Neutral Citation Number: [2021] EWHC 1981 (Admin)

Case No: CO/2390/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

13th July 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

THE QUEEN	**Claimant**
(on the application of U)	
- and -	
HACKNEY LONDON BOROUGH COUNCIL	**Defendant**

- -
- -

The **Claimant** in person
Catherine Rowlands (instructed by Hackney Legal Services) for the **Defendant**

Hearing date: 13.7.21

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

Introduction

1. This is an application for permission for judicial review. By order dated 22 April 2021 I directed an oral hearing, indicating the option of a remote hearing, so that permission-stage issues could be considered. That included – as I emphasised in particular – the question of the suitability of judicial review in the light of the suggestion that the local authority complaints mechanism was the appropriate recourse. I also indicated that if that suggestion proved to be right, the question would then arise as to whether to stay these proceedings.

Anonymity

2. In the reasons for my order of 22 April 2021 I invited the Claimant and her putative 'McKenzie Friend' to consider whether anonymity was being sought. I explained that they could ask for anonymity by writing a letter, to which the Defendant would then be able to respond. I raised this again with the parties this morning and we looked together at the observations that I had made. No request or application for anonymity has been made. The case was listed in the cause list with an initial instead of a name, on a precautionary basis, as I had indicated might be appropriate. I was satisfied that it was necessary for the Court to take a proactive and protective approach. The Claimant told me that she would "leave the question of anonymity to the Court". Ms Rowlands for the Defendant told me that it "did not resist" an order for anonymity. I made an anonymity order at the start of this hearing. I am satisfied, pursuant to CPR 39.2(4), that it is necessary, in order to protect the legitimate interests of the three young children in this case, to order that their identity and that of the Claimant shall not be disclosed, nor any information such as would lead to their being identified. I have done this to protect the three children who are at the heart of this case .

The Claim

3. The claim for judicial review was filed on 20 November 2020. It challenges a decision taken on 5 November 2020 to invoke a Child Protection Plan and make an entry on the Child Neglect Register. Prominent among the grounds for judicial review is the Claimant's insistence that there is in this case no neglect (as it was expressed in a letter dated 3 June 2020 to which the Claimant has specifically taken me during today's hearing : "there has never been an abuse or neglect about my children"). Also prominent among the grounds for judicial review is the Claimant's insistence that concerns raised about neglect are groundless. In describing the claim for judicial review, in the documents which she has prepared for today, the Claimant also characterises the challenge as being a challenge to the Defendant's unlawful, unreasonable or unfair refusal to deal with complaints previously raised by her. That way of putting the case is directly relevant to the alternative remedy issue. Three points in the judicial review grounds, in particular, have a public law shape. First, the Claimant says that the decision of 5 November 2020 breached a substantive legitimate expectation which arose from the Defendant's clear representations in September 2020 and October 2020 that matters were "closed". Secondly, the Claimant says that the Defendant breached its statutory duty pursuant to section 47 of the Children Act 1989 to investigate any concerns. Thirdly, the Claimant says that a procedural

legitimate expectation and statutory guidance were breached in that the GP and Health Visitor ought to have been included at the ICPC (Initial Child Protection Conference) held on 5 November 2020 at which the impugned decisions were reached. In her submissions to me today the Claimant has made clear that she adopts everything that was previously been put forward in this case and it is therefore important in dealing with the permission stage that I identify the substance of the challenge that has been put forward.

The letter of 2.11.20

4. The Claimant has submitted to me in the hearing today that a letter dated 2 November 2020, written by the individual who has become her McKenzie Friend, constituted a complaint to the Defendant for the purposes of its complaints mechanism. She invited me to reread that letter at today's hearing and I have done so. What that letter presents as being is a pre-action letter before claim. It calls upon the Defendant to write a "case closure letter" and "bring the matter to a close". It says that "time is of the essence" and it says that, in the absence of a case closure letter by noon the following day, the Claimant would be seeking immediate legal advice. I cannot agree that that letter is one which the Defendant ought to have recognised was a complaint inviting it to invoke its complaints procedures. I can understand why the Claimant wishes to emphasise, as she has, that the Defendant could have undertaken consideration under its complaints mechanism at various previous stages. What I cannot accept is that this was a letter asking it to do so. The contents of the letter do not support that submission.

