Neutral Citation No: [2013] NIQB 28

Ref:	**TRE8796**
Delivered:	**8/3/2013**

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

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

____

Guardian Ad Litem's Application [2013] NIQB 28

IN THE MATTER OF AN APPLICATION BY THE GUARDIAN AD LITEM ON BEHALF OF JH (A MINOR) FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE SOUTHERN HEALTH AND SOCIAL CARE TRUST MADE ON 6 OCTOBER 2011

____

TREACY J

Introduction

[1] This application is brought by the Guardian Ad Litem, Mr Michael McCloskey, on behalf of a minor, JH. The applicant challenges a decision made by the Southern Health & Social Care Trust ("the Trust") on 6 October 2011 to maintain this minor in a placement in a Home.

Background

[2] JH had a history of placement in voluntary care due to the poor mental health of his mother, Mrs S, which caused her to be incapable of providing him with appropriate care. On 9 August 2010 Mrs S requested that JH be placed in emergency foster care and on 12 August 2010 he was placed with private foster carers through a Care Agency. The foster carers were Mr and Mrs E. JH remained in that placement from 12 August 2010 until 20 June 2011 i.e. for a period of 10 months and 8 days.

[3] During the currency of this placement the Trust applied to the Family Proceedings Court ("FPC") for a Care Order in respect of JH. An Interim Care Order was made in January 2011.

[4] Around May 2011 the Trust expressed a wish to move JH from the private placement with the E family to a Trust placement with a new family – the Ds. The

Guardian Ad Litem had interviewed JH in April 2011 when "he indicated his strong desire to remain in his placement" and stated that he would like to move school to the local high school which was attended by the E children. The Guardian Ad Litem also reports in his second affidavit that the E foster parents repeatedly advised him that they were prepared to keep JH in this placement and felt that they could manage his sometimes challenging behaviour.

[5] At legal proceedings before the FPC on 6 June 2011 the Guardian Ad Litem submitted that JH did not wish to leave his placement with the E family and argued that that placement should remain in force. The Guardian Ad Litem reports:

> "The FPC listened to submissions made on behalf of JH but concluded that under an Interim Care Order they could not dictate where the Trust placed JH".

[6] The Trust decided to move JH to a Trust placement on 20 June 2011. By 25 July 2011 this new placement had broken down, JH had scored his arms with scissors and had overdosed on paracetamol tablets leading to his temporary hospitalisation. Upon release from hospital he was placed into temporary foster care and on 29 July 2011 into a residential placement in a Home. On 8 September 2011 JH disclosed that he had been the victim of alleged rape and other sexual offences within the placement and the police commenced an investigation which was still ongoing when the present proceedings were initiated.

[7] Despite the above developments the Trust did not move JH from this placement and the Guardian Ad Litem visited him on 14 October 2011. On foot of that visit the Guardian Ad Litem averred:

> "I do not believe that the current placement in [the Home] is meeting JH's needs".

Also he stated:

> "As the Guardian Ad Litem I am extremely concerned at JH's continued placement in [the Home]."

Under the heading "Concerns about the placement at [the Home]" he states:

> "JH has suffered significant harm in [the Home] while in the care of the Trust under an Interim Care Order that is designed to protect him from significant harm. JH is being retained in a placement in which he has been the victim of a serious sexual assault which has impacted on JH's wellbeing and welfare. The decision not to remove JH immediately into foster care in my

> view cannot be justified in the context of the disclosures made by JH."

[8] On 21 November 2011 JH was still living at [the Home]. On that date he swore an affidavit stating his own position in relation to the placement. He stated:

> "On a scale of 1-10 I would say 11 for wanting to get out of [the Home]".

