to hold a 'pre-birth case conference.' The applicant says that this was due to be held on 20 June, following the birth of the child,

but that it was then cancelled. That meeting (still referred to as a pre-birth case conference, albeit it occurred *after* the birth of Child A) was held on 23 June. Child A was removed from the applicant's care while she was in hospital and he was taken into foster care.

[3] The applicant's key concern is the Trust's failure to follow its own guidance (or guidance to which it subscribed) in respect of the convening of pre-proceedings meetings and pre-birth case conferences. She says that such a meeting would have considered alternatives to the removal of her child from his mother after birth. The applicant relies on a range of grounds of challenge, including breach of Articles 17 and 18 of the Children Order; the leaving out of account of material considerations; procedural unfairness; irrationality; breach of the applicant's rights under Article 8 ECHR; and breach of the respondent's own policy.

[4] Initially, the applicant was seeking relief including an order of certiorari to quash the decision of the Trust to issue proceedings. In oral submissions, however, it was clarified that the primary relief sought by the applicant was a declaration in relation to the failure of the Trust to comply with its own policy.

[5] Ms McKeown appeared for the applicant; and Ms Overing appeared for the proposed respondent. I am grateful to both of them for their submissions. Ms McCrory appeared for the child (acting by the guardian ad litem appointed in the family proceedings) as a notice party, who maintained a watching brief but played no active role in the proceedings.

The policies at issue

[6] The applicant relies upon the 'Safeguarding Board for Northern Ireland – Procedures Manual', which contains the following:

> "A Pre-birth Child Protection Case Conference should be requested (between the 24th and 35th week of the pregnancy, unless the pregnancy has been concealed or in circumstances where there are significant safeguarding concerns identified late in the pregnancy) as soon as it is apparent that child may be at risk of significant harm when born if:
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> - The expectant mother is living with, or in contact with, a person who is known to have abused or neglected children;
> - The expectant mother has abused or neglected children;
> - The lifestyle (for example substance misuse which may impact on capacity to parent) of the expectant

mother or other potential carer is such that the child may be at risk following the birth;

- There are concerns about potential or actual parenting capacity.

The purpose is to plan coordinated action and services for the protection of the child at the time of birth based on the UNOCINI pre-birth risk assessment. (See Guidance for the Safeguarding Process Prior to and Immediately after the Birth of a Baby where there may be Risk of Significant Harm)."

[7] In the course of pre-action correspondence, the Trust disclosed a further document entitled, 'Guidance for Pre Proceedings Meetings' which is a document which had been reviewed and updated by the Regional Principal Practitioners for Court in respect of the five trusts in April 2022. That document contains the following guidance, in section 2:

> "Pre-proceedings is **Stage 1** in the **Guide to Case Management** whereby the Trust's safeguarding concerns has [*sic*] increased to the point that the Trust is considering making an application to Court for a Care/Supervision Order under the Children (Northern Ireland) Order 1995 to protect the child. **It is important that Pre-Proceedings Stage 1 is not circumvented prior to any Care or Supervision application being made by the Trust unless the concerns are so severe that an emergency application is required immediately.**
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> Pre-proceedings is a formal meeting which provides the opportunity to set out the Trust's concerns with parent/s and their legal representative, discuss potential Court applications and develop a plan of what is required to avert Court action. During this stage a social history/genogram can be gathered. Referrals for assessment can be made and appropriate assessments can commence. In addition, the Trust should explore through a family network meeting or Family Group Conference, whether care can be safely provided by a relative or friend, having assessed the suitability of possible arrangements and the most appropriate legal status for such arrangements. Pre-proceedings should be reviewed within 6 to 8 weeks to determine if sufficient change has occurred and to decide if a Court application should be made."
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> [bold and underlined emphasis in original]

[8] The applicant relies on both sets of guidance mentioned above. She contends that this was *not* a case where her pregnancy had been concealed or the Trust's concerns only emerged late in the pregnancy. Accordingly, she says there was no reason why a pre-birth child protection case conference should not have been held. She also contends this was not a case where the Trust concerns were so severe that an emergency application to court was required immediately, without there being any opportunity for a PPM to be held.