The previous hearing

5. On 18 June 2021 Ellenbogen J gave permission for a McKenzie friend to assist at the hearing which I had directed. A remote hearing then took place before Ellenbogen J on 24 June 2021 – by a mode chosen to accommodate the Claimant – but it failed because of technical difficulties experienced by her. That led to a direction for this hearing, to take place in person at the RCJ, as it has before me.

The alternative remedy point

6. The Defendant's position, adopted in relation to the Claimant's criticisms and grounds regarding the impugned decision of 5 November 2020, now puts front and centre the point that judicial review is an unsuitable remedy in the context of this case. The Defendant emphasises the vehement denial of any neglect by the Claimant, and the claims made by her about concerns being groundless. The Defendant also submits that criticisms relating to the way in which the decision of 5 November 2020 was arrived at necessarily, in this case, engage issues which make judicial review inappropriate and the complaints mechanism the suitable route. The Court has a witness statement from the Defendant's Service Manager (Quality Assurance and Improvement Team) in the Defendant's children and families service. The Claimant, in her submissions during today's hearing, invited my attention specifically to that statement and to a key paragraph within it relating to 'stage I' of the complaints mechanism. The witness statement explains in detail the statutory complaints mechanism. It exhibits the April 2021 version of a document entitled "Complaints Guidance and Information". The Defendant's skeleton argument has also brought to my attention section 26 of the 1989 Act (statutory complaints mechanisms) and R v Kingston upon Thames RLBC ,

ex p T [1994] 1 FLR 798 (a case which discusses complaints mechanisms as a suitable alternative remedy to judicial review). As I have already explained, I had flagged up the question of whether the complaints mechanism was a suitable and appropriate alternative remedy in the reasons for my Order of 22 April 2021. The Claimant's skeleton argument for this hearing listed the occasions on which it is said by her that complaints were raised prior to 5 November 2020 but – she says – ignored by the Defendant. The list was repeated in her oral submissions today, in the very helpful speaking note that she had prepared and handed up and then took the Court through. She invites this Court to grant permission for judicial review. (She has also cited an authority called American Cyanamid which is a case about interim remedies: in the light of that point I have considered the question of interim remedies, something which had not previously been sought in relation to today's hearing; I am quite satisfied that there is no basis for making an order for any interim relief.) The central issue is whether permission for judicial review is appropriate so that the court process can now take place, or whether alternatively judicial review is inappropriate because there is the complaints mechanism which should now be invoked.

Oral evidence and cross-examination

7. In inviting the Court to grant permission for judicial review, and so to step in and address the substance of the arguments and counterarguments that have been raised, the Claimant has also raised the prospect of hearing live evidence from witnesses, with cross examination. She says, if not satisfied to resolve issues on the basis of the written materials, or if the Court has any concerns about the allegations of child neglect, then the Court should direct that there be oral evidence and cross-examination in these judicial review proceedings. Authorities illustrating the availability in principle of cross-examination in judicial review are cited in the skeleton.

Alternative remedy: discussion

8. I come now to my conclusion on the alternative remedy issue and to explain why I have reached it. Having given the parties this further opportunity to develop their positions in relation to the suggested alternative remedy of the complaints mechanism, I am entirely satisfied that that mechanism is the appropriate way forward for the concerns which the Claimant wishes to raise, including those about the way in which the impugned decision of 5 November 2020 came to be reached. That conclusion is strengthened by the emphasis that the Claimant puts on what she says were earlier complaints, and documents that she says should have been treated as being complaints, and the points that she has made arguing that the Defendant has failed to consider complaints under its complaints mechanism. The answer to all of these points is that it has been made very clear that the complaints mechanism is available, that the Claimant is able to use it if she wishes to do so in order to raise the concerns that she wishes to raise, and that if she takes that course those matters will be considered under that mechanism. The 'rights and wrongs' as to earlier correspondence – as to what should or should not have been seen as a complaint – is water under the bridge in this case. The important point is about what should happen next. There are two alternatives. One is for this Court to entertain a judicial review to examine the contentions made on both sides and to grapple with the facts and circumstances in order to decide the appropriateness in law of what the Defendant has done. The other alternative is for the matters to be properly looked at through the

