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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

SB's Application [2012] NIQB 71

IN THE MATTER OF AN APPLICATION BY SB (A MINOR BY VB HER  
FATHER AND NEXT FRIEND) FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE WESTERN HEALTH & SOCIAL  
CARE TRUST

**TREACY J**

**Introduction**

[1] This case is brought by a minor, SB, acting through her father and next friend. SB is a disabled girl who suffers from complex medical needs and severe learning difficulties and who requires care and attention on a 24-hour basis.

[2] This young person's disabilities are such that she is entitled to receive a package of care from the Health and Social Care Trust for her area. In September 2010 the Family Support Panel ("FSP"/"Panel") of the respondent Trust had approved a care package of 25 hours and 45 minutes of support by way of direct payments. On 15 December 2010 the FSP authorized a revised care package in which the hours were reduced from 25 hours and 45 minutes per week to 20 hours and 30 minutes per week. This was a reduction of 5.25 hours and it resulted in a loss of more than 20% of the carer's financial entitlements. It is this decision to reduce the care package which gives rise to the present challenge.

**Factual Background**

[3] The young person at the centre of this case was 16 years old at the time the impugned decision was issued. Due to her various disabilities and medical

difficulties she is doubly incontinent and wears an incontinence pad at all times. In addition, she has an irregular menstrual cycle. She has difficulty feeding herself due to motor co-ordination issues and she suffers from oro-motor dysfunction which, according to her consultant paediatrician, causes her to drool "quite considerably". She is predominantly wheelchair bound though she can walk with two people supporting her. She requires to be hoisted in and out of beds, showers etc. She has no functional verbal communication. She has learning difficulties including a short attention span and she displays behavioural difficulties including stressed and angry reactions to disruption of her established routines. She has a further range of complex medical difficulties, most of which are not relevant to the present case, but they do include "mild eczema" which is relevant to the issue whether or not a second daily shower is medically indicated for this Applicant.

[4] This young lady lives at home with her mother and older sister. She attends a special school daily and has some access to respite care facilities and to summer scheme facilities during the main school holiday. Her parents are separated and her father lives elsewhere but maintains contact with the family. The family originally came from outside this jurisdiction and they have little or no family support available to them in the part of Northern Ireland where they now live. The mother is the main carer and she is supported in this role by the direct payments she receives from the respondent Trust.

### **Legal Context**

[5] It is agreed by both parties that the respondent's legal duties toward the applicant are contained in Arts 17 and 18 of The Children (Northern Ireland) Order 1995 ("the 1995 Order"). So far as relevant these provide as follows:-

Art 17 is entitled '*Interpretation*' and it states:

"17. For the purposes of this Part a child shall be taken to be in need if –

- (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by an authority under this Part;
- (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services;  
or
- (c) he is disabled, ...."

Art 18 is entitled: '*General duty of authority to provide personal social services for children in need, their families and others*'. It provides:

“18.—(1) It shall be the general duty of every authority (in addition to the other duties imposed by this Part) —

(a) to safeguard and promote the welfare of children within its area who are in need; .....

by providing a range and level of personal social services appropriate to those children’s needs.”

[6] While both parties agree that Arts 17 and 18 are the legal provisions relevant to the applicant’s situation, there is disagreement about how these provisions were interpreted and applied in this applicant’s case and this is one of several legal issues in the case.

### **The Legal Issues**

[7] The applicant makes a range of complaints about the care package offered by the respondent Trust. The applicant’s case proceeds on the basis that the decision maker in this case is the FSP, and she sets out a range of complaints about how that panel dealt with her case. Most of these complaints relate to the procedure by which the decision maker reached its decision about what the package should be, but there are also complaints about the content of the decision reached. The complaints are contained in an Order 53 statement and an Amended Order 53 Statement issued a little later. The contents of these documents may be summarized as follows:

- (i) That the decision of the panel was in breach of the applicant’s legitimate expectation that her parents would be kept fully aware of and involved in any decision made to adjust her care package because, *inter alia*:
  - Her parents did not have access to all of the finalised documents placed before the panel prior to its deliberations;
  - The applicant’s parents’ views were not fully and properly represented in the draft family assessment plan dated 9 November 2010 which was drafted by Trust personnel and included some typed comments from the applicant’s mother;
  - A letter dated 17 November 2010 from the applicant’s mother expressing her views about the value to the applicant about an evening shower (the “second shower issue”) was not put before the panel.
- (ii) The applicant also complains that the decision was taken in breach of the rules of natural justice in that an oral report or communication from Dr Mackin was received by the panel and formed part of its assessment in circumstances where Dr Mackin had not yet seen the applicant for a review appointment.

