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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND FAMILY DIVISION OFFICE OF CARE AND PROTECTION

BELFAST HEALTH AND SOCIAL CARE TRUST

Applicant

and

A MOTHER

Respondent

with

THE DEPUTY PUBLIC PROSECUTOR OF MARSEILLE DISTRICT COURT, REPUBLIC OF FRANCE

Notice Party

and

THE NORTHERN IRELAND COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

Intervenor

IN THE MATTER OF SB (A CHILD)

Ms MacKenzie (instructed by the Directorate of Legal Services) for the Trust
Mr Larkin KC with Mr Devine (instructed by Gillen & Co Solicitors) for the Mother
Ms Murnaghan KC with Ms Brown (instructed by Flynn & McGettrick Solicitors) for the Court Children's Guardian
Mrs Danes KC instructed by the Northern Ireland Children's Commissioner (NICCY) as Intervener
Ms McDermott on behalf of the French authorities as notice party

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Before: Keegan LCJ and O'Hara J

Ex Tempore

KEEGAN LCJ (*delivering the judgment of the court*)

This judgment has been anonymised to protect the identity of the child. Nothing must be published which would identify the child or any member of the family.

Introduction

[1] This is a written record of the *ex-tempore* judgment given on 14 August 2023.

[2] This is an appeal from a decision of Mr Justice McFarland ("the judge") of 13 June 2023, wherein he made an interim care order in relation to a child who we shall call SB for the purposes of this judgment. The decision at first instance had the effect of removing the child from the care of her mother who is currently in Hydebank Prison awaiting the outcome of extradition proceedings to France.

[3] We heard this case on an expedited basis given that it involves a child, and we were told that SB is to begin nursery on 31 August 2023.

[4] At a case management hearing we stayed the removal pending our consideration but allowed a transition plan to progress in part with SB spending some overnights with the proposed foster carers. The recent Trust report tells us that the overnights have been positive, that the child has enjoyed staying with the carers and has been reluctant to return to the prison.

Factual Background

[5] The mother in this case is a Nigerian national. SB has two older children, who reside with maternal grandmother in Nigeria. The mother has not seen these children since 2011. She has, however, travelled throughout Europe for many years before arriving in Northern Ireland on 27 September 2019.

[6] The mother reports a difficult childhood with separation from her parents between the ages of 5-13, physical and emotional abuse as well as basic neglect at the hands of her aunt between the ages of 5-13 and exposure to alcohol fuelled domestic violence upon her return to parental care. She describes an emotionally impoverished childhood with limited educational opportunity. She states that she left Nigeria in 2011 with people traffickers associated with a Nigerian criminal organisation known as the 'Supreme Eye Confraternity.'

[7] The history given then states that the mother arrived in France sometime in 2011 and worked as a street prostitute in Lyon, France circa 2011-2016 as part of the above criminal organisation. Home Office material indicates that by 7 June 2011 the mother had claimed asylum in France. The mother reports being a victim of human trafficking and being forced to work in the sex trade in France for six years.

[8] At some stage during this history, by her own admission, the mother became involved in the sexual and financial exploitation of at least three other women. It is notable that one of these women was YY, interchangeably described in the mother's statement of 23 February 2022 as her cousin or her sister. The European Arrest Warrant ("EAW") papers from France indicate that the mother's sister Z was also arrested and indicted on 26 March 2019 with charges of human trafficking, procurement and criminal conspiracy.

[9] The mother's statements give little detail of her relationship with the father of SB. It appears clear that she was working in prostitution during the relationship. Indirect telephone contact took place regularly between the father and SB until approximately February 2023 when same stopped. This cessation of contact coincided with the issue of the extradition proceedings.

[10] No information about the father has been provided to the parties or the court by the mother or her representatives during the current care proceedings, however, we note that the mother may have made contact with him recently by telephone.

[11] The timeline for the mother leaving France and moving to Italy is very uncertain. In the papers the mother identifies having moved to live in Italy for two years. However, Home Office documentation would indicate that in 2018 following a series of arrests in France in respect of the prostitution ring, the mother fled to Italy to claim asylum. The documentation from France would indicate that some arrests took place on 12 June 2018 and others in March 2019. Overall, there is no clarity as to the time spent in Italy or the nature of her circumstances there other than she lived with the father, in Milan, Italy and became pregnant with SB. It is unknown whether she continued to engage in prostitution or associate with criminal elements during this period.