[9] The advantage of a PPM is that the parent(s) of the child in respect of whom an application may be made will be made fully aware of the Trust's concerns and will be legally represented. The meeting will explore if care can be safely provided by relatives or friends. A PPM can avert court action or narrow or focus the issues of concern, amongst other things. It is not an adversarial process and is social-work led. The more detailed guidance within the pre-proceedings guidance document describes a letter before proceedings being issued by the relevant senior social worker inviting parents to attend the meeting. This letter will outline the detailed concerns which the Trust has, what should be done to protect the child from suffering significant harm, and will often disclose relevant reports. A PPM itself will be chaired by a Trust representative and be attended by the parents and their legal representative, with Trust staff attending as appropriate (and Trust legal representatives attending in exceptional circumstances). Decisions are to be recorded, signed, and copied to the various parties at the end of the meeting; and there should be a date for review within 6-8 weeks.

Factual Background

[10] In light of my conclusions below, it is unnecessary to set out in any significant detail the factual background to this application. The following is an extremely brief summary only.

[11] As noted above, the applicant is the mother of Child A. She accepts that she had some contact with social services in the period leading up to Child A's birth. However, she says that she did not get invited to any formal meetings and was not invited to discuss how to manage her child when he was born.

[12] Child A was born very early in the morning on 20 June 2022. The applicant says that the pre-birth case conference was suddenly scheduled for 2.00pm on that same day. She agreed to attend this meeting, albeit that she was extremely tired. However, just before 2.00pm a staff member informed her that the meeting had been cancelled as a social worker was unavailable. Everyone therefore left. About two hours later, the social worker arrived again. The applicant says that she arrived unannounced and handed her a form to sign in order for her child to go into care. The applicant did not agree to this. On the Trust's case, a pre-birth case conference was arranged for 21 June 2022; but the applicant's child was delivered early (on 20 June) and so an urgent initial child protection case conference was convened on

23 June. The applicant attended, supported by her mother, her solicitor and an advocate from Bryson House arranged for her by the Trust.

[13] On 24 June 2022, the Trust applied for an emergency protection order (EPO) to remove Child A from the applicant's care. The applicant accepts that, during this hearing, the social worker was asked as to why there had been no pre-proceedings meeting. Her evidence is that the social worker stated that there could not be a PPM for an unborn child (although she did not indicate that this was Trust policy). The applicant had other concerns about the social worker's evidence, which was given by way of video link, but which are not relevant for present purposes. The matter proceeded to a fully contested hearing, with the court finding that the threshold test for the making of an interim care order was met, as was the legal test for immediate removal of the new-born Child A from the care of his mother.

[14] The applicant has lodged a notice of appeal in relation to this decision, seeking to appeal to the Family Care Centre. I was told that the appeal was lodged out of time and is presently 'live' but not actively being pursued.

[15] The applicant's solicitor sent formal pre-action correspondence in relation to the issue raised in these proceedings in late July 2022. The Trust responded to this on 10 August 2022. There followed further correspondence between the parties, with the Trust's solicitors sending a further pre-action response by way of letter dated 31 August 2022.

Initial Case management directions

[16] The application for judicial review was lodged on 29 September 2022. The case was initially considered by Colton J. He determined that a leave hearing was required in the case and further directed that, at the leave hearing, the applicant should address four particular issues, namely: (i) whether the application was out of time; (ii) whether this court was the appropriate forum to consider the issue, having regard to the fact that the applicant had lodged an appeal to the Family Care Centre; (iii) whether the court was in a position to address the apparent factual conflict between the applicant and the proposed respondent (discussed further below); and (iv) the utility of the proceedings generally "given the confirmation in the PAP correspondence in relation to the [Trust's] policy on pre-proceedings meetings/conferences."

[17] At the leave hearing, I granted an extension of time to the applicant to bring these proceedings under Order 53, rule 4, given the explanation for the delay which is provided in the affidavit of her solicitor, Mr Tumelty. The proposed respondent nonetheless opposed the grant of leave on a variety of bases.

