Neutral Citation no. [2005] NIQB 65

Ref: **GILC5378**

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

Delivered: **11/10/05**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (CROWN SIDE)

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IN THE MATTER OF AN APPLICATION BY A AND D FOR JUDICIAL REVIEW

AND

IN THE DECISION OF A HEALTH AND SOCIAL SERVICES TRUST

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GILLEN J

[1] I have concluded that there should be no identification of the names of the children in this case, the names of either of their parents or of any other person that may serve to identify the children in this family. Accordingly I have anonymised the names of the parties by ascribing to them each a letter.

[2] There is now before me judicial review proceedings brought by the applicants A and D, the father and mother of two children T and C, seeking:

(a) An order of certiorari to bring up and quash the decision of a Health and Social Services Trust which I do not propose to name ("the Trust") removing two children T and C from their foster placements in the care of A1, a relative of D.

(b) A declaration that the decision of the Trust was unlawful, ultra vires and of no force or effect.

Background

[3] The applicants were arraigned at Newry Crown Court in relation to charges of wilful ill-treatment of T, C and three other siblings contrary to Section 20(1) of the Children and Young Person Act (Northern Ireland) 1968.

A and D are the mother and father respectfully of T and C. These two children were made the subject of a care order under Article 50 of the Children (Northern Ireland) Order 1995 in November 2004 in the course of a lengthy hearing before me in October 2004. I gave judgment in that case in November 2004 and dealt in detail with a number of allegations which had been made against A and D involving abuse of T and C and other siblings. I pause to distinguish between the forthcoming criminal trial and the civil proceedings that were before me. The tasks facing a judge in family proceedings and the task that faces a judge and jury in criminal proceedings are quite different. In particular, as set out in Re U (Serious Injury: Standard Approved); Re B [2004] 2 FLR 263, the Court of Appeal in England has unequivocally stated that the standard approved to be applied in Children Order cases is the balance of probabilities and not the criminal standard of proof beyond reasonable doubt. My task in determining the issues in the care order procedures was therefore distinct from that which will confront the judges and jury in the criminal trial.

[4] Subsequent to my ruling, the Trust decided on or about 20 July 2005 to move T and C from their current foster care placement and place them in the care of A1. It is that decision that is the subject of challenge in this judicial review application. A1 is married to D's brother. She is a prosecution witness in the forthcoming criminal trial and has provided a witness statement to the police. The witness statement contains repetitions of allegations of abuse against A and D made by one of D's other children, J, the allegations of abuse having being made by J during the time that he was in the care of A1. A1's daughters C1 and D1 have also provided witness statements of a similar nature.

[5] The solicitor on behalf of the applicants during the course of a Looked After Children Review ("LAC") on 20 July 2005 made representations to the Trust (and also in correspondence thereafter) to the effect that moving the children T and C to the care of a prosecution witness was likely to prejudice the criminal trial. The thrust of the argument made was that given that part of the prosecution case was based on A1's repetition of allegations made by J whilst in her care, the applicants were concerned that A1 would seek to influence T and C in the forthcoming trial. The applicants therefore sought an undertaking from the Trust that the status quo would be maintained at least during the long vacation (ie July/August 2005) but these representations were rejected and the Trust proceeded to remove the children from their then foster placement to the care of A1.

[6] I observe that the care plan for T and C, which I approved in the care order proceedings of November 2004, was that the children would permanently move to relative carers, namely A1 and her husband ("A2") upon the successful conclusion of a fostering assessment. That is referred to at para. 23 of my judgment which I have appended to this judicial review

judgment. The Trust case, as appears in the affidavit of TMcC of 19 August 2005, is that following the making of the care order, the assessment of A1 and A2 commenced. The Trust family placement team undertook a full and comprehensive home study of them and their family including a focus on child protection issues. In particular educative work was provided to the couple given the past experiences of abuse suffered by T and C. The home study report was completed and presented to the family placement panel on 6 July 2005 when A1 and A2 were approved pending completion of a matching report for subsequent approval by the chair of the family placement panel. In line with procedures in previous LAC review decisions, the process of re-introduction of T and C to A1 and A2 commenced on 5 July 2005. Apparently this process went well with the children responding positively to their aunt and uncle and feeling happy to have contact with their brother J in a more normalised setting. The matching reports were submitted to the chair of the family placement panel and final approval for the move to A1 and A2 was given by the chair of the panel on 28 July 2005.