[9] On or about 14 November 2011 an affidavit was lodged by TN, Social Worker on behalf of the Trust. This affidavit deals with the efforts made by the Trust to secure a foster placement for JH since his admission to [the Home]. Her account indicates that despite efforts made by the Trust no emergency foster placement could be found for JH between the date of his disclosure of the sexual assaults (8 September 2011) and 14 November 2011 which was the date of swearing of her affidavit. She concludes:

> "JH's move from the care of Mr and Mrs E to the care of Mr and Mrs D was anticipated to be a positive long term for JH to his local area where he could build upon his social network, family networks and extremely positive school placement. It is regrettable that this placement did not work out for JH...... and that no alternative foster placement has since been available to JH."

[10] On 6 January 2012 Ms Pearson filed a second affidavit indicating that by that stage JH had obtained a placement in foster care and that the Trust was once again actively looking for a long term placement in its own area as soon as possible.

LEGAL ISSUES.

[11] As the facts disclose this application seeks to challenge a decision taken by the Respondent in October 2011 to maintain JH's placement in [the Home]. However, by the time the case came on for hearing that placement had ended and JH had moved on to a new foster placement.

[12] The relief sought in the original O. 53 statement was

(i) An order of *certiorari* quashing the decision not to remove him from the placement in [the Home];

(ii) an order of *mandamus* requiring the Respondent to place JH in foster care;

(iii) an interim order requiring an emergency placement pending determination of the present proceedings.

[13] The Order 53 statement was amended in February 2012 to seek the declarations that Part V of the Children (N.I.) Order 1995 is incompatible with children's rights under the ECHR and under the UN Convention on the Rights of the Child. The original and amended grounds upon which relief was claimed are:

(a) In failing to remove JH from [the Home] and place him in foster care, the Trust acted in breach of its general duty of authority under Article 26 of the Children (Northern Ireland) Order 1995 which provides that every authority looking after a child shall 'safeguard and promote his welfare'.

(b) The impugned decision was Wednesbury unreasonable and irrational in that, by failing to immediately remove JH from [the Home], the Trust reached a conclusion which no reasonable decision-maker, properly directing itself could have reached on the information available.

(c) In refusing to immediately place JH into foster care, the Trust, contrary to its obligations under Section 6 of the Human Rights Act 1998, has acted incompatibly with JH's rights under Articles 2, 3 and 8 of the Convention by interfering with his right to life, right to freedom from inhuman or degrading treatment and his right to private and family life in a way which is not proportionate.

(d) Part V of the Children (Northern Ireland) Order 1995 on Care and Supervision is incompatible with the child's rights under Articles 6 and 8 because it fails to provide for an express power enabling the Family Proceedings Court to make directions to the Trust authority regarding the placement of a child in the care of that Trust pursuant to an order of the Court.

(e) Part V of the Children (Northern Ireland) Order 1995 on Care and Supervision is incompatible with the child's rights under Articles 3, 20 and 25 of the United Nations Convention on the Rights of the Child because it fails to provide for an express power enabling the Family Proceedings Court to make directions to the Trust authority regarding the placement of a child in the care of that Trust pursuant to an order of the Court.

[14] The last two grounds were contained in the amended Order 53 statement which was filed after the original grounds and relief claimed had become academic because of the changes to the child's placement. Indeed the applicant's skeleton argument was confined to seeking leave in respect of grounds (d) and (e) above. When the case came on for hearing the impugned placement had already ended and

JH had been appropriately placed in a new foster home. The case was therefore listed for a *Salem hearing* to determine whether it had become academic and, if so, whether it is in the public interest for this case to proceed to a substantive hearing.

THE LAW.

[15] The normal principle governing all litigation is that courts determine live issues between parties and that where no live issue exists a court will not engage with an historic or academic dispute.

[16] There are precedents for departure from this principle, most notably the case of R v Secretary of State for the Home Dept., ex parte Salem [1999] 2 All E.R. 42 (H.L.) in which Lord Slynn stated:

> "appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, for example.................. when a discrete point of statutory construction arises ....and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

Our own Court of Appeal reiterated this exception in Re McConnell's Application [2000] NIJB 116 in which it said:

> "It is not the function of the courts to give advisory opinions to public bodies but if it appears that the same situation was likely to recur frequently and the body concerned had acted incorrectly, they might be prepared to make a declaration, to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future."