The Trust's Position

[18] In its submissions, the Trust has emphasised that pre-proceedings engagement with the parent (in respect of whose child the Trust is considering applying for a care order) is not limited to formal pre-proceedings meetings but encompasses several stages of interaction prior to an application being made for a care or supervision order. The Trust relies on the fact that, in the present case, there was a variety of attempts to engage with the applicant on the part of the Trust and other services in order to address issues of concern in advance of the application to court being made. The Trust position is that the applicant did not engage adequately with it, or with other services (including the Perinatal Mental Health Service and the Family Nurse Partnership), and also did not take medication which she ought to have been taking. The Trust's position is also that, at any time at which the Trust was able to establish contact with the applicant or her mother, advice was given regarding the urgent steps which needed to be taken in order to avoid proceedings in respect of her child when born. The Trust also relies upon the fact that the applicant's accommodation arrangements were inappropriate. She was living with her mother, which was itself in breach of a child protection plan designed to protect the applicant's younger siblings from the risk of harm which she posed towards them.

[19] The Trust says that the evidence before the FPC was that the applicant was unfortunately unable or unwilling to engage with the Trust or with other services or to implement the advice given, including by turning down an offer of accommodation. As a result, the Trust's pre-action correspondence asserted that "every effort was made to engage [the applicant] in the pre-proceedings process." The Trust asserts that the aims which would be expected to be achieved through a Family Group Conference were achieved through their engagement, limited though that was, with the applicant and her mother. In particular, it is asserted that the applicant and her mother were and remained in breach of a child protection plan which had been put in place to protect the applicant's siblings; and that the applicant had no other individuals to put forward in terms of support by way of kinship options.

[20] In the proposed respondent's pre-action correspondence, it was indicated that the Trust did not convene a PPM in this case for the following two reasons:

> "(a) A pre-birth assessment identified significant risks to the then unborn child; and
>
> (b) The purpose of convening a pre-proceedings meeting is to formulate a plan to manage any risks identified during assessment in order to place the child in parental care. The risks identified in the pre-birth assessment were so significant that the Trust considered no plan could be formulated to

safeguard and protect against the risks to the unborn baby."

[21] The Trust contends that it did consider all less interventionist approaches, which were addressed in the course of the evidence before the FPC. It makes the point that, in granting the interim care order, the court had to be satisfied, and indeed was satisfied, that less intrusive approaches were not suitable. The test for removal of a child from its parents at birth is high and, where this is proposed, alternatives to the care order should be explored in a meaningful way: see *AR v Homefirst Community Trust* [2005] NICA 8. The FPC did not consider that further efforts had to be made in order to 'bottom out' other options before granting the order, notwithstanding that the issue of whether a PPM ought to have been convened was the subject of both evidence and submissions in the family proceedings.

[22] The Trust's second detailed response to pre-action correspondence relied upon its earlier correspondence setting out the reasons why it was deemed not possible or appropriate to hold a PPM in this case "given the significant issues associated with the applicant, her vulnerability, her mental health, and her lack of engagement with a range of professionals." It continued by noting that the Trust also held additional concerns about the applicant's legal capacity. (Indeed, these concerns had been raised at court on 24 June 2022. An advocate was provided in order to assist the applicant; and, according to the Trust, the applicant's solicitor has recognised that there may be an issue in respect of her capacity, which concern is shared by the guardian ad litem, and a capacity assessment is to be undertaken.)

[23] In summary, the Trust accepts in principle that there is a requirement to explore matters before proceedings are issued and that, normally, the convening of a PPM would be an important part of this process; but maintains its position that it was not appropriate or feasible to do so in the circumstances of this particular case.

Consideration

[24] Considering all of the above, I have reached the view that the appropriate course is to refuse the applicant leave to apply for judicial review for the reasons summarised below.

[25] Firstly, I have significant concerns about the utility of the application. Judicial review is a discretionary remedy and an application for leave can be refused in the exercise of the court's discretion if the court takes the view that the application is academic or will serve no useful purpose as between the parties. (This issue was considered recently in *Re Bryson's Application* at first instance and on appeal: see [2022] NIQB 4 and [2022] NICA 38). In the present case, the Trust has accepted in principle both that it ought to comply with the guidance which directs it to convene a PPM and a pre-birth case conference. The latter type of meeting was planned; but Child A was born earlier than expected. In relation to a PPM, the Trust relies upon intensely fact specific issues – some of which are disputed – as to why it was neither

feasible nor appropriate to convene a PPM in the particular circumstances of this case. However, even if leave was granted and the applicant succeeded in persuading the court that the Trust was *not* justified in departing from the guidance, there is no meaningful relief which could be granted. The clock cannot be wound back.