[7] At a LAC review on 20 July 2005, attended by the applicants and their solicitor, the latter questioned the placing of the children with A1 on the basis that she might be a witness for the prosecution case and made the allegation that she might negatively influence her nephew and his sister ie T and C against their father. The chairperson advised the solicitor that consideration would be given to the factors raised by him. The affidavit of Ms McConnell, again anonymised by me, then goes on to depose:

> "Following the LAC review I contacted the Care Unit on 26 July and spoke to Detective Sergeant Lockhart who I understand contacted the Director of Public Prosecutions and returned to me… her advice in terms was that the placement would not adversely affect the criminal trial as long as A1 and A2 were instructed not to discuss the case with the children.
>
> 9. On 27 July 2005 I spoke to A1 about this matter and she advised she had been aware not to discuss the case with the children. A1 advised that Ms Mary Caruthers, Family Placement Social Worker, had spoken to her in relation in to this.
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> 10. T and C were moved to live with A1 and her husband (on 28 July 2005). The placement with Mr and Mrs B (which commenced on 18 August 2004) was envisaged initially to be a short term placement pending assessment of family relatives. If relative placement could not be secured Mr and Mrs B were willing to provide long term care for T and C.

> However difficulties had arisen in the placement in that C's sexualised behaviour had deteriorated. Further a complaint was made by a child in the neighbourhood alleging inappropriate sexualised behaviour of C, this also implicated T. Mr and Mrs B indicated that they wished the placement to come to an end sooner rather than later and indeed in respect of the holiday that they had planned to commence at the end of July had asked the Trust to take T and C into respite care in order to allow them to go on holiday with their own family on their own. These were the circumstances taken into account by the Trust in moving T and C on 28 July 2005. To have acceded to (the applicants' solicitors) request that no placement with A1 and A2 take place until the issue had been addressed by the court would have required the Trust to have arranged a serious of respite placements for T and C which in the Trust's view would have been severely adverse to the interests of T and C particularly in terms of C's behaviour and the pressing needs of both children for a settled placement.
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> 11. At paragraph 9 of the applicant's affidavit sworn on 5 August 2005 D states that it was her understanding that `the Trust were satisfied with this arrangement (placement with Mr and Mrs B) and that it would continue at least until the criminal trial concluded'. In the light of the care plan and the discussions and the LAC reviews referred to above I cannot account for how or why D came to that understanding".

The Applicant's Case

[8] Mr McGleenan in the course of a well constructed skeleton argument augmented by equally well argued submissions before me made the following points:

1. There has been a frank breach of Article 6 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention") in the light of the Human Rights Act 1998. Article 6(1) of the Convention provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing

> within a reasonable time by an independent and impartial tribunal established by law."

It was Mr McGleenan's submission that the placement of the children with A1 and A2 constituted a real risk of an adverse influence on the criminal trial of A and D which is to take place in early 2006 for the following reasons:

(i) Both T and C are prosecution witnesses in the forthcoming trial.

(ii) A1 has provided a witness statement hostile to the applicants and will be a prosecution witness at the forthcoming criminal trial. In the course of a statement that she made to the police on 26 June 2003 she related allegations of abuse which J had to her concerning his treatment by A.

(iii) The applicants have always maintained that their children have been negatively influenced to make statements against them while they have been in the care of various relatives.

(iv) Counsel submits that by comparing joint protocol interviews recorded on 13 June 2003 and 1 July 2003 made by J, with the witness statement of A1, the discrepancies that emerge support the contention that J was subject to external influences in the period between 13 June 2003 and 1 July 2003.

(v) The assessment of the Trust and the Director of Public Prosecutions that the placing of the children with the family of A1 would raise no issues in relation to the criminal trial was a misdirection.

(vi) The Trust further erred in accepting the police contention that, provided the case was not discussed with the children, it would not affect the criminal trial.

In essence counsel makes the case that the decision to place the two children T and C in the care of an extended family who have an interest in the outcome of the proceedings is a matter which the court should subject to the most anxious scrutiny. He argues they are likely to remain in the care of A1's family during the criminal trial in the course of which the evidence of the children and the family of A1 will be subject to forensic examination in the Crown Court. He submits that the potential for influencing the children in advance of that trial is real and substantial and constitutes a frank breach of Article 6 of the Convention.