complaints mechanism if the Claimant now wishes to invoke it: then everybody will know where they stand and the appropriate steps can be undertaken. Insofar as anything has arguably gone wrong in relation to any failure to consider a communication as a complaint under the complaints mechanism, that would now be being put right by the complaints mechanism considering the matters that the Claimant wishes to put forward. The complaints mechanism – properly invoked by the Claimant and properly implemented by the Defendant – would allow the circumstances to be considered, the facts identified, and the rights and wrongs on each side evaluated. It would include consideration of the adequacy of steps, the clarity of communications, the basis on which things were done, whether guidance was applied, whether promises were made, if so whether they were kept, and if not whether there was justification. The complaints mechanism can address all issues as to substance and proper procedure. It can consider any relevant underlying question touching on the merits of the positions taken. It would not, in my judgment, be appropriate to try to do justice to the issues raised in the materials before the Court, on the papers. Nor is this a suitable case or context for fact-finding and cross-examination on judicial review, as invited by the Claimant.

9. The Claimant has made a point this morning about the circumstances in which she was provided with a "link" to use for the pursuit of any complaint. That was something that happened in an email on 14 September 2020. She was told in that email that she was being provided with a link "to raise a complaint". She has said to me this morning that providing her with a link was not the same as providing her with "details of the complaints mechanism". She has also made the point that it "should not be necessary" to make a complaint by using a link; it should be enough simply to write a letter and then the Defendant should treat it as a complaint. I put to her the reply that she wrote when she was sent that link. She pointed out that that reply was overtaken by events because it preceded the time at which she says she was led to understand that the matter was "closed". But I have to focus on the points that are being made about the complaints mechanism. The fact is that the Claimant was clearly sent the link to use "to raise a complaint". As I have emphasised, that course remains open to her. She did not ask for "details" of the complaints mechanism, and I am sure that the details of the mechanism for complaints is not only publicly available but could readily have been provided had it been asked for. She did not say she had a problem using the link to raise a complaint. Nor did she say that he wanted to raise a complaint under the mechanism. What she said was: "I do not want to use the complaint link you sen[t] to me. I would rather speak [to] or email higher authorities (people who will hear me and act quickly on my behalf or investigate the real c[ause] of these unending problems)". She asked for the email address of the head of social services and the email address of the Hackney Mayor. I cannot accept, on the face of it, that the Claimant was unable to pursue a complaint through the mechanism if she had wished to do so. Rather, the Defendant has been able to identify that the Claimant was given the relevant link. I also have in mind that in her reply to the summary grounds of resistance, the Claimant set out detailed reasons why she said the complaints mechanism was not suitable. She has repeated today some of the points she there made. The speaking note that she used for her submissions at today's hearing, and her oral submissions, included these points: that she says the Defendant is "far from being interested in addressing or resolving my complaints", and that there had been no "indication of willingness to resolve my complaints".

10. As I have already said I have had considerable assistance for the purposes of today's hearing from both parties. In the reasons section of my order of 22 April 2021 I explained: that "precious little" had been said by the Defendant at that stage to the Court about the complaints mechanism; that no documents in support had been provided; and that the Court would have been assisted had there been a clear response setting out why the complaints mechanism was the appropriate way forward. But the Court now has that information. The Defendant's skeleton argument confirms that if the Claimant instigates the complaints procedure those complaints "will be fully investigated in line with the procedure".

The statutory context and the nature of the Court's role

11. The context in which the grounds for judicial review arise is one engaging the statutory duty of section 47 investigation. It is one engaging the various courses open to a local authority (including an ICPC) which are set out by this Court in DFX [2021] EWHC 1382 (QB) at paragraph 33. The judicial review Court has a limited, supervisory jurisdiction. As I said in my reasons on 22 April 2021: "There is obviously a long history to this case and this Court will not 'second-guess' the Defendant as the public authority with primary responsibility for dealing with the merits of important child welfare issues".