[26] There is also no issue of principle or general application which in my view requires to be addressed in this case. Ms Overing indicated in the course of the leave hearing that the social worker's view, apparently expressed in evidence in the FPC, that a PPM could not be held in respect of an unborn child was incorrect. The Trust accepts that the guidance referred to at paras [6] and [7] above should generally be followed. However, it relies upon the matters summarised at paras [18]-[22] as to why its failure to convene a PPM in this case was either a justified departure from the guidance or, in any event, made no difference.

[27] As Ms McKeown accepted in the course of her submissions, the guidance which is at issue in these proceedings is guidance only. In accordance with standard public law principles, it should be followed but, where it is not, before granting relief on that basis the court will inquire into whether there is some lawful reason for departure from the guidance (or, put another way, whether it was an abuse of power for the Trust not to comply with the guidance). That gives rise to the second concern. In the present case, this exercise will inevitably require the court to grapple with disputed issues of fact and detailed evidence about the applicant's engagement with the Trust over a period of time, the risk factors which her behaviour presented, and the question of whether she in any event had capacity to participate meaningfully in a PPM and/or agree to an action plan. As foreshadowed in Colton J's CMD order, these are issues with which the Judicial Review Court is not well equipped to deal (see also my comments in this regard in *Re JR138's Application* [2022] NIQB 46, at paras [25]-[26] and [39](f)).

[28] Third – and allied to the above concern – is the issue of the applicant having or having had an alternative remedy. The applicant had the opportunity to raise this issue and seek appropriate judicial consideration of the Trust's failure to convene a PPM (and a resultant failure to properly exhaust alternative options or proposals) in the course of the FPC proceedings. If she is dissatisfied with the outcome of that consideration, she has further opportunities to raise the same issue in the course of family proceedings which are better equipped (for a range of reasons) to consider and resolve the matter. Those opportunities include pursuing her appeal in the Family Care Centre in the substantive Article 50 care order proceedings; objecting to the periodic renewal of the interim care order (a number of such renewals having been consented to by the applicant); or filing an application to discharge the interim care order.

Conclusion

[29] It should go without saying that the court endorses the rationale behind the policies directing Trusts to hold pre-birth case conferences in cases such as this and, more generally, pre-proceedings meetings in cases where care proceedings are contemplated. They are an important means of seeking to avert the requirement for proceedings and to reach a negotiated solution where this is appropriate. Amongst other things, they assist in meeting Trusts' duties under paragraph 8 of Schedule 2 to the Children Order to take reasonable steps designed to reduce the need to bring proceedings for care or supervision orders with respect to children. I would also observe that, although there will be cases over and above the express exceptions identified in the policies where it will not be unlawful for a Trust to proceed in the absence of such a meeting, these cases will be rare in circumstances where it would be practicable to convene such a meeting. Trusts should be very slow to conclude that the holding of a pre-proceedings meeting would be pointless in the circumstances of any case. The formal nature of such a meeting, coupled with the threat of imminent proceedings and the availability of legal assistance, may cause otherwise uncooperative parents to engage; and there will always be examples of cases which seem hopeless where some change of heart or new proposal suddenly casts matters in a different light.

[30] In the present case, however, the opportunity to hold such a meeting has now been lost. The Family Proceedings Court has addressed the substance of applicant's objections to the making of an interim care order and to the Trust's care plan. Nothing is now to be gained, in circumstances where the Trust is generally committed to acting in compliance with the policies set out above, in seeking to determine (on disputed facts, which this court is not well placed to resolve) whether the Trust is right in its assertions that it was not obliged to hold a PPM or pre-birth case conference in the circumstances of this case and, indeed, that it would positively have been wrong to hold such meetings with the applicant in the absence of her having capacity to participate in them.

[31] By reason of the foregoing, I propose to dismiss the application for leave to apply for judicial review.

[32] I will hear the parties on the issues of costs but provisionally take the view that the usual order should follow, namely that there should be no order for costs at this early stage of the proceedings, save for an order for legal aid taxation of the applicant's costs.