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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR41's Application [2010] NIQB 104

AN APPLICATION FOR JUDICIAL REVIEW BY JR41

TREACY J

Introduction

Publication of the name of the applicant or any member of the family is prohibited as well as any information which would serve to identify them.

[1] By this judicial review the Applicant seeks an order of certiorari to quash the decisions of the Chief Constable of the PSNI and the South Eastern and Social Care Trust ("the Trust") taken at her home on 26 February 2009. These alleged decisions concern the removal of the three children of the family from the Applicant's care on that date. The Applicant also seeks a declaration that the said decisions were unlawful, *ultra vires* and of no force or effect and a declaration that the actions of the Trust, in removing the children, were unlawful, ultra vires and of no force or effect. The Applicant also claims damages.

Background

[2] The Applicant is the mother of 3 children who, at the time of the events in question, were aged approximately 3 and a half, 5 years 4 months and 9 years 2 months. In the course of 2008 social services were informed by the children's school that there were concerns about the middle child presenting at school with soiled underwear. There were also concerns about poor attendance at school especially in the case of the eldest child who had been referred to the education welfare officer for this reason. The school also reported concern about the Applicant sometimes presenting at school to collect her children while under the influence of alcohol.

[3] As a result of these concerns an initial social work assessment visit took place on 3 December 2008. During this visit the Applicant provided explanations in respect of some of the concerns raised by the social worker. The family home was observed to be warm and the Applicant was observed to be cooking a healthy meal for the family. She was also observed to have an open can of beer beside her whilst cooking which she accepted she had been drinking from. It was then approximately 4.30pm.

[4] Some of the issues raised by the social worker were not sufficiently clarified in this initial visit so she advised the Applicant that further assessment would be necessary. The Applicant appeared upset by this but did consent to multi-disciplinary checks being conducted in order to address the social services concerns.

[5] When multi-disciplinary checks were conducted they presented a mixed picture of this family unit. Medical advice indicated that the middle child had a bowel problem which could account for her frequent soiling. This evidence tended to support the mother's account that the child in question had no control of her bowel and sometimes soiled herself on the way to school however medical input also raised a concern about the level of the Applicant's drinking which was considered to be too high for good health. Input from school reiterated concerns about hygiene and about the children's school attendance. However it was noted that no new reports of hygiene concerns or alcohol abuse had been made since the date of the school's initial referral to social services. It was also noted that the children were attending school "much more regularly" since that time. It was also noted in the initial assessment that all the children presented as "happy and comfortable at home".

[6] The evidence from the multi-disciplinary checks fed into a UNOCINI assessment which reported that there was evidence of some improvement in the children's conditions since the original referral to social services but that concerns still existed particularly in relation to the possibility of alcohol misuse and to the possibility of domestic violence in the surrounding adult relationships. Because of these concerns the case was assigned to Noelle Sloan, a social worker in the local social services team. A follow-up visit to the family home was arranged for 10 February 2009. This visit quickly became confrontational and as a result subsequent social work appointments were arranged to take place in the local health centre rather than in the family home. One such meeting took place on 23 February 2009 between the social worker, the Applicant and her partner, Mr McC. At this meeting it was agreed that the Applicant would allow social services to visit her home to speak to the children. The initial appointment for this purpose was missed and another appointment was then arranged for Thursday 26 February. This was scheduled to take place at 3.00pm in the family home. It is important to note that on that same Thursday social services received a phone call from a

member of the Applicant's family indicating that they were aware of social services involvement in the case and offering to look after the children of the family should this become necessary.

[7] When the social worker attended for the 3.00pm appointment she could not gain access to the home. She contacted a family member through whom she was able to arrange access for approximately 4.00pm. When she attended the Applicant, her partner Mr McC and her sister were present in the home. All three children were also present. This meeting quickly became confrontational and as a result the social worker requested assistance from her senior social worker, Julie Patterson, who arrived at the home at approximately 4.20pm.

