Neutral Citation No: [2020] NIFam 5 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **KEE11273** *Delivered:* **15/6/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION FOR INJUNCTIVE RELIEF PURSUANT TO THE HUMAN RIGHTS ACT 1998

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BETWEEN:

MS X

Applicant;

-v-

A HEALTH AND SOCIAL CARE TRUST, MS Y

Respondents.

IN THE MATTER OF MARK AND TIM (REMOVAL: INJUNCTION: HUMAN RIGHTS)

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KEEGAN J

Nothing must be published which would identify the children or the family. The names that I have given to the children in this judgment are not their real names.

Background

[1] This case relates to two children who I shall call Mark and Tim. They are half siblings. Mark is 12 coming 13 and Tim is 9. The children currently live with their maternal grandmother Ms Y.

[2] Mark's care arrangements were settled by the making of a full care order on 25 July 2018 in the Family Proceedings Court. Mark had been living with his grandmother full-time since 2 February 2018 and the order formalised the placement. In October 2018 the Trust brought an application to reduce Mark's contact with his mother Ms Y.

[3] Tim has been living with his grandmother for eight years. Proceedings in relation to him began in the Family Proceedings Court in October 2019 and ran alongside the contact proceedings in relation to Mark. These proceedings were initiated when the Trust issued an application for a supervision order in relation to Tim. This was listed for a threshold hearing on 27 February 2020 but adjourned to allow the newly appointed social worker to familiarise herself with the case. The matter was then adjourned due to the Covid 19 pandemic.

[4] The mother, Ms X accepts the placement with the grandmother and makes no case for rehabilitation to her care. That is unsurprising given the many issues she has which are not conducive to her looking after these two young children. The father has played no part in proceedings. The real issue of substance is whether the kinship placement can be maintained in the short term. That involves consideration of Article 8 of the European Convention on Human Rights (the Convention) and the powers of the Court under the Human Rights Act 1998.

The application

[5] On 20 May 2020 Ms X brought an application under the Human Rights Act 1998 to prevent an emergency removal of Mark from the grandmother's care. This was on the basis that Mark was subject to a full care order with an approved kinship care plan. The younger child Tim was subject to proceedings in the Family Proceedings Court which I will come to. It was accepted that any interim relief I might grant in relation to Mark would inevitably have a bearing on Tim. The Trust also agreed that no action would be taken pending a hearing as a safe care plan was put in place.

[6] The Trust decision to effectively change the care plan came about because of events on 17 May 2020 which caused the Trust to indicate on 18 May 2020 to both the mother and the grandmother that they were minded without any further notice or consultation to remove both children from the kinship placement. I have read the comprehensive social work reports in relation to this incident and the police report. I reproduce only the highlights from these papers as follows.

[7] First and foremost I glean that there was a physical altercation at the home of the grandmother on 17 May 2020 between Ms X and her sister. It is alleged that the call to police in relation to this was made from the grandmother's phone although the grandmother now denies making any phone call. It appears quite clear that the mother was removed from the home by the PSNI but declared her intention to simply return back to the house. She was intoxicated. The mother was cautioned and taken home by police but later returned to the grandmother's home where she had been staying overnight.

[8] This concerning state of affairs led the Trust to undertake some investigations in relation to the home situation. In doing this they spoke to all of the adults involved and the children and some further information was obtained in relation to

alleged violence between adults occurring in the home, alcohol consumption in the home, an allegation that both children had consumed alcopops, and overnight visiting of both the mother and her sister. It was alleged that one of the children witnessed the fight on 17 May and was very upset. Further allegations were made about arguments between the mother and grandmother over alcohol and money. There is reference to both children saying that they had a movie night on the previous Saturday with their mother and aunt and that their aunt and everyone was drinking alcohol including them. The younger child made reference to the alcopop WKD. Following from the above, the Trust notified the mother Ms X and the grandmother Ms Y that the children would be removed immediately. They did this on 18 May 2020.

The hearing

[9] I heard this matter as an emergency application on 20 May 2020. By agreement of the parties this proceeded as a Sightlink hearing on submissions. Ms Lindsay BL appeared on behalf of the Trust, Ms McCrissican BL for the mother Ms X, and Ms McCartney BL for the grandmother Ms Y.