2. Alternatively Mr McGleenan argues that if there has not been frank breach of the Convention, Article 6 rights of the applicants have been engaged and there must be a balancing of the rights of T and C under Article 8 of the Convention with the Article 6 rights of the applicants.

Article 8 of the Convention is couched in the following terms:

> "(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 wellbeing 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."

[9] It was Mr McGleenan's submission that the Trust had not made a proportionate response to the needs of these children for a family life to the extent that it had transgressed the Article 6 rights to a fair trial of the applicants. He submitted that there had been no balancing exercise at all carried out and to that extent the Trust had acted irrationally. In essence his argument was that no reference had been made in their considerations to A1 being a prosecution witness and so far as this had not been taken into account as a factor in their planning meetings the process was flawed. It was his argument that the presence of A1, and the other prosecution child witnesses C and D in the same household with T and C meant that the Trust had allowed the process to be contaminated and had failed to give due consideration to relevant factors. He further argued that the Trust had not sought a proper legal opinion on the matter before determining the placement of the children and that by the time it decided to invoke the advice of the police and the DPP, it was too late and the matter had already been progressed to an advanced stage.

[10] Mr McGleenan relied on the following authorities, inter alia;

(a) In R v North and East Devon Health, ex parte Coughlan (Secretary of State for Health and Another intervening) [2000] 3 AER 850 at para 108 Lord Woolf MR (as he then was) said:

> "108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the

> product of consultation must be conscientiously taken into account when the ultimate decision is taken …".

(b) In Re G (Care: Challenge to Local Authorities Decision) [2003] 2 FLR 42 at para 36 Munby J said:

> "So Art 8 requires that parents are properly involved in the decision making process not merely before the care proceedings are launched, and during the period when the care proceedings are on foot … but also – and this is what is important for present purposes – after the care proceedings have come to an end and whilst the local authority is implementing the care order …"

In the affidavit of the applicant's solicitor of 5 August 2005 he deposes that the applicants were informed at the LAC on 21 July 2005 that their children were to be removed from their then foster carers to the care of A1 notwithstanding that both applicants were strenuously opposed to such a move. The solicitor then wrote to the Social Services on 25 July 2005 asking for a reconsideration. Despite this and a telephone call by him to the social worker Tracey McConnell on 29 July 2005, a later conversation with another social worker his attempts to dissuade them were in vain. Counsel therefore argued that this was a clear failure to involve the parents in the appropriate process. He argues this amounts to procedural impropriety and irrationality on the part of the Trust.

3. The third ground mounted by Mr McGleenan was that the decision to place the children in the care of A1 was in breach of the applicant's legitimate expectation that the children would remain in the care of their then foster carers Mr and Mrs B. Reliance is placed on a letter of 6 July 2005 to A's sister and brother-in-law who requested to be considered as potential carers for T and C. In the course of that letter the Trust through a senior social worker had stated:

> "However, the Trust would not wish to change the present care arrangements for the children as it is important that the carers for T and C have acknowledged the concerns and allegations which have been made against their parents A and D. It is the Trust's view that you have a difficulty in accepting the allegations made against A and D during the course of the care proceedings …"

He submitted that this is a representation that gave rise to a legitimate expectation that no change would be made to the care arrangements for the

children whereas on that same date the Trust was actually convening a family placement panel to facilitate the transfer of the children.

Conclusions

[11] I reject the arguments submitted by the applicants in this case and I refuse the application now before me for the following reasons:

(1) I commence by recognising that practice and procedure has moved on a great deal as a result of the stimulus of the Convention and the Human Rights Act 1998. Moreover I recognise that the fair trial guaranteed by Article 6 of the European Convention is not confined to purely judicial parts of proceedings, but unfairness at any stage of the criminal or litigation process may involve breaches of Article 6. It must be remembered that whereas rights under Article 8 are inherently qualified, a person's right to a fair trial under Article 6 is absolute and cannot be qualified by reference to or balanced against any rights under Article 8. In Re L (Care: Assessment: Fair Trial) [2002] 2 FLR 730 Munby J at para 113 adopted the decision of the court in Mantovanelli v France [1997] EHRR 370 and stated:

> "(113) I derive from Mantovanelli two principles of particular importance for present purposes:
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> (1) First, that the fair trial guaranteed by Art 6 is not confined to the purely judicial part of the proceedings. Unfairness at any stage of the litigation process may involve breaches not merely of Art 8 but also of Art 6. This is potentially very important bearing in mind … that whereas rights under Art 8 are inherently qualified and can be – and often have to be – balanced against other rights, including other rights under Art 8, a parent's right to a fair trial under Art 6 is absolute. It cannot be qualified by reference to, or balanced against, the child or anyone else's right under Art 8. The right to a fair trial under Art 6 cannot be compromised or watered down by reference to Article 8."