[8] A meeting followed during which the social workers formed the view that their concerns were not being addressed seriously by the Applicant and her partner. It was suggested that Mr McC should leave the meeting, a request which he complied with. At some point Mr McC's mother arrived on the scene and there followed an altercation in the street between Mr McC and his mother. This altercation apparently became violent and caused distress to the three children who were all present in the house at the time. As a result of these events the senior social worker, Julie Patterson, requested assistance from the police to deal with the altercation in the street. This was an entirely appropriate request as an issue of public disorder had arisen in the street.

[9] A police vehicle containing Constables Downes, McVeigh and McCloskey was despatched to the scene in response to this request. There is a conflict in the evidence of the Applicant, the Trust and the PSNI in relation to what happened next. Having carefully read all the affidavit evidence of all the parties I believe that the essential facts of the ensuing events were as follows. The police arrived at the scene and spoke to Mrs McC who was hostile to them, denied any incident had occurred and refused to make any statement (see para.3 affidavit of Constable Downes). At this point it appears the incident in the street was resolved and that any threat of violence was allayed.

[10] However, Julie Patterson, the Senior Social Worker, then asked the police to enter the Applicant's home. She told Constable Downes that an Emergency Protection Order was in place which prohibited the Applicant from drinking alcohol. She led the Constable to believe that the terms of this Order had been breached and, for this reason, social services intended "to act to remove the children" (see para.4 affidavit of Constable Downes).

[11] This conversation between a Senior Social Worker and a uniformed Police Constable took place in the hallway of the Applicant's home. A Junior Social Worker was also present. The conversation took place quite literally "over the head" of the Applicant who was sitting on her stairs in her home in a state of some distress. Constable Downes then reports "the Applicant

became very upset at the prospect of the children being taken away. The Social Worker asked her if she was prepared to take a breath test in order to confirm that she was not intoxicated and she agreed".

[12] Julie Patterson then arranged for the despatch of a second police vehicle containing a second set of uniformed Police Constables and a breathalyser kit. This kit was delivered to Constable Downes who then advised the Applicant that "she did not have to submit to this test and that I had no power to demand that she do so. I also advised her that the reading could support her claim that she had not been drinking. The Applicant consented to the test" (see paras.7-8 affidavit of Constable Downes).

[13] The result of the breathalyser test established that the Applicant was not legally fit to drive a motor vehicle. Apparently fortified by this information the social workers proceeded to forcibly remove the children of the family. This process was executed despite the clear distress, protests and physical resistance of mother and children alike (see para.9 of affidavit of Constable Downes). The two social workers physically removed the children. The uniformed police were in attendance at the scene but did not actively participate in the removals. The children were taken away and placed in the care of the Applicant's family.

[14] The Applicant has challenged the removal of her children in the circumstances described on the basis that it was unlawful.

The Issue

[15] The issue in this case is whether or not the removal of the Applicant's children in the circumstances described above was lawful.

The Law

[16] The law provides a range of powers whereby children at risk can be removed from potentially dangerous situations. The principle powers for this are contained in Arts63 and 65 of the Children's (NI) Order 1995 ("the Order"). Art63 provides:

> **"Orders for emergency protection of children**
>
> **63.—(1) Where any person ("the Applicant") applies to the court for an order to be made under this Article with respect to a child, the court may make the order if, but only if, it is satisfied that—**
>
> **(a) there is reasonable cause to believe that the child is likely to suffer significant harm if—**

> **(i) he is not removed to accommodation provided by or on behalf of the Applicant; ..."**

Orders issued under Art63 are known as "Emergency Protection Orders".

[17] Another power is available to the authorities to secure the protection of children at risk. This is contained in Art65 of the Order which provides:

> **"Removal and accommodation of children by *police* in cases of emergency**
>
> **65.—(1) Where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may—**
>
> **(a) remove the child to suitable accommodation and keep him there; ..."**

Where this power is used the child "is referred to as having been taken into police protection" [Art65(2)].

Had either of the legal powers referred to above been used at the time of the removal of the Applicant's children?

[18] Again, there is a conflict in the evidence of the parties about the legal basis (if any) of the removal of these children.