[10] When the case came before this Court, the Trust maintained the position that immediate removal was justified and that there was no breach of human rights. The care plan that was put before the Court proffered residential care for the eldest child. It is important to note that Mark suffers from a diagnoses of ASD/ADHD and he has presented from a young age with challenging behavioural issues, anger and suicidal ideation. It was therefore the view of the Trust that a foster placement would not be found and that he would have to be placed in residential care. In relation to Tim the plan was that he would be placed in stranger foster care as no other potential family placements were available.

[11] This plan was criticised by both counsel for both Ms X and Ms Y. Ms McCrissican BL on behalf of Ms X did not substantially dispute the fight that happened on 17 May between Ms X and her sister. Indeed it appears that Ms X was cautioned for this. However, the mother took issue with other points raised. Both the mother and the grandmother objected to the immediate removal plan. They both argued that the decision taken by the Trust, and communicated to the solicitors on 18 May 2020 to remove the eldest child was in breach of their Article 8 rights.

[12] There was no dispute that Article 8 is engaged. Whilst this application was brought by the mother, it is quite clear that the grandmother's rights are also engaged. She was represented and made supportive arguments during the course of these proceedings. Of course, the children also have Article 8 rights and as will become apparent I heard some representations on their behalf. As this was a hearing pursuant to the Human Rights Act no guardian was present on behalf of the child. However, as a guardian was appointed in Tim's ongoing case, she (Ms Patterson) took the trouble to share her views with the Court. I am extremely grateful for that and for the e-mail sent by the guardian's solicitor which was put before the Court. It

is dated 20 May 2020, and sent at 9.45am from Ms Holmes, solicitor. It reads as follows:

> "Dear All,
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> Just to update you in advance of the application to the High Court that I have spoken to GAL who managed to participate in a Zoom meeting yesterday. She advises that whilst she would wish some time to form a considered view her instinct at this stage is that no precipitant action should be taken to remove either child or both. She agrees that the incident involving the PSNI was serious and does not underestimate the Trust's concern. The GAL spoke to Tim via Zoom also and Mark also contributed although GAL is not currently appointed for him. Both boys were extremely upset and GAL view that removal would have a devastating and traumatic impact. Both boys were vehemently opposed to leaving their grandmother's care and each other. GAL view is that removal should be a last resort.
>
> Regards F."

[13] Obviously this intervention was highly significant in the case. In any event it was clear to me on hearing the well framed submissions of counsel for the mother and the grandmother that this removal plan was flawed and in breach of the human rights enjoyed by the mother, grandmother and the children. The reasons for that are set out below.

[14] Having heard submissions on 20 May 2020, I made an interim injunction on that date until 1 June 2020. By then discharge of care proceedings had also been brought and so the Guardian Ad Litem was formally appointed. Also on 22 May 2020, an interim care order application in relation to the younger child Tim was heard by District Judge Bagnall in the Family Proceedings Court. This was a contested hearing after which the application was refused. It appears clear that this disposal was on the basis that the Guardian Ad Litem wished to have further time to assess the situation. That application was subsequently transferred to the High Court by the District Judge on the basis that the two applications should be kept together. An appeal was lodged from this decision but subsequently withdrawn. Therefore the current position is that there are proceedings in relation to the two boys before the High Court and an interim injunction in place. I must decide whether or not I should continue with the interim injunction, whether I should make a declaration given what I have said in relation to the actions of the Trust and the forum for future proceedings, which undoubtedly should be by way of the two cases being kept together.

The relevant law

[15] Given the important issues at play in this case a reminder of the law in this area is apt. The power of the High Court to grant an injunction in a case such as this has not been questioned. Section 8 of the Human Rights Act provides for judicial remedies as follows:

> (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

[16] In the case of *Re DE (A child)* [2014] EWFC Baker J considered the question of how a court should determine an application by parents for an injunction pursuant to the Human Rights Act 1998 to prevent a local authority removing their child who was living at home under a care order. This case set out a number of important principles of substance and procedure. General guidance was given for cases where a decision is taken by a Trust to remove a child from the care of his or her parents at paragraph [49] as follows:

> "(i) In every case where a care order is made on the basis of a care plan providing that a child should live at home with his or her parents, it should be a term of the care plan, and a recital in the care order, that the local authority agrees to give not less than fourteen days' notice of a removal of the child, save in an emergency. I consider that fourteen days is an appropriate period, on the one hand to avoid unnecessary delay but, on the other hand, to allow the parents an opportunity to obtain legal advice.
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> (ii) Where a care order has been granted on the basis of a care plan providing that the child should remain at home, a local authority considering changing the plan and removing the child permanently from the family must have regard to the fact that permanent placement outside the family is to be preferred only as a last resort where nothing else will do and must rigorously analyse all the realistic options, considering the arguments for and against each option. Furthermore, it must involve the parents properly in the decision-making process.
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> (iii) In every case where a parent decides to apply to discharge a care order in circumstances where the

local authority has given notice of intention to remove a child placed at home under a care order, the parent should consider whether to apply in addition for an injunction under Section 8 of the HRA to prevent the local authority from removing the child pending the determination of the discharge application. If the parent decides to apply for an injunction, that application should be issued at the same time as the discharge application.

(iv) When a local authority, having given notice of its intention to remove a child placed at home under a care order, is given notice of an application for discharge of the care, the local authority must consider whether the child's welfare requires his immediate removal. Furthermore, the authority must keep a written record demonstrating that it has considered this question and recording the reasons for its decision. In reaching its decision on this point, the local authority must again inter alia consult with the parents. Any removal of a child in circumstances where the child's welfare does not require immediate removal, or without proper consideration and consultation, is likely to be an unlawful interference with the Article 8 rights of the parent and child.

(v) On receipt of an application to discharge a care order, where the child has been living at home, the allocation gatekeeper at the designated family centre should check whether it is accompanied by an application under Section 8 of HRA and, if not, whether the circumstances might give rise to such an application. This check is needed because, as discussed below, automatic legal aid is not at present available for such applications to discharge a care order, and it is therefore likely that such applications may be made by parents acting in person. In cases where the discharge application is accompanied by an application for an order under Section 8 HRA, or the allocation gatekeeper considers that the circumstances might give rise to such an application, he or she should allocate the case as soon as possible to a circuit judge for case management. Any application for an injunction in these circumstances must be listed for an early hearing.

(vi) On hearing an application for an injunction under Section 8 HRA to restrain a local authority removing a child living at home under a care order pending determination of an application to discharge the care order, the court should normally grant the injunction unless the child's welfare requires his immediate removal from the family home."

[17] I applied these principles in the case of *TG v The Health and Social Care Trust and Others* [2016] NI Fam 5 as follows from paragraph [21]:

"[21] The statutory provisions that are pertinent to this case emanate from the Children (Northern Ireland) Order 1995 and the Human Rights Act 1998. Article 51(2) of the Children (Northern Ireland) Order 1995 provides:

> 'Where a care order is made with respect to a child the authority designated by the care order shall receive him into its care and keep him in its care while the order remains in force.'

Articles 52(3) and 52(4) of the 1995 Order state:

> '(3) While a care order is in force with respect to a child, the authority designated by the order shall –
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> (a) have parental responsibility for the child; and
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> (b) have the power (subject to paragraphs (4) to (9)) to determine the extent to which a parent or guardian of the child may meet his parental responsibility for the child.
>
> (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.'

Article 52(9) of the Children (Northern Ireland) Order 1995 provides:

> 'The power in paragraph (3)(b) is subject (in addition to being subject to the provisions of this Article) to any right, duty, power, responsibility or authority which a parent or guardian of the child has in relation to the child and his property by virtue of any other statutory provision.'

[22] It follows that Article 52(4) of the Children (Northern Ireland) Order 1995 means that where a child is placed at home under a care order, a Trust may not remove that child from the care of his or her parents unless it is satisfied that such steps are necessary in order to safeguard or promote the child's welfare. That is the starting position for a Trust in making a decision to remove a child placed at home under a care order.

[23] A Trust is also subject to the obligations contained within the European Convention on Human Rights (ECHR). A Trust as a public authority must act in a way which is compatible with the ECHR. In particular it is clear that a removal of children from the care of their parents is a violation of their right to family life. The right to family life under Article 8 is a right contained in Article 8(1). However, Article 8(2) is the provision whereby a breach of Article 8 can be justified if necessary and proportionate. The Trust has to act in a manner which is compatible with the Convention under Article 8."

