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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY 'JR193'
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF
THE POLICE SERVICE OF NORTHERN IRELAND

Fiona Doherty QC and Colin Gervin (instructed by Swift Solicitors Ltd) for the applicant
Joseph Kennedy (instructed by the Crown Solicitor's Office) for the proposed respondent
Ciara McKeown (instructed by Quantum Law Solicitors Ltd) for the notice party

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SCOFFIELD J

Introduction

[1] This is an application for leave to apply for judicial review in which the applicant, to whom I have granted anonymity in order to protect the identity of the children who are the ultimate subject of these proceedings, seeks to challenge the decision of a police officer made on Friday 14 May 2021 to remove two children into police protection. The applicant is the biological father of one of these children and the other was the child of his partner.

[2] The police decision at issue in these proceedings was made pursuant to Article 65 of the Children (Northern Ireland) Order 1995 ("the Children Order"). The exercise of police powers under this provision is sometimes referred to as the making of a "police protection order", although (as the guidance issued by the Home Office in relation to equivalent police powers in England and Wales points out) this is a misnomer, since the exercise of the powers does not involve making of any order, much less a court order.

[3] Ms Doherty QC appeared for the applicant, with Mr Gervin of counsel; Ms McKeown appeared for the applicant's partner (as an interested party), who supported the grant of leave to apply for judicial review; and Mr Kennedy appeared for the proposed respondent, the Chief Constable of the Police Service of Northern Ireland (PSNI). I am grateful to all counsel for their helpful written and oral submissions.

Factual Background

[4] In light of the conclusion I have reached in relation to the grant of leave, it is unnecessary to set out at any great length the factual background to the proceedings before the court. These were opened to me in some detail at the leave hearing. The series of events which led to the children being removed was precipitated by an alleged disclosure made by the notice party, whilst at a medical appointment, of ill-treatment of her and the children on the part of the applicant. That was reported to Social Services, who had had previous and ongoing contact with the family (the precise circumstances of which are disputed), and who were concerned about the safety and welfare of the two relevant children (and, indeed, the applicant's two older children). They went to the family home and offered to assist the notice party to leave the family home for alternative accommodation; but she declined. The applicant was not present at the home at this stage but was with the two older children. By the time he returned home, the two older children were no longer with him and, indeed, appear to have been removed from the jurisdiction after it became clear that Social Services were making some kind of intervention.

[5] Police attended the home with social workers from around 5.20pm to 5.45pm and, during that time, the constable who is recorded as having exercised Article 65 powers was apprised of the situation by Social Services and was in contact with an Inspector (who was not at the scene) who was also involved in the discussions and has been said in some of the materials provided by the proposed respondent to have "authorised" the use of Article 65 for the removal of the two children who were at the house, who were then provided with emergency foster care.

The key statutory provisions

[6] Article 65 of the Children Order, in material part, provides as follows:

> "(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; or
>
> (b) take such steps as are reasonable to ensure that the child's removal from any hospital, or

other place, in which he is then being accommodated is prevented.

(2) For the purposes of this Order, a child with respect to whom a constable has exercised his powers under this Article is referred to as having been taken into police protection.

(3) As soon as is reasonably practicable after taking a child into police protection, the constable shall secure that the case is inquired into by a designated officer.

(4) In this Article "designated officer" means a police officer designated for the purposes of this Article—

(a) by the Chief Constable; or

(b) by such other police officer as the Chief Constable may direct."

[7] Article 65(5) and (6) set out a variety of steps which should be taken by the designated officer. Article 65(7) provides that, "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." Article 65(8) provides that, "No child may be kept in police protection for more than 72 hours."

The applicant's case

[8] On the applicant's case, the PSNI removed his children, or at least initiated that procedure, wrongly thinking that an emergency protection order (EPO) was in place under Article 63 of the Children Order; and social workers involved with the family wrongly procured the use of police powers under Article 65 of the Children Order because it was too difficult or inconvenient for them to make an application to court for an EPO on a Friday evening, albeit they had had ample time to do so earlier in the day after the disclosure of the allegations which give rise to the concern. The applicant further contends that the power was wrongly exercised by an officer who was not at the relevant scene, or without adequate enquiry by the officer who was at the scene, such that the statutory procedure which involves primary consideration by "the initiating officer" with later independent oversight by "the designated officer" was elided or ignored.

[9] The applicant relies on a range of grounds of challenge including illegality (breach of various provisions of Article 65 of the Children Order); failure to take

material considerations into account; procedural unfairness; irrationality; and breach of the applicant's rights under Articles 6 and 8 ECHR.