[12] The mother had in her possession false travel documents and was wanted under a EAW by French authorities for offences of human trafficking and bribery.

The circumstances following arrival in Northern Ireland

[13] When the mother arrived in Northern Ireland, she was pregnant with SB. She was arrested and remanded to Hydebank Prison where she has remained since. SB was born there in January 2020.

[14] The mother was convicted in her absence by the French courts on 22 October 2022 of the criminal charges we have already mentioned. We have had the benefit of seeing the extradition file and have reviewed the judgment of the court. Even a brief glance at these documents reveals a concerning picture of criminal activity which came to the attention of French authorities after information was received indicating the existence of a Nigerian criminal organisation operating procuring networks on French territory from the city of Lyon between 1 December 2014 and 12 June 2018. This relates to the sexual and financial exploitation of at least three other women

including a person thought to be a cousin or sister of the mother. The mother's name appears on this indictment regarding the trafficking of persons into prostitution and links her with the activity as a procurer who was also violent.

[15] The list of offences laid against the mother highlights the level of criminal activity involved as she was convicted of a number of offences described as aggravated procuring; plurality of victims, aggravated procuring; victim handed over to prostitution on arrival on the French territory, aggravated procuring; use of coercion, violence or deceit, human trafficking with remuneration or benefit committed with threat, coercion, violence or deceit towards the victim or their relations and aiding the irregular entry, movement or stay of a foreigner in France.

[16] The French court imposed a sentence of nine years' imprisonment in relation to all these offences.

[17] Extradition is sought by the French authorities based on the conviction warrant we have referred to. We are grateful to Ms McDermott who has appeared as a notice party in these proceedings on behalf of the French authorities who has assisted us in relation to the extradition process. These proceedings have been delayed but are listed for hearing on 21 August 2023. We rejected an application to pause this family appeal to await the outcome of the extradition proceedings. We also note that bail has been refused on several occasions throughout the extradition process, given the flight risk. We will say no more as to these proceedings given the imminent hearing of the extradition application, save to reiterate the fact that, in our view, they have taken too long to come to hearing.

[18] To complete the background we also note the mother applied for protection as a trafficked person but by letter of October 2019 National Referral Mechanism ("NRM") decided there were no reasonable grounds for protection. It is fair to say, by virtue of us reading that correspondence serious concerns are raised about the mother's credibility. That decision, as we understand it, is not yet appealed but apparently will now be some years on.

[19] There is also a rather unclear picture attaching to the mother's asylum and immigration position which we need not recite for present purposes save to say that nothing concrete has been achieved over many years when this has been in issue. None of this provides us with assurance but adds to the factual matrix in this case.

[20] Next, we turn to the Trust's involvement in the life of the child SB. In summary, it is apparent to us that this began on 3 January 2020 with a Pre-birth Case Conference and Child Protection Register ("CPR") registration. On 8 January 2020 Hydebank convened a mother and baby panel and concluded that the baby could remain in the prison with the mother subject to safeguards after birth. This was with the acknowledgement that the mother's extradition process would require review of arrangements and that the panel would need to reconvene within nine months.

[21] The nine months arose as a result of the policy in place at that time which only allowed babies or infants to stay in prison with mothers for a nine-month period, that is the 2006 policy. The relevant sections of that policy read as follows:

> "3.18 The Prison Service's view is that where separation has to take place, it may be least damaging and preferable for the child's interests that it happen early in the child's life. Ideally, the separation should take place when the child is under nine months old or earlier if the child is not being breast fed. Later separation may be necessary, but the developmental process suggests that the later the separation the more difficult it is for the child to adjust that this may significantly impair the child's physical and mental well-being.
>
> 3.19 In simple terms, it is recognised that what a child needs in its early years is a constant caring and stimulating relationship with an adult. For obvious reasons this is normally the mother of the child, but it does not always have to be, and an alternative carer may be able to provide such care where the mother's position prevents her from doing so. In such a situation the child benefits from bonding with the alternative and consistent carer early in its life rather than later. It gives the child the opportunity to form a stable long-term relationship with the consistent carer in the way that it could have done with its mother.
>
> 3.20 It is important to recognise that there is rarely a perfect solution. It is commonly a matter of finding the least bad option for the child and, in each case, the solution depends on the individual circumstances."