[18] I was also referred to two recent decisions of Cobb J in the High Court in England and Wales *CZ and Others v Kirklees Council* [2017] EWFC 11 and *SW and TW (Human Rights Claims: Procedure No. 1)* [2017] EWHC 450 Fam. In these cases the procedures and outworkings of claims under the Human Rights Act were considered by the court and in each case, declarations and damages were ordered by the court (and costs in one case.) Of course cases such as these are fact specific but they reiterate the importance of adopting a Convention compliant procedure particularly when Trusts aim to take such a draconian step as removal of children from the care of parents (or as in this case kinship carers).

[19] Of course the principle that parents must be involved in decision-making is well established and pre-dates the *DE* guidelines. In *Re G (Care: Challenge to Local Authority's Decision)* [2003] EWHC 551 when dealing with Article 8 of the Convention in family proceedings Munby J highlighted the fact that it "requires that the parents are properly advised in the decision-making not merely before the care proceedings are launched, and during the period when the care proceedings are on foot … but also … after the care proceedings have come to an end and whilst the local authority is implementing the care order." This case established a route for challenge to Trust decisions post care order by way of human rights applications.

[20] There is also an embedded line of authority as to the standard to be applied where the application is immediate removal of children from family care. In *G v N County Council* [2018] EWHC 975 Fam [2019] 1 FLR 774 McFarland J, referred to this at paragraph [30] when he said:

> "In my view, the quality of decision-making and the consequences of it in the context of a case such as this are just as important and have consequences which are just as likely to be long term as in the case under an EPO. In fact, given the existence of emergency protection orders and, in contrast, the limited options available to a parent in a case such as this, the human rights considerations require that the quality of the process should be at least as high, if not higher, than in an emergency protection order case."

[21] The seminal decision of the Supreme Court in *Re B* [2013] UKSC 33 highlights the fact that:

> "An order compulsorily severing the ties between a child and her parents can only be made if justified by an overriding requirement pertaining to the child's best interests. In other words, the test is one of necessity. Nothing else will do." (paragraph [215]).

[22] As I said in *TG*, the Children Order requires that intervention must be necessary for the immediate protection of a child. Simply stated, the test for immediate removal of children into care is a high bar.

[23] The English Court of Appeal has had cause to consider the *Re B* guidelines more recently in the case of *Re S (A child)* [2018] EWCA 215. In that case, the local authority had removed a child placed at home under a care order without giving notice, with no explanation for the failure to follow the *Re DE* protocol other than to say that the local authority regarded the case as an emergency. King LJ highlighted that the local authority's decision to remove S from her mother's care was made the very day the local authority was informed of the crisis, and criticised the local

authority for its failure to give consideration to whether anything could be done to salvage the situation rather than the knee jerk reaction of immediate removal. In that case King LJ outlined in detail the deficits "to highlight why the protocol set out in *Re DE* exists and should be applied in all cases".

Consideration

[24] Applying the law to this case, I am satisfied that I should make an interim injunction on an on-going basis. I stress that this is an interim determination and that a full fact finding has not as yet taken place. I understand that the Trust does not formally consent to this course, however, after the hearing on 20 May, Ms Lindsay BL has left the matter in the hands of the court without further submissions of substance. I accept the argument made by the other parties that an order is required to reflect the current position and to provide security given what has happened. Therefore, I will extend that interim injunction until further order. This is of course a holding position pending a full hearing and there is liberty to apply if a further application needs to be made. In making this interim order I have considered all of the various arguments and decided in favour of an injunction on an interim basis for the following reasons:

(i) While extremely concerning facts have been put forward regarding the behaviour of adults alleged to have taken place at the house in which these children reside there is insufficient evidence at the moment to say that the test for immediate removal is met to protect the safety of the children. Thankfully the children were not physically harmed in the incident and the evidence will have to be assessed about what they observed.

(ii) The effects on the children and the other disclosures made about certain behaviours taking place in the house are matters of concern but must be properly assessed and do not meet the test for immediate removal at this time.