- (iii) That the impugned decision was procedurally improper and/or otherwise in breach of the rules of natural justice because the panel failed to give sufficient reasons for its decision and, in particular, failed to explain all or part of the reduction in the hours contained in the care package.
- (iv) That the impugned decision was procedurally improper and/or otherwise in breach of the rules of natural justice because the applicant's parents had insufficient opportunity to express their views about the proposed care package, either in writing or by being offered the opportunity to appear before the panel or to be represented before the panel.
- (v) The applicant also alleges that the respondent Trust misdirected itself in law when considering the applicable legal duty which governed its treatment of her. She alleges that in reaching the impugned decision the Trust erroneously considered that its responsibility to the applicant was governed by Art 17 of the Children (Northern Ireland) Order 1995 whereas the applicant asserts that the respondent's duty to her is contained in Art 18 of the said Order.
- (vi) Finally, the applicant asserts that the decision of the panel is in breach of her Art 8 ECHR rights and of her rights under Art 7 and Art 19(b) of the UN Convention on the Rights of Persons with Disabilities.

[8] The skeleton argument on behalf of the respondent Trust asserts that the applicant's case is entirely misconceived in that it seeks to challenge a decision by the FSP when that panel was not responsible for the changes in the applicant's care package. The respondent asserts:

“... there has been a fundamental misappreciation by the applicant with respect to the role and function of the family support panel ...

The applicant has contended that the panel reduced the level of care. This, by necessity, suggests that the panel has the function of setting the level of care. This is NOT the function of the panel ... The level of need and the care package proposed to meet that need is recommended to the panel by a multi-disciplinary team from across the Trust. The panel is an internal Trust body whose function is to then allocate the appropriate resources to meet that need.”

[9] The respondent continues:

“... The panel did NOT reduce the Care package – they approved a multi-disciplinary recommendation which followed a comprehensive assessment. The reduction was within the assessment of need and it is not the function of the panel to assess the level of need – merely to allocate resources to meet that need if the assessment has been comprehensive.

The purpose of the panel is to standardise resource allocation not to enter into disputes on issues of disagreement between parties as to the level of need.  
...”

## Discussion

[10] I consider that two of the issues raised have a fundamental and preliminary nature which requires them to be addressed first, and separately from any other issues raised. These two issues are:

- (i) Did the Trust misdirect itself in law in relation to the duty it owes to the applicant?
- (ii) Did the applicant misconstrue the role of the FSP by treating it as the decision maker when that is not its true role?

I will consider these two issues first.

## Alleged Misdirection in Law

[11] The applicant submits that when considering her needs the respondent erroneously considered that its duty to her was governed by Art 17 of the 1995 Order which, they say “amounted to ensuring that the applicant maintained a reasonable standard of health and development”. This formulation of the duty is derived from Art 17(a). The applicant argues that Art 17 is a gateway provision designed only to identify those children who qualify as “children in need”. Once children are through the Art 17 gateway the respondent’s duty to them is the broader duty contained in Art 18(1)(a) – ie a duty to “safeguard and **promote**” their welfare [emphasis added]. The applicant asserts that “promotion” of a child’s welfare can involve “recommending services which may not be strictly necessary or required, but which had the effect of improving the child’s welfare or quality of life more generally”.

[12] In its skeleton argument the respondent denies that it treated Art 17 as the governing provision and accepts that “the Trust is governed by Art 18 in terms of the legal duty it owes to the applicant”. The argument then continues:

“However, when one reads Art 17 it effectively ALSO places the Trust under a specific duty under Art 17 towards [the applicant] ...” (emphasis added).

This is stated to be a duty to ensure that she receives a package which achieves or maintains “a reasonable standard of health and development”. The Trust’s view is that the Art 17 and Art 18 duties “sit very comfortably together and discharging the Art 17 requirement is merely one means by which the broader Art 18 duty is met”.

Which of these two approaches is correct?

### **Discussion of the Alleged Misdirection in Law**

[13] Art 17 is an interpretation provision designed to establish the meaning of the phrase “child in need”. It describes three sets of conditions which might apply to a child – Conditions A, B or C and states that a child “shall be taken to be in need” if any of these conditions apply to him/her. The sole purpose of Art 17, therefore, is to identify the pool of children to whom the remaining relevant provisions of the 1995 Order shall apply. Art 18 then sets out what is described in its heading as “the general duty of [an] authority to provide personal social services for children in need”. The statutory scheme is that Art 18 sets out the legal duty owed to the pool of children identified through the application of Art 17.

[14] The respondent’s view, expressed in its skeleton argument, that Art17 “effectively also places the Trust under a specific duty under Art 17” towards any child in need is not correct and is not a helpful approach to the interpretation of this legislation. To avoid the risk of contamination of the clear terms of Art 18 with extraneous irrelevant considerations, it is better for authorities applying this scheme to regard Art 17 as the gateway provision and Art 18 as the general duty that applies to all children identified by the application of Art 17. I consider that this approach is what the legislation was designed to deliver.

[15] The effect of this approach in the present case is to establish that the applicant fulfils the requirements of Art 17 because she meets the conditions set out in Art 17(c) – ie she is a disabled child. For this reason she is identified as a child in need and she becomes eligible to receive personal social services from the respondent authority under its Art 18 duty.

### **The Role of the Family Support Panel.**

[16] The role of the FSP is explained in the affidavit of Nuala Mangan, Head of Services in the respondent Trust who was also the chair of the panel who sat in the applicant’s case. At para 2 she states:

“The FSP is in place to ensure decisions across the Trust are broadly similar and appropriate and take into consideration the UNOCNI (“Understanding the

Needs of Children in Northern Ireland”) documentation and associated material. ...”