[22] There was a judicial review regarding the nature of arrangements which ultimately did not progress and so SB was discharged to Hydebank on 27 January 2020 to live with her mother.

[23] Mother and child managed well in what was a bespoke prison environment. On 16 July 2020 SB's name was removed from the Child Protection Register and on 30 July 2020 the social services closed the case ostensibly, it seems to us, on the basis the mother would be extradited to France imminently and that some provision was available for babies or infants to remain with mothers in French prisons.

[24] On 15 July 2022 the Trust received a "UNOCINI" referral which highlighted the fact that SB continued to live in prison with her mother due to extradition delays. By this stage the prison policy referred to above had also changed by virtue of a

revised 2022 policy document which essentially removed the nine-month expected limit for babies to remain in prison for a more open-ended approach depending on best interests of the child. We were told that in England & Wales the policy refers to an eighteen-month period.

[25] Thereafter, there was heightened activity by the Trust to regularise the situation resulting in a C1 being issued on 13 January 2023 and a C2 accompanied by a C10. Then a C2 of 13 February 2023 was lodged specifically seeking removal of the child to foster care by way of an interim care order. The case was transferred between court tiers until it finally came to the High Court on 16 February 2023.

The hearing at first instance

[26] McFarland J heard evidence from the social worker, the Guardian ad Litem and an expert psychologist, Dr Bratten, and reached several core conclusions which we summarise. First, he decided that the proceedings were properly before the court. Next, he decided that the interim threshold was met. Finally, and crucially, he approved the plan, made an interim care order for eight weeks and set a review for 29 September 2023.

[27] As to approval of the care plan, the judge's reasons are found at paras [25] - [30] of his judgment. This is the core part of the judgment under analysis in this case which we discuss as follows.

[28] First, we note that the judge was mindful of the high threshold for interim removal, utilising the principles in *Re C* [2019] EWCA Civ 1998 which provide the following template for consideration of such applications:

> "First, an interim order is inevitably made at a stage when the evidence is incomplete. It should therefore only be made in order to regulate matters that cannot await the final hearing and it is not intended to place any party to the proceedings at an advantage or a disadvantage. Second, the removal of a child from a parent is an interference with their rights to respect for family life under article 8. Removal at an interim stage is a particularly sharp interference which is compounded in the case of a baby when removal will affect the formation and development of the parent/child bond. Third, accordingly, in all cases an order for separation under an interim care order will only be justified where it is both necessary and proportionate. The lower reasonable grounds threshold for an interim care order is not an invitation to make an order that does not satisfy these exacting criteria. Fourth, a plan for immediate separation is therefore, only to be sanctioned by the court where the

> child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur. Fifth, the high standard of justification that must be shown by a local authority seeking an order for separation requires it to inform the court of all available resources that might remove the need for separation."

[29] Para [26] sets out the judge's findings regarding Dr Bratten's evidence. There he records his findings as follows:

> "[26] In my view, the report and the oral evidence of Dr Bratten was compelling. She recognised that keeping the child in prison would be detrimental to her welfare. She did consider whether it was appropriate that she remain in custody but that would only be the case if the mother's release was imminent, but the reality of the mother's situation is that that is unlikely. It is important to bear in mind the following factors. The first is that there is no exit plan currently for the mother and certainly not in the near future. Realistically, so long as she contests the extradition proceedings there is a high likelihood that she will remain in custody in Northern Ireland. She has been identified by the county court in relation to the extradition proceedings as a high flight risk, having already accessed and travelled on false papers. She is a fugitive from justice and has received a significant sentence for her criminal activity."

[30] At para [29] of the judgment we find the judge's analysis as to the proportionality of the plan which he was asked to approve. Appropriately, he asks the question "is it proportionate?" He goes on to find as follows:

> "[29] … The separation of the child from her mother will have a significant impact, as will, to a lesser extent, separation from the other attachment figures within the prison wing, and I refer specifically to the 'auntie' figure, that is the staff member, and a lady who is described as a 'granny', that is a prisoner serving a life sentence for two murders. The separation from the mother and these two individuals will clearly have an impact on the child. Separation will be a change in her circumstances which will have a negative impact on her, but we now have reached a situation where the developmental delay must be addressed and reversed before it is too late. The child

> is 3½ years of age and the current policy of marking time to see what happens in relation to the extradition proceedings cannot continue with this child's wellbeing at risk."