Illustrations of the points raised

12. I have described the nature of the claim, and the remedies sought. I can illustrate the sorts of points that are raised by the parties. The Claimant says that she was clearly told that the matter would be "closed", something which is reflected in an email which describes the confirmation of closure as having been delayed only by reason of computer problems. The Defendant, in its summary grounds – a document placed before the Court with a statement of truth – has characterised those discussions as simply having concerned "potential" closure. The Defendant says that even if a clear representation had been given, there were changed circumstances and new concerns – relating in particular to a change of a child's school and what is said to have been a failure of engagement by the Claimant – which justified, it says, the referral to an ICPC which referral was made on 14 October 2020. The Claimant says that the documents show that the GP and health visitor were excluded from that ICPC on 5 November 2020, while they should have been invited had the proper process been followed. The Defendant does not accept that it was necessary or appropriate to ensure that they were present. Then there is the question of adequacy of investigation: the Claimant alleges that the Defendant has been in breach of, but the Defendant replies that it has been acting in the context of the discharge of, the section 47 duty to investigate.

The Defendant's past handling of this case

13. Insofar as the Claimant wants to pursue complaints about the way in which this case has been handled in the past, including in relation to the ICPC and the decisions of 5 November 2020, I am satisfied that the proper recourse is the complaints mechanism which has been – and has again been – drawn to her attention. There is no basis for concluding, still less concluding prospectively, that that mechanism cannot provide an open-minded evaluation, by an appropriate enquiring mind, in order to satisfy relevant legal standards. In that context and in those circumstances, I cannot accept the

Claimant's submission that it would be "unjust" for this Court to fail to deal with this case by granting permission for judicial review and holding a substantive hearing into the detailed factual issues, relating to substance and process, and as to what has gone on in this case.

The present and future position regarding the children

14. So far as concerns the current position and moving forward, I emphasise this, as I did in my reasons in my Order of 22 April 2021. Even if there has been an impasse, that is no reason for placing on hold the need to find a practical and cooperative way forward. Everybody in this case – the Claimant and those acting for and with the Defendant – agrees that there are three young children whose needs and welfare are important. It is the position of the Claimant on the one hand, and of the Defendant on the other hand, that they are each dealing responsibly with securing those needs and that welfare. They each recognise the position of the other. The Claimant is the children's mother. The Defendant is the local authority charged by Parliament with important responsibilities. The need for them to find a way to work together is obvious. As I explained in my previous reasons – and as I repeat now – the judicial review Court cannot act as mediator and intermediary if relationships and trust have broken down. If they have broken down, those relationships need to be repaired. The interests of the three children require that. So, what needs to happen in this case is that the complaints about the past need to be ventilated – if the Claimant wishes to pursue them – through the complaints mechanism. But what also needs to happen in this case – regarding the present and the future – is constructive and cooperative engagement to find a practical and cooperative way forward, as I said nearly three months ago. These observations are intended to help both the Claimant and the Defendant. I add this. Neither party has raised any question regarding any proceedings or mechanisms in the family courts, as might be or become suitable in this case, and I have not needed to get into that question.

Conclusion

15. On the basis that the complaints mechanism constitutes the appropriate forum for the resolution of issues – including factual issues – as to the way this case has been handled by the Defendant in the past, permission for judicial review is refused.

Stay

16. In the three lines in the summary grounds of resistance that dealt with the question of the complaints mechanism as an alternative remedy, the Defendant said this: "it may be that these proceedings could be stayed whilst that avenue was explored". I was able to raise the point about the stay with the Claimant at the beginning of today's hearing and explain that such a stay would involve the judicial review proceedings being put on "pause". In the event, I am quite satisfied that that is not an appropriate course. There is no justification, in my judgment, for these judicial review proceedings to be stayed and to be left hanging, while the complaints mechanism is invoked if the Claimant decides to invoke it. The complaints mechanism is the appropriate way forward for her to raise the issues. Whatever happens in future, the position and the picture will be shaped by the decision that is arrived at, together with any reasons given, within that complaints procedure. These proceedings are not an appropriate vehicle to be parked with a view to their then continuing on their journey.