[10] The application was issued on 8 July 2021, with a certificate of urgency, seeking (unspecified) interim relief and expedition. By a case management directions order of 2 August 2021 I ordered that there should be a leave hearing in the case and declined to treat the case as requiring expedition since, as appears further below, the practical effect of the exercise of police powers in this case had come to an end and there were ongoing proceedings before another court through which the children's care was being overseen. I pause to reiterate that practitioners should be careful to ensure that, where urgency is sought, this is only done when appropriate and that a clear explanation is provided of why the case is urgent and what the court is being requested to do as a matter of urgency. This has been the subject of recent discussion by the President of the Queen's Bench Division in the Administrative Court in England and Wales (see *DVP v Secretary of State for the Home Department* [2021] EWHC 606 (Admin)), exercising what is known as the *Hamid* jurisdiction. I make no criticism of those involved in the present case since, albeit the proceedings were lodged sometime after the events to which they relate, I understand that the applicant was keen to move the proceedings along, and to ensure that they were not left unconsidered at all during the Long Vacation, given the fact that the children had not been returned. However, that was no longer as a result of the police actions in this case and I do not accept that a finding that the police had acted unlawfully in this case would have any material bearing on the children's present position, given that the family court will be dealing with that on the basis of its own assessment of the issues and the children's welfare.

Consideration of the grant of leave

[11] I am satisfied that the applicant has raised a number of grounds of judicial review which are arguable. Several of these relate to the procedure which was followed in this case and, in particular, the precise detail of which police officer made the relevant decision under Article 65(1) of the Children Order and when. There are live issues on the basis of the evidence provided to the court so far as to whether the correct statutory process was followed and relevant guidance was adhered to. Also at the heart of the applicant's challenge was an assertion that the use of police powers under Article 65 was unwarranted in the circumstances, that is to say that the factual foundation required to take a child into police protection in the circumstances at the time simply did not exist. For his part, Mr Kennedy has also asked me to look at the merits of the case in the round and conclude that the exercise of police powers was plainly appropriate in light of the fact that, on Monday 17 May 2021, the Family Proceedings Court granted an EPO of seven days' duration having heard evidence from the relevant social worker (who was cross-examined by counsel on behalf of the applicant and the disparity in this case) and that an interim care order had since been granted in relation to the children. I am not in a position at present to determine that it is unarguable that the police actions were lawful. However, there are other bases on which the grant of leave is opposed.

[12] The Crown Solicitor's Office provided a response to pre-action correspondence in this case dated 22 June 2021. It made the point that the PSNI exercise of powers which is the subject of this application was no longer in force at the time of the issue of the proceedings, having expired in accordance with the provisions of Article 65(8) of the Children Order within 72 hours. Accordingly, the proposed respondent contended that there was no urgency in the proceedings; that they are academic; and that any ongoing complaint about the applicant's children having been removed from his custody arises from the exercise of the courts' powers, not from the PSNI's exercise of their time-limited power to remove children as an interim measure.

[13] In the case management directions order referred to above, I indicated that the court would wish to explore the questions of whether the application was academic and/or whether the applicant has or had an alternative remedy, in addition to the merits of the application, at the leave hearing which had been directed.

[14] It is accepted on behalf of the applicant that, strictly speaking, this application is now academic because the period of police protection has expired and an order quashing the decision of the relevant police constable would at this stage have no practical effect. This concession was properly made. That is because the situation has now moved on and the present arrangements for the children's care is being dealt with, and arises from, the ongoing Children Order proceedings rather than anything which was done, or not done, by the police back in May.

[15] Nonetheless, Ms Doherty contends that this case is still appropriate for the grant of leave on the basis of the court's discretion to hear and determine cases which are academic as between the parties: see *R v Secretary of State for the Home Department, ex parte Salem* [1999] 2 All ER 42. She invites the court to do so on a number of bases: firstly, because of the significance of the exercise of police powers on the applicant and his children; secondly, because the correct exercise of such powers is (she submits) a matter of public importance; and, thirdly and relatedly, because the issues highlighted by this case may arise in other cases in future.

[16] In *ex parte Salem*, Lord Slynn (at 47) captured the relevant discretion in this way:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when the discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[17] Having reflected on the matter, I do not consider that this is an appropriate case for the exercise of the court's discretion to hear an application for judicial review which will have no longer have any practical effect as between the parties. The general approach is that the court will not devote resources to the resolution of such a dispute by way of judicial review. It is right that there are exceptions to that rule and that the court retains the discretion to hear such cases. However, I do not consider this case is appropriate for that course, particularly approaching the matter with the caution urged by Lord Slynn in the passage cited above.