This appeal

[31] Mr Devine commendably refined the appeal into three key points as follows:

(i) The court should not have assumed jurisdiction when the proceedings were defective as the C1 said the application was for an interim care order rather than a care order.

(ii) The judge was wrong to find the interim threshold met.

(iii) The judge was wrong to approve the interim plan of removal.

[32] We record that Mr Devine did not suggest that McFarland J left any relevant matters out of account or considered irrelevant matters. He also took no issue with the law the judge applied to the making of an interim care order.

Consideration

[33] The appellate test in family proceedings flows from the Supreme Court decisions of *Re B* [2013] UKSC 33 and *Re H-W* [2022] UKSC 17. It is simply whether the judge was wrong. The Supreme Court clarified the current law in *Re H-W*, paras [48]-[50]:

> "48. The very clear decision in *In re B*, albeit by majority, is that the existence of the requirement of necessity and proportionality does not alter the near-universal rule that appeals in England and Wales proceed by way of review rather than by way of re-hearing. It follows that it is not incumbent upon an appellate court to undertake a fresh evaluation for itself of the question of necessity and proportionality. For the reasons clearly stated by, in particular, Lord Neuberger at paras 83-90, such is contrary to principle, as well as undesirable in practice. In particular, if each appellate court were to undertake such a fresh evaluation, it would expose the parties, and the children, to the risk of successive investigations of the same issue, certainly two, and in some cases three or even four times. It would also mean that the appellate court was expected to undertake a task for which it is unsuited, having not heard the evidence or seen the parties for itself. A decision on

paper is no substitute for the decision of a judge who has, as Lord Wilson felicitously put it at para 42, had the advantage of a face-to-face, bench-to-witness-box acquaintanceship with those who are under consideration as carers of the child(ren).

49. In a case where the judge has adopted the correct approach to the issue of necessity and proportionality, the appellate court's function is accordingly, as explained in *In re B*, to review his findings, and to intervene only if it takes the view that he was wrong. In conducting that review, an appellate court will have clearly in mind the advantages that the judge has over any subsequent court - see Lord Wilson in *In re B* at para 41 and the earlier decision of the House of Lords in *Piglowska v Piglowski* [1999] UKHL 27; [1999] 1 WLR 1360.

50. In *In re B* Lord Neuberger, at para 93, essayed a further dissection of the process of deciding whether a judge's decision was wrong. He cautiously prefaced his suggested breakdown of the possible states of mind of an appellate judge with the observation that there was danger in over-analysis. With hindsight, that was a prophetic observation, as this court held in the subsequent case of *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079. Lord Carnwath, giving the judgment of the court, said this at para 63:

> 'With hindsight, and with great respect, I think Lord Neuberger's warning about the danger of over-analysis was well made. The passage risks adding an unnecessary layer of complication. Further, it seems to focus too much attention on the subjective view of the appellate judges and their degrees of certainty or doubt, rather than on an objective view of the nature and materiality of any perceived error in the reasoning of the trial judge.'"

[34] In *Re Stefan's Application* [2020] NIFam 22 the court said that appeals from interim decisions are also closely scrutinised, however, where removal is involved, it is appropriate for a court to consider appeal cases notwithstanding they involve interim decisions given what is at stake. At para [6] the court expressed it thus:

> "At the outset I reiterate the fact that appeals from interim orders are generally discouraged. This is on the basis that they are not final orders and obviously capable of review. That principle applies in both public and private law. However, where the effect of a decision taken at an interim stage is stark and prejudicial as removal into foster care, appeals may be mounted.

[35] By way of preamble we also reiterate the clear line of authority from *Re B* and *Re H-W*, that this is a reviewing court and not a court which should step into the arena of making its own proportionality assessment.

[36] With these well-established and uncontroversial legal principles in mind, we move to our conclusions on the three appeal points. We can deal with the first two limbs in relatively short compass.

[37] First, we do not accept the jurisdictional argument. The C1 may not have specifically referred to the care order but combined with the C10 no one could have been under any misapprehension as to what was sought. We agree with McFarland J's analysis on this issue wherein he rejected what was a technical procedural point. The judge rightly referenced the overall context of this type of children's case. We consider that the court was properly seized of care order proceedings. Mr Devine's only reference in aide of his argument to the text *Hershman and McFarland Children Law & Practice* deals with the Article 56 jurisdiction and does not assist him. Therefore, we dismiss this first limb of the appeal.