I accept that stricture and I have approached the law in this matter under the spur of that dictum. However in this case I am absolutely satisfied that there has been no breach of Art 6 rights in the forthcoming criminal trial and accordingly the issue in my view does not arise.

(2) I reject entirely the proposition that there is any evidence before me that there is a real risk of the forthcoming criminal trial of A and D being adversely influenced by the transfer of these children. I was in the

advantageous position of having heard the entire care order proceedings where the various allegations and counter allegations for and against A and D in the context of these two children were made and determined. At page 37para 25 of my judgment I stated:

> "I pause at this stage to observe that the respondents D and A had filed a reply to particulars at the commencement of this case (to which I have referred in the course of Dr Leddy's evidence) outlining a lengthy series of allegations against family members including D and M, her sister-in-law and partner, Mr and Mrs B, the maternal grandparents, N and J the maternal uncle and wife ie her brother and his wife, A2, the maternal sister-in-law and E the maternal sister together with the older children and all the social workers involved who it was alleged had the opportunity to influence these children."

Dealing with this conspiracy allegation and D's evidence before me I continued at paragraph 26:

> "(26) I found this witness' evidence profoundly unsatisfactory. I considered her evasive and disingenuous. Having heard her give her evidence in chief and then subjected it to cross-examination, I was convinced that there was a serious want of probity on her part. In particular:
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> (a) She was totally unable to provide any plausible reason why members of her family would have persuaded the children to make up such detailed and wicked allegations against a loving mother and father. I found it completely implausible that she was unable to give me a reason why they did not like him based on her failure to discuss it very much with them. She limply suggested that perhaps they were trying to punish her for W's death. However this had never been suggested to her apparently and no one had openly put blame on her for the event. Her suggestion that since the death of W, her family had been taking the children for walks and spent a lot of time with them particularly during the month of 2003, availing of opportunities to coach them to tell lies, was risible. She was quite unable to suggest how this could have been done without her being aware of any

> change in the children or the influences that were being brought to bear on them."

[12] Similarly, in relation to A, I formed similar views about the implausibility of the conspiracy theory involving A1 and I set those views out at pages 39 and 40 of my judgment.

[13] I hasten to add of course that the views that I have expressed in the care proceedings should have no influence whatsoever on the criminal trial where there is not only a different standard of proof (to which I have already adverted earlier in this judgment) but where the evidence of A and D given before me cannot be introduced pursuant to the provisions of the Children Order (Northern Ireland) 1995. Nonetheless based upon my conclusions, this Trust was perfectly entitled to conclude that there was no likelihood whatsoever of these children being influenced in the proposed transfer arrangements and that to date the evidence of the conspiracy theory was implausible. I have read the joint protocol interviews with J and also A1's statement to the police and I find absolutely no evidence before me to suggest that simply because J had varied in his account of the allegations somehow that points towards a malevolent influence on the part of A1. This matter can all be fully explored at the criminal trial but at this stage I find no evidence to suggest a breach of Art 6 of the Convention.

(3) Following the judgment in November 2004, in a LAC of 21 January 2005 it was made perfectly clear to A and his solicitor who were both present, that assessments on A1 were envisaged to be completed by April 2005. The relevant note as indicated to me by Mr Toner QC who appeared on behalf of the Trust, records:

> "A1, maternal aunt.
>
> It was noted that all assessments re caring for T and C are envisaged to be completed by April 2005. Miss McConnell, social worker reported that all assessments to date were positive and if A1 is approved by the Child Protection Team and family placement determined that this is where their needs would best be met, then contact can begin and progress at T's pace."