[19] Having carefully read all the affidavits and all the supporting exhibits of all the parties I believe the facts to be as follows.

The Emergency Protection Order

[20] Noelle Sloan, in her affidavit of 18 June 2009, states in para9 in connection with the breathalyser test:

> **"The reason the test was sought was to confirm evidentially that the Applicant was intoxicated as *the Trust were intending to seek an Emergency Protection Order in relation to the children".***

This suggests that at the relevant time this social worker at least was fully aware that no Emergency Protection Order was in force.

[21] The Senior Social Worker, Julie Patterson, unfortunately has not provided any affidavit evidence concerning her state of belief about the existence of an Emergency Protection Order at the material time. However,

Constable Downes is very clear about this matter. At para.4 of his affidavit of 6 November 2009 he states that Julie Patterson:

> **"... advised me that there was an Emergency Protection Order of some kind in place and that the mother was prohibited from drinking alcohol. She led me to believe that the terms of the Order had been breached and that consequently there was a basis for social services to act to remove the children".**

[22] Again at para.6 Constable Downes states:

> **"Julie Patterson advised me that the Applicant was in breach of a Child Protection Order as a result of having consumed alcohol. I recorded this exchange in my notebook and I exhibit the relevant entry at pp7-8 of Exhibit JPD1".**

This exhibit does indeed confirm the Constable's statement. It records:

> **"Directed by social worker, Julie Patterson, to assist her with removal of three children from the custody of parent[JR]…social worker stated [JR] is in *breach* of a Child Protection Order having consumed alcohol."**

[23] This account of the purported legal basis of the removal of the children is further supported by the most contemporaneous entry in the police incident log. This entry timed at 18:56 on 26 February 2009 states:

> **"Julie Patterson, Social Worker, has removed three children from the house ... Mother is in breach of a Child Protection Order as she has been drinking."**

[24] From this evidence I conclude that at the time of the removal of the children Julie Patterson asserted to the police that an Emergency Protection Order was in place. Moreover, she asserted that it was a term of this Order that the Applicant should not drink alcohol. She instigated the breathalysing of the Applicant to "confirm evidentially" that this alleged term had been broken. Upon receipt of the breathalyser reading she then embarked upon the removal of the children again on the alleged authority of an Emergency Protection Order.

[25] It later emerged that no Emergency Protection Order existed in this case at the time of the removal of these children. Not only was there no Order with a term prohibiting the Applicant from drinking there was no Child Protection Order at all with any terms of any kind relating to this Applicant and her children at the material time.

Were the Children Removed into Police Protection under Art65?

[26] It is clear from the evidence considered above that at the material time Constable Downes never considered whether the children needed to be removed into police protection by him. It is quite clear that at all relevant times the police relied upon the assertion of the social worker that an Emergency Protection Order was already in place. In these circumstances the police did not consider using Art65 of the Order at the material time. Indeed, it would have been irrational for them to do so if, as they believed, an Order under Art63 was already in place.

[27] The question of police protection only arises in this case because of events which unfolded after the children were removed from the Applicant. These events are described by Constable Downes. He explains in his affidavit that his shift for 26 February 2009 ended at 23:00 hrs at which point he returned to his police station. While debriefing his Sergeant about the incident a telephone call was put through to Constable Downes. The caller was Julie Patterson. Constable Downes reports:

> **"She ... enquired whether PSNI had issued the relevant Order. I was not sure what Order she was referring to and stated that I had been led to believe that there was an Order in place at the time of the removal.** ***Julie Patterson then stated that the police would have to issue the Protection Order because there was no order in place.***
>
> **I passed the telephone to Sergeant Montgomery who then spoke to the social worker. I was not party to all of the conversation but was aware** ***that it related to the apparent need for a Protection Order.*** **Sergeant Montgomery then contacted Inspector Sims and I was not party to that conversation.** ***I understand that an Art65 Order was issued that night. The police computer system records that it issued at 00:36 hrs on 27 February 2009".***