[38] Equally, the argument against a finding that threshold was met on the interim test contained in Article 57 of the Children (Northern Ireland) Order 1995 is weak. That test in Article 57(2) is clear that:

> "57(2) A court shall not make an interim care order or interim supervision order under this Article unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in Article 50(2)."

[39] To our mind, on the facts of this case, there are reasonable grounds to believe the threshold may be satisfied as regards the two main planks of the Trust's case, namely the mother's history including her conviction and the child's position of still living in a prison aged 3½ years. However, in any interim consideration the court must go on to consider the welfare tests and Convention compliance of any intervention. See *Re Stefan's Application* paras [18]-[22].

[40] It follows that the only point of any substance in this appeal, is the third point whether the judge was wrong in approving interim removal as part of the interim

care plan put forward by the Trust. We do not think that he was wrong for the following reasons:

(i) There is, in fact, no dispute as Mr Devine frankly conceded, that this child has suffered some developmental delay by virtue of living in prison. Dr Bratten's evidence was compelling when she said that keeping the child in prison would be detrimental to her welfare. To our mind this conclusion is unsurprising and something which even the mother can see as prison is not conducive to the welfare of a 3½ year old who must live behind bars, without normal socialisation with children or, as we have heard, modelling of what normal adult behaviour should be. We were particularly struck by SB's lack of socialisation with other children highlighted in Dr Bratten's observations. Strikingly the child did not play with the other children after two years of being in the same day care with them. We also think that there is a potent point to make about unhealthy attachment patterns with other prisoners and staff.

(ii) Our second reason is simply that there is no realistic other less intrusive option. Maintaining the status quo of going in and out of the prison is not going to repair the developmental delay and will only exacerbate it. We agree with the judge's analysis in relation to this issue.

(iii) Thirdly, in unison with the trial judge, we consider that there is no merit in further delay of this decision.

(iv) Fourthly, we do not think that awaiting the extradition outcome is the solution to this case. That is because whatever the outcome there are further complications depending on what the mother decides. As Ms McDermott explained the mother would need to go to France to argue for a retrial of 50% remission of her sentence. If extradition fails, there remain issues as to immigration status. The child starts nursery on 31 August. This is a critical milestone and the right time to move SB to allow for some much needed and belated normality.

(v) Fifthly, the judge recognised the negative effect on the child of removal from the mother rightly so, but he thought that this was counter balanced by the benefits of living in the community. We entirely agree with that analysis. We also point out that the child will under this interim care plan maintain contact with her mother which, again, is entirely appropriate.

(vi) Sixthly, an interim care order is as it says an interim measure. Final decisions are not made at an interim stage. If the mother's situation improves, she can apply for the child to live with her in the community at an appropriate stage. In the meantime, she can avail of contact which is currently facilitated twice per week in the prison environment, and we presume also involves indirect contact.

Final Thoughts

[41] Our final thoughts are these. We are concerned about some failure of information sharing between the mother's solicitors and the Trust as to the extradition. That has not helped the progress of the case and explains some of the delay.

[42] That said, there is a large gap between closure of the Trust case in 2020 and the re-referral. We consider that the Trust should have been doing more to monitor the situation in that time.

[43] We think that the NICCY is right to raise cultural identity of this child which we understand will be addressed within the final care proceedings.

[44] We stress that we are not adjudicating on prison policy in this case, however, we commend the prison service for working with this family in unique and unprecedented circumstances.

[45] Returning to the child's best interests which are, central to any consideration of this nature, we will briefly comment upon the additional argument that was made in relation to the application of article 5 of the European Convention on Human Rights. This aspect of the case is not strictly part of the appeal. However, we think that article 5 is engaged as far as the child is concerned. We are bound to say that we see a valid case to be made that the child should have been discharged from prison based on article 5 protections in addition to the other matters that we have raised after a period coinciding with progression from infancy. We do not think that the mother's consent to detention of the child is the absolute answer. We understand that the Guardian ad Litem will consider this issue further on behalf of the child and that it will be debated in the full care proceedings.

[46] Finally, we are encouraged by the positive reports of the time spent by the child in foster care to date. That bodes well alongside what we understand is the mother's co-operation. We commend her for that.

Conclusion

[47] We therefore dismiss the appeal. The interim care order remains in place, as made by the lower court, and the case will be reviewed on 29 September 2023 before the family court, as originally ordered. The stay is removed.