[18] I do not consider that this is a case which raises a discrete point of statutory construction. I also consider that this is a case which will involve detailed consideration of facts. In relation to the factual picture, Ms Doherty submitted that the key issue was whether there was a dispute of material fact and that it was not (yet) clear that this was so in the present case. However, it seems to me that this is a case which will inevitably, if it were to proceed to full hearing, require a detailed consideration of the factual position, including what was in the mind of the relevant social workers and police officers involved, at the time when the impugned exercise of police powers occurred. Ms Doherty, with characteristic skill and forensic analysis, took me to a number of apparently inconsistent statements or indications in the papers relating to the circumstances in which, or basis on which, the Article 65 power had been exercised. I consider it highly likely that, if leave were to be granted, this is a case in which the factual enquiry required to fairly and properly dispose of the case could not satisfactorily be undertaken on the basis of affidavit evidence alone. Even if that is not the case, however, it was accepted that the application is one which would require a detailed focus on the facts on the ground at the relevant time, which is enough to place the case into the category of those which would "involve detailed consideration of facts" which is an indicator given by Lord Slynn as to when the exercise of discretion to hear an otherwise academic case will not be appropriate.

[19] Nor do I consider that this is a case where a large number of similar cases exist or are anticipated, such that the issues raised by the applicant will likely need to be resolved in the near future. There is no statistical evidence before the court as to how often the PSNI's powers under Article 65 are used; but this seems likely to be rare, particularly given the availability of the courts' powers under Article 63 to grant an EPO upon application (including on an *ex parte* application, where that is warranted). Moreover, the complaints made in this case are intensely fact specific. Judicial guidance in relation to the nature, purpose and proper exercise of the relevant police powers which are at issue in these proceedings has already been given, at least to some degree, in *Re JR41's Application* [2010] NIQB 104 (see, in particular, paragraphs [32] and [33]). In addition, detailed guidance as to the proper exercise of these powers has been set out in the Home Office Circular 017/2008 ('*The duties and powers of the police under The Children Act 1989*'), upon which the applicant relies, in relation to materially similar provisions in England and Wales; and, to a lesser degree, in the PSNI Child Protection Service Instruction SI 3417. The asserted illegality in this case does not in my view arise because of any widespread or serious confusion in relation to the procedure prescribed by the statutory regime but, rather, on the basis (the applicant

submits) that those procedures were simply not followed in the circumstances of this case.

[20] The central submission advanced on behalf of the applicant was that, where it is possible for a Trust to make an application for an EPO under Article 63 of the Children Order (as it is contended it was in this case), police powers under Article 65 should not be used as a substitute for, or in order to circumvent, the usual requirement for a determination on the part of a court before children are removed from their parents as an emergency measure. It was accepted that the availability of an application under Article 63 is not an absolute bar to the exercise of police powers under Article 65 in an appropriate case. By the same token, I believe the proposed respondent would accept that it is obviously preferable, where possible, for a court determination to be made in a case of this nature, rather than police exercising their powers which are intended to be used in urgent situations, especially where the impetus for police action is information received from Trust social workers. I do not consider that much by way of additional guidance could be provided by focusing on the facts of this case (where risk of flight on the part of the applicant, with some of his children, was plainly a relevant consideration). Each case has to be considered on its own merits against a statutory backdrop in which, I consider, the test for the exercise of police powers is clear.

[21] For these reasons, I accept the proposed respondent's submission that the case is academic and there is no sufficient reason to exercise the court's discretion to nonetheless proceed to grant leave.

[22] I further consider that it is appropriate to refuse the grant of leave in this case on the basis that the applicant enjoys an adequate alternative remedy. The applicant's pleaded claim includes a contention that the removal of his children amounted to a violation of his rights under, *inter alia*, Article 8 ECHR. Such a claim can be pursued on the basis that the interference with his Article 8 rights was not necessary or proportionate; or, indeed, on the basis that the interference was not "in accordance with law." In challenging the legality of the exercise of police powers in that context, it would be open to the applicant to raise many if not all of the complaints advanced in this judicial review. The applicant could also bring a claim for trespass in relation to his contention that police unlawfully entered the family home, which appears on a number of occasions throughout the papers. The applicant would still be within time to bring ordinary civil proceedings in relation to these matters; and those proceedings would in my view provide a much more suitable procedure for both fact-finding and the resolution of disputed factual issues than would an application for judicial review. That is to say nothing of the additional avenues open to the applicant of complaint to the Police Ombudsman for Northern Ireland or use of the relevant Trust's complaints procedures (which was raised as a possibility at a Looked After Child review, at which it appears to have been conceded on the part of the Trust that there were "lessons to be learned" from the way in which the children had been removed from the applicant's partner in this case).

Conclusion

[23] I accept, without question, that the removal of the two children concerned into police protection and, in one case, quite literally from the arms of her mother, would have been an extremely significant and distressing event for the notice party and for the applicant. As the courts have previously emphasised, the use of the police powers under Article 65 of the Children Order is a draconian measure. However, those facts alone are not sufficient to warrant, much less require, the court hearing an academic application when the factual situation has moved on considerably. In any event, if either of the parents wishes to challenge the legality of police actions, the opportunity remains for them to do so by way of civil action, as mentioned at paragraph [22] above.

[24] By reason of the foregoing, I dismiss the applicant's application for leave to apply for judicial review. I propose to make no order as to costs between the parties; but will make an order for legal aid taxation of the applicant's and notice party's costs.