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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF THE HUMAN RIGHTS ACT 1998

BETWEEN:

SB (A MOTHER)

Applicant

and

A HEALTH AND SOCIAL SERVICES TRUST

Respondent

IN THE MATTER OF FLORENCE (A BABY)
CONTACT DURING COVID-19 RESTRICTIONS

Ms Laura Clarke BL (instructed by Sara Edge Solicitors) for the Applicant
Ms Louise Murphy BL (instructed by DLS Solicitors) for the Respondent

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KEEGAN J

Nothing must be published which would identify the child or her family. The name I have given to the child is not her real name.

Introduction

[1] This matter comes before the High Court on foot of an application brought under the Human Rights Act 1998 ("The Human Rights Act") in relation to contact between the mother and a new born baby. Florence was born in 20 June 2020. Her case has been before the Family Proceedings Court since she was two days old when she was made the subject of an emergency protection order. This was extended when she was four days old. On 3 July 2020 the child then became the subject of an interim care order and she remains subject to that order.

[2] There is a social services history in this case which I need not recite in great detail. Suffice to say that the mother clearly recognises her difficulties in caring for this child at the moment. She has four previous children who have been freed for adoption. She was diagnosed with emotionally unstable personality disorder which manifests itself as anxiety, depression and self-harm. There is an indication of the use of cannabis including during pregnancy and a recognition on behalf of the mother that her home conditions are not conducive to the care of a baby. Therefore, the fact of Florence being removed from her mother's care was not contentious in this case. This plan was made clear at pre-birth meetings at which the mother was engaged and there is no challenge made to the various orders which separated mother from baby at birth. In the originating application the Trust rightly raised the European and domestic jurisprudence in this area which points out that such an intervention represents a significant interference with family life and should only be contemplated in the strictest of circumstances.

[3] The live issue in this case was in relation to contact arrangements and the particular difficulties in arranging contact during the Covid-19 pandemic when restrictions were in place. There was agreement that the child would have 5 times a week direct contact with her mother upon her removal into care. However, the mother complained that skin to skin direct contact was prevented by the Trust. As such she asks I should grant relief pursuant to the Human Rights Act.

[4] I heard this case on an emergency basis on 8 July 2020 to deal with the issue of contact. At that stage there was direct contact but some conditions were being imposed in relation to PPE and skin to skin contact. I encouraged the parties to find a solution to this and ultimately issues were resolved by 21 July 2020. The point therefore became academic after that date however the mother maintains a claim for declaratory relief. She has abandoned her claims for damages and costs.

The Hearings

[5] Whilst this case was brought before the High Court, as I have said, the substantive proceeding were before the Family Proceedings Court. On two occasions, on 26 June 2020 and 3 July 2020 the issue of skin to skin contact was raised before the District Judge but the District Judge declined to make any order in relation to that issue. What broke the impasse in this case was that I suggested that clarification be sought from the Chief Medical Officer, Dr Michael McBride, in light of current public health restrictions as to whether or not the Trust's risk assessment compiled in alliance with the Department of Health could in the future provide for such contact. The context of this request was that in another case in June 2020 involving public care I had utilised the assistance of the Chief Medical Officer who advised in the case of a breast feeding mother that she should be able to have direct contact with her baby notwithstanding the public health restrictions. In this case there were slightly different considerations but nonetheless the Chief Medical Officer helpfully confirmed in correspondence of 9 July 2020 that "on consideration of the information provided I believe that while the risk assessment and measures

taken may have been proportionate at a point in time it is my professional view that the current requirements and recommendation for avoidance of direct skin contact are now unnecessary and disproportionate." Further, he said that he was "mindful of the potential negative impact on maternal bonding which is crucially important in these early neo-natal months and that the absence of skin to skin contact between mother and baby may have longer term adverse consequences for both. Finally, he said that in respect of individual risk assessments and wider application, "all risk assessments must be dynamic and subject to regular review in the current circumstances. It is essential that responsible HSC teams review these assessments on an ongoing basis and in so doing seek the relevant expert advice from professional nursing and medical colleagues and the relevant specialities." This correspondence was of great benefit to the court as was the Chief Medical Officer's advice in the previous case involving a young baby. As I have said it ultimately led to a resolution in this case and a revised risk assessment.

[6] It is important to state that in addition to the general health concerns associated with the pandemic there were two specific issues validly raised by the Trust in its planning. First there was a point raised that a foster carer had a heart condition and so there was a concern about vulnerability. Second, there was a concern about the mother's accommodation in a Simon Community hostel which involved her interaction with many other people. To deal with this latter issue the mother moved to more self-contained accommodation which meant that she was not circulating with other people. Therefore, the Trust plan for contact evolved. It started as a plan whereby the mother would not have any skin to skin contact. It evolved into a plan whereby she would have to wear full PPE which she did. It culminated in a plan whereby she could have skin to skin contact with appropriate safety precautions in place.

Legal Context

[7] All of this is in the context of the Trust's obligations to promote reasonable contact between a mother and baby contained in Article 53 of the Children (Northern Ireland) Order 1995. Also, once a care order or an interim care order is made a Trust assumes parental responsibility pursuant to Article 52(3). However, under Article 52(4):

> "(4) The authority shall not exercise the power in paragraph (3)(b) unless it is satisfied that it is necessary to do so in order to safeguard or promote the child's welfare."