[17] In the fourth paragraph of Ms Mangan’s affidavit (which is numbered para 3) she states:

“Family Support Panels are governed by protocols set out in the Family Support Panel Booklet ...” .

[18] Ms Mangan exhibits a copy of the relevant protocol to her affidavit. This protocol was issued by the respondent Trust in October 2008. Page 4 is entitled “Terms of Reference” and para 5 of this page states:

“The role of the Family Support Panel ... is to ensure quality practice that promotes the best outcomes for children and families based on a clear assessment of need and also to identify unmet need”.

[19] P5 of the protocol is entitled “The Assessment Framework (UNOCNI) and the Role of Family Support Panel/Disabled Children”. So far as relevant it states:

“The assessment framework emphasises that the assessment is not an end in itself but a process which will lead to an improvement in the well being or outcomes for a child or young person. The outcome of an assessment should result in:

- An analysis of the needs of the child and the parenting capacity to respond appropriately to those needs within the family context;
- ...
- A realistic plan of action (including services to be provided) detailing who has responsibility for action, a timetable and a process for review.

Generally, all phases of the assessment process should be undertaken in multi-disciplinary, inter-agency ways in partnership with the child and key family members and with their agreement. This includes finalising the plan of action”.

## **Discussion**

[20] It is clear from the above that the internal system devised by the Trust uses the common device of having a preliminary investigative stage conducted by social workers and other Trust staff which results in a recommendation going forward to a decision-making body – the FSP. Ms Mangan emphasises in her affidavit that:

“Family support panels do not ‘rubber-stamp’ the proposed care packages placed before them by social workers. ... I consider that ... family support panels are robust bodies which provide a strong degree of independent overview of care package proposals placed before them by social workers.”

[21] This confirmation of the independence of the role of the FSP also shows that the process of assessment is not complete until such time as the FSP has reviewed the proposals put forward and has made a response to them. Until this point arrives there can be no outcomes of any kind for the child or young person concerned. This is because the assessment is not complete until the FSP issues its final decision about what the care plan should include. It is this input from the Panel which gives the final assessment its force and its effect. In short, it is the input of the Panel which operates to turn an assessment into a decision which has effects for the individuals involved.

[22] It follows that the FSP is part of the assessment process and, indeed, that it has reserved to it the final function of generating the decisions which facilitate the outcomes of the assessment process. It is, in short, a decision making body.

[23] The FSP is a decision making body within the context of the UNOCNI assessment framework and the broader context of the content of care packages for qualifying children. The question remains - does it only decide what resources to allocate to which proposed care packages, or is it also part of its function to decide what the content of an individual care package should be?

[24] The governing protocol is clear. It states:

“The role of the Family Support Panel ... is to ensure quality practice that promotes the best outcomes for children and families based on a clear assessment of need and also to identify unmet need”.

The FSP cannot perform either of these roles unless there is ‘a clear assessment of need’ in every case. In the current case there is a disputed assessment. There is also an assertion in the communications from the parents of the applicant that both the child and her carer have needs which the proposed care package does not address. In such cases the FSP cannot proceed to its decision and cannot perform the functions required of it without first deciding what the true level of need is and whether all the identified need would be met by the proposed package. In other words the FSP must of necessity, contrary to the respondent’s submission, settle the dispute between the personnel recommending the proposed care package and the family objecting to it. In failing to appreciate this aspect of its role the Respondent fell into reviewable error and the decision must, on that account, be quashed.



[25] Furthermore, it is trite law to say that bodies deciding disputes of this kind must do so fairly and in a manner which complies with the rules of natural justice. Did that happen in the present case?

[26] Reverting to Ms Mangan's affidavit, she describes in para 6 the procedures used in the applicant's case. She explains that nine panel members were present, all of whom had been circulated with certain papers in advance. She recites which papers had been circulated and notes that these included 'the comments and amendments' received from the Applicant's mother. She does not say that the mother's letter of 17<sup>th</sup> November which sets out her representations about her daughter's need for a second shower was included in the circulated documents. Later in the same paragraph she states: 'there was no evidence of a requirement for a second shower.' This suggests either that the mother's evidence on this issue was not presented to the Panel at all, or it was available to them and was not recognized as evidence relevant to a dispute which the Panel had to resolve. Paragraph 6 also describes how the Panel did receive verbal reports of discussions with Dr Mackin in relation to the issue of the second shower. Other papers in the case confirm that at the time of these discussions the review appointment of the Applicant with Dr Mackin had not yet taken place. Moreover, the content of the verbal reports described in Ms Mangan's affidavit is significantly different from the content of the written report issued by Dr Mackin after his review appointment was complete. This gives rise to concerns about the quality of the evidence relied upon by this panel, as well as their choice of method of accessing the evidence in question.

### **Conclusions**

[27] By reason of the procedural flaws summarized in paragraphs 24 and 26 above the application for judicial review must be allowed. I direct that this dispute should be referred back to the FSP which should decide the case with reference to the guidance given in the present judgment.