[28] This account is corroborated by the single five paragraph affidavit from Julie Patterson in this case. In para.2 she states:

> **"I have been asked to file an affidavit explaining the circumstances in which the Trust obtained the typed statement of Constable Downes and the PSNI Art65 document which were entered into evidence at the hearing of this case."**

[29] In para.3 she proceeds to explain:

> **"It is standard practice for social workers who take children into care on foot of a Police Protection Order ... to request the vouching paperwork from police once the children's needs have been seen to. ... Due to Police Protection Orders being sought in emergency situations the paperwork is seldom provided at the scene. I called the Lisburn police station at 11.00pm as ... the children were settled in their placements and all necessary work had been completed.** ***I wish to highlight the point that I was of the full understanding that a Police Protection Order had been sought and granted and was solely calling to arrange collection of the paperwork in order to ensure my role had been fulfilled. ..."***

[30] I have to say that I find this statement surprising to say the very least. It is clear from Constable Downes' account that the purpose of Julie Patterson's call to the police station at 11.00pm on the night of these events was to inform the police that they "would have to issue the protection order because there was no order in place". That this was Julie Patterson's purpose in calling the police on that evening is confirmed by Sergeant Montgomery's account of his part of the conversation with her. In his affidavit of 21 December 2009 at para.5 he states:

> **"She stated that it was imperative that police produce "the paperwork" to cover the removal of the children."**

[31] Sergeant Montgomery then recounts how he contacted Inspector Sims and explained the situation to him. They discussed the possibility of issuing a Police Protection Order retrospectively and this was duly done by Inspector Sims on the morning of 27 February 2009. There is an interesting record of this in the Police Incident Log. The log records that this incident was closed at 19:11 hrs on 26 February 2009. It then records that the incident was reopened on 27 February 2009 at 00:26 hrs at which point it states:

> **"Three children were removed from this location by social services using Art65 Children (NI) Order 1995"**.

Later at 00:36 hrs it states:

> **"Art65 authorised by Inspector Sim".**

Can children be taken into police protection "retrospectively"?

[32] Art65 sets out the procedure whereby a Constable can remove a child into protective custody. It is fundamental to the use of Art65 that it should be initiated by the police in circumstances where they have "reasonable cause to believe that a child would otherwise be likely to suffer significant harm". At the time when the removal is being contemplated the police must believe that the child would be likely to suffer significant harm if it were not taken into protective police custody. The police must also have reasonable cause to believe this at the material time. If these conditions are not satisfied Art65 does not operate to confer any legal authority to take a child away.

[33] In the circumstances of the present case the police believed the children were being taken into social services care under an Emergency Protection Order which was already in force. They therefore did not believe that the children of the family would be likely to suffer significant harm unless the police took them into police protection. At the material time the police believed these children were being taken to safe accommodation arranged by social services. They did not believe the children were at risk of any significant harm. The conditions for use of Art65(1) were not satisfied at the time of the removal of these children.

If the conditions for use of Art65(1) are not satisfied at the removal of children can a subsequent authorisation by a designated officer bring that removal within the compass of Art65?

[34] The duty of the designated officer is set out in Art65(7) of the Order. It states:

> **"(7) On completing any inquiry under paragraph (3), the designated officer shall release the child from police protection unless he considers that there is still reasonable cause for believing that the child would be likely to suffer significant harm if released."**

[35] Applying this to the present case the designated officer should have realised first, that these children were not taken into protective custody by the police in the first instances and secondly, that the children were at 00:36 hrs on 27 February 2009 in safe accommodation arranged by social services and that there was no question of police protection "still" being necessary. The designated officer ought therefore to have refused the request for the issue of an Order under Art65. The "retrospective" Order which he purported to make had no legal basis because at the time when it was made there were no grounds for believing that these children were at risk of harm.

Conclusion

[36] For all the above reasons I conclude that there was never any lawful Order in place authorising the removal of these children from the Applicant. That removal was therefore unlawful. When the parties have had the opportunity to consider the judgment of the court I will hear the parties as to the appropriate relief in light of these findings.