(iii) Crucially, a safe care plan was almost immediately put in place and remains in place and there has been no breach of this by the adults. In broad terms this plan requires the grandmother to prevent the mother from coming to the home at any time. It also prevents the aunt from coming to the home. It prevents direct contact between the mother and children for a short period of time until safe arrangements can be put in place. It requires the grandmother not to supervise any direct or indirect contact with the children and the mother and to prevent telephone contact. It refers to the fact that only the Trust will supervise the indirect contact between the mother and her children in the short term. It requires the grandmother not to visit the home of the mother or the aunt. It requires the grandmother not to leave the grandchildren alone in her car or at home at any time. It also requires the

grandmother to supervise the two children due to the significant behavioural difficulties. It requires there to be no alcohol or drugs within the home of the grandmother. It requires the grandmother not to give any alcohol to her grandchildren. The plan also stipulates that the Trust will be completing daily unannounced visits to the grandmother's home to ensure that the agreement is adhered to. It requires that the grandmother should provide the social workers entry into the house and to complete any home checks necessary. It also clearly states should this agreement be breached until the matter is before the court the Trust will seek emergency legal advice regarding the children. As such, there was another option available rather than the last resort of immediate removal.

(iv) The revised care plan was drastic and proposed the splitting of siblings, one into residential care and one into a foster placement (which may not have been immediately available). This should not have been contemplated without further consideration. The input of the Guardian ad Litem correctly highlighted that no precipitant action was appropriate in this case. The Guardian also provided the views of the children (one of who has particular vulnerabilities and needs) who expressed their fear about being removed and this effect on the children should have been given greater thought.

(v) Overall, this is a case where the *DE* guidelines should have been followed and as such there has been a breach of the Convention. I understand the Trust concerns but I do not consider that a knee jerk reaction of removal was proportionate or in the interests of the two boys. Rather, the situation needed reflection and further assessment with the input of all parties including the Guardian ad Litem.

Disposal and final remarks

[25] I have reflected on the issue of forum going forward and in the current circumstances, given that the High Court is facilitating the hearing of cases in the next number of months I consider that the case should be retained here. It should be timetabled towards a final hearing in September. I ask that counsel liaise in relation to the steps that need to be taken and that Ms Lindsay BL file a proposed timetable by Friday of this week. In the meantime, as will be apparent from the above, it is crucial that the safe care plan remains in place. The adults should be under no illusions that if there is a breach of the safe care plan that may well result in an alteration of arrangements as the court will have to consider the proportionality of arrangements depending on prevailing circumstances.

[26] I have obviously not reached a concluded view in this case but I can say that there is clearly something amiss within this family dynamic and some issues that need addressed. I think it best that I set them out now. Firstly, the mother and her

sister need to regulate their behaviour and stop unsettling this placement. Secondly, the grandmother also needs to resist the pressure from the mother and sister to have additional contact. That cannot be an easy task as she is parenting on her own. I detect that the grandmother is also subject to divided loyalties. However, she must abide by the Trust plan for these children. She clearly needs some help in terms of the management of relationships and generally this is a case which is crying out for support and services to be utilised by Social Services. The pressure cooker of lockdown cannot be helping but hopefully that will ease somewhat over the coming months. Thirdly, I entirely accept the Trust's concerns about what the boys might have seen and particularly that they might perceive violence among adults as normal and that they may have been subjected to drinking and erratic behaviour in the house. Clearly, there is work to be done with the children as well as the adults. I am sure that the guardian will take up the baton in relation to this.

[27] Finally, I would like to commend counsel for the impeccable way in which they approached this case. I have been greatly assisted by the written arguments filed in relation to the law in this area, particularly that of Ms McCartney BL. I am grateful to Ms Lindsay BL and the Trust for managing the situation after I made the interim injunction. I have already said the guardian's intervention in this case has been critical and reflects the high standards of professionals working in this area.

Conclusion

[28] An interim injunction will remain in place until further order on the basis that the children should not be removed from their current placement pending a final consideration of this case. The case will be heard before the High Court in due course. As I do not agree with the Trust decision-making in relation to immediate removal it is appropriate to make a declaration about that the terms of which can be settled by counsel in due course. Any other issues can be raised at the full hearing.