[8] In addition to these provisions, Article 8 of the European Convention on Human Rights is engaged.

> "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 well-being 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] There are a number of aspects to Article 8 which have been highlighted in Ms Clarke's excellent submissions and which I summarise as follows. First, there are Article 8 ties between a mother and a new-born baby which must be protected against arbitrary interference. Second, there is a positive procedural obligation to involve parents in decision making and such decisions must be arrived at on the basis of relevant and sufficient reasons. Third, the essential essence of Article 8 is encapsulated in the decision of *Kroon & Others v The Netherlands* [1994] ECHR 18535/91 as follows:

> "31. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary cation by the public authorities. There may in addition be positive obligations inherent in effective respect for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definitions. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.
>
> According to the principles set out by the Court in its case law; where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child integration in his family."

[10] I am not convinced that there is much to apply from the Covid cases which are reported from England and Wales which Ms Clarke references including *D-S (Contact with Children in Care: Covid-19)* [2020] EWCA Civ 1031. This was a case where a mother's application was dismissed. Each case is fact sensitive. However, I can say that in Northern Ireland the Family Division has continued to try to find

solutions for families affected by Covid-19 both in public and private law within the guidelines for court hearings issued by the Lord Chief Justice.

[11] Under Section 6(1) of the Human Rights Act it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Under Section 7(1) a parent who claims that a local authority has acted or is proposing to act in a way that is made unlawful by Section 6 may either bring proceedings under the Human Rights Act or rely on the Convention right in any other legal proceedings. Under Section 8 of the Human Rights Act the court may grant such relief or remedy or make such order within its powers as it considers just and appropriate.

[12] The application of these principles is not in doubt, the question is now whether I should exercise my discretion to grant a declaration in the circumstances of this case when matters have resolved. In this regard I have received very helpful legal submissions from the mother's representative Ms Clarke BL in support of the application and from the Trust representative Ms Murphy BL who asks the Court to refuse relief.

Conclusion

[13] Having considered the competing submissions I am not persuaded to make a declaration for the following reasons:

(i) The Article 8 rights of the mother are particularly important as this case involves a new-born baby. The mother's representatives have rightly raised these points. However, Article 8 is a qualified right. In my view any interference has been justified in the context of the pandemic for the protection of health. The Trust is entitled to a margin of appreciation in compiling and applying risk assessments. Also, I consider the Trust acted proportionately in looking at its risk assessment and reviewing it on the basis of ongoing evidence including the Chief Medical Officer's advice. As such I cannot see that the Trust acted unlawfully. This Trust was faced with a very difficult situation and in my view took all matters into account to reach a mutually beneficial resolution.

(ii) There can be no valid challenge to the Trust's decision-making, pre or post birth. This clearly involved the mother and the Trust also took appropriate steps to ensure that the mother had supports given her vulnerability and the difficult and sensitive issues involved. Following the birth of Florence it was clear that there was no consent to voluntary accommodation given the issues with contact and again it is my view that the Trust acted entirely appropriately in relation to this. In this overall context it is not appropriate for me to make the declaration which is sought "quashing the decision made by the Trust before and after the subject child was born regarding the format in which direct contact took place between 23 June and 21 July."

(iii) I accept that it took some time to reach the end point here but I think that the delay has been adequately explained by the Trust. I repeat that this was a very difficult situation where legal representatives and social workers were acting under trying circumstances and in an effort to balance issues of public protection and health against individual parental rights.

(iv) Many families faced disruption which was simply unavoidable during this time. Some lost direct contact altogether for a period and had to resort to indirect contact. Happily in this case the interference was short lived and not so extreme.

(v) This issue was raised twice before the Family Proceedings Court. There was no appeal from those decisions. As such I have considerable sympathy with Ms Murphy's submission that the rights based argument made by the mother was capable of being argued before the substantive court, namely the Family Proceedings Court and that a remedy is available in Article 53 of the Children Order. As Ms Murphy rightly says, that course would have allowed representation on behalf of the child through the Guardian ad Litem. I agree with Ms Murphy that satellite litigation in the High Court on discrete issues of care planning by way of applications pursuant to Section 7 are not the best route and that cases such as this should be pursued before the lower courts where Article 8 can be raised in ongoing proceedings. I appreciate that times were difficult during the height of the Covid-19 crisis and that is why I decided to try and assist with this case. This is not to be taken as a precedent that I will entertain freestanding Section 7 applications in other cases.

(vi) This case was resolved and I cannot see any wider purpose in making a declaration as these cases are all fact specific. This judgment speaks for itself in relation to the obligation placed upon a Trust to promote reasonable contact. Overall, I consider that the Trust has done its best in this case and was committed to facilitating the best contact within the public health guidelines. In practice, Trusts should have flexibility going forward given the ongoing pandemic to make risk assessments depending on prevailing circumstances. Parents have recourse to court if issues arise. In these circumstances I do not believe that a declaration is appropriate.

[14] Accordingly, the application will be dismissed.