That journey is now at an end. Whether any public law issue arises out of any decision in future, which it is necessary and suitable for this Court to consider, can only be a question for the future. In saying that, I am not in any way encouraging any future judicial review. I am explaining why it is not appropriate to stay the present judicial review proceedings.

Outcome

17. It is those reasons and in those circumstances that I refuse permission for judicial review. I have decided to give detailed reasons for the action that I have taken today. I have done that because of the nature of the case and the materials that have been put forward by the Claimant. It is important that she understands that the matters and materials she has raised with the Court have been thoroughly read and considered. And I have wanted to explain to her in some detail, though it has taken some time, why I have reached the conclusions that I have. I will now deal with any consequential matter that arises out of my order refusing permission for judicial review.

Later:

Costs

18. In the summary grounds of resistance the Defendant stated that it wished to claim the costs of preparing the acknowledgement of service and summary grounds. I explained in my reasons on 22 April 2021 that I would not have made a costs order in favour of the Defendant in relation to the costs of the AOS and summary grounds. That was because the summary grounds had taken a raft of bad points – including that the judicial review proceedings were "out of time"; that they had been served on the wrong address; and that the grounds for judicial review were unclear – and that they had not given me the assistance that I needed to be able to determine permission and the alternative remedy point on the papers. It was in those circumstances that I directed an oral hearing. The Defendant has now renewed its position in relation to costs, in light of the refusal of permission for judicial review. It has invited the Court moreover to order the Claimant to pay the entirety of the Defendant's costs incurred to date in relation to these proceedings. Ms Rowlands has informed me that the cost being sought – were the Court to assess the full amount – would be just under £6,000. She has made clear that she would leave to the Court the question of whether any lesser ingredient of costs is appropriate, if the full amount is not; and the question of any summary assessment of the amount of recoverable costs.

19. I am not prepared to make any order as to costs. What, in my judgment, the Court needed in this case was a clear description of the complaints mechanism and why it was appropriate. It would also have been helpful to have reference to the relevant statutory provision and to any relevant authority. What would also have been helpful was for the Court's attention to be drawn to the exchange on 14 September 2020 and 29 September 2020 at which the complaints mechanism was raised by the Defendant and rejected by the Claimant. It would also have been better to be able to point to a pre-action letter of response stating that the complaints mechanism was the appropriate alternative remedy. All of these would have helped the permission Judge dealing with the case on the papers. The three lines – for that is what there were – within the summary grounds of resistance about the complaints mechanism were not

good enough to give the Court the help it needed. I know that to have been the case because I was the judge who was put in that position. That, as I explained in my reasons, was why I adjourned permission for an oral hearing. In terms of the subsequent steps, it was a matter for the Defendant local authority what it wanted to do in these proceedings. The Court had made clear that it needed a fuller explanation if it was going to refuse permission on the alternative remedy ground. That fuller explanation was received. But whether the authority wanted to go further, as it did, and deal with the substance and appear at hearings was entirely a matter for it. That is no criticism at all of the local authority. But in all the circumstances it would not, in my judgment, be just to order that the Defendant recover its costs. It was helpful to have skeleton argument and materials which dealt with all these matters as well as other arguments. I have considered, in the light of what I have said so far, whether there is justification for a costs order in the reduced original amount of the costs of preparing the AOS and summary grounds. The Court, so far as I am aware, has never been given a figure in relation to that but I put that to one side. It would not be just or appropriate, in my judgment, in the circumstances of this case, now to make an order for Mount Cook costs in relation to the acknowledgement of service and summary grounds of resistance. That is because, for the reasons which I explained back in April and have just explained again, the opportunity to provide the assistance – which could and would have led on the papers to a refusal of permission squarely on the alternative remedy ground – was an opportunity not taken in the preparation of the document the costs of producing which would be the subject of that costs order. In all those circumstances and for those reasons I refuse the Defendant's application for costs.

13.7.21