[14] Dealing with the care plan that report also records:

> "<u>Care Plan</u>
>
> It was agreed that T needs to be looked after on a long-term basis. This could possibly be with A1. If

> assessment proves A1 unable to care for T and C then they are to be placed with the Trust foster carers preferably with their current carers. … It was agreed that this decision will be made over the next three months.
>
> D, mother advised that she was not in agreement with this decision and expressed that she wished for T to stay with his current carers. It was noted that D has advised the Trust of her views."

[15] It is therefore erroneous to suggest that the applicants were unaware of the plan to transfer the children to A1 until July 2005. Not only had I approved of the care plan in the course of my judgment which envisaged the children being transferred to A1 but it was clearly picked up thereafter by the LAC review on 21 January 2005. I have no doubt therefore that this transfer does not come as a surprise to the applicants and I am of the view that this is a belated attempt to alter the course of a determination that emanates from my decision as far back as November 2004.

(4) I reject entirely the suggestion that these parents and their solicitor were not involved in the decision-making process. Both they and their solicitor were aware that the assessment of A1 was continuing in light of the care plan and that full consideration was given to the matter concerns as to inappropriateness of the children being placed with A1 given the impending trial. I am satisfied that all relevant matters were taken into account. An illustration of this is the relevant extract from the LAC review of 20 July 2005 which reads as follows:

> "Mr Haughey, solicitor, raised the question that if the issues raised today:
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> 1. (A1) is a witness at the prosecution case against T's parents.
>
> 2. A1 allegedly negatively influencing her niece and nephew against their father
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> were to be addressed through court, was T able to remain in his current placement in the interim? Mrs S, chairperson, advised that this would have to be confirmed with T's current carers. Mr Haughey queried that it would be in T's interest to move him from his current placement, to A1 and her husband, with a possibility that T might have to move back into placement with strange foster carers. The chairperson

> advised that consideration would be given to all these factors; however she added that a full and comprehensive assessment and all necessary checks had been completed and found to be positive in relation to A1 and her husband."

(5) I consider that it was appropriate for the Trust thereafter to contact the police and the DPP to ascertain if there were any concerns in their minds as to harm to the process leading up to the criminal trial. The fact of the matter is that the Office of Director of Public Prosecutions comprises lawyers and they are entitled to express a view as to whether the process would be flawed. Indeed it would have been very easy for the DPP to have played safe and simply directed that the children should not be transferred. I therefore reject the suggestion that it was inappropriate to contact this body or that anything other than a written note was appropriate. I am satisfied that it was a perfectly legitimate method of obtaining views by telephoning the police and DPP. I find nothing in this approach that suggests any impropriety or irrationality.

(6) It would be obvious that I am satisfied that the presence of the applicant's solicitors and indeed these applicants, at the various LAC reviews is clear proof that these parents were adequately involved within the whole process. I am satisfied that the reasons for the decision being taken were perfectly clear given the background care plan. Article 6 does not confer upon a defendant in a criminal trial the unfettered right to dictate the procedures to be adopted by the prosecution pending trial or how the welfare of a child witness in that trial will be catered for pending trial. Trusts have been given statutory responsibility of the utmost importance in ensuring the care of children. It is of importance that such power should be exercised not only responsibly but also with sensitivity bearing in mind Article 6 rights of other parties. Equally so the court must recognise that this Trust charged with the awesome duty of ensuring the welfare and interest of these children was faced with the pressing need of not only an obligation to implement the care plan, an undertaking which had been given to the court, but also the immediacy of the requirement of moving these children in light of the views of the current carers. I have no doubt that within the context of the care of these children, that was an appropriate and proper course to have adopted. I reiterate that I find nothing before me that suggests that in doing so they had sacrificed the Article 6 rights of the parents in their forthcoming trial to the Article 8 rights of the rights of the children. On the contrary, I do not believe that any breach arose or that they failed to make any proper balance in this situation. It seems to me to be an entirely proportional response to a perfectly legitimate aim.

(7) For the reasons I have set out above I find no procedural impropriety and no irrationality on the part of this Trust.

(8) I similarly reject the suggestion that the letter of 6 July 2005 raised any legitimate expectation on the part of the applicants that these children would not be moved to their present carers. The phrase "the present care arrangements" could clearly embrace the overall care of these children and the care plan as a fundamental part of those arrangements. I do not believe that the applicants could possibly have been misled by the letter of 6 July 2005 and I find nothing in that letter that undermines the probity, credibility or decision-making process of this Trust.

(9) I therefore dismiss this application.