DISCUSSION.

[17] In the present case there is no doubt that the issue between the parties has been resolved and that all the individual reliefs sought in relation to the treatment of JH are now no longer needed. The need for such intervention has been overtaken by developments on the ground. The only reliefs sought which could be granted at this stage are the two declarations sought in relation to the compatibility of the local legislation with international standards. Nevertheless the Applicant wishes to proceed with this case and I am advised that the young person most closely involved has also expressed a wish for this judicial review to proceed with the hope that its

resolution might protect other young people from suffering as he has suffered in the past.

[18] I understand the concerns of JH and I agree that his disquiet and that of the Guardian damage necessitated prompt investigation and resolution. I fully understand why the *Guardian ad Litem* took the very proper and unusual step of initiating judicial review proceedings in this case, and I commend him for pursuing the welfare of this young person by every means. I recognize that the change of placement for JH from his original foster home to the second foster home and thereafter to a residential care home may have had profound consequences for the young person at the centre of this action and I understand that the *Guardian ad Litem* is anxious to ensure that no such consequence is ever visited on any other young person within the care system. I have noted that the Applicant did his utmost at the FCP proceedings of 6/6/2011 to secure JH's continued placement with his original foster family and that the Respondent's decision to remove JH was done against the clearest advice from the Guardian. I note also that no explanation for the overriding of the advice has been given- at least not in the context of the present proceedings. I am concerned to see one statutory agency intervening decisively in a young person's life against advice from another statutory agency and without providing clear and compelling reasons for their intervention. It appears to me that the course of action undertaken in this case is unlikely to represent best practice in cases of this kind. The most unfortunate outcomes which have transpired for JH suggest to me that this may be a case in which the services involved could usefully review their procedures with a view to learning lessons and improving their practice for the benefit of all young persons who are settled in working placements and whose removal carries a high risk of changing the situation for the worse.

[19] Since all relevant issues have not been fully ventilated in the present proceedings I can go no further than to express my concern at the manner in which the *Guardian ad Litem's* input was treated in the present case. Examination of academic points is generally impermissible for obvious reasons of public policy including the need to avoid the unnecessary commitment of scarce resources, human and financial. Therefore it is in general only in the most limited of circumstances, for example 'where a discrete point of statutory construction arises' or where 'a large number of similar cases exist or are anticipated' that the court might contemplate allowing an otherwise academic case to proceed. In such circumstances one would expect the underlying utility of such an approach to be self-evident.

[20] The scope of the issues raised in the Applicant's amended Order 53 statement go well beyond 'a discrete point of statutory interpretation' and I am certain that this case is not the place to ventilate the issue of an alleged general incompatibility between the local legislation and the provisions of the ECHR and other international instruments. Neither have I received any evidence that there are any other cases of this kind in the system which would require or justify this court in addressing the general points raised. For these reasons I refuse leave for this case to proceed to a full hearing on the remaining issues.

[21] I add only this. In general placement decisions are unlikely to be a suitable subject for judicial review and this court does not sit on appeal from such decisions. But the present case exemplifies the need, in what are hopefully rare cases, for the safeguard of judicial review where the court can intervene urgently if fundamental rights are engaged. If a public authority placed a child where s/he would be exposed to risk of serious harm or abuse, the court would be impelled to act. This should not arise in practice because the welfare of the child is the public authority's paramount concern. Moreover a public authority would be acting unlawfully if it acted incompatibly with a child's convention rights. Should a case arise in which the placement of the child exposed it to risk of serious harm, for example in breach of art 2 or 3 of the ECHR, this court, as a public authority, must act. Since such a risk if it existed should be obvious it would not be lawful for the public authority concerned to expose a child to it.

[21] However, as the matter is now academic and there is no good reason in the public interest with proceeding further I have no alternative but to dismiss the application.